The California Legal Update

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

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THIS EDITION'S WORDS OF WISDOM:

"*Hey, I found your nose. It was in my business.*" (Unknown)

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CASE LAW:

Vehicles Searches and the Automobile Exception:
Searches for Contraband Based Upon a Plain Sight Observation of Marijuana:
H&S Code § 11362.1(c) and the Lawful Possession of Marijuana:

People v. McGee **(July 28, 2020) 53 Cal.App.5th 796**

Rule: Presence of an unsealed, opened baggie of marijuana, plainly visible on the passenger's person, constitutes probable cause to search the rest of the vehicle under the "automobile exception" for more contraband, including the passenger's purse.

Facts: Stockton Police Officers Greg Spears and David Muser were on patrol on July 28, 2018, when they observed defendant Tyrone Brendon McGee driving a motor vehicle with its registration tabs expired. With defendant driving, in his vehicle was a female passenger. Upon stopping defendant's car and approaching its occupants, both officers noted the "scent of unburned marijuana." Asked about the odor, defendant denied to Officer Spears that he had any marijuana in the car. But Officer Muser—approaching the vehicle on the passenger side and while apparently checking out the female passenger's low-cut blouse—could see what appeared to be an unsealed bag of marijuana tucked neatly into her cleavage. After retrieving the marijuana from the passenger (the Court did not indicate how) and verifying that it was indeed marijuana and, and finding that it was in an unsealed baggie, the occupants were removed from the vehicle and it was searched. While so doing, Officer Muser noticed a zipped purse on the passenger floorboard. The officer searched the purse for "anything illegal, any contraband that could be in the vehicle," finding a loaded handgun. After waiving his *Miranda* rights, defendant confessed that upon seeing the officer's patrol car, he placed the gun in the female's purse. He claimed to have obtained the gun just that day, taking it from some other person with whom he had had a fight. Defendant was charged in state court with being a felon in possession of a firearm. After his motion to suppress the gun was denied, defendant pled no contest and, after admitting to a prior prison term enhancement, was sentenced to 16 months in prison. Defendant appealed.

Held: This Third District Court of Appeal affirmed. The issue on appeal was the lawfulness of a warrantless vehicle search based upon the plain sight observation of an open container of marijuana in a vehicle, when the marijuana is of a lawful amount; i.e., less than an ounce. The People argued simply that the search of the passenger's purse was justified by probable cause and thus valid under the so-called automobile exception to the warrant requirement. The Court agreed, rejecting the defendant's contrary argument that since enactment of Proposition 64 by the voters in 2016, legalizing possession of small amounts (under an ounce) of marijuana for personal use, it no longer provides probable cause to be looking for more. In fact, H&S Code § 11362.1(c), as amended by Proposition 64, specifically says: "Cannabis and cannabis products involved in any way with conduct deemed lawful by this section *are not contraband nor subject to seizure, and no conduct deemed lawful by this section shall constitute the basis for*

detention, search, or arrest." (Italics added) The passenger's possession of less than an ounce of marijuana, therefore, being lawful, cannot be used as a basis for a search of the entire vehicle for more. (*People v. Lee* (2019) 40 Cal.App.5th 853; see *California Legal Update*, Vol. 24, #11, Oct. 28, 2019.) Pursuant to *Lee*, there must be additional evidence, beyond mere possession of a legal amount of marijuana, to support a reasonable belief the defendant has an illegal amount of marijuana or is violating some other statutory provision. The *Lee* Court distinguished its facts from those of an earlier case (*People v. Fews* (2018) 27 Cal.App.5th 553; see California Legal Update, Vol. 23, #11, Sept. 28, 2018.), where (in *Fews*), in addition to the defendant possessing a legal amount of marijuana in his car, officers saw the defendant making "furtive movements." They could also smell the odor of marijuana emanating from his vehicle. And lastly, the driver admitted that there was marijuana in his half-burnt cigar. Based upon this, the search of the car for more marijuana in *Fews* was upheld. In contrast, the *Lee* court held that a driver of a motor vehicle having on his person a small, legal amount of marijuana (i.e., with no odor emanating from the vehicle) is of "fairly minimal significance" in determining whether there is probable cause to believe the vehicle contains contraband. "(T)here must be . . . additional evidence beyond the mere possession of a legal amount" for there to be probable cause to believe there is more marijuana in a suspect's vehicle." (p. 856.) (See also *People v. Johnson* (2020) 50 Cal.App.5th 620 (*California Legal Update*, Vol. 25, #9, July 14, 2020), in accordance with *People v. Lee*, adding that an odor of marijuana emanating from the vehicle [not specified to be either "bulk" or "burning'] is not enough by itself to provide the necessary probable cause to look for more, but not discussed by the Court in this new case.) In this case, defendant's female passenger was found to be in possession of a legal amount of marijuana. However, her baggie of marijuana was unsealed, in violation of H&S Code § 11362.1(a)(4) and V.C. Code § 23222(b)(1). Pursuant to H&S Code § 11362.1(c), only cannabis and cannabis products *deemed lawful* by this section are no longer considered contraband for search, detention, or arrest purposes. With defendant's passenger's marijuana being unlawful, in that it was in an open, unsealed container, this fact alone was held to be enough to differentiate it from the *Lee* case. Per the Court; "(t)he presence of this contraband (unsealed, as it was) provided probable cause to believe the passenger possessed other open containers" (referencing *People v. Souza* (1992) 15 Cal.App.4th 1646, at p. 1653.). "Having established the open container of marijuana found on the passenger was contraband, (the Court) conclude(d) there was probable cause to search the passenger's purse pursuant to the automobile exception." The firearm that defendant (unwisely) admitted to possessing was therefore lawfully seized.

Note: This case goes a long way in clarifying some of the issues raised in both *Fews* and *Lee*. The bottom line is that H&S Code § 11362.1(c) makes marijuana in a sealed container legal to possess—i.e., *not* contraband—while in a vehicle, and thus cannot be used as an excuse to detain, arrest, or search its possessor or, as in this case, his vehicle itself. But if the possessor of the marijuana is also in violation of any other legal restriction, such as in this case, carrying it in a vehicle in an opened, or unsealed container, then he or she is violating both H&S Code § 11362.1(a)(4) and V.C. Code § 23222(b)(1). As such, the otherwise lawfully possessed marijuana reverts to its contraband status, thus negating the section 11362.1(c) protections, and providing the necessary probable cause to search the entire vehicle for more contraband under the so-called "automobile exception" to the search warrant requirement. But note that the protections from detention, arrest, or being searched, under H&S Code § 11362.1(c), are not limited to when the suspect is in a car. Other potential violations that may bring the otherwise

lawful possession of marijuana from under the protection provided for in section 11362.1(c), whether in a car or not, include smoking or ingesting marijuana (*1*) in a public place (§ 11362.1(a)(1)), which arguably includes in a vehicle while out on the public streets or in any other public place, (*2*) anywhere where smoking tobacco is prohibited (subd. (a)(2)), (*3*) within 1,000 feet (including simple possession, whether or not it's being smoked, if on the grounds) of a school, day care center, or youth center while children are present (subd. (a)(3) & (5)), or (*4*) while driving or operating, or when riding in the passenger seat or compartment, of a motor vehicle, boat, vessel, or aircraft (subd. (a)(7) & (8)) It is also illegal for anyone old enough to legally possess marijuana, to (*5*) "*possess*" (whether or not it's being smoked) an *opened* container (e.g., with its seal broken, even though closed when observed) or opened package of marijuana while driving, operating, or riding in the passenger seat of a motor vehicle, boat, vessel, or aircraft. (Subd. (a)(4)) (See also V.C. §§ 23220, 23221, and 23222, relative to cannabis in vehicles.) It is a good idea for law enforcement officers in the field to become familiar with these somewhat confusing and/or sometimes overlapping provisions so you can effectively and intelligently use them when they become an issue.

***Pinging Cellphones, the Fourth Amendment, and Exigent Circumstances*:**

People v. Bowen **(July 15, 2020) 52 Cal.App.5th 130**

Rule: The warrantless pinging of a suspect's cellphone immediately following a violent criminal act, where others in the area are in possible danger, constitutes an exigent circumstance and justifies the pinging prior to issuance of a court's authorization to do so.

Facts: Defendant Quentin Bowen owned a dog named Dash. In July, 2016, defendant advertised for a dog-sitter, offering to pay $100 per week. Sixty-two-year-old Dennis N. responded to the ad, working out a deal with defendant to care for Dash for two weeks. Five month later, however, Dennis still had Dash even though defendant had yet to pay him anything. Defendant, with the help of three friends, eventually took Dash back while not paying what was owed. Over the following weeks, defendant and Dennis argued via phone calls and texts over the moneys owed verses the quality of care Dennis had provided. Finally, in March, 2017, defendant came to Dennis's mobile home, "begging" him to watch Dash again. Dennis agreed. On March 31st, defendant visited Dennis and Dash for the stated purpose of putting a new tag on the dog. During this seemingly cordial visit, suddenly, and without provocation, defendant came up behind Dennis and hit him "hard" on the back of the head. As Dennis turned around to see what had hit him, defendant started stabbing him in the neck with a three-inch pocket knife. The two of them struggled over the knife with Dennis getting the worst of it, suffering a total of eight stab wounds to his neck, chest and shoulder. Dennis was eventually able to get away, fleeing towards a nearby preschool and yelling for help. The police were called by witnesses as defendant walked away through a field and into a forest area. The time was 3:37 in the afternoon. Officer Adams responded to the scene, interviewing Dennis. Obtaining defendant's cellphone number from Dennis, Officer Adams had his agency's police dispatcher contact defendant's mobile phone service provider to ping his phone in order to determine defendant's possible location. Pinging defendant's cellphone only once, police dispatch provided Officer Adams with a possible location for defendant, locating his cellphone in the area of the Santa Rosa Creek Trail east of Willowside Road. Responding to that area, and with the assistance of a helicopter,

defendant was soon located and arrested. His cellphone and backpack were seized, with several knives being found in his backpack. Arrested and charged in state court with premeditated attempted murder and assault with a deadly weapon plus appropriate knife-use and great bodily injury enhancements, defendant filed a motion to suppress the contents of his backpack. Defendant's theory was that because the police had failed to obtain a court order before having his service provider ping his cellphone, the knives found in his backpack should have been suppressed as a product of that unlawful search (i.e., the pinging). The People argued in response that the warrantless cellphone ping was justified by exigent circumstances. It was also argued that Pen. Code § 1546.1(c)(6)—which provides an exception to the warrant requirement where "the government entity, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires access to the electronic device information"—applied to this situation. The trial court denied defendant's motion. Convicted by a jury on all counts and allegations and sentenced to prison for seven years to life consecutive to a determinate term of four years, defendant appealed.

Held: The First District Court of Appeal (Div. 3) affirmed. On appeal (as at the trial court level), defendant argued that the search of his backpack, resulting in the discovery of his knives (including, apparently, the knife he used in the attack on Dennis N.), was the direct product of an unlawful, warrantless pinging of his cellphone.

Pinging Defendant's Cellphone as a Fourth Amendment Search: Between defendant's conviction and subsequent sentencing, the United States Supreme Court decided the landmark case of *Carpenter v. United States* (2018) 585 U.S. ___ [201 L. Ed. 2nd 507; 138 S.Ct. 2206]. In *Carpenter*, it was held that law enforcement accessing seven days-worth of the defendant's historical "cell-site location information" (i.e.; "CSLI"), providing a record of a defendant's past physical movements over that seven days, constituted a Fourth Amendment search. (138 S.Ct. at p. 2217, and fn. 3) However, the *Carpenter* decision was specified by the Supreme Court to be a "narrow one," with the Court declining to "decide whether there is a limited period for which the Government may obtain an individual's historical CSLI free from Fourth Amendment scrutiny, and if so, how long that period might be." (*Ibid*.) The Appellate Court here also declined to decide the issue of whether a single ping constitutes a search (which, if it does, would implicate the Fourth Amendment), upholding the ping of defendant's cellphone due to the "exigent circumstances" of the situation.

Exigent Circumstances: Exigent circumstances have long since been recognized as providing an exception to the Fourth Amendment's warrant requirement. "'[E]xigent circumstances' means an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence." (*People v. Panah* (2005) 35 Cal.4th 395, 465.) Whether or not exigent circumstances exist in a given situation depends upon the facts as known to the officers at the time. In this case, Officer Adams was confronted with a fresh, violent crime, with the victim having been stabbed multiple times. The incident took place within 200 feet of a preschool at a time when parents were there to pick up their children as the preschool was letting out. It was also in the middle of the afternoon on a Friday, near a large shopping center and "multiple (residential) neighborhoods in the area." Officer Adams testified to his concern that others in the area might be victimized by the suspect under these circumstances. His concern was further illustrated by the fact that it was felt necessary to use of a helicopter and a police dog in an attempt to quickly locate and arrest defendant before he could hurt anyone else. Under these circumstances, the Court found that

exigent circumstances justified the immediate pinging of defendant's cellphone as a means of quickly locating and arresting him. As such, the Court agreed with the trial court that the search of defendant's backpack was not the product of an illegal pinging of his cellphone.

Note: Defendant also argued that Officer Adams violated *The California Electronic Communications Privacy Act* (P.C. §§ 1546-1546.4) by not first obtaining a court order, as required by P.C. § 1546.1(b)(1). (The necessary court order was obtained three days later, as allowed for under subdivision (h) of Pen. Code § 1546.1, when an exigency is found justifying a warrantless pinging.) The People argued that the officer's "good faith" belief in the necessity for immediate action, as provided for in subdivision (c)(6) of section 1546.1, exempted Officer Adams from having to get a court order before they pinged defendant's phone. The trial court judge found that Officer Adams did in fact act in good faith. But the Appellate Court, already having found that exigent circumstances allowed for the warrantless pinging, didn't feel it was necessary to decide the good faith issue. Even more disappointing is the fact that this Court declined to rule on whether a single warrantless ping (as opposed to collecting seven days-worth of "cell-site location information," as was done in *Carpenter*) fails to amount to a "search," and is thus allowable without implicating the Fourth Amendment. The answer to this interesting concept (i.e., that while multiple occurrences is a search, but doing the same thing only once is not) will have to await another day.

***Miranda: Invocation of Right to Counsel*:**
***Edwards v. Arizona*: *A Clear and Unequivocal Invocation After a Prior Waiver*:**
***Selective Miranda Invocations*:**
***Considering the Context of an Attempted Invocation*:**

People v. Henderson **(July 30, 2020) 9 Cal.5th 1013**

Rule: A clear and unequivocal invocation by a suspect to needing the assistance of counsel requires an immediate cessation of an interrogation. A suspect explaining why he wants to invoke does not make the invocation unclear or ambiguous nor a "selective" invocation. While the context of an invocation is relevant on the issue of whether such invocation was clear and unambiguous, what the suspect may say later on in the interrogation cannot be considered.

Facts: Defendant Paul Nathan Henderson forced his way into 71-year-old Reginal and Peggy's mobilehome in Cathedral City on the evening of June 22, 1997, as the two were watching TV. Threatening the couple with a knife, defendant bound and gagged his victims, stealing their "bingo money," some costume jewelry, and their car. But before he left, defendant cut Reginald's neck although not deep enough to kill him. Suffering from severe heart disease, Reginald died of cardiac arrest, his condition being exacerbated by the stress of the attack (thus the first degree murder charge). Defendant also beat Peggy and tried to suffocate her. She survived the attack, however, by playing dead. Defendant was arrested on July 5th, being turned in by a police informant. Upon being interrogated by Cathedral City detectives, defendant eventually admitted to his crimes. Charged in state court with first degree murder, attempted deliberate and premeditated murder, and related allegations and special circumstances, and after his motion to suppress his confession was denied, defendant was convicted of all charges and sentenced to death. His appeal to the California Supreme Court was automatic.

Held: The California Supreme Court unanimously reversed, the Court ruling that defendant's confession should have been suppressed. The sole issue on appeal was whether defendant had clearly and unequivocally invoked his right to the assistance of counsel while being interrogated and before he confessed. Upon initially being interrogated, Cathedral City Police Detective Wolford and Officer Herrera first read defendant his rights pursuant to *Miranda*. Defendant waived his rights, both orally and in writing. Getting quickly to the point, the officers told defendant they were investigating Reginal's murder and the attempted murder of his wife, Peggy. Asked what he was doing on the evening of June 22nd, defendant was reluctant to disclose his whereabouts. However, he eventually admitted to being in Cathedral City. Defendant was somewhat hesitant in answering other questions. When at some point he was asked if he went to the victims' trailer park, defendant responded (*pay attention*; *this is the important part*): "*Uhm, there's some things that I, uhm, want uh . . .*" Interrupted, and asked again if he went into the trailer park that night, defendant said: "*uh, want to, speak to an attorney first, because I, I take responsibility for me, but there's other people that . . .*" From there, Officer Herrera and defendant consistently interrupted each other, with defendant finally being asked: "*Paul, what do you accept responsibility for*?" Defendant failed to respond to this question, provoking Officer Herrera to continue to press for an answer as to what it was he accepted responsibility for. Defendant eventually started talking again, finally confessing. The trial court ruled that defendant's confession was admissible in that defendant's request to "*speak to an attorney first*" could have reasonably been interpreted by the officers as being limited to defendant's concern with possibly implicating others who might have been involved. Specifically, the trial court ruled as follows: "*I infer from the totality of circumstances in this transcript that the police did believe Mr. Henderson's reluctance centered around incriminating others, and I further find that it was reasonable for them to believe that.*" As such, defendant's attempt to invoke was held by the trial court to be ambiguous, thus allowing the officers to continue the interrogation. The Supreme Court disagreed. The basic rules on this issue (at least on their face) are simple: "A defendant who has waived his *Miranda* rights may reinvoke them during the interrogation. If he clearly and unequivocally does so, police must stop questioning." (*Edwards v. Arizona* (1981) 451 U.S. 477, at pp. 478–479, 482, 485; *Miranda v. Arizona* (1966) 384 U.S. 436, at pp. 473-474.) "*Edwards* set forth a 'bright-line rule' that *all* questioning must cease after an accused requests counsel." However, in cases where the suspect has already waived his rights, the subsequent mid-interrogation attempt to invoke must be sufficiently clear and unambiguous so that a reasonable officer, under the circumstances, would have understood it to be an invocation. "[T]his is an objective inquiry." (*Davis v. United States* (1994) 512 U.S. 452, 461-462.) "[A]fter a suspect makes a valid waiver of the *Miranda* rights, the need for effective law enforcement weighs in favor of a bright-line rule that allows officers to continue questioning unless the suspect clearly invokes the right to counsel or right to silence." (*People v. Nelson* (2012) 53 Cal.4th 367, 377.) As noted above, the trial court held that the officers here could very well have interpreted defendant's comments to be no more than an attempt to consult with an attorney about avoiding implicating others who might have been involved, "render(ing) his invocation ambiguous." The Supreme Court disagreed, holding that while taking into consideration the context of one's attempt to invoke is important, the People's interpretation of what defendant had said "is untenable." Per the Court, "(d)efendant clearly said he wanted to talk to a lawyer." His explanation as to what he might have wanted to ask the lawyer about did not create an ambiguity. "There is nothing inconsistent or ambiguous about wanting to speak to an attorney before taking responsibility, and defendant made clear that he wanted to speak to an

attorney 'first.'" And taking into account the context, the record clearly showed a defendant who expressed reluctance to talk to the officers despite his previous waiver, often either not giving an answer to certain questions, or at least expressing a reluctance to do so. "This context does not bear out the People's argument that a reasonable officer could believe defendant was willing to continue the interview notwithstanding his request for counsel." The Court further rejected defendant's reference to "other people" as a limited (sometimes referred to as a "selective") invocation of the right to counsel, meant to refer only as to those questions that could potentially implicate others. In the Court's opinion, defendant was not referring to certain topics he wished to avoid, but rather to the *reason* he wanted counsel's advice. And lastly, the fact that defendant subsequently confessed is not relevant to the issue of whether he had legally invoked earlier. Once a subject has effectively invoked, it is improper to look to subsequent responses on the issue of whether the earlier invocation was clear and unambiguous. Defendant's confession, therefore, should have been suppressed. And given the lack of any other significant evidence of defendant's guilt, the Court found the error to be prejudicial, requiring a reversal of his conviction and a remand to the trial court for further proceedings.

Note: The California Supreme Court has been historically (at least since the Rose Bird era; 1977 to 1986) and consistently generous to the People in capital (death penalty) cases. This new decision might, however, be seen as an indication of a new trend in the liberalization of California's courts, tightening up the rules on prosecutors while expressing increased leniency to criminal defendants in general. We'll have to wait and see. More specifically, however, the People have pretty consistently been the beneficiary of appellate court decisions concerning what is considered to be an unclear, ambiguous, mid-interrogation attempt to invoke one's *Miranda* rights after a previous waiver. Whether or not this case foretells a shift in how this issue is to be decided as well must also await future cases. In the meantime, it might well be a good idea for an officer—in the face of a suspect making reference to needing an attorney or maybe having second thoughts about remaining silent, to stop and ask for clarification. While an interrogating law enforcement officer is not under any legal obligation to do so (See *Berghuis v. Thompkins* (2010) 560 U.S. 370, 381-389.), it might, depending upon the circumstances, be a good idea to at least consider doing so. You can't be any worse off in a close case such as occurred in this case, where an appellate court might later rule that a suspect's reference to needing an attorney was in fact a clear and unequivocal invocation. Yes, this takes a certain amount of guess work on the part of the officer. But that's why cops get paid the big bucks.

***Warrantless Searches of a Residence; Exigent Circumstances*:**
***Search Warrants and Probable Cause*:**
***Search Warrants*; *Use of Hearsay in a Warrant Affidavit*:**
***Search Warrants and the Search of the Curtilage of a Residence*:**
***Miranda*; *Admonishing in a Foreign Language*:**
***Miranda*; Successive Interrogations**
***Coercion*; *A Free and Voluntary Confession*:**
***The Vienna Convention as it Relates to an Arrestee's Confession*:**

People v. Suarez **(Aug. 13, 2020) 10 Cal.5th 116**

Rule: A warrantless entry into a residence to look for an outstanding rape suspect and/or to check for other possible victims is lawful as an exigent circumstance. Hearsay may be used to support a finding of probable cause in a search warrant affidavit so long as there is a substantial basis for crediting the truthfulness of that hearsay. Information illegally obtained may be excised from a warrant affidavit and not affect the validity of the warrant so long as there still remains probable cause supporting the lawfulness of the warrant. Pursuant to the execution of a valid search warrant on a residence, the curtilage of that residence is also subject to being searched even though not specified in the warrant as a place subject to being searched. It is not legally necessary that a *Miranda* admonishment as given needs to be in any specific form or use any specific language so long as the warnings, as given, reasonably convey to the suspect his rights as required by the *Miranda* decision. A defendant's confession will be held to be voluntary in the absence of circumstances indicating some form of physical intimidation, coercive tactics, promises of leniency, or threats. When a second interrogation is "reasonably contemporaneous" with an earlier interrogation at which a suspect had been properly advised of his *Miranda* rights, no second admonishment is required so long as the suspect still has his rights in mind. Article 36 of the Vienna Convention and Penal Code section 834c require that the Mexican Consulate be notified of a Mexican national's arrest "without delay." However, failure to do so will not, as a rule, result in the suppression of any subsequent confession, such failure being relevant only to a defendant's broader challenge to the voluntariness of his statements to the police.

Facts: In 1998, defendant Arturo Juarez Suarez was a seasonal worker at the Parnell Ranch in Auburn, California, where he lived alone in a trailer. His wife (Isabel, who was not present for any of the events described below) had two brothers, José and Juan Martinez, who lived in nearby Galt. They'd all grown up together in Mexico. José and his wife (Y.M.) had two children; a five-year-old son, J.M., and a three-year-old daughter, A.M. Although they all got along, often spending weekends and holidays together, Y.M. complained that defendant had touched her inappropriately on a couple prior occasions. Then it all seemed to fall apart on July 4th, 1998, when José, Juan, Y.M., and the two children, all visited San Francisco without telling defendant. Being left out apparently upset him. The following weekend (July 12th), defendant was to borrow José's car so that he could see his immigration officer on Monday, the 13th. So José, Juan, Y.M., and the two kids all visited defendant at his trailer on the 12th. While there, Y.M. and her two children walked around the ranch for about an hour and a half while defendant went to the store to buy some groceries. When Y.M. returned to defendant's trailer, he was there alone with José and Juan nowhere to be found. Asked where they were, defendant told Y.M. that they were off cleaning a deer that he had shot. Sitting outside defendant's trailer waiting for José

and Juan to return, with her children, J.M. and A.M., playing nearby, defendant suddenly came up behind Y.M. and put a rope around her neck, kicked her, and dragged her into his trailer. Y.M. lost consciousness. When she awoke, she found that defendant had put a chain around her neck, tied her wrists behind her back, and bound her feet. Cutting her shorts and underwear with scissors, exposing her private parts, defendant put his fingers in Y.M.'s anus and his penis in her vagina, telling her: "Since you didn't want to willingly, now you're gonna get f--ked up." Y.M. called for her husband, but to no avail. And although J.M. and A.M. had been with her before the assault, they were no longer present. Finishing up with Y.M., defendant eventually left the trailer after turning on the radio real loud and putting a gag into Y.M.'s mouth. She was eventually able to untie herself and flee the trailer. Seeking refuge at the Parnell's house, the police were called. Placer County Sheriff's Deputies Mark Reed and Kurt Walker responded. After interviewing Y.M., the deputies made a warrantless entry into defendant's trailer looking for him. Although he was not present, the deputies found in plain sight and seized a .22-caliber rifle and a .30-06 rifle. Two hours and fifteen minutes later, Detective William Summers and Deputy Randy Owens made a second (still warrantless) entry into defendant's trailer, hoping to find information related to his identity. The following day, Detective Desiree Carrington searched the trailer pursuant to a search warrant she had obtained after interviewing Y.M. and the officers who had already been at the scene. Detective Carrington also searched the area immediately surrounding the trailer (i.e., it's "curtilage") even though the yard was not listed in the warrant as a place to be searched. Recovered during the search were some of the implements described by Y.M. used to bind her, shell casings for the already recovered rifles, strands of hair (stuck to duct tape) that were similar to A.M.'s hair, and other evidence. Also observed were tire tracks which, when followed, led to a man-made opening in some bushes. Being about a quarter-mile from the trailer, the officers found freshly moved dirt at this location. Nearby, investigators found a blood-spattered, square-nosed shovel without a handle, and a round-nosed shovel. The fresh dirt was soon determined to be a grave containing Juan's, José's, J.M.'s and A.M.'s bodies. Later autopsies showed that both A.M. and J.M. had skull fractures from being struck in the head multiple times by a blunt object, such as a shovel. The cause of death for both, however, was determined to be "asphyxiation by obstruction of the airway due to aspiration of foreign material (soil)." (In other words, they were buried while still alive.) Both Juan and José died from multiple gunshot wounds to the head, inflicted at close range. As for Y.M., a physical examination showed that although no sperm was found, she suffered multiple injuries consistent with having been raped and sodomized. Defendant was arrested three days later (July 15th) in Wilmington, California (18 miles outside of Los Angeles). Long Beach Police Detective Dennis Robbins and FBI Special Agent Elizabeth Stevens transported him to the police station. When told during the ride to the police station that he was under arrest for four murders and a rape (responding to his question), defendant denied having raped anyone (failing, at the same time, to deny the murders). At the station, but before being interrogated, defendant volunteered again that he did not rape Y.N. This time, however, he specifically admitted that he had committed the murders. Detective Robbins, with Special Agent Stevens acting as a Spanish interpreter, interrogated defendant in a one-hour interview after having obtained a verbal and written waiver of his *Miranda* rights (see below). Upon being flown up to Placer County the next day, defendant was interrogated again in a videotaped interview (again, see below), but this time by Placer County Deputy Sergeant Bob McDonald and Detective Michael Bennett, with another deputy acting as a Spanish interpreter. In this interview, defendant told the officers how he had been planning the murders for about a week and that he had dug the grave ahead of time. He

admitted to having lured Juan and José to the grave site by telling them that he needed their help cleaning a deer he had shot. Defendant further said that he dug the grave big enough to also contain Y.M., apparently intending to kill her as well. As for J.M. and A.M. (Y.M.'s children), he admitted to also killing them, but only "because he did not have any other way out." Defendant told the officers that he took the two children to the gravesite to see their father, but then hit them in the head with a shovel and burying them. While continuing to deny that he had raped Y.M., he finally admitted to having touched her vagina. Charged in state court with capital murder (i.e., four counts of first degree murder plus special circumstances), rape, penetration with a foreign object (i.e., his fingers), and kidnapping for the purpose of committing a rape (dragging her into the trailer), plus related allegations, defendant was convicted on all counts and allegations. The jury also determined that the appropriate sentence was death. Defendant's appeal to the California Supreme Court was automatic.

Held: The California Supreme Court unanimously affirmed. Among the issues on appeal, the defendant challenged the (1) the denial of his motion to suppress evidence seized from his trailer, and (2) the admissibility of his various confessions.

(1a) *The Warrantless Searches of Defendant's Trailer*: Two warrantless entries were made into defendant's trailer July 12th, the day of the murders and rape. The first was by the initial officers (Deputies Mark Reed and Kurt Walker) responding to Y.M.'s 911 call shortly after she had been raped. The purpose of this entry was to look for defendant. The officers were in the trailer for less than two minutes, "open(ing) up 'anything and everything . . . that somebody could hide in.'" Defendant was not found. However, two rifles were recovered from the bedroom; "one under and one above the bed;" one of which was the likely murder weapon (ballistics was inconclusive). Other potential evidence was observed, but the rifles were the only items seized, and that was because the deputies were concerned that defendant might return and thereby gain access to these firearms. Two hours and fifteen minutes later, Detective William Summers and Deputy Randy Owens entered defendant's trailer in an effort to locate identifying information about him as well as the missing family members. In particular, there was some confusion as to whether defendant's name was Arturo Suarez or Arturo Juarez. The officers were in the trailer for no longer than 10 to 15 minutes. While potential evidence (e.g., duct tape, etc.) was observed, the only thing seized was a checkbook cover with José's driver's license inside and two envelopes containing vehicle registration and tax records. The trial court had denied defendant's motion to suppress these items (i.e., the rifles and the I.D. information) under the theory that defendant had "abandoned" the trailer, having fled the crime scene, and thus had no "standing" to challenge the officers' warrantless entries. The trial court judge also found the initial entry to be a legal "protective sweep," done for the purpose of locating and detaining a dangerous suspect and/or to check for other victims, and was "justified by 'unquestionably' exigent circumstances." The trial court also ruled that the second entry was lawful in that "the suspect and the family members remained missing," and the detective needed to verify every ones' identities. The trailer being defendant's home, the Fourth Amendment commands that a search warrant be obtained in order for law enforcement to enter it, absent an exception to this rule. As for the first entry, the Supreme Court agreed with the trial court that an exigency existed, justifying the officers' warrantless entry. Knowing that a rape had just occurred in the trailer, and with other potential victims (including the 5- and 3-year old children) still unaccounted for, the officers reasonably believed either defendant might return to the trailer, and/or other victims may still be inside, necessitating an immediate warrantless entry. As for the

second entry, the Court found this to be a "closer issue," but one that did not need to be decided in that any possible error on the part of the trial court concerning this second entry was harmless beyond a reasonable doubt. The only evidence seized during this second entry concerned the identities of Juarez and José; issues that were undisputed. Also, given these rulings, the Court determined that it was unnecessary to decide whether defendant had abandoned his residence.

(1b) *Search of the Trailer with a Search Warrant*: Detective Desiree Carrington sought and obtained a search warrant which was executed on July 13th, the day after the murders and rape. The warrant affidavit, recounting the facts known at that time, included information obtained from Y.M. as well as from the officers who had already entered defendant's trailer as described above. With the warrant in hand, Detective Carrington searched defendant's trailer, its screened-in porch, and, even though she had failed to seek the magistrate's authorization to search the curtilage around defendant's trailer, the yard immediately around the trailer in an area enclosed by a wire fence. Piles of evidence was recovered from both within the trailer and from the yard around it. Defendant challenged the lawfulness of this search, arguing that the affidavit relied on hearsay as well as information obtained during the two earlier entries. He also argued that even if valid, the warrant did not authorize a search of the yard. Rejecting defendant's arguments, the Court upheld the legality of this search. First, it was noted that an affiant may use hearsay (i.e., an out-of-court statement from a third party, used as evidence of the truth of the matter asserted; Evid. Code § 1200) in a warrant affidavit, so long as there is a substantial basis for crediting the truthfulness of the challenged hearsay. As such, an affidavit may include (and often does) information obtained during prior, lawful warrantless searches. As for Detective Summers's warrantless entry (the "second entry," as described above), even if illegal (an issue not decided), the information about what Detective Summers observed and seized can be excised from the affidavit and there would still be sufficient probable cause to uphold the lawfulness of Detective Carrington's warrant. The Court further upheld the search of the area around defendant's trailer; i.e., the yard as enclosed by a wire fence, or the "curtilage" of the residence. This is because even without the warrant specifying that this area is subject to being searched, case law upholds the search of the curtilage of a residence where the residence itself is the target of the warrant. "[A] warrant to search 'premises' located at a particular address is sufficient to support the search of outbuildings and appurtenances in addition to the main building when the various places searched are part of a single integral unit." (*LaFave*, *Search and Seizure* (5th ed. 2018) § 4.10(a), pp. 932–934; see also *United States v. Gorman* (9th Cir. 1996) 104 F.3rd 272, 273; and *People v. Smith* (1994) 21 Cal.App.4th 942, 950.) Based upon all this, the Court held that the trial court properly denied defendant's motion to suppress evidence seized as a result of the execution of the search warrant on defendant's residence.

(2a) *Defendant's Confessions; Completeness and Voluntariness*: Upon being arrested, defendant was questioned by Long Beach Police Detective Dennis Robbins and FBI Special Agent Elizabeth Stevens in a one-hour interview. Prior to being asked any questions, defendant was read his *Miranda* rights in Spanish. After stating that he understood his rights, defendant agreed to talk with the officers. He freely and fully confessed to everything except the rape of Y.M., admitting to only having "beaten" her. The next day, after being transported by plane to Placer County, defendant was interrogated again in a 2-hour videotaped interview; this time by Placer County Sheriff's Detective Bennett and Sergeant McDonald, with the assistance of an interpreter. Instead of reading his rights to him again, defendant was merely shown the form he had signed the day before in Long Beach and asked whether he recalled and understood it, and whether they could talk about his crimes again. Defendant "nodded his head" in agreement. He

subsequently admitted to his crimes again, but this time indicating that in addition to tying up and beating Y.M., he also "touched her vagina." Near the end of this interview, Sgt. McDonald asked defendant again to confirm that he remembered the *Miranda* admonishment form he had previously signed, and he said that he did. Asked to describe his rights, defendant responded: "*I don't understand anything*," and "*I cannot understand what rights I can have*." So Sgt. McDonald verbally reiterated his rights, one by one, getting a "*yes*" to each as he asked defendant if he understood the right just described. Sgt. McDonald then asked defendant whether he had decided to talk to them, and defendant again responded with a "*yes*." When asked; "*Because you wanted to and you didn't want to talk to an attorney*?", defendant responded: "*What am I going to gain by talking to a lawyer*?" Then, when asked why he decided to talk to the officers in Long Beach and then again to the Placer County detectives, defendant said that he would have felt "*very bad*" if he did not talk. The next day, Sgt. McDonald, assisted by other officers, took defendant on a 15-to-20-minute walkthrough at the Parnell Ranch. Asked again if he remembered the rights as were discussed before, defendant responded by asking whether he could have an attorney at that point. Told that it was up to him, defendant responded with a comment about how other inmates at the jail wanted to kill him. Told only that steps would be taken to protect him in the jail, there was no further discussion about an attorney. Defendant, on appeal, first argued that his confession at the Long Beach Police Station should have been suppressed because the admonishment form used, written in Spanish, did not fully and accurately describe his rights as required under the *Miranda* decision. Recognizing that it is the prosecutor's burden to prove by a preponderance of the evidence that a defendant freely and voluntarily provided police with incriminating statements before those statements can be admitted into evidence, the Court further noted that whether or not a defendant was properly advised of his rights requires a consideration of the "totality of the circumstances." This requires a consideration of several factors, including "any element of police coercion, the length of the interrogation and its location and continuity, and the defendant's maturity, education, and physical and mental health." The ultimate determinative question "is whether defendant's choice to confess was not 'essentially free' because his will was overborne." It is also recognized that it is not legally necessary that a *Miranda* admonishment as given needs to be in any specific form or use any specific language so long as the warnings, as given, reasonably convey to the suspect his rights as required by the *Miranda* decision. While recognizing that some of the wording in the Spanish language admonishment form used here could have been better, the advisement form was held to have touched all of the bases as required by *Miranda*. Defendant, therefore, was adequately advised of his rights. Nor was defendant coerced into waiving his rights. "There was no suggestion of 'physical intimidation,' 'coercive tactics,' promises (of leniency), or threats." The Court further noted that defendant's lack of experience with the criminal justice system did not invalidate his waiver or render his subsequent statements as involuntary in that he was never subjected to any undue pressure nor other mind games sometimes used by police interrogators. To the contrary, defendant consistently showed no hesitation in wanting to get his version of what happened out into the open, freely and voluntarily confessing to his crimes (except, maybe, for raping Y.M.). Defendant further complained of not having been readvised of his rights when being interrogated the next day in Placer County, citing his post-interrogation comments about not understanding his rights as evidence that he should have been readvised of those rights. The rule is, however, that when a second interrogation is "reasonably contemporaneous" with an earlier interrogation, so long as the suspect still has his rights in mind, no second admonishment is required. In determining whether a subsequent interrogation is reasonably contemporaneous, a

court is to consider the totality of the circumstances, including; (1) the amount of time that has passed since the initial waiver; (2) any change in the identity of the interrogator or location of the interrogation; (3) an official reminder of the prior advisement; (4) the suspect's sophistication or past experience with law enforcement; and (5) further indicia that the defendant subjectively understands and waives his rights. In this case the Court held that in considering the totality of the circumstances, the Placer County interrogation was reasonably contemporaneous with the earlier advisement and waiver in Long Beach, and that no *Miranda* readvisement was necessary at the outset of the Placer County interrogation. Defendant's post-interrogation expression of some confusion was easily cleared up by Sgt. McDonald who again led him, one at a time, through his rights as required by *Miranda*, with defendant indicating for each that he understood the rights he had already waived. As for defendant's comments about needing an attorney during the crime scene walkthrough, the trial court suppressed that evidence as "unduly prejudicial," so the jury never heard that evidence.

(2b): *The Vienna Convention*: Defendant was arraigned in the afternoon after the walkthrough at the Parnell Ranch, at which time the prosecutor advised him of his rights under the Vienna Convention (i.e., that the Mexican consulate would be notified of his incarceration). Defendant responded at that time; "*What for*." His attorney then told the court that they were not asking for any such notification at that point. Article 36 of the Vienna Convention and Penal Code section 834c require that the Mexican Consulate be notified of a Mexican national's arrest "without delay." The trial court determined that defendant had not been advised of his right to have the Mexican Consulate notified of his arrest in a timely manner, but because the officers' failure to so notify the Consulate was "negligent," and not intentional (not being aware of such a requirement), the trial judge declined to suppress defendant's confessions. The U.S. Supreme Court has subsequently held that an officer's failure to notify a suspect of his or her consular rights does *not*, in itself, render a confession inadmissible. (*Sanchez-Llamas v. Oregon* (2006) 548 U.S. 331; see also *People v. Enraca* (2012) 53 Cal.4th 735, 756.) But such a notification violation is relevant to a defendant's broader challenge to the voluntariness of his statements to the police, being but one factor to consider. In this case the Court found that the officers' failure to notify the Mexican Consulate of defendant's arrest in a timely manner, given defendant's lack of concern as expressed at his arraignment as well as his apparent intent to fully confess, was not prejudicial. Based upon all of the above, defendant's two confessions were properly admitted into evidence.

Note: The issues in this case were not really close, but worth reviewing nonetheless. I do have to say, however, that Detective Carrington should have included in her warrant application a request for the magistrate's authorization to search the curtilage of defendant's trailer. While case law covered that omission for her, it has always been my strong belief that it's important to minimize the issues available to a defendant as much as possible. The more issues a prosecutor has to deal with going into the courtroom on the eve of trial, the more likely a generous judge is going to throw the defense an occasional fish. It can also occasionally result in an appellate court changing the law on us. As for the Vienna Convention, that is a requirement not uncommonly ignored by law enforcement, given the U.S. Supreme Court's conclusion that suppression of a defendant's subsequent confession is not likely to happen. But the notification requirement is there, and one we should take seriously in that it can, under the right (or wrong) circumstances, come back to bite us. There's really no excuse for law enforcement not being aware of an officer's consulate-notification requirements when arresting a Mexican national. If

you'd like to see all the law on the Vienna Convention issue, I can send it to you. It's contained in its own section of the much broader *Miranda* Outline I publish every year.