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Remember 9/11/01; Support Our Troops

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THIS EDITION'S WORDS OF WISDOM:

"*Always forgive your enemies. Nothing annoys them so much.*" (Oscar Wilde)

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ADMINISTRATIVE NOTES:

***Probable Cause Statements in Warrant Arrests*:** I've been asked to remind officers that it is *not* necessary to submit a "*probable cause statement*" with an arrest based on an arrest warrant. Those statements are intended to summarize the basis for your determination of probable cause to arrest, giving a judge the opportunity to second-guess you "*without unnecessary delay*" prior to arraignment. (P.C. § 825(a)(1)) When arrested on an arrest warrant (as opposed to a "*P.C. arrest*"), the probable cause has already been reviewed and approved by a judge or the warrant wouldn't have been issued in the first place.

CASE LAW:

***Absent Victim's Hearsay Statements and the Sixth Amendment*:**

People v. Giles **(Mar. 5, 2007) 40 Cal.4th 833**

Rule: The "*Doctrine of Forfeiture by Wrongdoing*" may make admissible in evidence hearsay statements of an unavailable witness despite the fact the defendant is deprived of his chance to confront and cross-examine that witness.

Facts: Defendant and Brenda Avie had dated for several years. Defendant, however, had moved on to another girlfriend, Tameta Munks. In September, 2002, defendant was at his grandmother's house visiting with Tameta and other friends when he received a telephone call from Brenda. After the call, defendant told Tameta to leave, which she did. Brenda showed up 15 minutes later. Defendant and Brenda were outside, alone, when occupants of the house heard a series of gunshots. Defendant was found holding a nine-millimeter handgun and standing about 11 feet from Brenda who was lying on the ground and bleeding to death. Some of the six bullet wounds were consistent with Brenda trying to defend herself. Defendant fled but was arrested two weeks later. Charged with murder, defendant testified at his trial that when Brenda telephoned him and discovered that Tameta was there, she threatened to come over and kill Tameta. This is when defendant told Tameta that she should leave. Defendant also testified that despite his best efforts to end his relationship with Brenda, she was still very jealous of other women, including Tameta. Defendant also claimed that he had had a tumultuous relationship with Brenda and that he knew that she had shot a man once before and had threatened others with a knife. When Brenda arrived, she told defendant (still according to his testimony) that she knew Tameta would be returning and that when she did, she (Brenda) was going to kill both her (Tameta) and defendant. Hearing this, defendant retrieved a pistol from the garage, disengaged the safety, and started to walk towards the back door of the house. Brenda then "charged" him. Afraid that she had something in her hand, defendant fired at her in self-defense. The fact that Brenda was angry was corroborated by other witnesses. Also introduced at trial—over defendant's objection—was the testimony of a police officer who had responded to a report of a domestic violence incident a few weeks earlier where an emotionally upset Brenda reported that defendant had punched and choked her, and, while brandishing a knife, threatened to kill her. The trial court admitted this hearsay testimony as "a threat of infliction of injury" under a statutory exception to the hearsay rule. (Evid. Code, § 1370) The jury didn't buy defendant's self-defense argument and convicted him of first degree murder with a firearms use allegation. Defendant appealed. In affirming his conviction, the Appellate Court upheld the admissibility of the officer's testimony concerning Brenda's prior hearsay statement about what defendant did to her at the domestic violence incident. Defendant petitioned to the California Supreme Court.

Held: The California Supreme Court unanimously affirmed. Defendant's argument at both the Appellate Court and the Supreme Court levels was that the United States Supreme Court decision of *Crawford v. Washington* (2004) 541 U.S. 36, mandates the

exclusion from evidence of Brenda's hearsay statement to the officer. The Sixth Amendment to the U.S. Constitution protects a criminal defendant's right to confront and cross-examine his accusers. Defendant never had the opportunity to confront and cross-examine Brenda concerning what happened at the domestic violence incident. In *Crawford*, the U.S. Supreme Court ruled that the admissibility of a hearsay statement under the Sixth Amendment (such as Brenda's statement in issue here) requires proof that (1) the declarant is now unavailable to testify at trial, and (2) the defendant had a prior opportunity to cross-examine the declarant on that statement. (This rule applies only when the statement in issue is considered to be "*testimonial*." Brenda's statement to the police officer about the domestic violence incident was in fact testimonial.) Brenda, being dead, was obviously unavailable to testify at defendant's trial. However, defendant never had the opportunity to cross-examine her about that statement. Therefore, on its face, admitting the officer's testimony about what Brenda said violated the rule of *Crawford*. However, there are exceptions to this rule. The applicable exception here is what is known as the "*Doctrine of Forfeiture by Wrongdoing*." Under this common law equitable principle, it has been held that a defendant should not be allowed to complain about being deprived of his Sixth Amendment right to confront his accuser when the accuser's unavailability was caused by the defendant's own wrongdoing. Conceding the validity of this rule, defendant argued that because he killed Brenda for reasons other than to keep her from testifying in the murder case, the Doctrine of Forfeiture by Wrongdoing does not apply. Although recognizing that the Doctrine has most often been used in other types of circumstances, giving some weight to defendant's argument, the Supreme Court rejected the idea that the Doctrine is limited to such a situation. The reason the Doctrine has not often been used in murder cases is because before *Crawford*, other hearsay exceptions allowed for the admissibility of trustworthy hearsay statements. *Crawford* changed all that, holding that many of the statutory hearsay exceptions we've been using violate the Sixth Amendment. Since *Crawford* was decided, limiting the use of statutory hearsay exceptions, a number of cases from other jurisdictions have allowed for the use of the Doctrine under circumstances similar to those present in this case. The Court also decided that the Doctrine applies even if the defendant's "*wrongdoing*" (e.g., the murder, in this case; an issue for the jury) is the same wrongdoing about which the judge must make a preliminary finding as a prerequisite to deciding whether to allow into evidence a declarant's hearsay statements. In making this decision, the judge must find by a preponderance of the evidence that the declarant is "*genuinely unavailable*" to testify, such unavailability being caused by the defendant's intentional criminal act. Other rules dictated by the Court include (1) that the judge's "unavailability" determination must be based upon more than the unavailable witness's unconfronted testimony; i.e., it has to be corroborated by some independent evidence; (2) the trial judge is to be governed by the normal statutory rules of evidence; e.g., the declarant's hearsay statement must come within a recognized hearsay exception, and its probative value must outweigh its prejudicial effect (E.C. § 352); and (3) the jury must not be told that the judge has made this preliminary finding that defendant caused the declarant's unavailability. All these requirements were met in this case.

Note: I know this can be a confusing concept. But it's important. I recommend you read this brief a couple of times. I don't normally brief cases for the Legal Update

dealing exclusively with in-court evidentiary issues, this publication being more for cops than prosecutors. In fact, I have a whole pile of *Crawford* cases in outline form that I've never briefed, interpreting the *Crowford* rule and its various exceptions, and which I can send you upon request. But this particular case is of monumental importance, involving evidence admissibility issues with which police officers interviewing witnesses should at least be familiar. With the Court putting its stamp of approval on this "*Doctrine of Forfeiture by Wrongdoing*," it is now clear that for any hearsay exception where we can show by a preponderance of the evidence that it was the defendant who caused the unavailability of a victim or witness, that unavailable person's prior hearsay statements may still be admissible despite *Crawford*. This is a good thing.

***Grand Theft Person, per P.C. § 487(c)*:**

In re Jesus O. **(Mar. 8, 2007) 40 Cal.4th 859**

Rule: Taking property belonging to an assault victim, such property having been involuntarily dropped by the victim during, and as a result of, the assault, so long as the defendant has an intent to steal when the assault occurs, is a grand theft from the person.

Facts: Defendant and Roberto A. followed Mario H. and three other male juvenile companions from a Van Nuys McDonalds restaurant into an alley and confronted them, announcing their gang affiliation ("*Assassin Kings*"), and asking them for their money. Defendant then "sucker punched" one of Mario's companions in the mouth, and the fight was on. Mario and his compatriots fled when Roberto pulled out a knife and threatened to "shank" him. Escaping over a fence, Mario quickly discovered that his cell phone was missing. One of Mario's friends saw Roberto pick it up off the ground and put it into his pocket. Defendant (and separately, Roberto) was later arrested and charged by petition in Juvenile Court with robbery (P.C. §211) and grand theft person, per P.C. § 487(c). A Juvenile Court judge sustained the petition on one count of grand theft from the person and attempted second degree robbery. Defendant appealed. The Second District Court of Appeal affirmed, but reduced the grand theft to a petty theft, ruling that the property (worth less than $400) was not taken from Mario's person as required by subdivision (c) of P.C. § 487. (See *Legal Update*, Vol. 11, #6, pg. 5.) The State petitioned to the California Supreme Court.

Held: The California Supreme Court, in a split 6-to-1 decision, reversed the District Court of Appeal (thus affirming the trial court), finding the evidence sufficient to be a completed "*grand theft person*." Grand theft from the person, pursuant to subdivision (c) of P.C. § 487, requires proof that "the property is taken from the person of another." The issues here are (1) whether Mario's cell phone was "on his person" for purposes of the grand theft statute at the time of the "taking," and (2) whether it makes a difference that it was on his person when the assault first began, even if it was not on his person by the time the thief took physical possession of it. To answer these questions, the Court reviewed prior case decisions dating all the way back to 1897 when it was first held that to be a "*grand theft person*," the property taken has to have been "actually upon or attached to the (victim), or carried or held in actual physical possession" at the time of the

taking. (*People v. McElroy* (1897) 116 Cal. 583.) Cases since then have struggled with what this means. In reviewing these cases, the Court noted the developing theory that the "*taking*" element itself can extend over a period of time. In this case, defendant exhibited an intent to steal when he and Roberto first confronted Mario, claiming gang membership and asking him whether he had any money. Under these circumstances, it was evident that they intended to take whatever money Mario might have had on him. With this intent, defendant and Roberto assaulted Mario and his companions. The initiation of the assault, per the Supreme Court, when Mario still had his cell phone on him, comprised the beginning of the "taking." It was this assault that caused Mario to be separated from his cell phone. When Roberto later picked the cell phone up off the ground, the "taking" element of a grand theft from the person was complete. The initial part of the "taking," therefore, having occurred when the property was still on Mario's person, makes this crime a completed grand theft from the person. Also, the Court held that it is not relevant that the property defendant originally intended to take (i.e., money) is not the same property he and Roberto eventually did take (i.e., the cell phone). The Appellate Court, therefore, erred in reducing the crime to a petty (i.e., *not* from the person) theft.

Note: The dissenting opinion sees this decision as a bit of a stretch. I, quite frankly, do as well. Until now, most courts have given a pretty strict interpretation to the meaning of "*from the person*," for purposes of P.C. § 487(c). Even in *McElroy*, cited by the Court, it was held that it was *not* a grand theft person when the victim's wallet was taken from his pants pocket as the victim was sleeping with his folded-up pants being used as a pillow. That, to me, with his head lying on his pants in which his wallet is contained, is more "from the person" than under the facts of this case. But given that this case is now the law, my next question would be that if this is an example of a "taking from the person," with the "taking" element extending over the duration of the assault, why is it not also a completed (as opposed to an attempted) robbery; i.e., a theft accomplished by force? The Court does not discuss this.

***Kidnapping for Purposes of Robbery; Asportation Element*:**

People v. James **(Mar. 8, 2007) 148 Cal.App.4th 446**

Rule: Kidnapping for purposes of robbery occurs when the victim's movement (i.e., "*asportation*") is not merely incidental to the robbery itself. This is determined by considering the surrounding circumstances including the distance moved, whether the movement was necessary to facilitate the robbery, and the increased danger to the victim.

Facts: Defendant and three other "associates" robbed the "Bingo Club" in Hawaiian Gardens of over $60,000. The only employees present when the robbery started were the office manager, Michelle Hines, and three maintenance workers. One of the workers, Jesus Gonzalez, was outside hosing down the parking lot when he was approached by the robbers. Gonzalez was forced at gunpoint to knock on the Club's locked door and ask for admittance. One of the workers inside opened the door, only to find Gonzalez in the company of two of the robbers. Gonzalez was taken inside and "thrown" to the floor with the other maintenance workers while the other two robbers were let in. Defendant

accosted the office manager, Hines, and, with a gun at her head, forced to open two of the four safes. Hines couldn't open the other two safes where the bulk of the money was locked up because she didn't know the combinations. At defendant's insistence, she called her supervisor, Al Lazar, who indicated he was on the way anyway. Meanwhile, each of the maintenance workers was robbed of the contents of their wallets after which they were all moved to another location in the business and told to lie on the floor again. When Lazar arrived a short time later, he too was taken prisoner by the robbers and forced to open the other two safes. With all the stolen money put into trash bags, the victims, including Gonzalez, were moved into a bathroom where they were told to remain for ten minutes while the robbers escaped. Defendant was arrested some time later. After a jury trial, he was convicted of (along with several robbery counts and firearms allegations) "*kidnapping for purposes of robbery*," per P.C. § 209(b)(1), based upon the act of moving Gonzalez from the parking lot into the Bingo Club building. Defendant appealed the conviction on this charge only, arguing that the "*movement*" of Gonzalez's person was not sufficient to constitute a kidnapping for purposes of robbery.

Held: The Second District Court of Appeal (Div. 3) affirmed. P.C. § 209(b)(1) provides for an aggravated "life-top" sentence when a defendant kidnaps a person for the propose of committing a robbery (or any one of the various listed sex offenses). Subd. (2) applies this aggravated sentence only "if the movement of the victim (i.e., the "*asportation*" element) is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense." This legislative rule is based upon the California Supreme Court's decision in *People v. Daniels* (1969) 71 Cal.2nd 1119. The purpose of this asportation requirement is to preclude the use of the life sentence in so-called "standstill" robberies, as well as in those robberies where the movement of the victim is merely incidental to the commission of the robbery and doesn't substantially increase the risk of harm over and above that necessarily present in the crime of robbery itself. To justify the aggravated sentence attached to a kidnapping for purposes of robbery, a two-part test must be met: *First*; the movement must be more than merely incidental to the commission of the robbery. The "*scope and nature*" of the movement must be considered in determining whether this element applies. This includes a consideration of the actual distance the victim is moved. Although no minimum distance is required, the movement must be more than just a trivial change of location that has "no bearing on the evil at hand." Also, a movement is "*incidental*" when the asportation does not play a significant or substantial part in the planned offense (i.e., the robbery in this case). An example of a movement that is incidental to a robbery (and thus *not* an aggravated kidnapping) is when a robber moves a victim around the victim's own residence looking for property to steal. *Second*; the movement must be one that substantially increases the risk of harm above and beyond that inherent in the robbery itself. Factors to consider in evaluating this "*risk of harm*" element include (1) a movement that decreases the likelihood of being detected by potential rescuers, (2) foreseeable attempts by the victim to escape, and (3) the kidnapper's enhanced opportunities to commit additional crimes. In this case, of note is the fact that Gonzalez was not the original target of the robbery. The Bingo Club manager and her supervisor were. Moving Gonzalez was not an act necessary to the accomplishment of the intended robbery (such as when defendant forced Hines, and later

Lazar, into the area where the safes were stored). Also, Gonzalez was moved, at gunpoint, from the outside parking lot into the building (the exact distance of which was never established), putting him in a more dangerous situation, held on the floor where he and his fellow co-workers were subjected to additional crimes (i.e., being robbed themselves), and then moved twice more before the robbers left; all of which took up to an hour to do. The duration of the event, providing more opportunity for the victims to get hurt, is a factor tending to indicate an increased danger. The asportation in this case not being merely incidental to the robbery, while increasing the risk of harm to Gonzalez, supports defendant's conviction of kidnapping for purposes of robbery.

Note: There are a number of cases discussing what is, and what is not, an asportation of a robbery (or sex) victim that qualifies as being substantial, and thus not just incidental to the robbery (or sex offense). Either I'm just not bright enough to see the pattern, or the courts have become adept at justifying a finding either way in almost any circumstance. Some cases are clearly not "kidnapping for robbery," however, such as when victims in a commercial robbery are simply moved into a back storage room to get them out of the way (e.g., *People v. Washington* (2005) 127 Cal.App.4th 290), an act that probably *decreases* the danger they are in, or moving a victim around his own house for the purpose of locating items to steal. (*People v. Daniels, supra*.) But anything beyond these examples is a flip of the coin, with the bulk of the cases tending to uphold kidnapping for robbery convictions. So when in doubt, charge it, and we'll work down from there as the circumstances and the case law dictate.

***Probable Cause to Arrest; Arresting for the Wrong Offense*:**

United States v. Lopez **(9th Cir. Mar. 8, 2007) 2007 DJDAR 3328**

Rule: An arrest is lawful even when the arresting officers are using the wrong offense, so long as there is probable cause to arrest for some offense.

Facts: Two narcotics officers, who were apparently in plain clothes, were interviewing a witness in a case in a residential front yard in Hillsboro, Oregon. As this was going on, an unsuspecting male drove up in a green Ford Focus, got out of his car, and started to walk up to the group. As he did so, the witness waived him off, causing him to turn and walk away. When one of the officers called to him, the man suddenly turned towards the officers, drew a gun, and appeared to attempt to fire it at them. Failing this, the man jumped into his Ford Focus and sped away. The officers broadcast his description as "an adult male Hispanic in his 20s, thin build, taller, wearing a white sweater and armed with a firearm." An accurate description of the Ford Focus was also given out. About a half hour later, the Ford Focus was found parked in a shopping center parking lot "some distance away." A check of the license plate revealed that the car was registered to Roberto Lopez Gamez, for whom a physical description was provided. Staking out the Ford Focus, eight hours later a Ford Taurus came into the parking lot and parked near the Focus. A female got out of the Taurus and into the Focus, driving the Focus out of the parking lot. The Taurus, being driven by a male Hispanic of approximately 20 years of age, drove out another exit, but followed some 400 yards behind the Focus as it

proceeded down the street. Both vehicles were "hot-stopped" (i.e., a "high risk traffic stop," at gun point, and told to lie on the street, etc.). Defendant, the driver of the Taurus, was patted down for weapons (with none being found), handcuffed, and detained in the back seat of a patrol car. At this point, it was noted that other than being a Hispanic male in his 20s, defendant (being only 5' 6", unarmed, and wearing different clothing) did not match the description of the suspect. He also was not named "Gamez." But he was held onto anyway. He was eventually asked to accompany the officers to the Hillsboro Police Station where detectives questioned him. At the station, he was advised of his *Miranda* rights and his right to refuse to consent to search, and waived both. When questioned, defendant made some incriminating statements. He then signed a written consent form for the search of his vehicle; the Ford Taurus. Pursuant to this consent, the car was searched. Illicit drugs, cash and a loaded firearm were recovered from a secret compartment behind the rear seat. Filed on in federal court, the District (trial) Court denied defendant's motion to suppress this evidence, finding that the officers had sufficient "probable cause" to arrest him and that the resulting consent was the product of this lawful arrest. Defendant subsequently pled guilty and appealed.

Held: The Ninth Circuit Court of Appeal affirmed. The legality of the initial stop of defendant as he drove away from where the Ford Focus had been found was not contested. And the Court assumed for the sake of argument that defendant was under *arrest* when taken to the police station, declining to decide whether it was really only a detention. The initial stop being legal, the Court analyzed what affect, if any, the later developed information tending to indicate that defendant was not the suspect who pointed a gun at the narcotics officers, might have. When the officers noticed that defendant, other than being an Hispanic male in his 20s, did not match the description of the suspect they were looking for, the probable cause went away. The Court ruled that even if there had been probable cause to arrest defendant at the time the traffic stop was initially made, believing him to be the man who pointed a gun at the narcotics officers, that probable cause had dissipated by the time he was taken to the police station. However, both federal and (more importantly, this originally being a state arrest) Oregon law (18 U.S.C. § 3, and Or. Rev. Stat. § 162.325 (2002), respectively) make it a felony to aid a felon to escape apprehension. The fact that the arresting officers might have subjectively, albeit erroneously, believed that they had the suspect they were originally looking for, is irrelevant so long as they had probable cause to arrest him for some crime. Under the circumstances of this case, the officers had probable cause to arrest defendant for being an "*accessory after the fact*;" helping the original suspect escape detection and arrest. The arrest, therefore, was lawful, as was the resulting consent to search.

Note: California's P.C. §32, "*accessory after the fact*," is nearly identical to the federal statute analyzed in this case. Oregon's accessory statute is even easier to prove, not requiring evidence that the defendant knew the person he was helping had committed a felony. But the important point of this case is the rule of law that even if an officer is mistaken as to whether he has probable cause to arrest for the offense he or she lists on the booking slip, the arrest is still lawful so long as probable cause exist to arrest for some offense. It's getting really hard to screw up these cases. *Life is good*.

***Miranda; Beheler in the Jail*:**

***People v. Macklem* (Apr. 10, 2007) __ Cal.App.4th __ [2007 DJDAR 4735]**

Rule: A jail inmate is not in custody for purposes of *Miranda* merely because he is an inmate. Telling the inmate that he does not have to answer questions is one of the factors to be considered when determining whether a *Miranda* admonishment and waiver is necessary.

Facts: Eighteen-year-old defendant was an inmate in San Diego County's George Bailey detention facility awaiting trial for having murdered his 17-year old former girl-friend. Defendant suffered from a number of psychological issues, including, among others, Asperger's syndrome (a less sever form of autism) and ADHD (attention deficit hyperactivity disorder). As a result, anger, impulse control, and aggressive assaultive-type behavior was not unusual for him. Housed in a special section of the jail reserved for very young, and very old, inmates, defendant's older diabetic cellmate, Ray Doane, asked the jail deputy for an extra tray of food. Defendant, thinking that this was unfair, wanted to complain to deputies. Doane put a bar of soap into a sock and swung it around, "loudly and aggressively" telling defendant about what happens to snitches in prison. Defendant took this as a threat. Later, with Doane asleep in his bunk, defendant attacked him, beating on him with a PVC pipe that had earlier been a leg to a chair. When Doane awoke and fought back, defendant pulled him to the floor and continued to hit and punch him until the fight was broken up by sheriff's deputies with pepper spray. Four days later, Sheriff's jail investigator Danielle Birmingham interviewed defendant, who (obviously) was still in custody. Defendant was contacted by deputies in his administrative segregation cell and asked if he wished to speak to the detective. Agreeing to this, he was brought in handcuffs to a "professional interview room;" i.e., one used for interviews by lawyers and doctors. Once there, the handcuffs were removed. He smiled and seemed happy to meet with the detective. Defendant was not advised of his *Miranda* rights. Rather, he was simply told that he did not have to speak with the detective and that he could return to his cell whenever he chose. Showing no hesitation, defendant stated that it was fine; that he would talk to her. Asked what had occurred between him and Doane, defendant admitted to having assaulted Doane, telling the deputy that although he (i.e., defendant) was a "smart guy," he was "just not wired right." In fact, if not stopped by the deputies in the jail, defendant admitted that he would have killed Doane. Convicted of first degree murder for killing his former girlfriend, and assault with a deadly weapon on his cellmate (acquitting him of an attempted murder charge), defendant appealed. Among the issued raised on appeal was whether the trial court properly admitted into evidence defendant's incriminating statements concerning his assault on Doane, obtained without benefit of a *Miranda* admonishment and waiver.

Held: The Fourth District Court of Appeal (Div. 1) affirmed. Defendant's argument on the *Miranda* issue was that because he was a jail inmate, and obviously not free to leave, he was necessarily "*in custody*" for purposes of *Miranda* and should have been advised of his rights prior to being questioned by Detective Birmingham. Rejecting this argument, the Court noted that the case law is quite clear that just because a person is a jail inmate

does not mean that he is necessarily "*in custody*" for purposes of *Miranda*. "*Custody*" in the jail (or prison) context requires that there be some restriction on the inmate's freedom over and above that inherent in the normal jail setting. In determining whether such a circumstance exists, thus requiring a Miranda admonishment, the Court took into consideration the totality of the circumstances including four specific factors: (1) The language used to summon the inmate to the interview; (2) the nature of the physical surroundings of the interview; (3) the extent to which the suspect is confronted with the evidence against him and the pressure exerted on him; and (4) whether there was an opportunity given to the inmate to leave the site of the questioning. Thrown in for good measure was a fifth factor: (5) The fact that the inmate's interrogator was an investigator for the agency responsible for the jail, inquiring about an incident that occurred in the jail as opposed to someone from an outside agency inquiring about some other offense. In this case, the investigator sent deputies up to defendant's cell to ask him if he would talk to her. The interview took place in a "professional interview room," which is about as neutral of a setting as is available in a jail, with the door unlocked and ajar. He was otherwise unrestrained. The defendant was not confronted with any evidence against him, but was rather asked merely what he knew about the Doane incident. He was told that he did not have to talk to the detective and would be returned to his cell if and when he asked. And lastly, the detective was a jail investigator asking about a jail incident and not someone from an outside agency. With this, it is clear that nothing was done to elevate defendant's degree of custody over that of his status as an inmate. Therefore, defendant not being in custody for purposes of *Miranda*, no admonishment and waiver were required.

Note: The U.S. Supreme Court decision of *California v. Beheler* (1983) 463 U.S. 1121, has long stood for the proposition that "*custody*," at least for purposes of *Miranda*, can be taken out of almost any police-suspect interaction by merely telling the suspect that he is not under arrest and/or that he does not have to talk to the officer and can go free (or back to his jail cell, in the case of a jail inmate) whenever he wishes. No reasonable person having been told this would feel that he was "*in custody*" for purposes of *Miranda*. Interestingly enough, the Court here only mentions "*Beheler*" in passing, noting instead that telling a suspect that he doesn't have to answer the investigator's questions (i.e., what we in law enforcement commonly refer to as a so-called "*Beheler admonishment*") is merely one of the factors that needs to be considered. Although this is a correct statement of the law, I would have emphasized *Beheler* as the most important of the factors listed. I've been teaching the value of *Beheler* in the jail for a long time and finally have a case right on point. While I still encourage jail deputies to use *Miranda* as a general rule, it is clear that *Beheler*, although but one of the four, or maybe five, factors to consider, is certainly the most important one. And I have to question the fifth factor listed here; i.e., that it is a jail investigator asking about a jail incident. The Court here got this from *Mathis v. United States* (1968) 391 U.S. 1, where the inmate defendant's interrogator happened to be an Internal Revenue Agent. *Mathis* never says that this fact was a factor that needed to be considered when determining whether or not the defendant was in custody for purposes of *Miranda*. If this is really a factor, it is a relatively insignificant one, at least in my never-to-be humble opinion.