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Remember 9/11/01; Support Our Troops

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THIS EDITION'S WORDS OF WISDOM:

"*Give a man a fish and he eats for a day. Teach him how to fish and you get rid of him all weekend*." (Zenna Schaffer)

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ADMINISTRATIVE NOTES:

***New and Amended Statutes*:** Effective as of 3:00 p.m., September 20, 2006, by "*emergency legislation*," the following new and amended statutes (via S.B. 1128) are now on the books and enforceable:

P.C. § 209(b)(1) (Amended): *Aggravated Kidnapping*: Section is amended to add kidnapping for the purpose of committing a *felony child molest* (per **P.C. § 288)** or for the purpose of committing a listed *sex offense in concert* (per **P.C. § 264.1**) to the list of offenses constituting an "*aggravated kidnapping*." (Felony: Life, with the possibility of parole.)

P.C. § 220(b) (New): *First Degree Burglary with Intent to Commit Sex Offense*: New **subdivision (b)** adds the new crime of First Degree Burglary (per **P.C. § 460(a)**) with the intent to commit *rape*, *sodomy*, *oral copulation* or any violation of **P.C. §§ 264.1** (*sex offense in concert*), **288** (*felony child molest*) or **289** (*sexual penetration with foreign object*). (Felony: Life, with the possibility of parole.)

P.C. § 269 (Amended): *Aggravated Sexual Assault of a Child Under Age of 14*: Amendment reduces necessary age difference between the offender and the victim *from 10 to 7 years*, and makes the following additional amendments:

> **(a)(1)**: Adds *rape accomplished by threat to use the authority of a public official*, per **P.C. § 261(a)(6)**.
>
> **(a)(3)**: Limits *sodomy* to violations of **P.C. § 286(c)(2), (3)**, or **(d)** (*force, future retaliation, or in concert*, respectively).
>
> **(a)(4)**: Expands *oral copulation* to violations of **P.C. § 288a(c)(2), (3)**, or **(d)** (*force, future retaliation, or in concert*, respectively).
>
> New **subdivision (c)** adds a sentencing requirement of consecutive sentences for separate incidents. (Felony: 15 years to life.)

P.C. § 288.3 (New): *Luring*:

> **(a)(1)**: Arranging a meeting with a minor, or a person the suspect believes to be a minor, for the purpose of exposing his or her, or to have the minor expose his or her, genital, pubic, or rectal area, or to engage in lewd or lascivious behavior, when motivated by an unnatural or abnormal sexual interest in children. (Misdemeanor: 1 year, $5,000 fine; *or* with a prior conviction for any registerable offense listed in **P.C. § 290(a)(2)**: Felony: 16 months, 2 or 3 years,)
>
> **(b)**: Going to the arranged meeting place, at or about the arranged time. (Felony: 2, 3, or 4 years.)

P.C. § 288.7 (New): *Sex Acts with Child 10 years or Younger Than Suspect*:

> **(a)**: *Sexual Intercourse* or *Sodomy* with a child who is 10 years of age or younger. (Felony: 25 years to life.)
>
> **(b)**: *Oral Copulation or Rape by Foreign Object*, per **P.C. § 289**, with a child who is 10 years of age or younger. (Felony: 15 years to life.)

P.C. § 290(a)(2) (Amended): *Sex Registration Offenses*: Offenses for which a person must register has been amended to add **P.C. § 187** (*Murder*) when committed in the perpetration, or attempt to perpetrate, a *rape* or any offense punishable under **P.C. §§ 286**, **288**, **288a**, or **289** (*Sodomy*, *felony child molest*, *oral copulation*, or *rape by foreign object*, respectively), **P.C. § 288.3** (*Luring*), **P.C. § 288.7** (*Sex Acts with Child 10 years or Younger Than Suspect*), or a *conspiracy* to commit any of the above, and any listed offense in which the person was a principal, per **P.C. § 31**.

P.C. §§ 290.03 to 290.07 (New): "*The Sex Offender Punishment, Control, and Containment Act of 2006*:"

> **290.03**: Legislative "*findings and declarations*" justifying "a comprehensive system of risk assessment, supervision, monitoring and containment for registered sex offenders residing in California communities . . . ."
>
> **290.04**: Establishment of the State-Authorized Risk Assessment Tool for Sex Offenders (SARATSO) and the SARATSO review committee.
>
> **290.05**: Establishment of training relative to SARATSO.
>
> **290.06**: Effective date of SARATSO, on or before July 1, 2008, and the procedures for administering the program.
>
> > See **P.C. §§ 1203** (Amended), **1203c** (Amended), **1203e** (New), and **1203f** (New), for Probation's Department's risk assessment responsibilities.
>
> **290.07**: Right of "any person authorized by statute to administer" SARATSO to have access to the necessary records in order to administer the program.

P.C. § 290.08 (New): *Retention of Records*: Requires District Attorney's Offices and the Department of Justice to retain sex offender (registerable offenses, per **P.C. § 290**) records for 75 years.

> A Court is required to retain records on all felonies for 75 years (**Gov't. Code § 68152(e)(2)**) and, by amendment effective with this new legislation, for misdemeanor sex offender (registerable) cases, for 75 years. (**Gov't. Code § 68152(e)(12)**)

P.C. § 290.46 (Amended): *Megan's Law*:

> New **subd. (b)(1)**, **(b)(2)(I)**, & **(b)(2)(K)**: The fact of a prior adjudication as a "*Sexually Violent Predator*," and prior convictions

for **P.C. § 288.3** (*Luring*), and **P.C. § 288.7** (*Sex Acts with Child 10 years or Younger Than Suspect*), respectively, added to the information to be released to the public.

(Effective 7/1/2010, even more information relative to the registrant's incarceration, as listed in what will be new **subd. (a)(2)**, will be made available to the public.)

P.C. § 311.2 (Amended): *Child Pornography*: Amended **subd. (c)** increases the punishment for a first offense of *distribution*, or *possession with the intent to distribute*, child pornography to a felony (wobbler). (Felony (wobber): 1 year and/or $2,000, or 16 months, 2 or 3 years in prison.)

P.C. § 311.4 (Amended): *Child Pornography*: Amended **subd. (a)** increases the punishment for a first offense for *employing a minor to assist in the distribution or importation of child pornography* to a felony (wobbler). (Felony (wobbler): 1 year and/or $2,000, or 16 months, 2 or 3 years in prison.)

The statute of limitations was changed (see **P.C. § 801.2** (New)) to 10 years from the date of production of the pornographic material.

P.C. § 311.11 (Amended): *Child Pornography*:

(a): Amended subdivision increases the punishment for a first offense *possession of child pornography* to a felony (wobbler). (Felony (wobbler): 1 year and/or $2,500, or 16 months, 2 or 3 years in prison.)

(b): Makes all **P.C. § 290** sex registrants and persons previously adjudicated as a sexually violent predator liable for more severe felony punishment. (Felony: 2, 4 or 6 years)

P.C. § 626.81 (New): *Trespass on School Grounds by Sex Offender*: Per **subd. (a)**, a registered sex offender (**per P.C. § 290**) who comes into any school building or upon any school ground without lawful business thereon *and* without written permission from the school's chief administrative official is guilty of a misdemeanor. (Misdemeanor: 6 months, $500, with a minimum 10 days for a second offense or 90 days for a third or subsequent offense.)

"*School*" is as defined in **P.C. § 626(a)(4)**; generally, K through 12.

P.C. § 647.6 (Amended): *Misdemeanor Child Molest*: Renumbers the misdemeanor child molest offense as **subd. (a)(1)** and adds a new offense under **subd. (a)(2)** of committing the same acts, when "*motivated by an unnatural or abnormal sexual interest in children*," with an adult who the

suspect believes is a child under the age of 18. The fine is increased from $1,000 to $5,000. (Misdemeanor: 1 year, $5,000.)

P.C. § 653b (Amended): *Loitering About Schools or Public Places*: Former section **653g** is renumbered to **653b(a)** and adds, under **subd. (b)**, enhanced sentences for registered sex offenders. (Misdemeanor: 6 months, $1,000. For a registered sex offender, first offense; 6 months, $2,000, with a minimum of 10 days for a second offense and 90 days for a third or subsequent offense.)

P.C. § 653c (New): *Trespass on Day Care or Residential Facility for Elder or Dependent Adults by Sex Offender*:

> **(a)**: A registered sex offender (per **P.C. § 290**) whose registerable offense was committed against an elder or dependent adult (per **P.C. § 368**), other than a resident of the facility, is prohibited from entering or remaining on the grounds of a day care or residential facility where elders or dependent adults are regularly present or living, without having registered with the facility administrator or his or her designees, except to proceed expeditiously to the office of the facility administrator or designee for the purpose of registering.
> **(b)**: Registration includes the fact that the person is a registered sex offender, his or her name, address, purpose for entering the facility, and proof of identity.
> **(c)**: Grounds for refusing to register, or to impose restrictions on, or revoke registration: A reasonable basis for concluding that the person's presence or acts would (1) disrupt, or have disrupted, the facility, any resident, employee, volunteer, or visitor; (2) result, or has resulted, in damage to property; (3) interfere, or has interfered, with the peaceful conduct of the activities of the facility; or (4) otherwise place at risk the facility, or any employee, volunteer or visitor.
> **(d)**: Misdemeanor: First offense; 6 months, $2,000, with a minimum of 10 days for a second offense and 90 days for a third or subsequent offense.

P.C. §§ 667.1 et seq., **1170.125** & **1192.7** (Amended): *Sentencing*: Various sentencing and enhancement statutes are expanded and clarified to include sex offenses not previously listed.

P.C. §§ 1203.06, **1203.065**, & **1203.075** (Amended): *Probation*: Probation denial for listed offenses with addition of various sex-related offenses.

P.C. §§ 3000 (Amended), **3001** (Amended), **3005** (New): *Parole*: Parole period extension and parole supervision for sexual offenders.

P.C. § 3072 (New): *High Risk Sex Offenders; Treatment*: Establishment of a pilot treatment program for high risk sex offender inmates.

P.C. § 12022.75 (Amended): *Administration of Drugs to Commit Felony*: New **subd. (b)** provides a 5-year enhancement for administering drugs to a victim for the purpose of committing a sexual assault.

P.C. § 13887.1 (Amended): *County Sexual Assault Felony Enforcement* (*SAFE*) *Team Program*: Amendment adds a statement of the program's mission.

P.C. § 13887.5 (New): *SAFE Program; Grants*: New section provides for the establishment of program grants.

CASE LAW:

***Jail Body Cavity Searches*:**

Way v. County of Ventura **(9th Cir. Apr. 20, 2006) 445 F.3rd 1157**

Rule: An arrest for the misdemeanor offense of being under the influence of a controlled substance, per H&S § 11550, does not, by itself, justify a later visual body cavity search at the jail despite a state statute and a jail policy to the contrary.

Facts: The female plaintiff in this civil suit, while working as a bartender working at a Ventura bar, displayed symptoms of cocaine or methamphetamine influence; i.e., dilated pupils, rapid pulse rate, a nervous attitude and rapid speech. A Ventura police officer noted this while at plaintiff's bar and arrested her for being under the influence of a controlled substance, per H&S § 11550. The officer had blood taken at a local hospital (which later showed that she *did not* have any controlled substances in her system; a fact not really relevant to the existence of probable cause) while en route to Ventura County's pretrial detention facility. As per a Ventura County Sheriff's policy for "fresh misdemeanor drug" arrestees, plaintiff was subjected to a visual body cavity search during the booking process. This policy, allowed for under P.C. § 4030(f), was based upon the theory that merely being arrested for any drug-related offense (including H&S § 11550) constituted a reasonable suspicion that the person possessed drugs and was therefore subject to a search, including of body cavities, even though the arrestee wasn't to be introduced into the general jail population. After obtaining a supervisor's approval for the search, defendant was taken to a private room by a female deputy, told to disrobe, and required to "bend forward, spread the buttocks, and cough to allow for a visual inspection of the anal area" as well as to "spread her labia at the same time to allow a check of the vaginal area." At no time was plaintiff physically touched. No contraband was found and defendant bailed out shortly thereafter. She later sued in federal court per 42 U.S.C. § 1983 (violation of federal civil rights). The federal district court, during hearings related to a pre-trial summary judgment motion, ruled that as a matter of law the plaintiff's Fourth Amendment rights had been violated, the search having been conducted without individualized suspicion that she actually possessed a controlled substance. The trial court also declined to find that the defendant deputies had qualified immunity from civil liability. The County appealed.

Held: The Ninth Circuit Court of Appeal agreed that plaintiff's constitutional rights had been violated, but held that the deputies were entitled to qualified immunity. Penal Code § 4030(f) allows for a visual body cavity search of a misdemeanor arrestee when the charged offense involves weapons, controlled substances, or violence, even though the person is not going to be introduced into the jail's general population. Based upon this statute, the Ventura Sheriff's Department established a blanket policy that anyone arrested for any of these three types of offenses was automatically subject to a visual body cavity search. However, whether or not section 4030(f), or the Sheriff's policy, is constitutional, depends upon a balancing of (1) the scope of the intrusion, (2) the manner in which the search is conducted, (3) the justification for the search, and (4) the place in which it is conducted. In this case, there was no issue that the manner in which the search was conducted and its location were both reasonable. On the other side of the coin, however, the Court also ruled that it is "indisputable" that a body cavity search, even if not involving any touching of the plaintiff's body, and even if done "with all due courtesy," was "frightening and humiliating." The only real issue is whether such a search, under the circumstances of this case, was justifiable. While specifically declining to rule on other drug-related cases, the Court determined that the mere fact that a person is charged with a violation of being under the influence of a controlled substance, per H&S § 11550, does not, by itself, justify a conclusion that there exists a reasonable suspicion to believe that she might also be hiding that substance in a body cavity. And in this case, there were no facts or circumstances (other than the belief that she was under the influence) to support any suspicion that plaintiff, herself, possessed a controlled substance. Absent some articulable evidence amounting to at least a reasonable suspicion, it is a constitutional Fourth Amendment violation to subject her to visual body cavity search. However, because a reasonable law enforcement officer, relying upon a Department policy and section 4030(f), would not have necessarily realized that conducting such a search would be held to be a Fourth Amendment violation, the deputies in this case are entitled to qualified immunity from civil liability.

Note: They are not saying here that P.C. § 4030(f) is invalid in all contexts. They note prior authority indicating that crimes of violence or which involve the use of weapons might very well allow for routine body cavity inspections even before the arrestee is to be placed into the jail's general population. The Court also specifically declined to comment on "any other kind of drug offense, which may have different characteristics that might lead to a different analysis on a different record." Therefore, until we are told otherwise, 4030(f) continues to apply to when the person is arrested for the possession of a controlled substance (which would be a felony anyway). All they are saying here is that for the simple, non-violent charge of being under the influence of a controlled substance, without any articulable facts indicating that the arrestee might also possess on his or her person some of that controlled substance, the assumption that she is carrying some of it in a body cavity is just not warranted. While I'm not sure I agree with this conclusion, it's one we'll have to understand because now that we're on notice of the Ninth Circuit's opinion on this issue, the next officer who does a body cavity search under similar circumstances won't be entitled to qualified immunity when he or she later gets sued.

***Attempt Murder and the Specific Intent to Kill*:**

People v. Anzalone **(Jul. 13, 2006) 141 Cal.App.4th 380**

Rule: A specific intent to kill the victim is a necessary element of every attempted murder charge.

Facts: Che Love parked his car in an alley in Cardiff and left his keys in it. Minutes later, he discovered defendant in his car trying to start it. Love and three friends administered a little street justice on defendant as he tried to get out of the car. He eventually fled on foot. Minutes later, as Love and his friends were standing in the alley discussing these events, a silver convertible Mitsubishi Eclipse came down the alley at about 15 to 20 miles per hour. As the Mitsubishi neared Love and his companions, the driver, identified as defendant, leaned across the passenger seat pointing a gun at them. Seeing the gun, the four victims dove for cover as defendant fired two shots, narrowly missing them. Several months later, three of the victims positively identified defendant as the shooter from a photographic lineup. Three months after that, defendant was arrested in a stolen black-over-silver convertible Mitsubishi Eclipse. Charged with four counts of premeditated attempted murder (along with other charges and enhancements), defendant presented alibi evidence to the effect that he couldn't have been the shooter because he was busy stealing another vehicle some miles away at the time of the shooting. The jury didn't believe him and found him guilty on all counts. During trial, the prosecutor argued to the jury that it was not necessary for them to find that defendant had the specific intent to kill each of the four victims so long as each victim was in a so-called "*zone of danger*" (referred to also as a "*kill zone*," or "*zone of risk*") created when defendant fired gunshots indiscriminately at the group of victims. Defendant appealed from his conviction and 42½-year-plus-two-consecutive-life-terms sentence.

Held: In a decision certified for partial publication, the Fourth District Court of Appeal (Div. 1) reversed in part and affirmed in part. Defendant argued on appeal that evidence of a specific intent to kill is a necessary element of each attempted murder charge that must be proved in order to sustain a conviction. Per the defendant, the prosecutor's argument that proof of such a specific intent is not necessary—that merely the victim's presence in the so-called "zone of danger" created by the defendant's random shooting into a group is sufficient—was error. The Court agreed. A necessary element of any attempted murder is the "*specific intent*" to kill that victim (i.e., "*express malice*"). The prosecutor committed reversible error when he argued otherwise. An intent to kill, however, can be inferred under a number of different theories. For instance, when a person places a bomb on an airliner, or shoots an automatic weapon into a crowd, intending under either circumstance to kill one specific person, it can be "conclude(d) (that) the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity," referred to by the Supreme Court as being within the "*kill zone*." (*People v. Bland* (2002) 28 Cal.4th 313.) Another theory supporting an inference of an intent to kill is when a suspect shoots at one person under circumstances where he either knew, or should have known, that he was creating a likelihood, to a "*substantial certainty*," that a secondary victim's death might also occur. The Supreme Court so held

in a case where the defendant fired one shot at his estranged girlfriend, narrowly missing the head of the victim's baby who was in the line of fire between the defendant and the girlfriend. Because that shooter had to have known to a "*substantial certainty*" that the baby might also be hit, his conviction on two counts of attempted murder was upheld. (*People v. Smith* (2005) 37 Cal.4th 733.) In this case, however, the trail court didn't give any jury instructions concerning either legal theory, but rather left it to the prosecutor to explain, and the prosecutor got it wrong. "He did not tell the jury that the zone (of danger) is defined by the nature and the scope of the attack and that the attack must reasonably allow the inference that defendant intended to kill some primary victim by killing everyone in the primary victim's vicinity." For the prosecutor to argue to the jury that defendant may be found guilty of a count of attempted murder for anyone merely by being in some undefined zone of danger, without regard to any proof of (or a lack thereof) a specific intent to kill, was error. The Court thus reversed three of the four counts of attempted murder.

Note: This case provides a very good explanation of some very confusing concepts propagated by the California Supreme Court in *Bland* and *Smith*. It's still confusing, but at least we now know what cannot be argued in a drive-by shooting incident where people other than the intended target are wounded. We still have to prove an intent to kill the persons within the defendant's "*kill zone*," or anyone else for whom the defendant should have known he was causing a "*substantial certainty*" of death. It's just that it appears we can usually substantiate either or these two theories through some otherwise relatively weak circumstantial evidence. Police officers need to understand these concepts so as to be able to properly charge a drive-by shooting suspect and to intelligently testify to the circumstances that apply to either. The Court further noted, just in case you were wondering, that the "*doctrine of transferred intent*" does not apply to circumstances such as in this case (or in *Bland* or *Smith*). Under the doctrine of "*transferred intent*," shooting at one person, intending to kill him, will justify charging defendant with the murder of anyone else down range who might accidentally be hit and killed. The intent to kill one person will transfer to anyone else who is accidentally killed in the process. But it will *not* substantiate a charge of *attempted murder* on that same unintended down-range victim who happens to survive. Weird, but that's the law.

***Consent Searches and the Right to Withdraw Consent*:**

***United States v. McWeeney* (9th Cir. Jul. 21, 2006) 454 F.3rd 1030**

Rule: Allowing an officer "*look*" for anything "*they are not supposed to have*" is a consent search. But creating a setting in which a reasonable person would believe that he can't limit or withdraw that consent may invalidate the search.

Facts: Defendant was the passenger in his mother's car, being driven by a friend, and stopped by an officer of the Las Vegas Metropolitan Police due to the lack of a front license plate. Prior to the stop, the officer also did a radio check of the license number (obtained from the rear license plate), discovering that the car at some point had been reported stolen and subsequently recovered. During the resulting contact, the officer

asked both defendant and the driver if they were in possession of anything that "they were not supposed to have." Both subjects replied in the negative, after which the officer asked if they "mind(ed) if (he) looked." Both subjects said that they didn't mind. But first, the officer ran a warrant check on the subjects. After discovering that defendant was a convicted felon and that the driver had an arrest record for a weapons-related offense, the officer decided to wait for backup before he searched the car. After two other officers arrived some seven minutes later, the two subjects were reminded by the officer that "if you have nothing that you aren't supposed to have, I'm going to take a look." Defendant and the driver were then told to exit their car and stand facing away, towards the officer's car, while the search was conducted. During the search, either the defendant or the driver tried to turn to watch what was happening but was told "to face forward and stop looking back." The officers eventually got to the trunk and noticed that the carpet lining was loose. When it was pulled back, a handgun was found. Defendant was arrested for, and charged in federal court with, being a felon in possession of a firearm. After his motion to suppress the gun was denied, defendant appealed.

Held: The Ninth Circuit Court of Appeal reversed. Defendant's first complaint was that his consent, merely allowing the officer "*to look*," could not reasonably be understood as permission to search the vehicle's trunk and to look under the carpet lining. The Ninth Circuit rejected this argument noting that when considering the permissible scope of a consent search, the test is "what would the typical reasonable person have understood by the exchange between the officer and the suspect?" Following prior case law, the Court held here that "an officer does not exceed the scope of a suspect's consent by 'searching' when the officer asked only if he or she could 'look.'" Checking under the trunk's carpet lining, therefore, was no more than part of an otherwise lawful search based upon the defendant's consent to "*look*" for anything that they were "*not supposed to have*." However, defendant (and his passenger) had a constitutional right to modify or withdraw their general consent at any time. In this case, the two subjects were told to stand in a position where they could not observe the search. When one of them attempted to turn to see what was going on, he was ordered to turn back around again. Such a circumstance suggests that the subjects might have been coerced into believing that they were without authority to limit or withdraw their consent. However, the trial court failed to consider this issue. The Court therefore remanded the case back to the trial court for a factual finding on the issue of "whether the officers created a setting in which the reasonable person would believe that he or she had no authority to limit or withdraw their consent."

Note: The Courts are not real tolerant of the common police tactic of painting a suspect into a corner (e.g.: "*You don't have anything illegal in your pockets, do you*?") and then using a denial of criminal involvement to coax a consent to a search out of him (e.g.: ""*Then you wouldn't mind me looking, would you*?"). It is improper to purposely put a subject in the position where he feels that by exercising his right to refuse, he would be incriminating himself or admitting participation in illegal activity. (*Crofoot v. Superior Court* (1981) 121 Cal.App.3rd 717, 725.) But that's basically what the officers did here in this case. And although the Ninth Circuit still approved the initial consent, they were careful to protect the defendant's right to change his mind. Something to think about when you're tempted to play these games trying to secure a suspect's consent.