The California Legal Update

Remember 9/11/2001; Support Our Troops

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THIS EDITION'S WORDS OF WISDOM:

"*No society ever thrived because it had a large and growing class of parasites living off those who produce*." (Thomas Sowell; Syndicated Columnist)

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ADMINISTRATIVE NOTES:

***Solicitors on Private Property*:** The next time you respond to a radio call at a mall, shopping center, or other big-box style department store concerning solicitors collecting signatures or soliciting donations at the store's entrance or exit, expect the store's management, while asking you to arrest the individual(s) for trespassing, to push a brand new appellate court decision under your nose where it was ruled that "within a shopping center or mall, *the areas outside individual stores' customer entrances and exits . . . are*

not public forums . . ." (*Donohue Schriber Realty Group, Inc. v. Nu Creation Outreach* (Dec. 12, 2014) __ Cal.App.4th __ [2014 Cal.App. LEXIS 1194].) As such, it will be impressed upon you that, not being a "*public forum*," the constitutional First Amendment protections typically accorded such activity do not apply at the store's entrance or exit and that you should therefore arrest the trespassers and take them away. My advice, however, as it always has been, is "*don't do it*." *Why*? Because the *Donohue* decision, as with the bulk of the appellate court decisions before it, *is a civil case*; one that came about after the officers called to the scene correctly refused to arrest the civil defendants and where the store owners then filed for civil injunctive relief. *This is the way these situations are supposed to be handled.* The Court also noted that under different circumstances, depending upon how the entrance or exist at issue is configured and/or furnished, the result may be different. Also, the Court in *Donohue* declined to grant the store owners an absolute ban, imposing only "*reasonable time, place, and manner restrictions*" upon the offending solicitors, moving them to another area of the shopping center. These were all decisions made by a civil court after an evidentiary hearing, applying some very complicated legal theories. These are *not* decisions a police officer is prepared to make at the scene and on the spot. If you wish to obtain a copy of the updated 21-page memo I've written on this topic, you need merely ask for it. No extra charge.

CASES:

***Miranda*: *Equivocal Invocations to the Right To Counsel*:**

Sessoms v. Grounds **(9th Cir. Sept. 22, 2014) 768 F.3rd 882**

Rule: A clear and unambiguous request that an attorney be present during an interrogation must result in the termination of the interrogation.

Facts: Nineteen-year-old Tio Sessoms, the defendant, and two others, burglarized the home of Edward Sheriff in Sacramento. During the burglary, one of defendant's accomplices repeatedly stabbed Sheriff, killing him. Defendant fled to Oklahoma where he learned that an arrest warrant had been issued for him. After talking with his father, defendant turned himself into the Oklahoma police. Detectives Woods and Keller from the Sacramento Police Department flew to Oklahoma to interview defendant and bring him back to California. Upon their arrival, they met with defendant where he was being held in an interrogation room. Before going into the interrogation room, defendant had been mumbling to himself; "*I'm not a criminal . . . . They didn't tell me if I have a lawyer. I know I want to talk to my lawyer now*." Upon meeting defendant, they started to introduce themselves when defendant blurted out, "*There wouldn't be any possible way that I could have a—a lawyer present while we do this*?" As a surprised Detective Woods grasped for an answer, defendant continued; "*Yeah, that's what my dad asked me to ask you guys . . . uh, give me a lawyer.*" Detective Woods, instead of answering, told defendant that his two accomplices had already been charged, and that they (the detectives) already knew what had happened because the accomplices had waived their rights and "laid it out from A to Z." Woods then told defendant that he believed that he did not participate in the stabbing, but warned him that if he didn't make a statement right then and there, they wouldn't

be able to "*get his version of it*" *because* "*most all attorneys—in fact, all attorneys—will sometimes or usually advise you not to make a statement*." Detective Woods further told defendant that he didn't really "*need* (*defendant's*) *statement to make* (*the*) *case*" because they already had complete statements from his accomplices with hard evidence to back it up. The detectives then, finally, advised defendant of his *Miranda* rights. Defendant shrugged his shoulders and said, "*Let's talk*," making no more mention of his desire for a lawyer. He thereafter implicated himself in Sheriff's murder. Defendant was charged in state court with robbery, burglary, and murder with special circumstances. His motion to suppress his statements, arguing that he had invoked his right to counsel and that his statements, introduced against him at trial, were the product of a *Miranda* violation, was denied. He was convicted of all counts with special circumstances and sentenced to prison for life without the possibility of parole. On direct appeal, his conviction was upheld by the California Appellate Court which held that his comments to the detectives about having a lawyer present were equivocal, and therefore legally ineffective. He thereafter filed a Writ of Habeas Corpus in federal court which was also denied. A three-judge panel of the Ninth Circuit affirmed. Upon rehearing, an en banc (11 justice) panel reversed, ruling that defendant had clearly and unequivocally invoked his right to counsel. (See *Sessoms v. Runnels* (9th Cir. 2012) 691 F.3rd1054.) However, on the state's petition for a writ of certiorari, the United States Supreme Court vacated the Ninth Circuit's ruling and remanded the case back to the Ninth Circuit for reconsideration in light of the recently decided case of *Salinas v. Texas* (2013) 133 S.Ct. 2174.

Held: The Ninth Circuit Court of Appeal again reversed their own three-judge panel in a split 6-to-5 decision, holding once more that defendant had clearly and unequivocally invoked his right to counsel and that the detectives, by interrogating him after his invocation, violated his rights under *Miranda v. Arizona.* The Fifth Amendment protection against self-incrimination is enforced by requiring that a suspect who is questioned by law enforcement be informed that he or she has the right to remain silent and to the assistance of counsel. The concern is not so much the potential of physical coercion, but rather by the psychological ploys often used to "overbear the will of a defendant in an isolated custodial interrogation setting." "To ensure that the use of such psychological tactics to exploit a suspect's vulnerabilities do not run afoul of the Fifth Amendment," *Miranda* established a "bright line" rule prohibiting the use of an in-custody defendant's statements against him unless first warned of his rights which must freely and voluntarily waive. If a defendant under such circumstances clearly and unequivocally invokes one or both of those rights "in any manner and at any stage of the process," then further questioning is prohibited. For instance, "a suspect, 'having expressed his desire to deal with the police only through counsel,' must not be 'subject to further interrogation by the authorities until counsel has been made available to him.'" The Supreme Court has further held, however, that merely making reference to an attorney that is ambiguous or equivocal does not require the cessation of questioning. It is the suspect's burden to make clear that he is invoking his right to counsel (or to silence). As an extension of this rule, the Supreme Court has held that standing mute only, even in the face of questioning by law enforcement, is not an invocation. That was the point of *Salinas v. Texas*. The suspect must affirmatively express his desire to remain silent. The same rule applies to the right to counsel. In this case, the California trial and appellate courts both ruled that defendant's comments about whether; "(*t*)*here wouldn't be any possible way that I could have a—a lawyer present while we do this*?", even when followed up by; ". . . *that's what my dad asked me to ask you guys . . . uh, give me a lawyer*," were equivocal. As

such, these comments, per these lower courts, did not effectively invoke his right to counsel. The Ninth Circuit, in this decision, disagreed. The problem, per the Ninth Circuit, was that the below courts considered these comments in isolation when in actuality, the two comments should have been considered together along with all the surrounding circumstances. When defendant made this request, the detectives understood that he was asking for a lawyer, as demonstrated by their immediate response. Instead of ending the questioning at that point, as *Miranda* requires, the detectives ignored his invocation and proceeded to attempt to dissuade him from using an attorney by telling him that to do so would prevent him from giving his side of the story. This ploy worked. When belatedly advised of his rights, after being advised of the advantages of waiving, defendant changed his mind about needing an attorney, waived ("*Let's talk.*"), and proceeded to give the detectives incriminating responses that were later used against him at trial. This is exactly the type of scenario—overcoming the will of the in-custody suspect—that *Miranda* and its progeny was intended to prevent. When defendant asked about having a lawyer present, telling the detectives that his father had advised him to ask for one, he ended his comment with what his father had told him to say; ". . . *give me a lawyer*." The only reasonable interpretation of this scenario is that defendant was asking for a lawyer.

Note: The test at this stage of the proceedings was whether or not the conclusions of the California trial and appellate courts were "*landed on an unreasonable application of clearly established federal law*." The five dissenting opinions were grounded in this esoteric theory, and not because they necessarily disagreed with the majority opinion as expressed here. Although I tend to agree with the majority insofar as their conclusion that *Salinas v. Texas* is not relevant to the issues in this case, at least one of the dissenting opinions expressed the belief that The U.S. Supreme Court sent this case back with the strong hint that defendant's comments about having an attorney present were in fact ambiguous. So this case might just be going back to the Supreme Court again for a final shot at whether or not this was an ambiguous attempt to invoke. In the meantime, when faced with such a *potentially* ambiguous comment from a suspect who you're about to interrogate, it might not always be a bad idea, as suggested by some of the dissenters, to stop and ask for clarification from the suspect. While seeking clarification is not legally required, it could avoid a couple of years of expensive appellate litigation.

***Arrests of "Out of Control" Juveniles on School Campuses*:**
***Handcuffs; Use of Force on Minors*:**

C.B. v. City of Sonora **(9th Cir. Oct. 15, 2014) 769 F.3rd 1005**

Rule: A single report of a minor being off his meds and "out of control" does not constitute probable cause (or even a reasonable suspicion) to believe the minor is in violation of W&I Code § 601(a). Handcuffing an otherwise complaint 11-year-old minor and transporting him while still handcuffed is an unreasonable use of force.

FACTS: C.B. was an 80-pound, 11-year-old boy who suffered from attention-deficit and hyperactivity disorder ("A.D.H.D"). On September 28, 2008, C.B. had gone to school without having taken his medication; meds that kept him focused and under control. At some point during the morning, C.B. failed to return to class after a break. The physical education instructor, Coach Karen Sinclair, assisted in returning C.B. to class. However, C.B. was later brought to Coach Sinclair's office because, having caused more disruptions, he "needed to be

there for a while." The school administrators were aware of C.B.'s issues and had an accommodation plan in place for him. The accommodation plan designated Coach Sinclair's office as a safe space where C.B. could go if he was experiencing a "shut down," to calm himself and refocus until he was ready to return to class. Coach Sinclair's prior history with C.B. included one incident where C.B. had said that he was "tired of feeling the way he felt and he wanted to go out into traffic and kill himself." In exploring these feelings in the past, C.B. told Coach Sinclair: "(S)ometimes I feel like running into traffic." On this date, however, after some "quiet time," C.B. indicated that he was ready to return to class. But then, after continuing to have a "rough" morning, C.B. became unresponsive on the playground. Sinclair attempted to speak with C.B. but he wouldn't respond to her inquiries. Concerned that he might run out of the playground area and into the street, Coach Sinclair had someone call the police for assistance. Sonora Chief of Police Mace McIntosh and Officer Harold Prock, defendants in this civil suit, responded. After being informed that C.B. was "a runner," off his meds, and had been "yelling and cussing" earlier (facts Sinclair later denied telling the officers), the officers had concern about C.B.'s welfare if he were to run onto a nearby busy roadway. Officer Prock therefore attempted to engage C.B. in conversation for approximately four to five minutes. C.B., however, continued to be unresponsive. Determining that C.B. was "uncontrollable," the officers handcuffed him, causing him to cry. After ensuring that the handcuffs were not too tight, C.B. was put into a patrol car and transported, still handcuffed, to his uncle's place of business where he was released. The entire contact lasted about 25 to 30 minutes. Following this incident, C.B. experienced psychological and emotional problems including difficulty sleeping, low self-esteem, anger, irritability, and depression. C.B., as the Plaintiff/minor, later sued the Sonora Police Department, Chief McIntosh, and Officer Prock in federal court, alleging several state (i.e., false imprisonment and the intentional infliction of mental distress) and federal (i.e., Fourth Amendment unlawful seizure and excessive force) allegations. After some confusion concerning the wording of the jury instructions and verdicts forms, the officers were held civilly liable. Defendants appealed. The Ninth Circuit Court of Appeals, in a split 2-to-1 decision, reversed (730 F.3rd 816.), finding that the officers had qualified immunity from civil liability. However, plaintiff's petition for rehearing before an en banc (11 justice) panel was granted.

Held: The en banc panel of the Ninth Circuit Court of Appeal agreed that arresting—i.e., the "seizure" of—C.B. under these circumstances, and then handcuffing him—i.e. "excessive force"—both constituted violations of the Fourth Amendment. And a majority of the Court also agreed with the 3-judge panel's decision that the officers were entitled to qualified immunity on the seizure issue. However, as to the use of handcuffs on C.B., a majority of the court found that the unlawfulness of handcuffing an unresisting 11-year-old child was something any reasonable officer should have known, and that these officers, therefore, were *not* entitled to qualified immunity on this issue. (1) *Seizure*: As to the unlawful seizure issue, C.B. argued that the officers lacked probable cause to arrest him. The Court agreed. "Fourth Amendment seizures are reasonable only if based upon probable cause to believe that the individual has committed a crime." While the Court recognized that "*special needs*" applicable to the school setting allow for searches and seizures by school officials on less than probable cause, using a less onerous "*reasonableness*" standard, the Ninth Circuit declined to decide whether this relaxed standard applies to police officers on a school campus as well. No matter which standard is used, the Court determined here that taking C.B. into physical custody was unlawful. At the time they took him into custody, the officers knew only the following: (a) The school had reported an "out

of control" juvenile; i.e., C.B. (b) C.B. was alleged to be a "runner" who had not taken his meds; (c) C.B. sat quietly looking at the ground and never made any movements the whole time the officers were present; (d) C.B. was unresponsive in the three and a half minutes during which Officer Prock tried to talk to him; and (e) Coach Sinclair wanted C.B. removed from the school grounds. No follow-up questions were asked of Coach Sinclair as to what being a "runner," or "off his medications" meant, or what other problems she may have had with him. Nor did they consider any less intrusive solutions, such as ordering C.B. to return inside the school building or asking a guardian to pick him up. The officers argued that W&I §§ 601(a) and 625(a) allowed for taking C.B. into custody. The authority to take a minor into custody, as provided for under section 625(a), requires that the minor be a person described in section 601. However, section 601(a) requires that the minor "persistently or habitually refuses to obey" his or her parent or custodian, or is "beyond the control of that person." Case law provides that a single instance of disobedience (assuming that C.B. is guilty of even that) does not qualify as "persistently or habitually," or being "beyond the control." Under these circumstances, the Court found no legal justification for the officers to take C.B. into physical custody and remove him from the school grounds. The fact that Coach Sinclair may have requested the officers to do so doesn't make it reasonable. This, however, not being a clearly established rule of law (i.e., that any reasonable officer would have known), the officers were entitled to qualified immunity on this issue. (2) *Use of Handcuffs*: C.B. also argued that the officers used excessive force by putting him into handcuffs, and then keeping them on all the way to his uncle's business some 25 to 30 minutes away. The Court agreed, finding again that no matter which legal standard is used (i.e., full Fourth Amendment probable cause or the relaxed standards applicable to school administrators), the use of handcuffs on a calm, compliant, but nonresponsive 11-year-old child is unreasonable. The knowledge that C.B. *might* have attempted to run, or the unsubstantiated reports from the school administrators that he was "out of control," doesn't supply the necessary suspicion that he needed to be restrained with handcuffs. Therefore, handcuffing him was excessive under the circumstances. A majority of the justices, overruling the prior 3-judge panel's decision, found this to be something that any reasonable officer should have known. The officers, therefore, were *not* entitled to qualified immunity on the excessive force issue.

Note: It is interesting to note all the divergent opinions among the many learned judges as to whether the rules on these two issues are clearly established in the law, entitling (or not) police officers to qualified immunity. Such is the crap-shoot with which we are all faced when attempting to decide how to handle any particular situation in the field, on the spot, without the benefit of a law library, a host of legal interns, and all the time in the world to think about it. But screw it up and you will not only get sued, but be told that it is a rule that you should have known. No wonder we get paid the big bucks. *So what do you do*? My sole advice, as inadequate as it may seem to some of you, is to merely "*go with your gut*." With training and experience, sprinkled with a certain amount of common sense, perhaps ignoring your department's polices in some cases (e.g., handcuffing *all* prisoners put into the backseat of your patrol car), *if it feels wrong to you what you are doing, then it probably is wrong*. Handling the 11-year-old C.B. like a common felon may have seemed to Chief McIntosh and Officer Prock to be wrong, and perhaps it should have (I don't know; I wasn't there). If so, they would have been better off just to go with their gut feeling and perhaps take him by the hand to a quiet, out of the limelight, place where they could talk to him, one-on-one. That might have eliminated a whole host of legal problems later on down the line.

***Miranda; Offers of Leniency*:**

People v. Dowdell **(July 27, 2014) 227 Cal.App.4th 1388**

Rule: Offers of leniency, actual or implied, for the benefit of a loved one, will result in an involuntary and inadmissible confession unless it is shown that the offer was not the motivating cause of the confession.

Facts: On April 13, 2009, 36-year-old Terrance Ray Lincoln and his 20-year-old pregnant girlfriend, Brittany Kim Dowdell, co-defendants in this case, decided to go out on the town and rob someone. They enlisted Derric Shavens to drive them because they didn't have a car. Lincoln was armed with a pistol which he later claimed was merely a plastic toy. Around 10:00 p.m., Shavens drove the defendants to a carwash in Sunnyvale where they saw victim Benjamin Toma washing his Chevrolet Avalanche truck. With Shavens and Dowdell remaining in the car, Lincoln snuck up behind Toma, put his hand on Toma's neck, and held the gun to his head. Toma reacted by grabbing ahold of the gun. But Lincoln punched Toma four times in the side of his head, causing him to momentarily lose consciousness and allowing Lincoln to regain control of the gun. Toma was pushed onto the backseat floor of his truck where Dowdell, who had come up to assist, held him down at gunpoint with her feet on his back. Lincoln told her to shoot him and paralyze him if he resisted. During this initial confrontation, Lincoln demanded that Toma give him $300, which he apparently didn't have. But Lincoln took his cellphone, car keys, wallet containing $50, and an automated teller machine (ATM) card. With Shavens following, Lincoln drove Toma's truck around Sunnyvale, unsuccessfully attempting to use Toma's card at various bank ATM machines despite Lincoln's threats to kill Toma if he gave them a false pin number. Toma was eventually left in his truck, sans pants and shoes, while the three suspects escaped in Shavens' vehicle. Before leaving, Lincoln told Toma that if he reported the incident to police, he would send some "bad cops" to harm him and his family. Toma, however, walked to a nearby restaurant from where the police were called. ATM records and various videos recorded the defendants' visits to the ATMs and the later purchase of gasoline with Toma's credit card. Over the next week, Lincoln twice called Toma on his home telephone, renewing the threat to send a "bad cop from Oakland" to visit him if he went to the police. Police were able to trace both phone calls to a cellphone registered to Lincoln's son. Phone records from the same phone, which Lincoln had on his person when later arrested, also led to Dowdell. Shavens was arrested as well, but later testified against both Lincoln and Dowdell under a grant of immunity. Both Lincoln and Dowdell were interrogated at length. Lincoln admitting to everything in a videotaped confession except to making the telephone calls to Toma's home. He also claimed that the gun, which was never recovered, was only a toy. Dowdell also confessed to her participation in the crimes. Lincoln and Dowdell were charged in state court with (1) kidnapping for ransom or extortion (P.C. § 209(a)), (2) kidnapping during a carjacking (P.C. § 209.5), (3) carjacking (P.C. § 215), and (4) kidnapping for robbery (P.C. § 209(b)(1)). Lincoln was also charged with (5) making criminal threats (P.C. § 422). Firearm use enhancements and, for Lincoln, prior conviction and prison term enhancements, were added. At trial, Lincoln testified,

denying having committed the alleged crimes, claiming that he confessed only in an attempt to defect as much blame away from Dowdell as he could. Dowdell also testified at trial, claiming that she did not intend to rob, kidnap, or carjack Toma, but that she merely obeyed Lincoln's instructions because she feared retaliation from him if she didn't go along with his scheme. She also put on witnesses in an attempt to establish an "Intimate Partner Battering" defense. (See "Note," below.) Shavens testified against both defendants under a grant of immunity. With his prior confession admitted into evidence against him, Lincoln was found guilty of all charges and his priors were found to be true. The jury acquitted him of the firearm-use enhancements. Dowdell was convicted of the kidnapping for ransom or extortion and the kidnapping for robbery charges only (minus the gun-use enhancements). Both defendants appealed from their respective life with the possibility of parole (plus 4 years for Lincoln) sentences.

Held: The Sixth District Court of Appeal affirmed (with some sentencing corrections). Among the issues on appeal was the voluntariness of Lincoln's confession that he made to the police. Lincoln argued that his confession was the product of "*implicit promises of leniency*" for Dowdell, who was pregnant with his child. The Court agreed. However, the Court also held that Lincoln's inculpatory statements were nonetheless voluntary, and thus admissible into evidence, under the unique circumstances of this case. The Fourteenth Amendment "*due process*" clause (as well as Art. I, §§ 7 & 15, of the California Constitution) dictates that an involuntary confession may not be admitted into evidence against the accused. However, "(c)oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." The question is, under the "totality of the circumstances," was "the defendant's will overborne at the time he confessed." The burden is on the prosecution to show by a preponderance of the evidence that a suspect's inculpatory statements were voluntary. While "(m)ere advice or exhortation by the police that it would be better for the accused to tell the truth" is insufficient by itself to constitute coercion, should those "exhortations" be accompanied by threats *or promises*, then it becomes an issue as to whether the defendant's will was overborne. When the police make an express or, as here, "*clearly implied*" promise of leniency, either for the benefit of the accused himself or for someone close to him, *and* where that promise is the motivating cause of the accused's inculpatory statements, then those statements must be excluded from evidence as involuntarily obtained. In determining whether a detectives' promises were the motivating cause of a suspect's later admissions or confession, the Court will consider the suspect's criminal sophistication, his prior experience with the criminal justice system, and his emotional state. In this case, after repeatedly emphasizing that Dowdell was pregnant with his child, the detectives told Lincoln that Dowdell claimed that the gun used was only a toy. Whether the gun used was real or a toy is relevant to the firearm-use enhancement which can add years (e.g., "ten, twenty, or life;" per P.C. § 12022.53) onto a defendant's prison time. They told Lincoln that if he could corroborate her claim, it would greatly reduce Dowdell's exposure to an otherwise lengthy prison sentence. Specifically, they told him that "*Brittany* (*Dowdell*) *needs you*" *to* "*save her*"—i.e., to make a statement lessening her liability. But in order for Lincoln to support Dowdell on this, he would of necessity be admitting that he took part in the crimes. Lincoln did in fact later admit to his involvement in kidnapping and robbing Toma, but the Court held that his confession was not a result of the offers of leniency made by the detectives. To the contrary, Lincoln, who had been through the system many times before and who, during the interrogation, appeared calm, in control, and fully aware of his legal rights, told the detectives that he didn't believe they had the

power to do either him or Dowdell any favors; but rather that only the prosecutor could do that. "*Well, gentlemen, ultimately, . . . the only person who is qualified and capable of um, making any type of deals is the District Attorney*." The Court therefore found that Lincoln's later confession, *not* being the product of the detectives' improper offers of leniency, was voluntary and properly admitted into evidence against him.

Note: The trial court referred to the implied offer of leniency for Dowdell as "*upsetting;*" a descriptive term that the Appellate Court agreed was appropriate. For whatever my opinion is worth, I too agree. But my conclusion that the offer of leniency used in this case is upsetting is based upon the fact that I have been preaching the evils of offers of leniency in lectures and writings for years, and yet this rule continues to be violated time and time again. I am seriously of the belief that many officers are getting their *Miranda* training from some of the abundant TV cop shows where cleverly manipulating a confession out an in-custody suspect is the norm. Bad idea. The only thing that saved this conviction was (1) the overwhelming evidence of Lincoln's guilt aside from his confession, and (2) that he told the detectives he didn't believe for a second that they could do anything for Dowdell. Ironically, Lincoln really had no concern for Dowdell, later testifying that he (Lincoln) wasn't involved, and that it was Shaven, Dowdell, and some other mysterious dude who did the robbery/kidnapping, thus throwing Dowdell (and their baby) under the bus, so to speak. Not discussed in my brief above was a segment of the Court's decision concerning "*battered women's syndrome*," or "*intimate partner battering*." (pp. 1417-1421) The trial court improperly excluded evidence and a proposed jury instruction on the issue of whether Dowdell did or didn't form the necessary specific intent to commit the charged crimes. This error, however, was found to be "harmless," and did not require reversal of her conviction. For those of you who investigate or prosecute cases of spousal abuse, you need to read the full discussion on this issue in that it deals with the legal standards for such a defense and how a jury must be instructed.

***Residential Entries without Probable Cause or an Exigency*:**
***Residential Entries under the Emergency Aid Doctrine*:**
***Firearms and Illegal Arrests*:**
***Handcuffs and Use of Force*:**

Sandoval v. Las Vegas Metro. Police Dep't. **(9th Cir. July 1, 2014) 756 F.3rd 1154**

Rule: A warrantless entry into a home without probable cause to believe a felony is in progress is a violation of the Fourth Amendment absent a reasonable belief that someone inside is in imminent danger. Pointing a gun at a person, and/or handcuffing him, without probable cause to believe he is committing a crime, may be an unreasonable use of force.

Facts: On October 29, 2009, a witness called the Las Vegas Metropolitan Police Department to report two white males, between the ages of 18 and 20, jumping over a fence in a residential neighborhood and looking into the windows of a house. Knowing that there had been a recent pattern of youths burglarizing homes in the area, Sgt. Jay Roberts and Officer Michael Dunn responded to the reported residence. The officers entered the yard and noted open windows, doors, and gates, but nothing inconsistent with typical residential use. Sgt. Roberts looked through an open bedroom window and saw three young males, later determined to be Henry Sandoval (age 18), who lived there, and his two companions, David (age 15) and Jordhy (age

16). All three were, and appeared to be, Hispanics. The boys were listening to music, watching TV, and playing video games. Without asking any questions, Sgt. Roberts pointed his gun through the window and at the head of one of the boys, ordering them not to move and to "let me see your hands." At that point, Officer Dunn entered the house though the sliding glass door. He later testified that he made entry because he could hear Sgt. Roberts giving commands more than once and didn't feel he could control the suspects from outside. Henry asked to be allowed to put away the family dog; "Hazel," a pit bull. Sgt. Roberts told him no. As the boys exited the bedroom upon being ordered to do so, Hazel came out with them. Officer Dunn shot Hazel in the face, twelve inches from David and in the direction of Henry and Jordhy. David and Jordhy were ordered to drop to the floor where they were handcuffed. Henry was allowed to carry out the bleeding dog. Animal Control was later called, but Hazel died shortly thereafter. Henry was also handcuffed after Animal Control took charge of his dog, and put into a patrol car where he was held for some 30 to 40 minutes. Henry was allowed to call his father, Jesus Sandoval, who came immediately to the scene. Seeing Henry covered with Hazel's blood, Sandoval, who was walking with a cane from having recently had back surgery, thought that his son had been shot and tried to get to him. When told that he could not enter the property, he became erratic and upset. So he was handcuffed as well and put into a patrol car. Despite screaming that he was in pain from his recent back surgery, Sandoval was detained in the patrol car for some 25 to 30 minutes. Eventually, when it was determined that the Sandovals lived there and that no burglary had occurred, everyone was released. The Sandovals subsequently filed a civil suit in federal court pursuant to 42 U.S.C. § 1983, alleging violations of their Fourth Amendment (search and seizure) rights, and their Fifth and Fourteenth Amendment (due process) rights. The federal district court dismissed the suit and the Sandovals appealed.

Held: The Ninth Circuit Court of Appeal reversed. The Court reviewed the separate allegations one by one: (1) *Officer Dunn's Entry into the Residence; Probable Cause and Exigencies*: A warrantless entry into one's home or the curtilage surrounding the home is "presumptively unreasonable" under the Fourth Amendment. To overcome this presumption, the officers must have either (a) probable cause and exigent circumstances, or (b) an emergency sufficient to justify the entry (see (2), below). This is a clearly established rule with which any reasonable police officer should be familiar. In this case, the Court first determined that Officer Dunn did not have the necessary probable cause. The report made to the police described two while males, ages 18 to 20, going over a fence and looking in windows. When the officers arrived, they saw nothing indicative of burglary. Upon finding Henry Sandoval and the other two youths, it was immediately noticed that there were three of them (instead of two), they appeared to be Hispanics (instead of white), and they were younger than the reported suspects. Also, when found, they were merely sitting in one of the rooms listening to music, watching TV, and playing video games. An exigency exists where officers have a reasonable belief that their entry is necessary to prevent the destruction of relevant evidence, the escape of a suspect, or some other consequence improperly frustrating legitimate law enforcement efforts. Nothing about the circumstances in this case, however, indicated that the three youths were doing anything unlawful. The absence of probable cause to believe a burglary was occurring negated any argument of an exigent circumstance. (2) *Officer Dunn's Entry into the Residence; the Emergency Aid Exception*: Officer Dunn testified that he believed that with Sgt. Roberts standing outside the window, and by listening to what was being said, it would be difficult to control the suspects who could then perhaps flee into other rooms and/or arm themselves. He

therefore felt it was necessary to make a warrantless entry for reasons of officer safety. The emergency aid exception to the search warrant requirement typically has been understood to permit law enforcement officers to enter a home without a warrant in order to protect either an occupant or other officers from imminent injury. But there has to be "*a reasonable basis*" for concluding that there is an imminent threat of violence to justify this exception to the search warrant requirement. The government bears the burden of showing specific and articulable facts to justify invoking this exception. Under the facts of this case, there were never any weapons seen. Nor did the youths do or say anything that might have indicated that they were a threat. The Court could find no objective basis, therefore, for applying this theory. (3) *Excessive Force; Pointing Guns*: The trial court had dismissed the plaintiffs' allegations that excessive force was used, having found that it was reasonable to believe that Henry, Jordhy, and David were burglars and that qualified immunity therefore protected the officers. However, as noted above, there was insufficient evidence to support the officers' belief that the three youths were committing a burglary. Pointing a gun at the head of one of the suspects without probable cause to believe he was committing a potentially violent felony violates clearly established case law, eliminating the availability of qualified immunity from civil liability. (4) *Excessive Force; Use of Handcuffs*: The lawfulness of the use of any type of force, including handcuffs to secure criminal suspects, requires a balancing of the "nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." The trial court had found that with probable cause to believe the three youths were burglars, using handcuffs on them was lawful, as it was when Jesus Sandoval was handcuffed for acting irrationally and refusing to comply with the officer's commands. The trial court, however, failed to presume that the plaintiffs' allegations were true, as is required by law, giving the officers' version of the facts too much weight. If, at trial, the jury chooses to believe the plaintiffs, then the officers did not have the probable cause necessary to believe that Henry and his companions were burglars, or guilty of any crime. Handcuffing them at this point, therefore, may be found to be excessive. As for handcuffing Jesus Sandoval for refusing to comply with the officers' commands while acting irrationally, a detention, even if lawful, may be found to be unreasonable if it is unnecessarily painful. (5) *Due Process and Equal Protection*: The Court, however, rejected the plaintiffs' "*due process*" and "*equal protection*" claims. First, it was noted that separating Jesus Sandoval from his son for 40 minutes while they were detained is not sufficient to constitute a violation of a parent's "*fundamental liberty interest*" in the companionship of his or her children. It was also noted that shooting the family dog, "albeit sad and unfortunate," does not constitute a "*deprivation of a familial relationship*." Secondly, the plaintiffs failed to produce evidence sufficient to permit a reasonable trier of fact to find by a preponderance of the evidence that officers' actions in arresting Henry and his companions was racially motivated which, if it had been proven, would have been an equal protection violation.

Note: First, I need to remind you that the rendition of facts cited here is based primarily upon the Plaintiffs' allegations, and not necessarily how it is going to come out in testimony when both sides of this story are considered. That's just one of the procedural rules applicable to an evaluation of a pre-trial dismissal (i.e., "*summary judgment*") of a civil suit. But the issues described here should not be just rejected as nothing to be concerned about. If, upon responding to a possible burglary call (the accuracy of the information from an untrained private citizen almost always being a crapshoot), you arrive to find the occupants of the home acting naturally, and without any indications that a burglary is a actually in progress, it's probably not a good idea

to start sticking guns in people's ears and or putting them to the floor and handcuffing them, . . . or, for God's sake, *shooting their dog*! Again, taking your time (when possible), thinking about what you're doing, and using a little common sense is the key.