The California Legal Update

Remember 9/11/2001; Support Our Troops

Vol. 20 December 1, 2015 No. 13

Robert C. Phillips
Deputy District Attorney (Retired)

(858) 395-0302
RCPhill101@goldenwest.net

www.legalupdateonline.com
www.cacrimenews.com
www.sdsheriff.net/legalupdates

THIS EDITION'S WORDS OF WISDOM

"*You're getting old when you get the same sensation from a rocking chair that you once got from a roller coaster*." (Author Unknown)

IN THIS ISSUE:

Page:

***Administrative Notes*:**

California Legal Update Enhancement Plans 1
California's Death Penalty 2

***Cases*:**

Miranda; Invocation of the Right to Counsel and a Break in Custody 2
Businesses; Investigations in Areas Open to the Public 5
Miranda; Questioning Outside of Miranda for Impeachment Purposes 6
V.C. § 22450(a) and Stopping at Intersections 9
Escape by Force or Violence, per P.C. § 4532(b)(2) 10
Defense of Necessity 10

ADMINISTRATIVE NOTES:

***California Legal Update Enhancement Plans*:** The *Legal Update* has been brought to you free of charge now for almost 20 years. In that time, much has happened. I've since retired from the San Diego District Attorney's Office. Also since then, the distribution of the *Update* has been picked up by a private enterprise out of Northern California at their own considerable expense. My own research expenses, also not insignificant, have come out of my own pocket for several years now. But despite all, publication of the *Legal Update*, free to you, has continued uninterrupted.

We now have plans to expand and improve our service to you by publishing an enhanced, more versatile, and more useful version of the *Update*. Tentative plans include giving you easy access to prior editions of the *Update*, appropriately indexed, so that you can easily research more cases. Also being considered are plans to make available training outlines and other articles and publications on important law enforcement topics. You will also have quicker access to me personally, with everything available on mobile phones. My publisher is also having constructed a fantastic, and in-depth website, making all the above readily accessible. But such an expansion will also increase the costs of providing this service.

While we hope to continue to make available to you a free version of the *Update*, which has always been my goal, the enhanced version will require a minimal subscription fee. Therefore, in the next couple of weeks you will receive a short survey asking what it is that *you* want to see in such a publication, and what *you* hope to get out of it. Also, we will be asking you whether you'd be willing to pay for such an expanded version of the *Update*, and if so, how much. What we ultimately do with the *Update* will depend entirely upon your responses reflecting your needs and your wishes.

California's Death Penalty**:** Last year, a federal district (i.e., trial) court judge granted capital defendant Ernest Dewayne Jones' Habeas Corpus Writ in *Jones v. Chappell* (C.D. Cal. 2014) 31 F.Supp.3rd 1050, ruling that California's post-conviction appellate system for capital prisoners violates the U.S. Constitution's Eighth Amendment's prohibition against cruel and unusual punishment. The problem, as cited by the trial court, is California's "dysfunctional . . . long period of delay between sentencing and execution, (resulting in) . . . only an 'arbitrary' few prisoners actually (being) executed." Jones, for instance, was convicted in 1995; 20 years ago.

If you were worried that this decision jeopardizes California's death penalty, you can put that worry to rest, at least for now. The Ninth Circuit Court of Appeal reversed *Jones v. Chappell* last month in *Jones v. Davis* (9th Cir. Nov. 12, 2015) __ F.3rd __ [2015 U.S. App. LEXIS 19698]. The Ninth Circuit didn't say the district court was wrong, however, but only that a Writ of Habeas Corpus is not the right vehicle by which a defendant can test this theory. Citing United States Supreme Court authority (i.e., *Teague v. Lane* (1989) 489 U.S. 288), it was noted that federal courts may not consider "novel constitutional theories" on habeas review, and that Jones' argument here was such a novel constitutional theory. But while this particular bullet has been dodged, don't think that the issue is totally dead. Even though California's voters keep showing their support for the death penalty, no one seems to want to be responsible for flipping the switch. So expect to see this and other arguments again before anyone is ever executed in this state.

CASES:

***Miranda*; *Invocation of the Right to Counsel and a Break in Custody*:**

People v. Bridgeford **(Oct. 27, 2015) 241 Cal.App.4th 887**

Rule: After an in-custody suspect invokes his right to counsel under *Miranda*, the interrogation may be reinitiated only if counsel is provided, the suspect himself reinitiates the questioning, or there is at least a fourteen-day break in custody.

Facts: On January 4, 2010, defendant and two others committed a home invasion robbery at in the town of Dos Palos, California. Although all three robbers were wearing masks, the victim quickly recognized defendant (tipped off by his voice, unique physical characteristics, and one of the other robbers calling him by his first name) as someone with whom he'd grown up. Defendant carried with him a rifle with a distinguishable "see-through clip." The victim was later able to recognize this rifle at defendant's murder trial (see below). The next day (January 5), two Sureño street gang members were shot to death in the garage of one of the victims located on Highway 33 in Dos Palos. From the bullet casings left at the scene, it was determined that a 12-guage shotgun and a .22-caliber rifle were used in the murders.

There was some evidence that defendant and three other of his fellow North Side Barrio Locos (a Norteño gang) members had stolen ammunition for both weapons from a Walmart the day before. On January 6, the Dos Palos Police Chief, Barry Mann, went to defendant's home as a part of the January 4th home invasion investigation. He contacted defendant at the front door and asked him if he knew why he was there. Defendant responded yes, "because of the stuff that happened on the highway," making apparent reference to the homicides instead of the robbery. Defendant refused to grant Chief Mann permission to search his house despite the Chief's threat to get a warrant.

A week later (January 12), however, the home of one of defendant's companions (Jose German) was searched, resulting in the recovery of a .22-caliber rifle with an aftermarket detachable magazine. Ballistics tests later proved that this was the rifle used in the homicides. Also, the victim of the home invasion robbery later testified that this was the same rifle used by defendant in that crime. Defendant was picked up and interviewed later on the 12th. Sixteen minutes into the interview, he invoked his right to counsel. The interview was immediately ended and, because there wasn't yet enough evidence with which to charge him, he was released. Further investigation that same day, however, including an interview with Jose German, resulted in the officers' belief that they then had probable cause to arrest defendant, which they did some 2 to 3½ hours after his earlier release.

Defendant was readvised of his *Miranda* rights, waived them, and confessed to the murders shortly thereafter. He was subsequently charged in state court with two counts of murder with various weapons and gang enhancements, and with an allegation the he committed multiple murders. (The home-invasion robbery was not charged although evidence of that event was admitted into evidence for the purpose of tying defendant to the murder weapon.) Defendant's motion to suppress his confession was denied. Jose German testified for the prosecution under a

grant of use-immunity. He told the jury that the murders stemmed from one of the victims having thrown a brick at his car a couple of days earlier. He also fingered defendant and another gang member as the shooters. German claimed the defendant had given him the rifle to hide after Chief Mann had come to defendant's house asking for permission to search it. Defendant was convicted of all charges and enhancements and sentenced to two consecutive life terms without the possibility of parole plus consecutive 25-years-to-life terms for the firearms use enhancements. He appealed.

Held: The Fifth District Court of Appeal reversed. The primary issue on appeal was the admissibility of defendant's confession, obtained during his second interview after having been released and re-arrested. Based upon evidence deduced at defendant's pre-trial motion to suppress his confession, it was determined that he'd been contacted by sheriff's deputies on January 12th and transported to the Sheriff's station for an interview. Although told that he was only being detained, he remained in handcuffs while in the interrogation room. He was also read his rights pursuant to *Miranda v. Arizona*, which he waived. But he soon changed his mind and invoked his right to have an attorney present, ending the interrogation.

Because the deputies believed that they did not yet have sufficient evidence with which to charge him, he was released. Subsequent interviews with other witnesses, including Jose German, all of which occurred that same day, led to the officers deciding to re-arrest him. So he was immediately (i.e., 2 to 3½ hours of his earlier release) tracked down, arrested, searched, and transported back to the Sheriff's station. At the station, he was interviewed by Sgt. Charles Hale. Defendant was told that this time he was under arrest for two murders. He was reminded that he'd earlier invoked his right to have counsel present and told that "that's your right." Defendant told Sgt. Hale that after he was released, he went home and told his grandmother that he'd invoked his rights and that she'd told him that by doing that it make him look guilty. Admitting that he "ain't the very smartest person," and that he had "a very bad memory," defendant told Sgt. Hale that he "listen(s) to (his) grandma, basically." Told by the sergeant that he was going to "give (him) another opportunity to talk," and asked if he wanted to make a statement, defendant said that he'd "provide everything (he knew)." He was therefore re-read his *Miranda* rights, which he waived.

Although defendant initially denied being involved in the murders, he made a full confession immediately after being put into a room with Jose German who told him that the officers had the murder weapon and knew what he'd done. Citing *People v. Storm* (2002) 28 Cal.4th 1007 (where a 2-day break in custody between the defendant's invocation of his right to counsel and his later confession was upheld), the trial court denied defendant's motion to suppress his confession. The trial court ruled that while "minimally sufficient," the 2 to 3½ hour break between his earlier interview when he'd invoked his right to counsel and his later arrest was enough time for him to have contacted counsel had he wanted to do so. The rule (often referred to as the "*Edwards* Rule," pursuant to *Edwards v. Arizona* (1981) 451 U.S. 477) is that once an in-custody suspect invokes his right to counsel (as opposed to his right to remain silent), he is off limits to all further attempts to interrogate him about that case, or any other case, absent either counsel being provided, the suspect's own reinitiation of the interrogation, *or* (as significant here), a break in custody.

The California Supreme Court, in *People v. Storm*, found two days to be a sufficient break in custody, giving the suspect a reasonable opportunity to consult with friends, relatives, or an attorney, dissipating the inherent coerciveness of the prior in-custody interrogation. In *Maryland v. Shatzer* (2010) 559 U.S. 98, however, decided eight years after *Storm*, the United States Supreme Court set out a blanket rule requiring a 14-day break in custody (impliedly overruling *Storm*). *Shatzer* involved a state prisoner who, after invoking his right to counsel, was put back into the general prison population where he, in effect, lived at the time (i.e., "*return*(*ing*) *to his normal life*." *Shatzer*, at p. 107), and was not interviewed by law enforcement again for several years. The High Court held this to be, for purposes of *Miranda* and *Edwards*, a "*break in custody*" (i.e., "*Miranda* custody," even if not actual "physical custody'), allowing officers to return and attempt a renewed interrogation. The idea behind this theory is that once the pressures of an in-custody interrogation are sufficiently relieved, and the suspect has had the opportunity to seek outside advice as to what his options are, thus relieving the inherent coerciveness of the interrogation situation, then the justifications for the *Edwards* Rule no longer exist.

Finding that the trial court in the instant case had "impliedly" found defendant to have been in custody (i.e., arrested) when he initially invoked his right to counsel, the Appellate Court held here that the investigating officers failed to wait the required 14 days as dictated by *Shatzer*. As such, defendant's confession, being obtained in violation of the *Edwards* Rule and *Shatzer*, should have been suppressed. The Court further rejected the People's argument that having consulted with his grandmother, who told him that he shouldn't have invoked, defendant had in effect reinitiated the interrogation himself. Whatever advice his grandmother may have given him, it was law enforcement that reinitiated the interrogation. Finding the rule in *Shatzer* to be retroactive (it being decided after defendant's crimes), and admission into evidence of defendant's confession to be prejudicial, the Court reversed his conviction and remanded the case to the trial court for retrial.

Note: Previous to this case, I read *Shatzer* to apply only to its facts; i.e., a prison inmate who is put back into the general prison population after invoking his *Miranda* right to the assistance of counsel (as opposed to remaining silent), reserving comment as to whether *Shatzer* applied at all to the pre-trial situation. But in re-reading *Shatzer*, I have to agree that *Shatzer* imposed an over-all general rule with the arbitrarily-determined requirement that police interrogators must wait at least fourteen days after the suspect is released from "*Miranda* custody," and that the post-conviction prisoner situation is but one, *non-exclusive*, application of this rule. So defendant in this case is indeed entitled to the benefits of *Shatzer's* fourteen-day requirement. However, left undecided is whether *Shatzer* applies to the defendant who remains in physical county jail custody where, while awaiting trial, he is released into the general county jail population for at least fourteen days.

There is some significant language in *Shatzer* indicating that even a 14-day break in police contact with a county jail pretrial inmate is not enough. That's because even though he may not be molested by police investigators while awaiting trial, the suspect is still being held in "uninterrupted pretrial custody while the crime is being actively investigated, . . . cut off from his normal life and companions, 'thrust into' and isolated in an 'unfamiliar' 'police-dominated atmosphere' . . . where his captors 'appear to control [his] fate, . . .'" (*Shatzer*, a p. 106.)

While the Supreme Court in this quote was presumably talking about before the in-custody suspect is even charged in court (i.e., arraigned), the same argument can be made for any defendant right up to, and including, his trial. In other words, there is a difference between the county jail inmate, under the pressure of a pending trial, the outcome of which will have a significant effect upon the rest of his life, and the post-trial prison inmate who's immediate, if not extended, future has already been decided. But we will have to await another case to decide this issue for us.

***Businesses*; *Investigations in Areas Open to the Public*:**

Patel v. City of Montclair **(9th Cir. Aug. 18, 2015) 798 F.3rd 895**

Rule: Police officers do not conduct a search within the meaning of the Fourth Amendment merely by entering private, commercial property, so long as it is an area open to the public.

Facts: Plaintiff Mahesh Patel owned a corporation called "Hospitality Franchise Service" ("HFS") and the Galleria Motel, in the City of Montclair. The motel primarily rented rooms to middle-aged and elderly low-income residents who were on public assistance. Montclair police officers came onto the motel grounds, entering the motel's public areas, and cited Patel for code violations that were observable in plain sight. Patel sued the city and its police officers in federal court, pursuant to 42 U.S.C. § 1983, for violating his Fourth Amendment rights. The civil defendants filed a motion to dismiss for failure to state a claim. The federal district court granted the motion, holding that neither Patel nor HFS had a reasonable expectation of privacy in the areas of the Galleria Motel that were open to the public. Patel appealed.

Held: The Ninth Circuit Court of Appeal affirmed. The issue here is whether police officers, upon coming onto private commercial property that is open to the public, are conducting a search. If they are, the Fourth Amendment requires that a search warrant be used in order for that entry to be lawful. The Court here held that no search was involved under the circumstances of this case making a search warrant unnecessary. "The touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy.'" The Supreme Court has held that "[t]he Fourth Amendment protects against trespassory searches only with regard to those items ('persons, houses, papers, and effects') that it enumerates."

Commercial property is not one of the areas enumerated. Patel did not argue that the officers, by entering the public areas of the Galleria Motel, violated any expectation of privacy. Rather, he argued that police officers violate the Fourth Amendment merely by entering any property when it is done for the purpose of conducting an investigation. The Court declined to extend the areas protected by the Fourth Amendment to commercial property that is open to the public, even when officers are conducting an investigation. In an alternative argument, Patel cited several Supreme Court cases from early 1967 that might be interpreted to hold that commercial property is indeed protected. However, the Court here noted that the subsequent (by six months) decision of *Katz v. United States* (1967) 389 U.S. 347, limited these decisions to the situations where one's reasonable expectation of privacy has been violated; i.e., in these cases, to the non-public areas of a business.

Thus, the 1967 cases cited by Patel could not be used to support an argument that any unauthorized entry onto private property, at least when the areas entered are open to the public,

constitutes a search. Therefore, the Montclair officers' entry into the public areas of Patel's motel was not a search and did not require a search warrant.

Note: The rule here is really kind of obvious, and does not tell us anything new. But it's nice to have the case citation to point to when someone argues that police officers, while conducting an investigation of some sort, are violating their rights merely by entering an area of a commercial business that is open to the general public. Another way to look at it is that there is no Fourth Amendment violation when, as the Court here put it, the officers are committing a mere "*technical trespass*." Think "*no reasonable expectation of privacy*," and the answer becomes obvious.

***Miranda; Questioning Outside of Miranda for Impeachment Purposes*:**

People v. Nguyen **(Aug. 13, 2015) 61 Cal.4th 1015**

Rule: Ignoring an in-custody suspect's request for an attorney (or to remain silent) and continuing with an interrogation may provide the prosecution with admissible impeachment evidence should that defendant testify and lie. However, if it is determined that ignoring a *Miranda* invocation for the purpose of obtaining impeachment evidence is the result of a police department's official policy or otherwise demonstrate widespread, systematic police misconduct, the resulting statements may be held to be inadmissible for any purpose.

Facts: Six members of Vietnamese street gangs in Orange County, mostly members of the "Cheap Boys," were shot in six separate incidents in 1994 and 1995. Three of the victims died and three were seriously injured. Defendant was a member the "Nip Family" street gang, with whom the Cheap Boys were warring. Of the three wounded victims, one was left paralyzed from the neck down, one was partially paralyzed, and the third survived with seven bullets in him. As is typical with gang cases, the evidence connecting defendant to each of the shootings varied in strength and detail.

Shortly after the last murder, on May 23, 1995, police attempted to stop a car leaving 13401 Amarillo Drive in Westminster where it was known that a number of Nip Family gang members resided. As the car was pulled over, a male who resembled the defendant fled on foot. The other two occupants of the vehicle were determined to be members of the Nip Family street gang. A Colt .380-calibler revolver was found in some bushes near where the fleeing passenger (presumed to be defendant) was last seen. A police dog alerted on the gun, indicating that a person had recently held it. A .380-caliber Colt was used to kill one of the Cheap Boy victims. A search warrant was obtained for the residence at 13401 Amarillo Drive, resulting in the recovery of a bunch of guns and some prescriptions for "John Nguyen." The issuing physician was contacted and indicated that he treated defendant, who used the name of John Nguyen, for a gunshot wound to the hand and arm.

Two days later, Westminster Police Detective Mark Nye arrested defendant when he arrived for a medical appointment with the doctor. Defendant had injuries to his left hand and right elbow consistent with wounds caused by a shotgun, apparently inflicted during the commission of one of the murders where the victim shot back. Taken to the Westminster police station, defendant was advised of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, by Detectives Nye and Proctor. In response, defendant specifically invoked his right to counsel, so the

interview was stopped. But a few minutes later, the detectives reentered the interrogation room and resumed the questioning, telling defendant: "We just have to get some other things clear."

During the ensuing questioning, defendant admitted that he was a member of the Nip Family gang. After defendant reminded the detectives twice more that he wanted to speak with an attorney, the interview was finally concluded for good. Charged in state court with multiple counts of murder (with a special circumstance of multiple murders), attempted murder, and other charges, defendant testified in his own defense. In his testimony, defendant denied being a member of the Nip Family although he admitted to knowing or being friends with many of its members. In rebuttal, over a defense objection, the prosecution introduced evidence of defendant's admission to detectives that he was in fact a Nip Family member. Convicted of two counts of murder (with the special circumstance) and three counts of attempted murder, and with a jury determination of a sentence of death, appeal to the California Supreme Court was automatic.

Held: The California Supreme Court affirmed. As one of the many issues on appeal, defendant argued that his admission to the detectives that he was a Nip Family gang member was obtained in violation of *Miranda* and should not have been admitted into evidence, even if only for impeachment purposes. The law is clear: Once an in-custody suspect invokes his right to counsel, all questioning must cease. (*Miranda*, *supra*; *Edwards v. Arizona* (1981) 451 U.S. 477.) (The same rule applies to an invocation to remain silent: *Miranda*, *supra*, at pp. 473-474.) Any statements made as a result of a continued interrogation after that point are inadmissible. An exception, however, has been made for when that defendant, upon invoking his right to silence, later testifies and claims facts that are in conflict with anything he'd said to his interrogators after his invocation. Such statements are admissible against him in the People's rebuttal case, solely for purposes of impeaching his in-court testimony. (*Harris v. New York* (1971) 401 U.S. 222.)

This same exception applies when defendant's invocation was for the purpose of obtaining the assistance of counsel. (*Oregon v. Hass* (1974) 420 U.S. 714.) The reason for this impeachment exception is because the Supreme Court believes that *Miranda* shouldn't be used by a defendant to facilitate perjury. The Supreme Court is also of the opinion that the suppression of a defendant's statements made "outside *Miranda*," precluding the use of those statements in the People's case-in-chief, supplies sufficient deterrence to prevent wholesale violations of the *Miranda* rule, making the suppression of those statements for impeachment purposes unnecessary. However, the California Supreme Court here held that it is "illegal" for police officers to purposely violate *Miranda*, even when done solely for the purpose of obtaining impeachment evidence. Specifically, the Court held that, "we reiterate that *Miranda* and *Edwards* 'imposed an affirmative duty upon interrogating officers to cease questioning once a suspect invokes the right to counsel.'"

As the California Supreme Court has warned officers before: "(I)t is indeed police misconduct to interrogate a suspect in custody who has invoked the right to counsel." (*People v. Peevy* (1998) 17 Cal.4th 1184, 1205.) "Such practices tarnish the badge most officers respect and honor." (*People v. Neal* (2003) 31 Cal.4th 63, 92.) Despite the California Supreme Court's reluctant acceptance of the U.S. Supreme Court-dictated impeachment exception, it continues to hold that "a statement obtained in violation of *Miranda* and *Edwards* is a statement 'obtained illegally.'" (*Peevy*, *supra*., at pp. 1204.)

The detectives in this case testified that they'd received training from the Orange County District Attorney's Office to the effect that continued questioning of an in-custody suspect who has invoked his *Miranda* rights, done for the purpose of obtaining impeachment evidence, is an acceptable practice. It was also noted that a 1996 training videotape produced by California's Commission on Peace Officer Standards and Training (P.O.S.T.) has discussed the availability to police officers of such an interrogation technique. So while there may have been other reasons for continuing this defendant's interrogation after his invocation (e.g., the personal education of the officers and for booking purposes), obtaining impeachment evidence was at least one of the detectives' goals.

The trial court, after hearing evidence on this issue, ruled that there were no indications that the detectives were "overbearing in terms of their conduct, or the way that they handled or processed the accused." The California Supreme Court agreed and, despite its misgivings as to the practice, recognized that the U.S. Supreme Court has approved this interrogative technique for the purpose of obtaining impeachment evidence. The Court also warned officers, however (as it has more than once before), that it was leaving open the question whether a new rule of suppression should be imposed, not allowing statements obtained in violation of *Miranda* for any purpose, should it be determined in some future case that intentional violations of *Miranda* were the result of an "official police department policy" or otherwise demonstrate that it constitutes "widespread systematic police misconduct."

In this case, however, there was insufficient evidence to justify any such new rule of suppression. Defendant also argued that his admission to being a member of the Nip Family was the result of coercion. Noting that he hadn't been misled as to the admissibility of such an admission, and that the detectives hadn't used any otherwise coercive interrogation techniques, the Court held that defendant's statement as to his gang affiliation was not the product of coercion. And lastly, defendant complained that the trial court had failed to admonish the jury that his statement in issue here was admissible only for purposes of impeachment, and not for the "truth of the matter" (i.e., as substantive evidence of guilt). However, defendant failed to request such an instruction to the jury and the trial court was not obligated to give such an instruction without such a request.

Note: I have long since preached the *inadvisability* of purposely ignoring a *Miranda* invocation and continuing an interrogation despite the fact that the later-obtained statements of an in-custody suspect may be valuable to a prosecutor for impeachment purposes. But I have to admit, based upon case authority from the U.S. Supreme Court, as detailed in this case, the High Court seems to have no problem with the practice. It is only the California Supreme Court that is threatening to impose a new rule of exclusion should it be determined that an intentional *Miranda* violation is the result of some official police department policy or otherwise become a "widespread systematic police" practice. It would be interesting to see whether the U.S. Supreme Court would uphold such a California-only suppression rule, if that ever occurs. The only question is whether you want it to be your case, with your name attached, that supplies that new case law on this issue. In the meantime, you might also consider whether, with or without a rule of suppression, it is the professional or ethical thing to do when you know that purposely ignoring the dictates of *Miranda v. Arizona* and its progeny violates federal and state limitations on proper interrogative techniques.

***V.C. § 22450(a) and Stopping at Intersections*:**

People v. Overing **(Aug. 26, 2015) 239 Cal.App.4th Supp. 31**

Rule: V.C. § 22450(a) requires that a motorist stop at an intersection's limit line, crosswalk, or, when not so marked, before entering the intersection. The purpose of these provisions is to allow a motorist to safely determine the presence of anyone else in the intersection who might have the right of way. The physical location of a stop sign or painted "STOP" in the road is irrelevant.

Facts: Defendant was driving his vehicle eastbound on Sierra Madre Boulevard in the City of Sierra Madre, approaching the intersection with Sunnyvale Avenue. Sierra Madre Blvd. at Sunnyvale Ave. is controlled by four-way stop signs. As one approaches the intersection in the direction defendant was travelling (eastbound on Sierra Madre), he will come upon the word "STOP" painted on the road, which is lined up with a physical stop sign erected on the curb to the driver's right side. Ten feet further east on Sierra Madre the driver will come to the near side of a painted crosswalk.

Defendant testified in this case that he came to a full stop one foot behind (to the west) the stop sign and the word "STOP" painted in the roadway. After the intersection appeared to be clear of all traffic, he then continued to drive eastbound across the crosswalk and into the intersection, turning left to northbound Sunnyvale Ave., without again stopping. Sierra Madre Police Department Officer Fernandes was in his patrol vehicle parked on Sunnyside facing north, just south of Sierra Madre. Because of bushes on the southwest corner of Sierra Madre and Sunnyvale, he didn't (or couldn't) see defendant stop to the west of the stop sign, seeing only that defendant drove across the crosswalk and into the intersection without stopping.

Officer Fernandes stopped defendant and wrote him a traffic citation for failing to stop at the stop sign, per V.C. § 22450(a). Defendant challenged the issuance of the ticket in court, arguing that he did in fact stop at the stop sign. The trial court accepted defendant's excuse of having stopped behind the stop sign some eleven feet west of the crosswalk. However the court found defendant guilty anyway, ruling that he stopped "too far back" from the crosswalk and was thus in violation of section 22450(a). Defendant appealed.

Held: The Appellate Department of the Los Angeles Superior Court affirmed. The issue here was whether stopping one foot behind a stop sign, when that puts a driver some 11 feet from a crosswalk, meets the requirements of V.C. § 22450(a). Section 22450(a) provides as follows: "The driver of any vehicle approaching a stop sign at the entrance to, or within, an intersection shall stop at a limit line, if marked, otherwise before entering the crosswalk *on the near side of the intersection*. [¶] If there is no limit line or crosswalk, the driver shall stop at the entrance to the intersecting roadway." (Italics added)

There being no "limit line" at the intersection in issue here, the Court wrestled with what "*on the near side of the intersection*" means when we're dealing with a stop sign and a crosswalk. The Court was obligated to engage in a little statutory interpretation in deciding what this means. In so doing, it looked to the "right-of-way" statutes. "'Right-of-way' is the privilege of the immediate use of the highway." (V.C. § 525) V.C. § 21800(a) & (c) mandates that a driver give the right-of-way to other vehicles that are already in an intersection, or any vehicle to the immediate right when two vehicles reach an intersection at the same time. V.C. § 21950(a) does the same for any pedestrians in marked or unmarked crosswalks. These sections recognize the

need for a motorist to be able to assess the proximity of vehicles and pedestrians before proceeding into an intersection.

Based upon this, the Court concluded that section 22450(a) requires a motorist to stop at a location where he can safely determine the presence of other vehicles and pedestrians, and then properly assess who has the right-of-way. Stopping too far back prevents a motorist from being able to do this. "[T]he apparent purpose of [V.C. § 22450(a)] is to require a vehicle to stop before it is in a position where it could impede or hit pedestrians who could be in a crosswalk, or cross-traffic that could be in an intersection. (Citation) Allowing a stop at a distance too far from the crosswalk would be dangerous if motorists could not see other vehicles in the approaching intersection or pedestrians in the crosswalks." In this case, the officer, who was facing northbound and around the corner from where defendant claims to have stopped, couldn't see defendant's stop due to bushes obstructing his view. That being the case, it is apparent that defendant also couldn't see the officer. This fact lends weight to the trial court's determination that defendant stopped too far back to be able to properly assess whether or not it was safe to enter the intersection. Defendant, therefore, was properly convicted of V.C. § 22450(a).

Note: I was taught, back in my youth that you stopped at the stop sign, and then slowly creeped up to where you could see the cross traffic or pedestrians who might be attempting to use the crosswalk. That, apparently, while maybe one alternative, is legally unnecessary. So long as you stop before any painted limit line, or any crosswalk (painted or not), or if none, before you enter the intersection, but at least at a point where you can properly assess the presence of other vehicles and pedestrians already in or at the intersection, then you're good to go. Where some city or county worker determines to erect a physical stop sign, or paint "STOP" in the road, is really irrelevant. That's good to know.

***Escape by Force or Violence, per P.C. § 4532(b)(2)*:**
***Defense of Necessity*:**

<u>*People v. Kunes*</u> (Dec. 3, 2014) 231 Cal.App.4th 1438

Rule: The use of "force or violence" in an escape includes force used against property. The defense of necessity does not include a perceived need to visit one's ailing parents.

Facts: Defendant, a life-long "property crimes" offender with 15 prior felony convictions, was serving a four-year prison sentence in county jail (per P.C. § 1170(h)(2).) The county sheriff released him to complete his jail term in a home detention program, as allowed under P.C. § 1203.016. His only obligations were that he wear a GPS device around his ankle and stay within the premises of "New Home," a sober living facility, at all times except for 4½ hours once a week when he was allowed to perform necessary tasks within a defined geographical area. Even these comparatively minimal inconveniences were too much for him to handle. So on August 22, 2012, defendant left his "defined geographical area," setting of an alert at the sheriff's department. But before he could be found, defendant had cut off his GPS device which he FedEx'd back to the sheriff's department. He then flew to Pennsylvania where he stayed with his parents for about six months until his father was contacted by the sheriff.

About a week later, defendant showed up in Carpinteria, California, and was arrested while sitting in a restaurant, sipping a martini. Defendant was charged in state court with one count of simple escape (P.C. § 4532(b)(1)) and one count of escape by force or violence (P.C. §

4532(b)(2)), with four prior prison terms alleged. In total, defendant was looking at up to ten years in prison, plus the prosecutor was holding onto a new felony non-sufficient funds (NSF) charge which hadn't yet been filed. As a result of plea negotiations, defendant pled no contest to forcible escape with a midterm (4 year) prison commitment guarantee. A part of the plea bargain was to dismiss the simple escape charge and the four prior prison term allegations, with the NSF case not being filed if he paid restitution within 90 days. However, upon appointment of a new attorney, defendant moved to withdraw his plea on the grounds that he was factually innocent of the forcible escape charge, and that his prior counsel had rendered ineffective assistance.

Defendant also claimed that his first attorney did not tell him that he had the possible defense of "necessity," under the theory that he needed to go to Pennsylvania to take care of his parents who were both suffering from cancer. Defendant also claimed that had he known about the necessity defense, and that the charge of "forcible escape" was "absurd," as apparently advised by his new attorney, he would never have pled no contest. The trial court denied defendant's motion to withdraw his plea. Defendant appealed.

Held: The Second District Court of Appeal (Div. 6) affirmed. On appeal, defendant again made the argument that he was "factually innocent" of the "escape by force or violence" charge, and that he had a viable "necessity" defense that his first attorney hadn't told him about. The underlying issue was whether his first attorney had failed to provide him with competent advice by not telling him about these two issues before he pled no contest. The Court disagreed with defendant on both counts, ruling that his attorney had represented him competently. As for defendant's "escape by force or violence" argument, the Court pointed out that a forcible escape does not need to involve danger to human life.

The "force" used in effecting an escape also includes any wrongful use of force against property. Subdivision (a)(1) of section 4532 specifically makes criminal an escape from the place of confinement in a P.C. § 1203.016 home detention electronic monitoring program. Subdivision (b) of the same statute increases the penalty when escape from the home detention monitoring program is by force. Nowhere is it required that the force used be against a person. Per the Court; "(f)orcible removal of the GPS device is quintessential forcible escape from a home detection monitoring program." Cutting his GPS device off with scissors is sufficient force, therefore, to be a violation of this provision. As for the "necessity" defense, even if defendant were to be believed, escaping to be with his ill parents does not meet the required elements of a valid "necessity."

Before a defendant may use this defense to excuse his criminal act of escape, it is his burden to prove by a preponderance of the evidence that; (1) he was faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future, (2) that there was no time for defendant to make a complaint to the authorities, or there was a history of such complaints that were not acted on so that a reasonable person would conclude that any additional complaints would be ineffective, (3) there was no time or opportunity to seek help from the courts, (4) the defendant did not use force or violence against prison personnel or other people in the escape, and (5) defendant immediately reported to the proper authorities when (he/she) had attained a position of safety from the immediate threat. (CALCRIM No. 2764)

The only element of this defense defendant would have been able to prove was #4; that he didn't use force or violence against any person. Such a defense does not include a perceived need to

rush to the aid of one's ailing parents. Defendant's original counsel, therefore, provided him with competent advice, securing for him a sentencing deal that he wouldn't have seen again had he been able to successfully withdraw his plea.

Note: In 36 years as a cop and a prosecutor, and 20 years while writing the *Legal Update* (eight of which since retiring), I have yet to see a case where anyone was able to successfully use the defense of "necessity." The attorney who told defendant here that he might be able to use such a defense obviously had a flash back to his academic law school days, no doubt congratulating himself and bragging to cohorts that evening around cocktails that he was sharp enough to remember that there was even such an obscure theory despite never having used it before. As for the force element in an escape, the rule has long since been clear that property damage suffices to meet this element. While it really was a non-issue, it's good to get this refresher.