San Diego District Attorney

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Remember 9/11/01*: *Support Our Troops

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THIS EDITION'S WORDS OF WISDOM:

"*Those are my principles. If you don't like them, I have others*." (Groucho Marx)

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ADMINISTRATIVE NOTES:

Corrections; *New & Amended Statutes Update*: Aside from a simple typo (pg. 2, end of disclaimer paragraph; should be "2009" instead of "2008"), I committed a major "*faux pas*" (meaning I screwed up) beginning on page 34 by briefing the wrong (although related) statute. (*Hey, I'm a senior citizen, and entitled*.) Where I intended to summarize P.C. § 679.026 (as indicated in the title), I actually summarized P.C. § 679.08; "*Victim's Rights Card*." So, here's the right section, below. If you cut and paste the following into the New and Amended Statutes Update, pages. 34-35, beginning with the title: "P.C. § 679.026 (New; Effective

11/5/08) *Proposition 9*; *Marsy's Rights*," deleting the material that's there now, your copy will be updated and correct. Or, if you ask me, I'll resend the whole Update to you.

P.C. § 679.026 (New; Effective 11/5/08); *Proposition 9; Marsy's Rights*:

> **Subd. (a):** Statement of Intent: "(T)o implement the rights of victims of crime established by **Section 28** of **Article I** of the **California Constitution** to be informed of the rights of crime victims enumerated in the Constitution and the statutes of this state."
>
> **Subd. (b):** Vicitms' right to receive at no cost a list of the rights of victims of crime.
>
> **Subd. (c)(1):** Every law enforcement agency investigating a criminal act and every agency prosecuting a criminal act shall provide or make available to crime victims, at the time of initial contact with a crime victim, during the follow-up investigation, or as soon thereafter as deemed appropriate, without charge or cost, a "*Marsy Rights*" card.
>
> **Subd. (c)(2):** Victim disclosures to be available to the public on a Web site known as "*Marsy's Page*," as authorized by **P.C. § 14260**.
>
> **Subd. (c)(3):** The Attorney General shall design and make available a "*Marsy's Rights*" card, which shall (1) contain the rights of crime victims as described in **Cal. Const.**, **Art. 1**, **§ 28(b)**, (2) information on the means by which a crime victim can access the web page described in **subd. (c)(2)**, and (3) a toll-free telephone number to enable a crime victim to contact a local victim's assistance office.
>
> **Subd. (c)(4):** Law enforcement agencies which investigate criminal activity shall, if provided without cost to the agency by any non-profit organization per **Int. Rev. Code § 501(c)(3)**, a "*Victims' Survival and Resource Guide*" pamphlet and/or video as approved by the Attorney General, which shall include an approved "*Marsy's Rights*" card, a list of government agencies, nonprofit victims' rights groups, support groups, and local resources that assist crime victims, and any other information the Attorney Genera deems helpful to victims of crime.
>
> **Subd. (c)(5):** In addition to, or in lieu of, the provisions of **subd. (4)**, any agency described in **subd. (1)** may, in its discretion, design and distribute to each victim of a criminal act its own "*Victims' Survival and Resource Guide*" and video, the contents of which must be approved by the Attorney General.

CASE LAW:

***Patdowns for Weapons*:**

In re H.M. **(Sept. 29, 2008) 167 Cal.App.4th 136**

Rule: Stopping, detaining, and doing a weapons patdown of a known gang member observed running through traffic, in a gang area, while looking back nervously as if fleeing from a crime, is lawful.

Facts: Los Angeles Police Department gang officers were citing members of the 18th Street Gang for possession of tobacco when Detective George Magallon stopped to talk to them about a gang-related shooting the day before, just a block away. Magallon, a three-month veteran of the gang detail, was familiar with the area having worked there previously as a patrol officer. The area was known as a "stronghold" of the 18th Street Gang and was covered by an existing gang injunction. Gang activity, including shooting at passing vehicles, narcotics activity, and just "hiding out," was common for the area. As the three officers were talking, they observed defendant running in their direction, crossing the street in front of traffic causing cars to slow and honk. One of the officers recognized defendant as a 14-year-old member of the 18th Street Gang who was subject to the injunction and whose house, a half a block away, was known as an 18th Street Gang hangout. Defendant was sweating profusely and appeared confused and nervous as if "something was happening." He kept looking back as he ran, with a facial expression suggesting that he was trying to get away from something. Although Magallon himself hadn't had any prior contact with defendant, he assumed that the other officers had since one of them referred to defendant by name. Based upon these observations, Detective Magallon stopped defendant for crossing in front of traffic although he was more concerned with why defendant was running, suspecting that he might be fleeing from a crime as either a victim or a perpetrator. This conclusion was based on defendant's demeanor, his actions, and being in a documented gang area. Suspecting that weapons might be involved, Detective Magallon decided to pat defendant down. He therefore grabbed him by the wrist and ordered him to step towards a wall. In patting down defendant's outer clothing, Magallon felt a hard object in the area of his pants pocket. When asked what it was, defendant replied; "*It's a .25, sir*." Magallon retrieved a loaded semi-automatic handgun. Defendant was arrested. He told the detective that he'd found the gun five days earlier and kept it for protection. Charged by petition in Juvenile Court with the illegal possession of a concealable firearm, defendant's motion to suppress the gun was denied. The petition was sustained and defendant was declared a ward of the court. Defendant appealed.

Held: The Second District Court of Appeal (Div. 3) affirmed. Despite the fact that defendant did not contest the legality of his initial detention, the Court felt predisposed to find that the detention was legal anyway. If the circumstances weren't suspicious enough, defendant's act of illegally crossing the street, interfering with traffic (see V.C. § 21954), was sufficient cause to stop and detain him. Defendant did contest, however, the legality of the patdown for weapons when he was stopped for nothing more than a traffic

infraction. According to defendant, "he ought to have been told why he was being stopped, given a citation and then been allowed to leave freely." Defendant, however, hadn't been stopped and patted down merely because of the traffic violation. His detention and patdown was also because of the suspicious circumstances surrounding his approach to the officers. "Viewed objectively, through the lens of common sense and experience, (defendant's) odd behavior strongly suggested criminal activity was afoot." Flight, alone, is insufficient cause to stop and detain a person, let alone pat him down for weapons. But flight under suspicious circumstances, particularly when it is reasonably suspected that gang activity might also be involved, *is* cause to stop, detain, and check the person for weapons. (See *Illinois v. Wardlow* (2000) 528 U.S. 119.) Patdowns are lawful so long as an officer can articulate sufficient circumstances to justify a "*reasonable suspicion*" to believe that the person may be armed. In this case, the Appellate Court agreed with the trial court that a patdown for weapons was justified because: (1) defendant was running through traffic and nervously looking around, causing Detective Magallon to believe he might have been involved in some kind of criminal activity either as a victim or perpetrator; (2) the area was known for gang activity; (3) defendant was known to one of the officers present as an active gang member, and (4) there had been a gang-related shooting a block away the previous day. After discussing the increase in gang-related violence and a gang's common use of weapons, the Court summarized their conclusion as follows: "Common sense suggests that persons who are fleeing from a crime in an area known for violent gang crime are often armed. The totality of the circumstances gave rise to a reasonable suspicion, based on specific and articulable facts, that (defendant) was armed, and Magallon was justified in conducting the brief, limited pat search." The petition was sustained.

Note: Defendant's argument was centered on the rule that you can't pat a person down just because he happens to be found in a gang, or other "high-crime," area. This is true. (*People v. Medina* (2003) 110 Cal.App.4th 171.) The Court was quick to reaffirm this rule, noting, however, that there was a lot more here than just being found in a gang area. The United States Supreme Court decision of *Illinois v. Wardlow*, *supra*., is particularly instructive, holding that although flight alone is insufficient cause to detain and pat a person down for weapons, flight in a so-called "*high-narcotics*" area *is*. In this case, we have flight in a "*high-crime*" gang area with defendant's suspicious actions (looking back nervously as if fleeing from a crime), and with defendant himself being recognized as a gang member. *Not* patting him down for weapons under these circumstances would have been a dangerous oversight, as recovery of the loaded gun so clearly demonstrated.

***Interrogations and Voluntariness*:**

People v. Richardson (May 22, 2008) 43 Cal.4th 959

Rule: Deceptions used by police during an interrogation do not necessarily make the subsequent statements involuntary. The defendant's low IQ, absent coercive police tactics, is irrelevant to the issue of involuntariness.

Facts: Eleven-year-old April Holly was left with a family friend by her mother before she, the mother, went off to party with other friends. After April got caught stealing $20, she no longer wanted to stay there. April called a playmate and asked her to meet her at her (April's) trailer in Tulare County. She then hooked a ride with others and went home. The friend never arrived, however, leaving April home alone; her mother still partying somewhere and her older sister spending the weekend in jail. Defendant lived within walking distance of April's trailer where he was bumming off of friends. Defendant decided to visit April in her trailer. At about noon the next day, April's dead body was discovered in her bathtub. Physical evidence later indicated that April was raped, sodomized, choked, and drowned in the bathtub. Due to incriminating statements defendant had made to others and which were reported to police, he was looked at as a prime suspect. Defendant fled the area the next day. A week after the murder, defendant was located in San Leandro by Tulare County Sheriff's Sergeant Harold Jones and Lieutenant Gary Harris and questioned about April's death. Defendant was first advised of his *Miranda* rights which he waived. He appeared to be alert, responsive, and eager to cooperate. Defendant denied any knowledge of the murder and was therefore not arrested. In a subsequent interview, defendant occasionally changed his story about where he'd been the night of the murder, but otherwise continued to deny being involved. During this interview, defendant volunteered that he would never sodomize a little girl. The fact that April had been sodomized was not yet public knowledge. Defendant voluntarily returned to Tulare the next day, apparently on his own. When contacted again by the detectives, he was arrested on an outstanding misdemeanor arrest warrant. At defendant's request, and after a second *Miranda* advisal and waiver, he was given a polygraph examination, the results of which were "inconclusive." He asked for, and was given, a second polygraph (the results of which were not reported). After a third *Miranda* advisal and waiver, defendant was questioned again for an hour and forty minutes. This time, defendant admitted seeing April the night of her death in the company of someone else, but still denied going to her home or being involved in her death. The detectives then falsely told him (falsehood #1) that he'd been seen at April's. To explain this away, defendant told them that he'd knocked at her door, but no one answered. But then when he was falsely told (#2) that he'd been seen leaving April's back door, he claimed to have been high on cocaine that night. Little by little, defendant admitted to being more and more involved until he was falsely told (#3) that his semen was found in April, which he denied. He did admit, however, to finding April already dead in the bathtub, only to later deny being in the trailer at all. Defendant also made some comments about April being strangled; another fact that was not yet made public. When asked how he knew this, defendant finally lost it and said: "*How did I know, well, I did it*? *All right, I did it*. *Come on, I'm saying that I did it. . . . You know what, I didn't do it*. *I'm not saying I did it*." Retracting his statement that he'd seen her in the bathtub, defendant returned to denying any involvement and eventually asked for a lawyer. The interrogation was terminated. Defendant was charged in state court with capital murder. After being convicted by a jury of murder with special circumstances, defendant was sentenced to death. Appeal to the Supreme Court was automatic.

Held: The California Supreme Court affirmed. Among the issues litigated on appeal was the voluntariness of defendant's statements to the Tulare County detectives.

Defendant's argument was that the statements he made after being arrested on the misdemeanor warrant were involuntary because (1) the police used deceptions, (2) the interrogating officers were overly aggressive, (3) his low IQ made him particularly vulnerable to the questioning, and (4) *Miranda* was violated. As for the deceptions used by the detectives, the Court found that those used in this case weren't sufficient to render defendant's statements involuntary. "Lies told by the police to a suspect under questioning can affect the voluntariness of an ensuing confession, but they are not per se sufficient to make it involuntary." The deceptions used here involved telling him that witnesses saw him at the victim's home and that he'd left his semen in her. Had he been innocent, he would have known that these claims were false. The first two deceptions got him to admit that he was at April's trailer, which he then again later denied. The third deception he totally denied. There was nothing said that rendered any of defendant's statements involuntary. The Court further held that defendant's claims that the detectives became overly aggressive were not supported by the record. Instead, defendant would become agitated only after being caught in a lie. Whether or not defendant's limited IQ (73) made him especially vulnerable in the interrogation setting is irrelevant absent coercive police tactics. There were no such tactics used here. The detectives were unaware of defendant's IQ at the time and his responses fail to indicate any mental defects. Lastly, defendant's *Miranda* rights were not violated. He was *Mirandized* three times, waiving each time, before he started making any admissions. And then when he'd had enough, he knew enough to invoke his right to counsel; an occurrence that stopped the interrogation. "Indeed, as his invocation of his right to counsel demonstrates, and contrary to his characterization of himself as a helpless, easily confused naïf, defendant, a convicted felon, was wise in the ways of the criminal justice system, . . ." Based upon these circumstances, defendant's statements were not involuntary.

Note: The reason defendant's low IQ was held to be irrelevant is because voluntariness is a "*due process*" issue. The United States Supreme Court has held that a subject's due process rights are not violated absent "*coercive police misconduct*." (*Colorado v. Connelly* (1986) 479 U.S. 157.) In this case, there was absolutely no coerciveness demonstrated by how the detectives handled their investigation. Also, on the issue of deceptions, note that the Court referred to them as "*lies*." That's exactly how defense counsel will refer to them when arguing to a jury about how the police cannot be trusted. More importantly, juries tend to distrust a police officer who lies. Deceptions are lawful, at least as long as nothing is said that might cause a false confession. However, because juries are uncomfortable with this tactic, deceptions should be used only as a last resort. A jury that disapproves of a police officer's tactics will work real hard to find some excuse to acquit the defendant. A jury shouldn't unnecessarily be given that opportunity.

***Impounding Vehicles Under V.C. § 14602.6(a)(1) as a Discretionary Duty*:**

***California Highway Patrol v. Superior Court [Walker]* (May 9, 2008) 162 Cal.App.4th 1144**

Rule: The authority to impound a vehicle and hold it for 30 days, per V.C. § 14602.6(a)(1), when a person is arrested for driving on a suspended license or never had

a license, including when the vehicle has been in an accident, is a discretionary act by law enforcement and does not generate civil liability when the vehicle is not held for 30 days.

Facts: California Highway Patrol Officers Machado and Lopez responded to a report of a non-injury traffic accident. The driver of one of the vehicles, Scott St. Pierre, appeared to be under the influence. After failing a sobriety test, St. Pierre was arrested for driving while under the influence of prescription drugs. His car was impounded with one of the CHP officers filling out a CHP-180 vehicle report form, indicating that St. Pierre's car would be "*stored*" (instead of "*impounded*" or "*released*") pursuant to V.C. § 22651(h). Subdivision (h) of section 22651 authorizes a peace officer to "remove a vehicle" when the officer arrests its driver. It was later discovered that St. Pierre's driver's license was suspended. In addition to V.C. § 23152(a) (DUI), defendant was also booked for driving on a suspended license per V.C. § 14601.1. In the arrest report, the officer again marked St. Pierre's car as "*stored*." Defendant was released from jail later that same day and his mother rescued his car from the tow yard (as mothers tend to do). Within hours, after retrieving his car from mom, defendant had another collision killing Jerry Walker. Mr. Walker's widow and son later sued the CHP in state court pursuant to Gov't. Code § 815.6, which imposes liability for a public entity's breach of a mandatory duty. The "*mandatory duty*," as alleged by the Walkers, was as provided for in V.C. § 14602.6(a) (now amended to (a)(1)), which provides in pertinent part: "Whenever a peace officer determines that a person was driving a vehicle while his or her driving privilege was suspended . . . or driving a vehicle without ever having been issued a driver's license, the peace officer *may either* (*italics added*) immediately arrest that person and cause the removal and seizure of that vehicle or, if the vehicle is involved in a traffic collision, cause the removal and seizure of the vehicle without the necessity of arresting the person. . . . A vehicle so impounded *shall* (*italics added*) be impounded for 30 days." The CHP filed a motion for summary judgment (i.e., asking to dismiss the lawsuit without a trial). The trial court denied the motion and the CHP filed a petition for writ of mandate, seeking an appellate court decision reversing the trial court's ruling.

Held: The Third District Court of Appeal reversed. The CHP argued that section 14602.6(a) *did not* impose a mandatory duty to impound St. Pierre's car for 30 days after arresting him. The Walkers, of course, contended that it did. In resolving this issue, it is necessary to analyze the statute, considering the language used, the legislative history, the context of the section, and the "public policy" involved. Section 14602.6(a), in discussing the alternatives available to the officer, uses the term "*may*" instead of "*shall*." "*Shall*" is mandatory. "*May*," on the other hand, is permissive, typically conferring a discretionary authority on the agency to which it refers. The question here is what the phrase "*may either*" in the statute (as quoted above) refers to. The civil trial court concluded that "*may either*" refers to either action available to the officer (either arrest the driver and impound the vehicle, *or* if an accident is involved, impound the vehicle without arresting the driver), either action requiring the vehicle to be impounded for 30 days (i.e., ". . . *shall* be impounded for 30 days"). The Appellate Court disagreed. Per the Appellate Court, an officer is not limited to these two choices. According to the Court, the phrase "*may either*" does no more than apply the "*may*" to the succeeding clauses. In so doing it infers that the officer may choose some other alternative if he or

she wishes. An officer "may . . . immediately arrest th[e] person and cause the removal and seizure of th[e] vehicle or . . . [*may*] cause the removal and seizure of the vehicle without the necessity of arresting the person. . . . " The "*shall*" (". . . *shall be impounded for 30 days*.") describes only the 30-day time period for any vehicle "*so-impounded*." If an officer decides not to impound a car under the discretionary authority provided by section 14602.6(a), it is not "*so impounded*" and therefore the 30-day provision is inapplicable. In this case, the officers chose not to impound the car under the discretionary authority described in section 14602(a), but rather to just store it. The officers had the discretion to do that. The Court looked at the legislative history and found that the development of the statute over the years supported this conclusion. In considering other similar impound statutes, the Court also noted that the power to impound a vehicle is commonly discretionary. In the context of those statutes, this section should be similarly interpreted. Lastly, public policy dictates that not all vehicles driven by people with suspended licenses (estimated to be around 720,000 drivers at any one time) or who never had a license (another 1,000,000) should be impounded. Just the administrative burden of processing the number of cases that would result dictates that officers should be allowed the discretion to weed out the cases where impounding (as opposed to just "storing") the vehicle is not necessary. As a discretionary duty, therefore, the CHP is immune from civil liability. (Gov't. Code § 820.2) The trial court should have granted the CHP's motion for summary judgment.

Note: I found the reasoning in this case a little difficult to follow. The way the statute is worded, I can see why the trial judge held that there was no discretion. But I never complain about any statutory interpretation that allows an officer to exercise his or her personal discretion. If you are similarly confused, all you really need to know is that whether or not you invoke the 30-day hold requirement of V.C. § 14602(a)(1) is your decision. Note also that this case does not discuss the applicability, if at all, of recent decisions that have held you can't impound a vehicle unless it's necessary to do so under the so-called "*Community Caretaking Doctrine*." (See *Miranda v. City of Cornelius* (9th Cir. 2005) 429 F.3rd 858; and *People v. Williams* (2006) 145 Cal.App.4th 756.)

***Private Citizens as Agents of Law Enforcement*:**
***Law Enforcement Viewing Containers Already Opened by a Private Citizen*:**

People v. Wilkinson **(Jun. 18, 2008) 163 Cal.App.4th 1554**

Rule: (1) For a private citizen to qualify as a "*police agent*," there must be more than a police officer's mere knowledge and passive acquiescence. (2) It is not an illegal search for a police officer to view the contents of a container (e.g., a compact disc) already opened and viewed by a private citizen.

Facts: Jessica Schultze, defendant, and a third person, all shared an apartment, each with his or her own bedroom. Harry Sadler, Schultze's boyfriend, spent a lot of time with Schultze in her room. Schultze had a computer in her room complete with a webcam (i.e., a camera used in transmitting live images over the Internet). Playing with Schultze's computer one day, Sadler found a video file on the computer that showed

defendant in Schultze's room. Over the next several days, Sadler noted that someone was deleting video files from the computer and moving the webcam, pointing it at the bed. Sadler and Schultze called the police. City of Sacramento Police Officer James Walker responded. After being told of their suspicions, Officer Walker spoke with defendant and asked for permission to search his room. Defendant declined. Officer Walker told Sadler and Schultze that he did not have sufficient evidence to arrest defendant or to search his room, but that he would accept a citizen's arrest if *they* wanted to arrest him. Sadler asked Officer Walker if he (Sadler) could go into defendant's room. Officer Walker told Sadler, "*Well, you can do whatever you want. It's your apartment. . . . . But keep in mind, you cannot act as an agent of my authority. I cannot ask you to go into the room, nor can you go into the room believing that you're doing so for myself*." Sadler understood all this to mean that he could go anywhere in the apartment, including defendant's room, and pick up anything he found lying around. With Sadler and Schultze making a citizen's arrest, Officer Walker took defendant to the police station where his sergeant quickly overruled him (a private citizen's arrest also requires probable cause), telling him to "*unarrest*" defendant and take him home. But before this could happen, Sadler went into defendant's room and picked up 15 to 20 compact discs lying around the room. With nothing written on them to indicate their contents, Sadler ran 3 to 5 of them on Schultze's computer. On them he found images of Schultze's room and images of himself and Schultze "hanging out," "undressing," and "being naked," with some sexual content but no sexual intercourse. Sadler went back into defendant's room to retrieve all the writable compact discs he could find, including some in drawers. When Officer Walker got back with defendant, Sadler told him about the new evidence he'd found. Sadler showed Officer Walker the contents of two of the discs he had already viewed. Officer Walker told Sadler he would need to see more explicit images of Sadler and Schultze, preferably having sexual intercourse. So Sadler looked through another 7 to 10 discs until he found the images the officer wanted. Officer Walker returned to the police station with defendant and 36 discs taken from defendant's room by Sadler. At the police station, Detective Jimmy Vigon looked at several of the discs showing Sadler and Schultze having sex. He then interviewed defendant, telling him that he had been looking at discs Sadler had retrieved out of his bedroom. Defendant admitted obtaining the images from Schultze's computer. Defendant also signed a consent form allowing the police to search his room. Charged in state court, defendant filed a motion to suppress. After the trial court denied defendant's motion, he pled no contest to one count of first degree burglary and appealed.

Held: The Third District Court of Appeal reversed, remanding the case back to the trial court to take further evidence. The Court noted that there were four separate searches at issue here: (1) Sadler's search of defendant's room as well as of the discs he'd recovered. (2) Officer Walker's viewing of two of the discs that Sadler had already viewed. (3) Officer Walker's and Sadler's viewing, together, of additional discs looking for more explicit pictures. (4) Detective Vigon's viewing of the discs at the police station. First, however, the Court rejected the People's argument that because defendant's discs contained "voyeuristic images" stolen from "his roommate's private sex life," he doesn't have the "*standing*" necessary to challenge the search of those discs. The discs themselves, despite whatever might be on them, were defendant's personal

property in which he had a reasonable expectation of privacy. A warrantless search of those discs, if done illegally, violates that expectation of privacy. The Court upheld, however, Sadler's search of defendant's room, finding that he acted in his private capacity and not as an agent of law enforcement (i.e., a "*de facto police officer*"). In reaching this conclusion, the Court noted that more than mere knowledge and passive acquiescence by a police officer is required before finding an agency relationship. It takes some evidence of a police officer's control or encouragement. Also, a dual purpose (e.g., the citizen's intent to help the police *and* himself) is not enough. In the present case, Officer Walker did nothing to encourage Sadler to search defendant's room. Telling Sadler to "*do whatever you want. It's your apartment*" was not enough to make Sadler the officer's agent. Also, Sadler was as motivated to retrieve the sexually explicit videos as he was to help the police. Defendant further argued that before Officer Walker could view any of the discs, he should have obtained a search warrant. The Court, however, ruled that as to the two discs Sadler showed Officer Walker, discs that Sadler had already viewed, no warrant was needed. The rule is that when a private citizen opens a container (the discs in this case) and views its contents, there is no greater intrusion created when the citizen later shows the same thing to a police officer. Also, the fact that the officer may view specific images on those two discs not previously seen by the citizen is irrelevant so long as "the police knew with substantial certainty" that the same type of images would be found. However, looking at other unmarked discs, not knowing for sure what might be on them, requires a search warrant. Also, Officer Walker cannot constitutionally direct Sadler to look at the other discs, looking for more images, without a search warrant. Therefore, except for the two discs Sadler looked at previously, for Officer Sadler and Detective Vigon to view them required a search warrant. Unfortunately, the record is unclear as to which disc is which. Also, it is possible that the defendant's later confession, as well as his consensual search of his room (which could possibly lead to an "inevitable discovery" argument), might be products of Walker and Vigon illegally viewing those discs that required a search warrant. So the case was remanded to the trial court to take further evidence on these issues.

Note: The right of a police officer to open a container, and even view and subject the contents to chemical tests, after the container has been opened by a private citizen acting on his own, stems from cases where a common carrier (e.g., UPS or Federal Express) opens up a package of dope and then calls the police. (See *People v. Warren* (1990) 219 Cal.App.3rd 619; *United States v. Jacobsen* (1984) 466 U.S. 109.) But applying this rule to computer discs is something new. Applying this same rule to separate files on the same, already-viewed computer discs, when those specific files had not yet been viewed by the private citizen, so long as it can be established that it is "*substantially certain*" that the contents will be of the same type already viewed, is also something new, at least to me (although the Court cites some direct authority from another jurisdiction for this theory; see *United States v. Runyan* (5th Cir. 2001) 275 F.3rd 449, 463.). The "*police agent*" discussion is also important, but should not be interpreted as approving a practice of telling private citizens, with a "*wink and a nod*," to do whatever they choose. At some point, a court is going to find that you coxed or purposely encouraged the citizen into doing a warrantless search. That's what the defendant argued here, but the proof of that argument fell just a bit short.