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Remember 9/11/01; Support Our Troops

THIS EDITION'S WORDS OF WISDOM:

> "*How is it that our memory is good enough to retain the least triviality that happens to us, and yet not good enough to recollect how often we have told it to the same person*?" (François Duc de La Rochefoucauld)

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***Case Law*:**

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***Silence and the Fifth Amendment*:**

Salinas v. Texas **(June 17, 2013) __ U.S. __ [133 S.Ct. 2174]**

Rule: Refusal to answer a specific question, but while failing to expressly invoke one's Fifth Amendment right against self-incrimination during a non-custodial, pre-*Miranda* interrogation, is not an invocation, such silence being admissible at trial as evidence of a consciousness of guilt.

Facts: On December 18, 1992, two brothers were shot and killed in their home in Houston, Texas, the murder weapon being a shotgun. A neighbor heard the gun shots

and saw someone run out of the house and speed away in a dark-colored car. Shotgun shell casings were recovered at the scene. Defendant was interviewed because he had been at a party in the victims' home the evening before. Contacted at his house, officers noted a dark blue car in the driveway. Defendant agreed to hand over a shotgun he owned for ballistics testing and to accompany the officers to the station for questioning. At the station, defendant submitted to an hour-long interview. It was stipulated that defendant was not in custody during the interview and that he was never admonished of his *Miranda* rights. A cooperative defendant freely answered all the officer's questions right up until he was asked whether his shotgun "would match the shells recovered at the scene of the murder." Instead of answering, defendant silently "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, clenched his hands in his lap, [and] began to tighten up." After a few moments of silence, the interview resumed with defendant again freely answering the officer's questions. Following the interview, defendant was arrested on some outstanding traffic warrants. However, he was released shortly thereafter. A few days later, police obtained a statement from a man who told them that defendant had confessed to him to the killings. On the strength of this additional evidence, prosecutors decided to charge him. But by this time defendant had absconded. Fifteen years later, defendant was found living under an assumed name, still in Houston. Charged in state court with murder, defendant did not testify at his trial. But the prosecution was allowed to use his silence about his shotgun as evidence of his guilt. (It was not indicated whether the shotgun shells were ever actually connected to defendant's gun.) Found guilty and sentenced to 20 years in prison, defendant appealed. His conviction was upheld through the Texas courts of appeal. The United States Supreme Court granted certiorari.

Held: The United States Supreme Court, in a split 5-to-4 decision, affirmed. The issue as argued on appeal was whether defendant's silence in response to a question about his shotgun was an assertion of his Fifth Amendment right to silence, and whether the prosecution should be allowed to use his silence, during a non-custodial police interview, as evidence of his guilt in the People's case-in-chief. A plurality of the Court (three justices) declined to answer this question, finding instead that because defendant did not specifically invoke his right to silence, he was not entitled to complain about his pre-arrest silence being used against him as evidence of guilt. (Two other justices, making for a majority of five, concurred in upholding defendant's conviction, but did so on the theory that pre-custodial silence may be used in evidence against a defendant in any case.) In analyzing this issue, the Court noted that the privilege against self-incrimination is an exception to the general principle that the Government has the right to everyone's testimony. But to invoke this privilege, a person must specifically claim it at the time he intends to rely on it. Defendant failed to do that here. This ensures that the Government is put on notice when a witness intends to rely on the self-incrimination privilege so that it has the opportunity to either argue that the proposed testimony is not incriminating, or if it is, to cure any potential self-incrimination issue through a grant of immunity. Requiring a witness to specifically invoke the privilege also provides the trial court with a record of the witness's reasons for refusing to answer so that the issue can be properly and fully litigated. In those situations where the act of asserting the privilege might itself be incriminating, a witness's silence is justifiable. But that rule does not apply here. In this case, defendant's interview with the police was voluntary. There was no reason why

defendant, if he'd chosen to invoke his Fifth Amendment self-incrimination privilege, could not have done so. "(I)t would have been a simple matter for him to say that he was not answering the officer's question on Fifth Amendment grounds." Merely "standing mute" does not do enough to put either the police or the court on notice that the suspect is invoking his Fifth Amendment self-incrimination privilege. In answer to the criticism that most people are not schooled in the intricacies of the Fifth Amendment, the Court answered merely that just about everyone is familiar with one's right to "invoke the Fifth" if he doesn't want to talk about something. The "Fifth Amendment guarantees that no one may be 'compelled in any criminal case to be a witness against himself;' it does not establish an unqualified 'right to remain silent."

Note: The whole idea here is that as a general rule, the prosecution may not use a defendant's exercise of his Fifth Amendment right against self-incrimination to punish him for doing just that; exercising the privilege. All the rules aside, suddenly going mute when confronted with a question an honest answer to which would necessarily be incriminating, reflects "a consciousness of guilt." Juries love, and place a lot of weight on things crooks do or say that make them *look* guilty. As a prosecutor, I'd often rather have a "consciousness of guilt" act than a confession. So determining whether one's silence is, or is not, a constitutionally protected invocation against self-incrimination is important, and the subject of a lot of conflicting case law. The Supreme Court has already held that a post-*Miranda* (after a waiver and during the ensuing interrogation) silence of 2 hours and 45 minutes is not an invocation. (*Berghuis v. Thompkins* (2010) 130 S.Ct. 2250].) Certainly then, during a pre-*Miranda*, non-custodial interrogation, failing to answer one question cannot be considered an invocation. Good call. The two concurring justices would have gone even further, putting on record their dislike for the whole idea that one's silence cannot be used against a suspect even when considered an invocation of his Fifth Amendment self-incrimination privilege. These two justices didn't see the need to hang their hat on the theory espoused here by the three-justice plurality. The four dissenting justices would have ruled that by inference, one's refusal to answer a question is an exercise of the suspect's privilege against self-incrimination and cannot be used as evidence of guilt. This case makes the rule a lot easier to apply; i.e., either the suspect specifically claims the privilege, or if not, it's waived.

***Confessions and Voluntariness*:**

United States v. Preston **(9th Cir. Feb. 27, 2013) __ F.3rd __ [2013 U.S. App. LEXIS 4690]**

Rule: Agents' use of various interrogation tactics do not cause an involuntary confession, at least under the circumstances of this case.

Facts: Eight-year-old TD was a neighbor and a relative of defendant's. Defendant was 18 years old and had an IQ of about 64, referred to by the Court as "mild retardation." On September 23, 2009, TD went over to defendant's home. While he was there, defendant put a condom on his penis and inserted it into TD's anus for several seconds, causing a crying TD to run from his home. After joining two young cousins, the three

boys, now all crying and visibly upset, went to TD's home where his grandmother asked him what was wrong. TD told her in an "excited utterance" (admissible hearsay) that his "butt" hurt because defendant had put his penis in it. The grandmother called the police. TD was examined at the Safe Child Center at the Flagstaff Medical Center, where he continued to complain about his butt hurting. When interviewed by a forensics expert, TD repeated his story that defendant "put his penis in my butt and it hurts." But when pressed for more detail, he proceeded to relate "a long and convoluted story involving multiple assaults by (defendant)—including statements that (defendant) had ejaculated onto his shirt and mouth," neither accusation being corroborated by any physical evidence. TD also told the interviewer of "police chases, helicopters, monster trucks, and other apparently fabricated events." TD further claimed that defendant had sexually assaulted his sister, as accusation for which there was no proof. And he claimed to have been involved in "throwing knives to attack (defendant) and some imagined 'robbers.'" TD was examined by a nurse practitioner, who conducted a "head-to-toe" medical examination of TD. While TD told her the same story about defendant assaulting him, she could find no body surface injuries. Defendant was later interviewed by two agents (FBI?) who contacted him outside his home on the front driveway. They told defendant that they were there to discuss TD's allegations of sexual assault, but that he was not under arrest and was free to leave. Although there was some confusion as to the date of the alleged assault, defendant denied any knowledge of a sexual assault against TD. During the next 45 minutes, in a tape-recorded interview and during which defendant was calm and seemed to understand the agents' questions, the agents employed a number of interrogative tactics attempting to get him to open up. They told him they had other evidence, such as "forensic exams and interviews" that supported TD's accusations, which at the time was not true. They minimized defendant's acts, suggesting that this was a one-time event as opposed to him habitually "prey(ing) on little kids." He was told that he seemed like a "pretty good dude" and he should just confess if he felt sorry. He was also told that if he did confess, "(w)e don't tell this to anybody. It stays with the folder, and it stays with the U.S. Attorney's Office and that's it." At one point, he was asked if he'd like to sit in the agents' vehicle to talk about it away from other people standing around in the area; an offer defendant declined. Defendant was reminded again that he was not under arrest and was free to leave. Eventually defendant started to open up by admitting that TD did come to his house. Telling defendant that they knew that "something did happen," they asked him if he'd used a condom. Defendant, losing the will to continue his denials, nodded his head and said, "That's it. Just came in, and it just happened." From there, through a series of "leading questions" (i.e., questions that suggest the answer), defendant slowly started to open up. Finally, when asked if he put his penis into TD "all the way or just a little bit," defendant responded that he put it in TD's anus for "five, six seconds . . . then TD . . . said, I'm going to tell on you, and then he just . . . started crying." The agents wrote a summary of defendant's confession, gave it to him to review, and had him sign it. They left without arresting him. Charged in federal court with a reduced offense (after some plea bargaining) of Abusive Sexual Contact (18 U.S.C. §§ 1153, 2244), defendant waived his right to a jury trial. Relying partially upon defendant's confession, the district court judge found him guilty after a 3-day bench trial and sentenced him to 50 months in prison. Defendant appealed.

Held: The Ninth Circuit, in a split 2-to-1 decision, affirmed. Among the issues on appeal, defendant argued that his confession was involuntary and should not have been admitted into evidence. Involuntary or coerced confessions are inadmissible at trial because their admission is a violation of a defendant's Fifth Amendment right to due process. In determining whether a confession was involuntary, the court will look to the "totality of the circumstances." The factors the court must consider include (1) the degree of police coercion, (2) the length of the interrogation, (3) the location of the interrogation, (4) the interrogation's continuity, and (5) the defendant's maturity, education, physical condition, mental health, and age. Ultimately, the issue is whether the "*suspect's will was overborne*." But for these rules to apply, "*coercive police activity*" must have been involved. This may be in the form of either physical intimidation or psychological pressure. In this case, the agents did not physically threaten defendant. Also, as noted in the following discussion, none of their interrogation tactics were improper. The interview lasted only 45 minutes, in front of defendant's own home, and with others persons present in the area. Defendant was told several times he was not in custody and no physical restraints were used. Defendant's refusal to move the interview into the agents' car was honored, reemphasizing at that time that he was not under arrest and was free to leave. Also, despite his confession, he was not arrested when the interview was over. Not accepting a suspect's denial is not coercion. And there was no evidence that the agents' confusion as to the date of defendant's crime was a purposeful ploy in an attempt to confuse defendant. The Court further found no fault with the agents telling defendant that other evidence implicated him, attempting to minimize his acts, or asking suggestive, or leading, questions. And even if some of the stuff the agents were telling defendant was misleading, that does not amount to coercion by itself. "[M]isrepresentations made by law enforcement in obtaining a statement, while reprehensible, does not necessarily constitute coercive conduct." Similarly, the agents' statements to defendant that his confession would stay between them and the United States Attorney were not improper. Such a tactic is not enough by itself to cause a resulting confession to be involuntary. In all, the Court found that nothing the agents did could have "overborne" the defendant's will. And even if defendant is mentally slow, the Court held that his "mental capacity does not so heavily influence the totality of circumstances test that a finding of involuntariness is appropriate."

Note: For those of you who might be worrying that this mentally slow defendant might have been pushed into giving a false confession, and therefore erroneously convicted, you might be interested to know that there was also some DNA evidence retrieved from TD's underwear that supported TD's allegations; a fact only barely mentioned in the majority decision, and not at all in the dissent. As for TD's wild stories about police chases, helicopters, etc., the forensic interviewer testified that children commonly use diversionary techniques to avoid providing embarrassing details about their sexual assault, including projecting their victimization onto another person (his sister in this case) and describing unsupportable acts of aggression against their attackers (e.g., throwing knives, etc.). But having read the dissent, this case is one that could have gone either way. Playing "mind games" with a suspect, particularly one who has mental issues, can often backfire on you. Also, as a prosecutor, I've never been a big fan of intentionally using "misrepresentations" when interrogating a suspect. While commonly

upheld as an acceptable interrogation tactic, at least so long as nothing is said that might cause a false confession, this Court, even while upholding its use here, referred to such a tactic as "reprehensible." More importantly, defense attorneys will point out to a jury that you "lied" to the defendant. Juries don't like that very much, at least when coming from a representative of the law, and may use such a "lie" to justify an adverse verdict.

***Eight Amendment Cruel and Unusual Punishment*:**

Chappell v. Mandeville **(9th Cir. Jan. 31, 2013) 706 F.3rd 1052**

Rule: Severe restrictions on a prison inmate's movements, based upon a "reasonable cause to believe" that he may have ingested contraband, may not be an Eighth Amendment "cruel and unusual" violation so long as the restrictions are limited in time and have a valid penological purpose.

Facts: Plaintiff Rex Chappell was a prisoner in the California State Prison, Sacramento, when he had a visit by his fiancée who was a druggie in her own right. After the fiancée left, her ponytail hairpiece and some spandex undergarments were found in a trashcan and in the women's bathroom, all of which tested positive for cocaine residue. As a result, plaintiff's cell was searched. No cocaine was found, but three unlabeled eye drop bottles were recovered, the contents of which later tested positive for methamphetamine. Fearing that plaintiff might have ingested the cocaine, the civil defendants (R. Mandeville, captain of the prison's Investigative Services Division, and T. Rosario, acting warden) determined that plaintiff should be placed on "*contraband watch*." "Contraband watch" is a temporary confinement in isolation during which the prisoner is dressed in a manner (i.e., taped into two pairs of underwear and two jumpsuits) so that his bowel movements can be searched without being tampered with by the prisoner. The prisoner is handcuffed with his arms chained to his sides, and is closely and continually monitored with the cell's lights being left on 24 hours a day. The only furniture in the cell is a bed with no mattress. The prisoner is given a blanket and receives three meals a day and beverages. When the prisoner needs to defecate, he must notify the prison staff who will bring him a plastic, moveable toilet chair. Once he uses the chair, the staff searches the waste to determine if it contains contraband. Plaintiff was also placed in ankle shackles and chained to his bed. Under prison regulations, a prisoner can be placed on contraband watch with the approval of a captain or higher, whenever there is "reasonable cause to believe" that the inmate has ingested or secreted contraband. Plaintiff was held under contraband watch for six to seven days, during which no contraband was ever recovered despite three bowl movements. Alleging a violation of his Eighth (cruel and unusual punishment) and Fourteenth (due process) Amendment rights, plaintiff filed a civil lawsuit in federal court. In his lawsuit, he further complained that the waist restraints were not loosened for meals, forcing him to "eat [his] food like a dog," the temperature in his unventilated cell was very high, and the lights were "very bright." Plaintiff further alleged that the conditions "did in fact torture [him] mentally" and he felt like he "deteriorat[ed] mentally" while kept under contraband watch. The civil defendants filed a motion for summary judgment, which was denied by the trial court. The civil defendants appealed this ruling.

Held: The Ninth Circuit Court of Appeal, in a split 2-to-1 decision, reversed, finding that the prison officials/civil defendants were entitled to qualified immunity and that the lawsuit should have been dismissed. Qualified immunity protects government officials from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. A court must consider whether "a reasonable officer would have had fair notice that (his actions) were unlawful, and that any mistake to the contrary would have been unreasonable." Plaintiff Chappell argued that the combination of conditions to which he was subjected, including twenty-four-hour lighting and mattress deprivation, violated his Eighth Amendment right as a prison inmate not to be subjected to cruel and unusual punishment. After reviewing the case law, the Court determined that the legal limits in the use of the "contraband watch" are not clearly established. Having little if any prior guidance, the civil defendants were entitled to qualified immunity. Continuous 24-hour lighting has in fact been held before to be cruel and unusual punishment. (See *Keenan v. Hall* (9th Cir. 1996) 83 F.3rd 1083.) However, *Keenan* involved two large fluorescent lights that were kept on for 24 hours a day for six months under circumstances where there was no legitimate penological justification for doing so. In this case, it was for only six or seven days, and under circumstances where there was a "clear penological purpose" in observing plaintiff continually so that he couldn't dispose of any contraband. Also, here, contrary to the facts in *Keenan*, plaintiff failed to allege any specific effects of the continuous lighting, claiming only that he "felt like he 'deteriorat[ed] mentally.'" The Court ruled that aside from this not being a "clearly established" constitutional violation, the justices also had "some doubt" whether what plaintiff experienced in this case was cruel and unusual for purposes of the Eighth Amendment. Most importantly, there was a penological purpose in disallowing plaintiff the comfort of a mattress because it would have given him a place to secret contraband. And even when combined with requiring him to wear two pairs of underwear and jumpsuits, in a hot cell with no ventilation, while chained to a bed and shackled at the ankles and waist so that he could not move his arms, forcing him to "eat like a dog," the Court found that there was no clear precedent dictating that such treatment was cruel and unusual. Lastly, the Court rejected plaintiff's Due Process argument that he was entitled to an opportunity for a hearing before the officials who ordered his placement in contraband watch. Such a hearing is not one of the limited "liberty interest" rights to which a prison inmate is entitled. "(T)he Due Process Clause does not protect against all changes in conditions of confinement even where they 'hav[e] a substantial adverse impact on the prisoner involved.'" The prison officials, therefore, are entitled to a summary judgment dismissal of the lawsuit.

Note: Unfortunately, the Court declined to specifically find that the "contraband watch" restrictions imposed on the plaintiff were lawful, holding only that it is an unsettled area of the law, and one that prison officials aren't expected to know. The net result is that it is still an unsettled issue. But they did say that given the limited amount of time plaintiff was forced to endure the restrictions as described above, and with a valid penological purpose to such restrictions, the Court "doubts" that contraband watch constitutes cruel and unusual punishment. That helps.

***Non-Custodial Interrogations and Beheler*:**

Dyer v. Hornbeck **(9th Cir. Feb. 6, 2013) 706 F.3rd 1134**

Rule: Telling a criminal suspect that she is not under arrest and is free to leave negates the need for a pre-interrogation *Miranda* admonishment, . . . possibly.

Facts: On March 22, 2002, 19-year-old D.J. Hunter's charred body was found in the bed of his own burnt pickup truck. He had been shot three times in the head. His cell phone was found nearby. Telephone records showed a recent call from Hunter's phone to defendant's apartment. This and other evidence led to investigators getting a search warrant for defendant's apartment in Fowler, California. When the search warrant was executed beginning at about 10:35 p.m. on March 28, defendant was not at home. However, she showed up five minutes later. When she did, she was locked into the back seat of a patrol car parked in the alley behind her apartment, unhandcuffed, for the duration of the search. Detective Chapman arrived at the scene after the search had been completed. He contacted defendant who was still sitting in the patrol car. Chapman (and his partner), in plain clothes and with no firearms exposed, told defendant he was conducting an investigation. He asked defendant if she would mind coming to the Sheriff's Division to speak with them. Defendant was "agreeable." So she was transported to the Sheriff's Station which was within 30 minutes from her apartment. Still not being handcuffed, defendant was led to an interrogation room that was about 15 feet by 15 feet and contained a table, chairs and a trash can. It had been over an hour since she was first put into the patrol car. At the outset of the interview, defendant was told that she was not in custody and she was free to leave. "*And you understand that you're not in any trouble, you're not under arrest, and that you're free to leave at any time*?" The ensuing interview lasted 3 hours and 45 minutes, during which time two breaks were taken with her being allowed to leave the room and walk to the restroom, unescorted, about 30 yards away, and return. For the first hour and a half of the interview, defendant denied all knowledge and involvement in Hunter's murder. At various times, defendant was told that "people had told (them) that she was the one who killed D.J. (Hunter), and that they knew she was involved She eventually made some incriminating statements. Finally, when she said that she wanted to go home, she was arrested. Defendant was charged in state court with murder, robbery, and kidnapping. Her motion to suppress the statements she made during the interview was denied. She was convicted of all charges and sentenced to life in prison without parole. A state court of appeal affirmed. Defendant eventually filed a petition for Writ of Habeas Corpus in federal district court, which was denied. She appealed.

Held: The Ninth Circuit Court of Appeal affirmed; *but grudgingly so*. In a Writ of Habeas Corpus, a federal appellate court is bound by the state appeals court ruling on the admissibility of defendant's statements unless it finds that the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," *or* that the state decision was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." It is irrelevant that the federal court might disagree with the

state court's decision, so long as the above standard is met. Defendant's argument was that she was in custody at the time of the interview and that she should have been read her *Miranda* rights. Because she was never advised of, and therefore never waived her rights, her statements should not have been admitted into evidence. The issue, therefore, is whether, under the totality of the circumstances, defendant was subjected to a "custodial interrogation." The test is an objective one; i.e., whether a "reasonable innocent person in such circumstances" would understand that she could refuse to answer an officer's questions and leave. The state trial court had found that defendant was not in custody, and that decision was upheld by the state appellate court. This conclusion was based upon (1) the fact that defendant voluntarily agreed to go with the detectives to the Sheriff's Station and to answer questions, (2) she was told that she was not under arrest and was free to leave, and (3) she was permitted two unaccompanied breaks to visit the restroom. While confronted with an accusation of guilt by the interrogating officer, this factor alone was not enough to overcome the totality of the circumstances that would have indicated to a reasonable person that she was not in custody for purposes of *Miranda*. At least, it cannot be said that the state court's decision on this issue was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Defendant's petition for Writ of Habeas Corpus was therefore properly denied.

Note: That having been said, the Court also strongly indicated that it was "*troubled*" by the state court's decision on this issue even though, being consistent with the majority of those cases considering the issue, it was not "unreasonable." In fact, a lengthy concurring opinion by one justice went on forever talking about how, had it been his decision, he would have ruled that defendant *was* in custody at the time of the interview. This conclusion was based upon defendant's 20-minute detention in a locked patrol car right before agreeing to travel with the detectives to the station and to speak with them about Hunter's death; the trauma of this detention perhaps negating the voluntariness of her decision to cooperate. Also, being 30 minutes from home, in the middle of the night, with no way to get home, this justice also would have found that the detective's admonition that she was free to leave was a meaningless gesture. I briefed this case because although the People won out in the end, it is important to note that a so-called "*Beheler* admonishment" (i.e., telling a suspect that she is not under arrest and free to leave) is not always going to be enough to undue what otherwise would be a custodial interrogation. This case is a clear warning from the Ninth Circuit that the wide-spread belief common among many law enforcement officers (and prosecutors, and judges) that a *Beheler* admonishment will always take the custody out of any interrogation is misplaced. A *Miranda* admonishment and waiver should be the rule, with a *Beheler* admonishment the exception.

***Texting While Driving, per V.C. § 23123.5*:**

***People v. Corrales* (Feb. 6, 2013) 213 Cal.App.4th 696**

Rule: A traffic stop for texting while driving is lawful when based upon an articulable reasonable suspicion to believe that the driver is in fact texting.

Facts: Los Angeles Police Department Officer William Lantz, a 16-year veteran, was driving a marked patrol car in North Hollywood with his partner when they passed defendant sitting in the driver's seat of his car parked at the side of the road. Officer Lantz could see that defendant was using his cellular telephone, writing a text message. Five minutes later, the officers returned to that same location and observed defendant pulling his car into traffic. As the officers approached, and were right behind defendant, Officer Lantz could see that he was leaning forward and looking down while making movements with his hand like he was still texting. Officer Lantz observed these texting motions for some 30 to 40 seconds before making a traffic stop. Upon stopping defendant, intending to write him a citation for texting while driving (V.C. § 23123.5), it was noted that defendant was under the influence of a drug. He was arrested for this offense and searched incident to arrest. This search resulted in the recovery of a baggie of methamphetamine hidden in his shoe. Charged in state court with possession methamphetamine, defendant filed a motion to suppress, which was denied. A jury convicted defendant and he appealed.

Held: The Second District Court of Appeal (Div. 5) affirmed. Defendant's argument on appeal, as it was in the trial court, was that Officer Lantz had an insufficient basis for concluding that he was texting while driving. A traffic stop, however, to be lawful, needs to be supported by no more than an articulable "*reasonable suspicion*" to believe that a driver has violated the Vehicle Code. This, of course, is a lower standard of proof than "*probable cause*." In determining whether a stop is supported by a reasonable suspicion, a law enforcement officer may draw on his or her own experience and specialized training to make inferences from and deductions about the available cumulative information, even when that same information might well elude an untrained person. Using these standards, the Court rejected defendant's argument that Officer Lantz's observation of defendant leaning forward and looking down while moving his arm in a manner consistent with texting, particularly when he'd been observed texting just minutes earlier, was insufficient to establish a reasonable suspicion to believe that he was in fact texting while driving. Stopping defendant, therefore, after making the above-described observations, was lawful.

Note: The Court did not, however, tell us whether the texting-like motions, had they not been observed minutes after seeing defendant texting while at the side of the road, would have been enough. I suspect that they would be. A "reasonable suspicion" does not require a lot of information to justify. And other case law tells us that it is not necessary to positively eliminate all other lawful possibilities when observing what an officer interprets to be suspicious activity. But certainly, with having seen defendant texting mere minutes earlier, this was not even a close case. The only reason I can see that this case was published at all is because there are very few cellphone-use cases out there defining for us V.C. §§ 23123 (using a cell phone), 23123.5 (texting), and 23124 (minors using a cell phone).