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Remember 9/11/2001; Support Our Troops

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IN THIS ISSUE:

ADMINISTRATIVE NOTES:

Use of Deadly Force; Lawful vs. Necessary: In the last *Update* (Vol. 20, No. 7; July 5, 2015), I wrote a piece on the use of deadly force citing specifically the circumstances in the U.S. Supreme Court decision of *City & County of San Francisco v. Sheehan* (May 18, 2015) __ U.S.__ [135 S.Ct. 1765; 191 L.Ed.2nd 856] (see *Cal. Legal Update*; Vol. 20, No. 6; June 2, 2015.), where, although the shooting of the plaintiff—a knife-wielding, 50-something-year-old female mental patient—was held to be legally justified, I questioned whether it was really "necessary" under the circumstances. Contrary to case law, I explained that in light of the training you receive, it is my belief that there is a difference between "*legally justified*" and actually "*necessary*" when choosing whether or not to use deadly force. Expecting some very heated (or at least "*impassioned*") responses, I tallied those few comments I did receive. I thought you might be interested in the totals: Of the *fourteen* responses I received, *eight* were in agreement with what I'd written, *one* basically accused me of forgetting what it was like on the streets when I was a cop, *one*

suggested that I should have "toned it down a bit," and *three* were very neutral. Another person (a judge) sent me an article concerning a recognized expert's opinion on the issue that can only be read to conclude that I'm totally in left field on this, at least when it is a firearm that the suspect "may" have, or is suspected of having. But I was particularly moved by one response from an LAPD officer who told me about *not* shooting (where it probably would have been legally justified) a violent drug-crazed, overly-large male who physically and viciously assaulted her and her partner, choosing instead to use nightsticks on him as she'd been trained in order to take him into custody. Years later, she ran into him again in the company of his young daughter who, at the time of that incident, had not yet been born. The officer didn't recognize who he was until he explained that through drug rehab and a change in lifestyle, he'd become a slimmed down, productive adult and parent. He thanked her, for the sake of his daughter more than anyone, for not having killed him the last time they'd met. If you missed either the *Sheehan* brief, or my discussion on the use of deadly force (or both), and would like to see it, let me know and I'll send it (or them) to you.

CASES:

***Kidnapping and Associated Crimes*:**

People v. Delacerda **(Apr. 28, 2015) 236 Cal.App.4th 282**

Rule: The forced movement of a victim that is merely incidental to some associated crime cannot be used to supply the "substantial movement" element for a simple kidnapping.

Facts: The victim, Emily R., and defendant, a deputy sheriff, dated for several months in 2009. Emily eventually broke it off because defendant tended to be very possessive. But defendant wouldn't take "no" for an answer and continued in his attempts to keep the relationship alive, calling and texting her, threatening to kill himself if she wouldn't see him. They still got together on occasion, having sexual relations several times. Finally, in April, 2010, Emily was spending the night with an ex-boyfriend when around 4:00 a.m. she noticed that she had several voice and text messages from defendant asking where she was. She texted him back, telling him she would call him in the morning. But defendant responded with a demand that she call him immediately. So she called him back, but refused to tell him where she was, reminding him that they weren't together anymore and the he "need(ed) to knock it off." The next afternoon, Emily returned to her apartment only to find defendant there. He refused to leave, blocking the front door so Emily couldn't leave. At that point, defendant took a revolver from his pocket and put one bullet in it. When asked what he was doing, he told her that he wasn't going to hurt her; that he just wanted to talk. Removing the bullet from the gun, defendant told her that he wanted to read her e-mails, promising not to bother her again afterwards. Sitting on the bed together with her laptop, Emily suddenly threw it at him and tried to run away. He tackled her halfway across the apartment and held his hands over her mouth and nose so she wouldn't scream. He picked her up and "marched" her back to the bedroom. As defendant was reading one of her e-mails, Emily again threw the computer at him and made another unsuccessful attempt to run for the door. Defendant again tackled her and, with his hands over her nose and mouth, dragged her back to the bedroom. With defendant reading her e-mails, Emily made a third escape attempt. Defendant again tackled her, this time near the front door. Sitting on her, defendant put the

bullet back into his revolver, put the gun in his mouth, and pulled the trigger. The gun only clicked as Emily screamed. Defendant pointed the gun at her face and told her to "shut up." Ignoring her pleadings to stop, defendant forcefully dragged her back to the bedroom and shoved her into the closet, blocking the exit. When Emily promised to be quiet, defendant picked up the laptop, got into the closet with her, and started going through her e-mails again. Emily made another dash for the door, picking up her keys in the process and escaping to her car. Defendant chased her to her car and, with the doors locked, jumped onto the hood. Emily was able to shake him off and drive to a nearby police department. It was later determined that the distance between the closet to the front door was between 22 to 40 feet, depending upon who was doing the estimating. Defendant was later arrested and charged in state court with simple kidnapping (P.C. § 207(a)), felony false imprisonment (P.C. §§ 236, 237(a)), assault with a firearm (P.C. § 245(a)(2)), and domestic violence battery (P.C. § 243(e)(1)), along with allegations that he personally used a firearm (P.C. §§ 12022.5(a), 12022.53(b)). Convicted on all counts and allegations, he was sentenced to 13 years in prison. Defendant appealed.

Held: The Fourth District Court of Appeal (Div. 3) reversed the kidnapping conviction, remanding the case to the trial court for a retrial on that count, but otherwise affirmed. At trial, the kidnapping, as argued by the People, was proven by evidence of Emily's third escape attempt, when defendant forced her to move some 22 to 40 feet from near the front door to the bedroom closet. The defense argued, as it also did to the jury, that either there was no movement at all because Emily had lied, or that if there was movement, it was not substantial enough to constitute a kidnapping. The Court on appeal ruled that the jury could well have believed Emily, and that a movement of some 22 to 40 feet was sufficient to constitute a kidnapping, it being "neither slight nor trivial." Also, the Court looked at other factors used to determine whether there was a kidnapping; i.e., that the reason for the movement was to decrease the likelihood of detection, removing Emily from near the front door where she'd been screaming and perhaps attracting attention of the neighbors. Also, the evidence supported the argument that the movement increased the risk of physical or psychological harm to Emily, increased the danger of a foreseeable escape by her, and gave defendant a greater opportunity to commit additional crimes against her. As such, the evidence was sufficient to constitute a kidnapping. However, with the agreement of both the prosecution and the defense, the jury was *not* instructed that there cannot be a kidnapping as a matter of law if that movement used to support the kidnapping charge was "merely incidental to an associated crime." For simple kidnapping, an "associated crime," as that phrase is used, is *any* criminal act the defendant intends to commit where, in the course of its commission, the defendant also moves the victim by force or fear against his or her will. If defendant committed such an associated crime and moves the victim incident to that crime, then that same movement cannot be used to support a simple kidnapping conviction. Failure to instruct on movement merely incidental to an associated crime violates defendant's right to a correct jury instruction on all the elements of the offense of simple kidnapping, and is reversible error. Looking at the other crimes defendant was accused of having committed, the Court ruled here that the felony false imprisonment was *not* an associated crime in that it is a lesser included offense of kidnapping. As a matter of law, a lesser included offense cannot also be an associated crime. Looking at the assault with a firearm (ADW) charge, it was noted that at the time defendant pointed his firearm at Emily there was no movement at all. The ADW was complete before Emily was moved from the front door to her bedroom and the closet. So ADW did not constitute a crime associated with the kidnapping. However, the domestic violence battery is a different story. To prove the domestic violence battery, per P.C. § 243(e)(1), the

People had to prove that "(t)he defendant willfully touched [Emily] in a harmful or offensive manner." (CALCRIM No. 841.) A review of the evidence reveals multiple acts of harmful or offensive touching that occurred, before, during, and after the dragging movement which constituted the kidnapping. With this evidence that defendant battered Emily as he forcefully moved her from the front door back to the closet, the jury could have found that in the course of that harmful or offensive touching, Emily was moved by force or fear against her will. As such, the jury should have been instructed on the option of finding that the movement used to support the kidnapping conviction was merely incidental to the closely associated crime of domestic violence battery. By failing to so instruct the jury, the trial court committed reversible error. The case, therefore, was remanded for a retrial of the kidnapping charge with the jury being properly instructed that if they find the movement of the victim was merely incidental to an associated crime—i.e., the domestic violence battery—then no kidnapping occurred.

Note: If you're left a bit confused by this, then you and I are in agreement. This whole "associated crime" theory is all based upon prior case law. (E.g.; *People v. Martinez* (1999) 20 Cal.4th 225; *People v. Bell* (2009) 179 Cal.App.4th 428.) What I see these cases as saying is that we can't use the same forced movement of the victim to supply the necessary "asportation" element for simple kidnapping if that movement was merely "incidental" to (i.e., to facilitate) another offense. Why we can't, the Court doesn't tell us and I haven't been able to find a reasonable explanation as to why. That's the bad news. The good news is that as investigating police officers, you need not overly concern yourselves with these fine legal nuances other than to recognize the need to record, *in detail*, all of the defendant's individual acts committed upon your victim. It is then up to the prosecution, and the trial court, to figure out how a jury should be instructed on these issues based upon the facts collected in the field.

***Firearms; Transfer by a Felon*:**

***Henderson v. United States* (May 18, 2015) __ U.S.__ [135 S. Ct. 1780; 191 L.Ed.2nd 874]**

Rule: A federal trial court has the equitable power to allow a convicted felon to designate someone, with the approval of the court, to take possession of the felon's firearms.

Facts: Tony Henderson, a former U.S. Border Patrol agent, was convicted in federal court of the felony offense of distributing marijuana. Pre-conviction, the trial court ordered Henderson to surrender all his firearms as a condition of his release on bail. Henderson complied, with the FBI taking custody of his guns. Post-conviction, 18 U.S.C. § 922(g) served to prohibit Henderson from legally possessing firearms ever again. Following his release from prison, Henderson asked the FBI to transfer the guns to a friend of his who had agreed to purchase them. The FBI denied the request, explaining to him that "the release of the firearms to (his friend) would place you in violation of (§ 922(g)), as it would amount to constructive possession" of the guns. Henderson therefore filed a motion in the federal District (trial) Court trial, asking it to invoke its equitable powers and to order the FBI to transfer the guns either to his wife or to his friend. The District Court denied the motion, ruling that Henderson could not "transfer the firearms or receive money from their sale" without "constructive[ly] possessi[ng]" them in violation of § 922(g). The Eleventh Circuit Court of Appeals affirmed. The U.S. Supreme Court granted certiorari.

Held: The United States Supreme Court unanimously reversed, remanding the case back to the trial court for further hearings. 18 U.S.C. § 922(g) prohibits a convicted felon from "possessing"

a firearm. That possession may be "actual" or "constructive." "Actual possession" exists when a person has direct physical control over a thing. "Constructive possession" is established when a person, although lacking direct physical control, still has the power and intent to exercise some level of control over the object. Section 922(g) prevents a court from ordering the sale or other transfer of a felon's guns to someone willing to give the felon access to them or to accede to the felon's instructions about their future use. A felon cannot evade the strictures of § 922(g) by arranging a sham transfer that leaves him in effective control of his guns." The FBI, the trial court, and the 11th Circuit Court of Appeal were all concerned that to allow a felon to sell his firearms to a designated recipient fails to divest the felon of his constructive possession of those firearms. However, if such a transfer of firearms can be accomplished in such a manner that the felon's actual or constructive possession is eliminated to the satisfaction of the trial court, then there is nothing wrong with that court allowing such a transfer. Where the felon is divested of the ability to use or direct the use of his firearms after the transfer, there is no constructive possession. The act of nominating an intended recipient, with the approval of the court, does not mean that the felon retains constructive possession of the firearms. Once the court approves the proposed recipient, the FBI can handle the firearms' physical conveyance without the felon's participation. In approving such a transfer, the trial court might ask the proposed transferee to promise to keep the guns away from the felon, and to acknowledge that allowing him to use or control the use of the guns might constitute the aiding and abetting of a section 922(g) violation. Upon being satisfied that the felon will no longer have any say in the use, or the control, of the firearms, the court has the equitable power to order such a transfer.

Note: While § 922(g) prohibits merely the "possession" of a firearm by a convicted felon, California's P.C. § 29800 (formerly P.C. § 12021) makes it a felony when such a person (and others) "owns, purchases, receives, or has in possession or under custody or control" a firearm. Whether or not California's much broader application dictates a different result in the transfer of ownership of a firearm by a state court is unknown. But it shouldn't. A state trial court probably has the same "equitable" authority to make such a decision as well. In either case, note here that the Court did not address whether there would be a problem with transferring the guns to the petitioner's (defendant's) wife, as he requested in the alternative. That will be for the trial court on remand to decide. But I would think that a court would be real skeptical of a wife's promise that she wouldn't allow her felon-husband to have any access to, let alone control over, the firearms. (See, e.g., *State v. Fadness* (Mt. 2012) 268 P.3rd 17, 30; upholding a trial court's finding that the assurances given by a felon's parents as potential recipients were not credible.)

***Second Degree Implied Malice Murder*:**

***People v. McNally* (May 21, 2015) 236 Cal.App.4th 1419**

Rule: A person acts with implied malice supporting a second degree murder conviction when he is under the influence of alcohol and/or drugs, engages in joking or horseplay with a firearm, and then discharges the firearm killing another person.

Facts: Defendant was a federal correctional peace officer. On March 8, 2012, he and fellow correctional officer and good friend Gary Bent attended riot control training at a hotel in Lompoc. After training, defendant went to Bent's hotel room where they consumed alcohol and "bath salts" (a "designer drug" known as MDVP which mimics the effects of cocaine and methamphetamine). At some point, Bent went into the bathroom complaining that he felt sick

and was going to throw up. Calling Bent a "sissy," and thinking it would be "funny," defendant took his loaded Springfield Armory XD nine-millimeter pistol out of its holster and pointed it at Bent. Holding his gun "gangster style," and believing that there was no bullet in the chamber, defendant waived it at Bent, who was sitting on the edge of the bathtub, and told him to "Hurry up and puke." Defendant then pulled the trigger, shooting Bent in the neck and severing his jugular vein. Rather than administering CPR or calling for help, defendant smoked a cigarette and paced around the room. He then texted his girlfriend, Sonia Reynolds, telling her that he'd just shot his friend. Reynolds called the Lompoc Police Department. Defendant was arrested. Upon questioning, he admitted to the shooting but stated that it was "completely an accident." "I don't know how . . . I pulled the trigger." Charged with murder, evidence was presented as to defendant's firearms training. He was a seven-year Army veteran, and "knew about firearms" and all the safety rules. As a corrections officer, he received monthly training in firearms use and safety. He'd taken an advanced shooting course and was a member of a special operations response team, training twice a month in firearms use and safety. He was also trained not to drink or engage in horseplay when using a firearm, and to only draw his firearm when threatened. There was also evidence presented that defendant's blood showed the presence of bath salts and Vicodin, but no alcohol. Per expert testimony, high doses of bath salts can cause extreme anxiety, panic attacks, severe agitation, aggressive behavior, and combativeness. The jury found that defendant had acted with implied malice and convicted him of second degree murder (Pen. Code, §§ 187(a), 189) with special findings that he personally used a firearm. (P.C. §§ 12022.5(a) and 12022.53(b)). The trial court sentenced him to prison for 15 years to life plus 10 years for the firearm enhancements. Defendant appealed.

Held: The Second District Court of Appeal (Div. 6) affirmed. Defendant argued on appeal that the evidence was insufficient to prove that he'd acted with "implied malice," and that the shooting was purely an accident. The Court didn't buy it. Murder is the unlawful killing of a human being with malice aforethought, requiring express or implied malice. (P.C. §§ 187(a), 188.) Express malice will support a first degree murder conviction. But defendant was convicted here of second degree murder, requiring evidence of "implied malice." Implied malice may be proven circumstantially, having both a physical and mental component. The physical component is satisfied by the performance of an act, the natural consequences of which are dangerous to life. The mental component is established whenever the defendant knows that his conduct endangers the life of another and he acts with a conscious disregard for life. The physical component—shooting the firearm—was not contested. Only the "implied malice" component was in issue. Case law has established that brandishing a loaded firearm at a person is an act dangerous to human life. Defendant here pointed a loaded pistol at his friend, "overrode" the gun's safeties, and pulled the trigger. It was not unreasonable for the jury to decide that defendant knew what he did was a highly dangerous act and that he therefore acted in a conscious disregard for life, particularly when you consider that he had extensive training in firearm safety. The Court noted that there is a difference between an "accidental discharge" and a "negligent discharge." "Negligence" in the improper handling of a loaded firearm supports a finding of "implied malice." A killing is an accident only if it can be said that defendant was doing a lawful act in a lawful way, and acting with usual and ordinary caution. Defendant was not doing that in this case. The Court concluded that "(a) person acts with implied malice when he is under the influence of alcohol and/or drugs, engages in joking or horseplay with a firearm, and causes the discharge of the firearm killing another person." Defendant was properly convicted of second degree implied malice murder.

Note: Other case law, not discussed here, notes that when you're handling an inherently dangerous instrument such as a firearm, you're going to be held to a higher standard should you be dumb enough to kill or injure someone as a result or your negligence. Guns are dangerous. We all know that. This defendant knew that. Whether because of the drugs, or his own immaturity (or a combination of the two), he chose to ignore his training and experience in the proper way to treat and respect firearms. In a footnote (fn. 2), the Court lists the common sense rules for handling any firearm: (*1*) Always treat all firearms as if they were loaded; (*2*) never allow the muzzle of your firearm to point at anything you do not intend to shoot; (*3*) keep your finger off the trigger until your sights are aligned with the target and you are ready to shoot; and (*4*) be sure of your target and its surroundings (referencing the California Rifle and Pistol Association (www.crpa.org), and several cases). The Court added two more: (*5*) There is no joking or horseplay with firearms; and (*6*) there is no alcohol and/or drug use with firearms.

***Mistake of Law*:**

People v. Campuzano **(June 5, 2015) 237 Cal.App.4th Supp. 14** [as modified at 2015 Cal. App. LEXIS 493]

Rule: A "mistake of law" will excuse an otherwise unlawful detention so long as that mistake was "objectively reasonable" under the circumstances.

Facts: Defendant was observed by San Diego Police Department Officers Adam George and Patrick Kelly as he (defendant) rode his bicycle on the sidewalk in front of a business once known as "Lee's Auto Repair." The former Lee's Auto Repair, obviously no longer in business, is located on a corner lot surrounded by a chain-link fence with weeds growing along the fence and in the asphalt of the parking lot. The trial court record failed to describe what was next door to Lee's Auto Repair or how far down the block the next commercial business establishment might be. Believing defendant to be in violation of a municipal code ordinance (San Diego Municipal Code § 84.09(a)), which prohibites the riding of a bicycle "upon any sidewalk fronting any commercial business establishment," the officers stopped and detained him. When told why he was being stopped, defendant became agitated, confrontational, and belligerent. He did not follow the officers' instructions and did not seem to understand the reason for the stop. Due to his behavior, Officer George suspected defendant might be under the influence of a controlled substance. While talking with defendant, and upon observing several objective symptoms indicating that defendant was under the influence of a controlled substance (i.e.; body tremors, speaking rapidly, being disoriented, occasional incoherence, and an inability to focus on the conversation), it was decided to evaluate defendant for being under the influence. Based upon defendant's performance on these tests, Officer George determined that defendant was in fact under the influence of a stimulant and arrested him for violating H&S Code § 11550. Charged in state court, defendant filed a motion to suppress, arguing that Muni Code § 84.09(a) did not apply when riding a bicycle in front of a business that no longer existed. The People, on the other hand, argued that §84.09(a) should be interpreted to mean that if there are *any* commercial establishments on the block, the sidewalk along that entire block would be covered by the ordinance. The trial court agreed with the prosecution and denied defendant's motion. On appeal to the Appellate Department of the Superior Court, it was held that defendant's motion should have been granted in that the city ordinance in issue did not apply when the

alleged violation occurs in front of an inoperable business despite the fact that there may be other businesses on the block, and that defendant's initial detention was therefore illegal. It was also held that because the officers had misinterpreted the statute—i.e., a "*mistake of law*"—their good faith was irrelevant. (See *People v. Campuzano* (Oct. 14, 2014) 231 Cal.App.4th Supp. 9.) However, subsequent to this decision, the United States Supreme Court decided *Heien v. North Carolina* (Dec. 15, 2014) 574 U.S. __, __ [135 S.Ct. 530; 190 L.Ed.2nd 475, 483] (See *Calif. Legal Update*, Vol. 19, No. 15, Dec. 18, 2014). In *Heien*, it was held that an objectively reasonable mistake of law may in fact give rise to a reasonable suspicion under the Fourth Amendment. The Fourth District Court of Appeal therefore remanded the Appellate Department's decision in this matter for a rehearing in light of the rule of *Heien*.

Held: The San Diego Superior Court Appellate Department reversed its prior ruling and upheld the trial court's determination that defendant was lawfully stopped and detained despite the inapplicability of Muni Code § 84.09(a) to the circumstances of this case. The Court first revisited its prior ruling as to how § 84.09(a) should be interpreted. In so doing, and in using the standard rules of statutory interpretation, it held again that the prohibition on bicycle riding in front of a commercial establishment applies only when that particular business is operational. The fact that there may be other open businesses elsewhere on the same block is irrelevant. "The plain meaning of subdivision (a) is that bicycle operation is precluded only on that portion of the sidewalk fronting commercial business establishments or places that are open for the trading of commodities and/or services." In this case, it was clear from the record that Joe's Auto Repair, in front of which defendant was observed riding his bicycle, was no longer a functioning business. Defendant's detention for a suspected violation of § 84.09(a) was therefore illegal. The officers' misinterpretation of § 84.09(a) is a mistake of law which, prior to the Supreme Court's decision in *Heien*, would mandate that any evidence discovered pursuant to this illegal detention be suppressed. However, the *Heien* decision dictates a reevaluation of this issue. In *Heien*, it was held that where an officer's mistake of law is based upon a misapprehension of the scope of a statute that has yet to be decided, then such a mistake is "*objectively reasonable*," then any a detention based upon that misapprehension is *not* a violation of the Fourth Amendment. That is exactly what occurred in this case. Officers George and Kelly had no prior guidance on how § 84.09(a) is to be applied. Their mistake as to this issue was therefore "*objectively reasonable*." The trial court, therefore, properly denied defendant's motion to suppress (even if for the wrong reasons).

Note: The "*mistake of law*" exception is now in line with a "*mistake of fact*," which, if "*held reasonably and in good faith*," will excuse an otherwise illegal stop, detention, arrest, or search. (See my description of the difference between a mistake of law and a mistake of fact in my *Heien* brief, cited above.) It's just that the latter (a "mistake of fact") is more likely to be found reasonable by a court in that it's not unusual or to be mistaken as to what is going on when you're making snap decisions on the fly. But do not take this broadening of the "mistake a law" rule, as dictated in *Heien*, as your ticket to be running around in ignorance, giving your own interpretation to various statutes. For instance, you now have the necessary "prior guidance" on how § 84.09(a), or any similar ordinance in your own jurisdiction, is to be applied. Ignorance of a well-established statute will not excuse your failure to be familiar with it and how it is to be applied absent a viable argument that your ignorance was "*objectively reasonable*." The general rule is still that a mistake of law will not justify a detention, search, or arrest. *Heien* and this case merely provide an exception to this general rule that did not exist prior to the decision in *Heien*.

***Minors and Penal Code § 26 Determinations*:**
***Miranda; Voluntariness*:**

In re Joseph H. **(June 8, 2015) 237 Cal.App.4th 517**

Rule: A *Gladys* Admonishment, used to establish whether a minor under the age of 14 understands the wrongfulness of his criminal act as mandated by P.C. § 26, should not be used until after the minor is advised of his *Miranda* rights.

Facts: Ten-year-old defendant had lived a troubled life. Until he was three or four, he and his sister lived with their biological mother who was a doper and child abuser. Her boyfriend also sexually abused him. He and his sister were eventually placed by the courts with his father, Jeff, who later married Krista McC. Defendant himself was a difficult child with attention deficit hyperactivity disorder (ADHD) and other learning disabilities. He was violent with his siblings, his grandmother, and other kids and teachers at school, being kicked out of six different schools. Defendant's father, Jeff, couldn't hold a job, was also a drug addict, and was frequently violent towards both Krista and defendant. Jeff was also active in various Neo-Nazis and other anti-illegal immigration groups. He owned guns, which he showed defendant how to use, keeping an unlocked and loaded pistol in his closet. On the evening of April 30, 2011, Jeff and Krista hosted a National Socialist Movement meeting in their home at which a lot of alcohol was consumed. Later, after an argument, Krista went to bed upstairs while Jeff slept on the couch downstairs. Early the following morning, at around 4:00 a.m., Krista heard a loud noise. She went downstairs to investigate and found Jeff still lying on the couch, mortally wounded and bleeding from the head. Defendant came downstairs and told Krista; "I shot dad." The police were called. When the police arrived and asked Krista what had happened, defendant made unsolicited statements to the effect that he'd taken his father's gun from the closet and shot him in the ear, telling officers that he did so because his father had beaten him and Krista the day before. Defendant further told the officers that he'd hidden the gun under his bed upstairs, where it was later found. Taken to the police station, defendant, while in the company of Krista, was questioned by Detective Hopewell. He was first asked questions relative to his understanding the difference between right and wrong; i.e., a "*Gladys* admonishment." Upon being satisfied that he did, Detective Hopewell then admonished defendant of his *Miranda* rights, which he waived. Defendant confessed to shooting and killing his father. A wardship petition was filed alleging that defendant had committed acts which would have been crimes if committed by an adult; i.e., murder (P.C. § 187(a)), with a special allegation of discharging a firearm causing death (P.C. § 12022.53(d)). After a contested hearing, the juvenile court found that the minor understood the wrongfulness of his acts (per P.C. § 26), had committed an act which would have been second degree murder if committed by an adult, and had discharged a firearm within the meaning of section 12022.53(d). Defendant was committed to the Division of Juvenile Justice and appealed.

Held: The Fourth District Court of Appeal (Div. 2) affirmed. 1. *The Gladys Admonishment*: When defendant was initially brought to the police station, he was interviewed by Detective Hopewell who, because defendant was under the age of 14, was obligated pursuant to Penal

Code section 26 to first determine if defendant understood the difference between right and wrong. (See *In re Gladys R.* (1970) 1 Cal.3rd 855.) Following a written questionnaire, defendant was asked to give the detective an example of something he might do that would be wrong. To this, defendant responded: "*Well, I shot my dad*." At that point, defendant had not yet been advised of his rights to silence and to the assistance of counsel. Defendant's comment about shooting his father was admitted into evidence against him over his objection. The admission of this statement was contested on appeal. The Court here agreed that the detective should have advised defendant of his constitutional rights prior to asking any questions about his appreciation of the wrongfulness of his conduct. The *Gladys* admonishment form used by the detective even warned the user to first *Mirandize* the minor. Defendant's admission of guilt should not have been used at trial. However, given defendant's many other admissions made before being interrogated and after he waived his rights, the error was harmless. 2. *Waiver of Rights*: Defendant also argued on appeal that the waiver of his *Miranda* rights was not voluntary given his age and other emotional issues. It is the prosecution's burden to show by a preponderance of the evidence that a waiver of rights is "knowing, intelligent, and voluntary." In evaluating this issue, a court is to consider the "totality of the circumstances" even though the defendant is a juvenile. The Court did warn, however, that "(a)dmissions and confessions of juveniles require special caution, and courts must use special care in scrutinizing the record to determine whether a minor's custodial confession is voluntary." "This is because threats, promises, confinement, and lack of food or sleep, are all likely to have a more coercive effect on a child than on an adult." It was also noted that "the mental subnormality of an accused" is a "significant" factor to be considered. In this case, however, the Court found no indications that defendant's waiver and confession were coerced in any way. To the contrary, Detective Hopewell was careful to explain to defendant each of the rights enumerated under *Miranda*, stopping to answer his questions as she went through them. Also, there was no evidence that the presence of his step-mother, Krista, was in any way coercive, but rather that defendant seemed to look to her for support. At no point was defendant coerced into waiving his rights or to fully confessing after he did so. Defendant's post-*Miranda* admissions were therefore properly admitted into evidence against him.

Note: I've always been an advocate of at least attempting to get a *Miranda* waiver despite whatever age, emotional, or mental issues (including drunkenness) a suspect might be exhibiting. If there appears to be some impediment to him understanding what you're talking about, take it slower and supplement the standard admonishment with an explanation about what it all means in plain language, while being careful to not misstate the law as you do so. The Courts consistently uphold waivers, as they did here, when the officer goes that extra mile and makes the *Miranda* admonishment as understandable as possible, as Detective Hopewell did in this case. It also helped in this case that the interview was videotaped, the Court noting a couple of times that there did not appear on the video anything to support defendant's contentions on appeal that he was confused or coerced. Videotaping an in-custody minor's confession in a murder case is required by law now anyway. (See Pen. Code § 859.5) In reference to the *Gladys* admonishment, the Court does not tell us, other than to use it *after* the *Miranda* admonishment, what to do if the defendant invokes his *Miranda* rights. My suggestion is to go ahead and do the *Gladys* admonishment even after an invocation, recognizing that anything incriminating he might say at that point, while admissible to prove he understood the wrongfulness of his acts, will *not* be admissible at trial in determining guilt.