The California Legal Update

Remember 9/11/2001: Support Our Troops; Support our Cops

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THIS EDITION'S WORDS OF WISDOM:

"*Be decisive. Right or wrong, make a decision. The road of life is paved with flat squirrels who couldn't make up their minds*." (Unknown)

IN THIS ISSUE:

ADMINISTRATIVE NOTES:

The Homeless Camping in Public Places: The Ninth Circuit Court of Appeal ruled in a two-to-one split decision that a local ordinance making it criminal for people to camp or sleep outside on public property, at least when those people don't have available a home or other shelter to go to, violates the ***Eight Amendment's*** prohibition on cruel and unusual punishment. (***Martin v. City of Boise*** (9th Cir. Sept. 4, 2018) __ F.3rd __ [2018 U.S. App. LEXIS 25032].) The decision is a long and involved dissertation on issues such as one's "*standing*" to bring such a lawsuit, and whether or not pleading guilty to a charge of illegally sleeping on public sidewalks precludes a belated challenge to the constitutionality of an ordinance making it illegal to do so. The importance of this decision is obvious, given the social problems associated with large numbers of homeless people inundating our cities, not to mention the health and safety issues that naturally follow. But I've put off briefing the entire case in that a rehearing en banc (i.e., heard by an eleven-justice panel) is very possible, the Court having invited the parties to submit further briefs on the need for such a rehearing (see 2018 U.S. App. LEXIS 27936) and giving the parties until November 13 to "augment its Petition for Panel Rehearing and Rehearing En Banc" (2018 U.S. App. LEXIS 28682). So stay tuned. When and if we have a final decision in this case, you'll get it all here.

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CASE LAW:

***Miranda; Invocation of the Right to Counsel*:**
***Routine Booking Questions*:**
***Reinitiation of an Interrogation*:**
***The Functional Equivalent of an Interrogation*:**

Martinez v. Cate **(9th Cir. Sept. 11, 2018) __ F.3rd __ [2018 U.S. App. LEXIS 25703]**

Rule: Upon an in-custody suspect invoking his Fifth Amendment right to the assistance of counsel, an interrogating officer must immediately cease questioning and scrupulously honor that right. Attempts to encourage the suspect to change his mind violate *Miranda*.

Facts: The defendant Daniel Martinez and his co-gangster, Pablo Lopez, got into a verbal confrontation with rival gang members Jefte and Jair Garcia on December 8, 2005. The Garcia brothers were upset at some tagging activity they believed Martinez and Lopez were responsible for. Although Jefte took his shirt off during the argument, exhibiting an intent to fight, there was no evidence that either of the Garcias might have been armed other than one comment from Jair Garcia that he might shoot one of them (i.e., "*I'll peel your guys' cap back*."). Lopez, however, had brought a shotgun to the altercation, hiding it behind his back. Finally, on Martinez's command ("*Just do it*."), Lopez produced the shotgun and shot Jafte Garcia at close range; one pellet from which pierced Jafte's eye and penetrated his brain, killing him. Defendant was arrested by investigators two days later and interrogated. After being advised of his *Miranda* rights, defendant immediately invoked his right to counsel. (See below for details of the invocation and interrogation.) After some further discussion, which included the detective telling defendant that he would therefore be booked for murder without having the opportunity to tell his side of the story, defendant changed his mind and agreed to talk without his attorney being present. Although never confessing, defendant did admit to being at the scene of the shooting and, when asked, claimed that he did not feel threatened by Jafte Garcia, nor did he see him with a gun. Charged in state court with murder, defense counsel's objection to the admission of defendant's statements was overruled, the trial judge holding that although defendant had invoked his *Miranda* rights, he voluntarily reinitiated the questioning. The prosecutor used defendant's statements about not being afraid of Jafte Garcia during the People's case-in-chief, as well as in closing arguments, to rebut a self-defense claim. Defendant was convicted of second degree murder with a gang allegation and sentenced to state prison. California's Fifth District Court of Appeal upheld defendant's conviction, agreeing with the trial court that defendant himself had reinitiated the questioning and that the detective was not being deceptive nor did he mislead defendant into making his post-invocation comments. (*People v. Martinez*; No. F055977.) The California Supreme Court summarily denied review. (2010 Cal. LEXIS 2327.) Successive habeas corpus writs in state and then federal court were all denied. (See *Martinez v. Cate* (June 19, 2014) 2014 U.S. Dist. LEXIS 84389.) Defendant appealed to the Ninth Circuit Court of Appeal.

Held: The Ninth Circuit Court of Appeal reversed. Defendant's argument on appeal, and then throughout the entire habeas corpus petition process, was that despite having clearly and unequivocally invoked his right to the assistance of counsel, he was subsequently talked out of

his decision to invoke by the detective; a clear violation of *Miranda*. The lower courts—state and federal—all held that the discussions between defendant and the detective after his invocation were merely part of the booking process and that defendant reinitiated the questioning of his own accord. The part of defendant's interrogation at issue here proceeded as follows:

The Invocation and Interrogation: After obtaining some biographical information, the detective told defendant that he already knew what had happened, having talked to the "*guys across the street, the Sureños*," but that he wanted to "*get (his) side of the story*." Immediately upon reading defendant his rights per *Miranda v. Arizona*, defendant asked; "*I can have an attorney*?" After attempting to clarify whether defendant was trying to invoke his right to an attorney, defendant said: "*I would like to have an attorney*." Despite this clear and unequivocal invocation, the detective continued on, asking defendant if he already had an attorney (*yes*), his attorney's name (*Percy*), whether he'd spoken to Percy (*no*), and whether he would talk if he had his attorney present? To this last question, defendant replied: "(*Y*)*eah cuz I don't know much about the law*." Then, following some irrelevant discussion about defendant's father, defendant said: "*Alright. I'm willing to talk to you guys uh but just I would like to have an attorney present. That's it*." Telling defendant that they didn't know if they could get ahold of his attorney right then, the detective added: "*All I wanted was your side of the story. That's it. OK. So, I'm pretty much done with you then. Um, I guess I don't know another option but to go ahead and book you. OK. Because . . .*" An apparently surprised defendant interrupted: "*What am I being booked under*?" The detective answered: "*You're going to be booked for murder because I only got one side of the story*." Defendant asked about the procedure for getting his attorney involved, only to be told that they didn't know when his attorney might be available, and then telling him "*I don't know when you're going to call him*." To this, a confused defendant responded; "*I have to get ahold of him*? . . . *You guys don't* (*unintelligible*)." The detective responded: "*No. No, you're going to have to call him and it's going to have to be from jail*." At this point, a "*frustrat*(*ed*)" defendant gave up, asking what the detective wanted to talk to him about. After some further discussion attempting to clarify whether defendant still wanted his attorney present, defendant told the detective that he did not want to go to jail and that he would tell the truth if that "*help*[*ed*] [*him*] *walk away*." So, apparently believing that he now had a waiver, the detective continued on with the interrogation. He eventually elicited from defendant the fact that he did not feel threated by Jefte Garcia and did not see him with a gun; statements used by the prosecutor at trial and in closing argument.

Legal Analysis and Conclusion: It was agreed by the parties that defendant had in fact invoked his right to counsel. The U.S. Supreme Court has dictated that once an in-custody suspect, when being interrogated, clearly and unequivocally invokes his right to the assistance of counsel, the interrogation must cease. (*Edwards v. Arizona* (1981) 451 U.S. 477.) *Edwards* established the rule that in such a case, a defendant "is not subject to further interrogation by the authorities until counsel has been made available to him." (*Id*., at pp. 484-485.) An exception to this rule exists when the suspect himself reinitiates the questioning, deciding of his own accord to waive his right to counsel despite an earlier invocation. But a waiver of counsel must not only be voluntary, it must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege. A valid waiver is not established by merely showing that an arrestee responded to further police-initiated custodial interrogation. There is a presumption that a subsequent waiver that has come at the authorities' behest is itself the product of the inherently compelling pressures of an in-custody interrogation, and not the voluntary choice of the suspect. (*Arizona v. Roberson* (1988) 486 U.S. 675, 681.) Thus has developed a line of cases establishing

a "*prophylactic rule*" designed to prevent the police from badgering an arrestee into waiving his previously asserted *Miranda* rights. (*Michigan v. Harvey* (1990) 494 U.S. 344, 350.) The issue here, therefore, is whether defendant himself reinitiated the questioning, or was it the product of such badgering. More specifically, was defendant interrogated after his invocation without a free and voluntary reinitiation of the interrogation by the defendant himself. The lower courts in this case held that the detective's questions after defendant's invocation qualified as "*routine booking questions*," and not an interrogation. Booking questions are described as "words and actions that are 'normally attendant to arrest and custody.'" (*Rhode Island v. Innis* (1980) 466 U.S. 291.) The problem is in deciding where to draw the line between such routine booking questions and those questions that are the "*functional equivalent of an interrogation*;" i.e., "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." (*Id*., at p. 301.) The Court here held that asking defendant whether he already had an attorney, and seeking information about his father, could reasonably be considered such booking questions, and not improper. After that, however, when defendant asked what he was going to be booked for, the detective told him that he was going down on a murder charge, noting specifically that it was "*because I only got one side of the story*." This continued invitation to defendant to tell "*his side of the story*" was held by the Court to constitute an interrogation, unrelated to the booking process, and likely to provoke an incriminating response about the murder. By linking defendant's decision not to provide his side of the story to being booked for murder, implying that should he agree to submit to an interrogation, that he might not be booked, the routine booking questions evolved into an interrogation. He was in effect "badgered" into changing his mind about having his attorney present then and there. The Court further rejected the People's somewhat lame argument that defendant had already reinitiated the interrogation when he asked what he was being booked for, and later, asking what the detective wished to talk about, in that these questions were asked while the illegal interrogation was already underway. Per the Court, to "(*i*)*nitiate means 'to begin' and no reasonable jurist could review the transcript of the interaction between (the detective and defendant) and conclude that (defendant)* began *the exchange* . . ." Finding the defendant's decision to allow the interrogation to continue was not a free and voluntary choice, and that the People's use of his statements at trial to be prejudicial, the Court reversed defendant's conviction and remanded the case for retrial.

Note: The detective did his best in this case right up front to discourage an invocation, and, after the invocation, to reinitiate the interrogation, by repeatedly telling defendant that this was his opportunity to tell his side of the story, even inferring (or at least leaving defendant with the impression) that he (defendant) might be able to escape incarceration by doing so. There's some case law already hinting strongly that the pre-admonishment tactic of discouraging an invocation by telling an arrestee that this would likely be his only chance to "*tell his side of the story*" (noting, not incorrectly, that any attorney later appointed to represent him will likely prevent him from talking to the police) violates *Miranda*. (See *Collazo v. Estelle* (9th Cir. 1991) 940 F.2nd 411, 414; and *Lujan v. Garcia* (9th Cir. 2013) 734 F.3rd 917, 932.) While such a comment may be lawful *after* a free and voluntary waiver (see *People v. Spencer* (2018) 5 Cal.5th 642, 671-675.), the detective in the instant case not only used such a tactic (albeit watered down a bit) before advising defendant of his rights, but then reused it to get him to change his mind afterwards. Probably not a good idea. But the bottom line here is that once an in-custody

suspect invokes, you're done. Playing mind games with him after an invocation, trying to get him to change his mind, is not going to be looked upon favorably by the courts.

***Vehicle Searches Incident to Arrest*:**
***Vehicle Searches with Probable Cause*:**

People v. Johnson **(Mar. 28, 2018) 21 Cal.App.5th 1026**

Rule: (1) The search of a vehicle incident to arrest is not lawful unless the search is contemporaneous in time and place with the suspect's arrest. Arresting a suspect two blocks from the subsequently searched vehicle fails to meet this test despite him having been a "recent occupant" of that vehicle. (2) A warrantless search of a vehicle is lawful when there is probable cause to believe that the vehicle contains contraband or other evidence of criminal activity.

Facts: Los Angeles Police Officer Darryl Danaher was monitoring the Nickerson Garden Housing Development area of Los Angeles on a closed circuit television ("Big Brother" is watching) on May 5, 2016, when he observed a woman approach a person later identified as Corey Johnson; defendant in this case. Defendant was observed offering the woman a hand full of what appeared to be off-white, rock-like substances which the officer recognized in his training and experience to be a controlled substance. She chose one rock, giving defendant a $5 bill in exchange. As the two subjects parted ways, defendant walked a short distance to a car and proceeded to drive away. Returning a short time later, defendant was observed getting out of the driver-side door of the car and walking away. Officer Danaher radioed other officers who approached defendant about two blocks from his car and arrested him. In a search of his person, car keys were recovered but no money or drugs. Returning defendant to his car, a young woman was found seated in the driver's seat. In contacting the woman, the officer observed in plain sight what appeared to be a small bag of marijuana in the middle of the front passenger seat. The officer could also smell the odor of marijuana as the woman stepped out of the car. The woman told the officers that she was watching the car for her uncle who she identified as "Corey." A search of the car resulted in the recovery of a clear plastic bag containing several off-white solid rocks which, when later tested, was determined to be 1.37 grams of cocaine base. Also recovered was a $5 bill and an electronic benefits transfer (EBT) card in defendant's name. Charged in state court with several drug-related offenses (plus allegations that the offense was committed for the benefit of a criminal street gang, along with three prior strikes and five prior prison terms), defendant's motion to suppress the evidence recovered from his car was denied. He subsequently pled no contest to selling cocaine base and admitted that the offense had been committed to benefit a criminal street gang and that he had one prior strike conviction. In a very generous plea bargain, all other charges and the additional special allegations were dismissed. Sentenced to an eight-year state prison term, defendant appealed.

Held: The Second District Court of Appeal (Div. 7) affirmed. Defendant argued on appeal, as he did in the trial court, that the warrantless search of his car violated the Fourth Amendment. The Court analyzed two relevant legal theories applicable to the situation.
(1) *Search of an Automobile Incident to Arrest*: It has long been established that a search incident to a lawful arrest is an exception to the general rule prohibiting warrantless searches.

(*Chimel v. California* (1969) 395 U.S. 752.) The legal justifications for such a search are so that the arresting officer can remove any weapons that an arrestee might seek to use in order to resist arrest or effect his escape, and to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. However, such a search, to be lawful, has to be contemporaneous in both time and place with the arrest (i.e., at the time and at the location of the arrest). Subsequent to *Chimel*, the U.S. Supreme Court applied the same rules in the context of a vehicle search incident to an occupant's arrest, allowing for a warrantless search of the passenger compartment of an arrestee's automobile, as well as any containers found within the passenger compartment. (*New York v. Belton* (1981) 453 U.S. 454.) The High Court later extended the *Belton* "bright line" vehicle search rule to those instances when the arrestee was a "*recent occupant*" of the vehicle. (*Thornton v. United* States (2004) 541 U.S. 615.) However, just when we were getting comfortable with these easy-to-apply theories, the U.S. Supreme Court threw a monkey wrench into the works in its decision in *Arizona v. Gant* (2009) 556 U.S. 332. *Gant* adopted a new, two-part rule under which an automobile search incident to an occupant's arrest is constitutional only when (1) an unsecured arrestee is within reaching distance of the vehicle during the search, *or* (2) if the police have "*reason to believe*" that the vehicle contains evidence relevant to the crime of arrest. Per the rule of *Gant*, as refined by later cases, handcuffing and securing an arrestee into the backseat of a police car precluded a warrantless search of the arrestee's car incident to arrest *unless*, under the circumstances, an officer had a "*reason to believe*" the car contained evidence relevant to the crime of arrest. If neither of the two *Gant* justifications applied, then any search of that vehicle would be illegal. In this case, everyone conceded that there was probable cause to arrest defendant. However, he appeared to have been secured prior to the search of his vehicle. Assuming he was, there was at least a "*reason to believe*" that evidence related to defendant's offense (see "*Search of an Automobile with Probable Cause*," below). However, the Court here analyzed the rule of *Chimel*, *Belton*, and *Thornton*, as they were modified by the *Gant* decision, and held that the "*contemporaneous in time and place*" rule (i.e., that the search took place "when and where" he was lawfully arrested) must be satisfied before *Gant* applies. Because defendant was arrested two blocks from his vehicle, with his vehicle being searched only after he was transported back to it, the search of the car was not contemporaneous in time and place with his arrest. Failing to first satisfy this requirement, *Gant's* "*reason to believe*" justification for a warrantless vehicle search *cannot* be used to justify the vehicle search in this case.

(2) *Search of an Automobile with Probable Cause*: Under what is sometimes referred to as "*the automobile exception*" to the warrant requirement, the U.S. Supreme Court has established the rule that a vehicle may be searched without a warrant in any case where there is "probable cause to believe (that the) vehicle contains evidence of criminal activity." (*United States v. Ross* (1982) 456 U.S. 789.) Such a search is broader than that allowed under the "*incident to arrest*" theory, authorizing a search of any area of the vehicle in which there is probable cause to believe the evidence might be found, and is not limited to offenses for which the suspect has been arrested. Such a search is lawful even though not incident to an occupant's arrest, and need not be contemporaneous in time and place with an arrest. A search warrant is not necessary so long as the vehicle "is readily mobile and probable cause exists to believe it contains contraband" or other evidence of criminal activity. In this case, it is arguable that the officers' plain sight observation of marijuana, when combined with the odor of marijuana, supplied the necessary probable cause to justify a warrantless search of defendant's car. (See *People v. Waxler* (2014) 224 Cal.App.4th 712.) But the Court declined to decide whether it agreed with the theory of

Waxler, holding instead that the necessary probable cause was supplied by the fact that defendant had been seen with multiple rocks of cocaine base, along with a $5 bill paid to him for one of those rocks, before he returned to his car, and that neither was on his person when arrested shortly thereafter. Under these circumstances, the officers had probable cause to believe that both items might be in his car, justifying the warrantless search of that car.

Note: There is really nothing new in this case other than limiting *Gant's* "*reason to believe*" justification for a warrantless search of a vehicle to those instances where *Chimel* is first satisfied; i.e., being "*contemporaneous in time and place*." This case also helps to illustrate that in any one case, there may be several arguable theories for justifying a warrantless search. An officer (and a prosecutor) should look to all viable theories, tossing them all up against the wall in the hope that at least one of them sticks. And it only takes one. When reviewing such a case in the appellate courts, a legal theory justifying a detention, arrest, and/or search, won't even be considered unless it was discussed below; i.e., it is likely to be considered "*waived*." As for the continued validity of the *Waxler* decision, allowing for a warrantless search of a vehicle based upon no more than probable cause to believe at least *some* marijuana may be there and despite the current legality of recreational marijuana, see *People v. Fews* (Sept. 24, 2018) 27 Cal.App.5th 553, briefed in the last *California Legal Update* (Vol. 23, #11, Sept. 28, 2018).

***Warrantless Residential Entries*:**
***Proximate Cause and Civil Liability*:**
***Negligence in Making Warrantless Entries of a Residence and Civil Liability*:**
***Knock and Announce* (*or Notice*) *Violations*:**

Mendez v. County of Los Angeles **(9th Cir. July 27, 2018) 897 F.3rd 1067**

Rule: (1) Law enforcement officers may be civilly liable for injuries inflicted on an occupant of a residence when the officers' entry into that residence is both a violation of the Fourth Amendment and found to be the "proximate cause" of the resulting injuries. (2) Law enforcement officers may be civilly liable for injuries caused by a violation California's negligence rules. Tactical conduct and decisions *preceding* the use of deadly force, including the failure to comply with statutory knock and notice rules, are relevant considerations under California law in determining whether the use of deadly force gives rise to negligence liability.

Facts: Deputies from the Los Angeles County Sheriff's Department with a felony parolee-at-large warrant for a person named Ronnie O'Dell went to an address where a confidential informant had told them that O'Dell was hiding. (Or, if the Ninth Circuit's version of the facts is correct; that someone "resembling" O'Dell had been seen riding a bicycle in front of that address (pgs. 1072, 1079), or leaving that address by bike (pg. 1080, fn. 2).) Upon arrival at the address, a bicycle was seen parked in front of the residence. As some of the officers knocked on the front door of the residence, two deputy sheriffs went to the back yard to prevent any attempted escape out the rear. At the back of the house, the deputies found the yard cluttered with debris and abandoned automobiles. They also found three metal storage sheds and what was described as a "one-room shack made of wood and plywood." The shack, complete with an air conditioner mounted on the side and an electrical cord running from the main residence, had a single wooden door covered by a blanket. It was alleged that the deputies had been told at an earlier briefing

that two people were living in the shack. After checking the three metal sheds for other persons, the deputies approached the shack with guns drawn and on alert because they believed that O'Dell, reported to be armed and dangerous, might be in there. What they did *not* know was that plaintiff Angel Mendez and his wife (Jennifer) were asleep inside. Despite not having a search warrant, and failing to knock and announce their presence, one of the deputies pulled back the blanket and opened the wooden door. Plaintiff Mendez, who had been sleeping inside, rose from his futon bed with a BB gun in his hand that he (allegedly) used for rodent control. With the BB gun "point[ing] somewhat south towards (the deputy)," the deputy believed it was a small-caliber rifle. So, after yelling "*Gun*," both deputies opened fire, discharging a total of 15 rounds. Angel Mendez was shot approximately ten times, suffering severe injuries, but survived. As a result, however, he lost much of his leg below the knee and faced substantial ongoing medical expenses. Jennifer was wounded in the upper back and left hand.

Trial/Appellate History: The Mendezes filed a federal 42 U.S.C. § 1983 civil suit against the deputies and the County of Los Angeles, alleging (1) an illegal warrantless entry of the shack, (2) a failure to comply with the statutory "knock and announce" requirements, and (3) the unreasonable use of force. After a bench trial (i.e., with a judge but no jury), the federal district court judge found warrantless entry and knock and announce violations, awarding nominal damages as a result. However, he also ruled that the force used by the deputies was reasonable under the circumstances. The trial court also refused to grant recovery under California's negligence law, basing its decision on the fact that the deputies acted reasonably in shooting the Mendezes when it appeared that an armed suspect was pointing a gun at them. However, using the so-called "*provocation rule*," invented by the Ninth Circuit in earlier cases, the trial court held that the illegal entry and knock and announce violation had provoked Angel Mendez's response, necessitating the deputies' need to use force, and therefore finding the deputies to be civilly liable, awarding Mendez and his wife $4 million. The Ninth Circuit Court of Appeal, except to rule that the deputies had qualified immunity for the knock and announce violation, otherwise affirmed. (See *Mendez v. County of Los Angeles* (9th Cir. 2016) 815 F.3rd 1178; certiorari granted, reversed and remanded.) As to the use of the "*provocation rule*" in finding the deputies liable, the Ninth Circuit agreed, holding that the deputies' illegal warrantless entry did in fact provoke the need to use force, even though the act of shooting the plaintiffs itself was reasonable under the circumstances. The Court therefore upheld the trial court's finding of civil liability under the provocation rule. The Government appealed. The U.S. Supreme Court reversed, remanding the case back for further proceedings. (*County of Los Angeles v. Mendez* (May 30, 2017) __ U.S. __ [137 S.Ct. 1539]; see *California Legal Update*, Vol. 22, #7; July 22, 2017.) Specifically, the Supreme Court disapproved the Ninth Circuit's use of the "*provocative rule*," finding such a rule to be "incompatible with (the Supreme Court's) excessive force jurisprudence" in "us(ing) another constitutional violation to manufacture an excessive force claim where one would not otherwise exist." (137 S.Ct. at p. 1546.) The Supreme Court noted, however, that "plaintiffs can—subject to possible qualified immunity—generally recover damages that are *proximately caused* by any Fourth Amendment violation." (Italics added; *Id*. at 1548.) In other words, without having to resort to a non-existent "provocation rule," the Mendezes could, in principle, still recover for "injuries proximately caused by the warrantless entry." The case was remanded to the Ninth Circuit for a consideration of the "proximate cause" issue.

Held: Taking its hint from the Supreme Court, the Ninth Circuit again reversed the district court's ruling, holding that the deputies' act of illegally entering the plaintiffs' shack (ah, excuse me, "home") was in fact the proximate cause of the Mendezes' resulting injuries. The Court further found that California's negligence law provides an independent basis for recovery of all damages awarded by the district court (an issue not decided in the Ninth Circuit's earlier decision).

(1) *Proximate Cause*: Without re-analyzing the issue, the Court renewed its earlier conclusion that the warrantless entry into the shack, without a warrant, consent, or exigent circumstances, did in fact violate the Fourth Amendment. The issue here, however, was whether this illegal entry was the "*proximate cause*" of the resulting injuries to the Mendezes. In other words, "*but for*" the illegal entry, might the Mendezes not have been injured? The Ninth Circuit had no problem finding that the illegal entry was in fact the proximate cause of the resulting injuries, noting that the "law (on this) was clearly established at the time," thus precluding any argument that the deputies were entitled to qualified immunity. In reaching this conclusion, the Court talked about which of the deputies' acts or omissions constituted a "breach of (their) duty;" i.e., the failure to obtain a search warrant or the illegal entry itself. The Court agreed with the Mendezes that it was the illegal entry, but that it really mattered not in that either way, the Mendezes would have been injured given the deputies' failure to comply with the statutory "*knock and announce*" (or "*knock and notice*") requirements. Without or without a search warrant, it was the act of the deputies—concerned with possibly confronting an armed parolee-at-large and with guns exposed—bursting into the plaintiffs' shack unannounced, that triggered Angel Mendez's response of rising suddenly from his futon with what appeared to be a firearm in hand, and which in turn was what caused the deputies to start shooting. "(T)he touchstone of proximate cause in a (42 U.S.C.) § 1983 action is foreseeability." Recognizing one's privacy rights in his or her own home and the homeowner's right to protect that privacy, it was noted that any non-consensual entry into someone else's house carries with it a risk of confrontation. It is not unexpected that homeowners may possess weapons with which to protect the privacy of their home. The whole purpose of requiring a warrant, consent, or exigent circumstances, before government agents can make entry into a person's home is to minimize the risk of a violent confrontation. "Especially where officers are armed and on alert, violent confrontations are foreseeable consequences of unlawful entries." "(U)nlawful entries can invite precisely the sort of violence that occurred here, where 'an officer seeing a gun being drawn on him might shoot first.'" The Court, therefore, found it to be entirely foreseeable that an unexpected, unannounced entry by officers into one's home might well result in the homeowner's resistance. Lastly, the officers argued that Angel Mendez's act of pointing what appeared to be a firearm at the officers was a "superseding" cause of their injuries, cutting off the deputies' civil liability. The Court noted, however, that something is a superseding cause only if it is "a later cause of independent origin that was not foreseeable." "A victim's behavior is not a superseding cause where the tortfeasor's (i.e., the deputies') actions are unlawful precisely because the victim foreseeably and innocently might act that way." Here, the deputies' act of entering the shack in a manner that violates the Fourth Amendment was unlawful for the very reason that such an entry is likely to trigger a violent confrontation, as noted above. For this reason, the Court rejected the deputies' argument that Mendez's act of reaching for his BB gun, being entirely foreseeable, was a superseding cause sufficient to cut off the deputies' civil liability. As such, the Fourth Amendment violation here, when the deputies entered the Mendezes' home with guns drawn, without a warrant, consent, or exigent circumstances, and while failing to announce their

presence and their intent to enter, was held to be the proximate cause of the resulting shooting and the Mendezes' injuries.

(2) *California's Negligence Laws*: Not addressed in the Court's earlier 2016 decision was whether California's negligence rules provided plaintiffs with a separate civil liability theory. The trial court also failed to decide this issue, noting at the time that a decision on what evidence could be considered on this issue was then pending before the California Supreme Court. Since then, the California Supreme Court made its decision, ruling that "tactical conduct and decisions *preceding* the use of deadly force are relevant considerations under California law in determining whether the use of deadly force gives rise to negligence liability." (Italics added; *Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 639.) Applying the rule as announced in *Hayes*, and considering in particular the deputies' decision to enter the plaintiffs' shack unannounced, the Ninth Circuit found here that the deputies are indeed liable under a negligence theory for the injuries inflicted on the Mendezes. "Under California law, unlike under 42 U.S.C. § 1983, the failure to knock and announce can be a basis of liability. The officers knew or should have known about the Mendezes' presence. Yet they decided to proceed without taking even simple and available precautions, including announcing their presence, which could have protected the Mendezes from the severe harm that befell them." The deputies, therefore, were civilly liable under this theory as well.

Conclusion: The case was therefore affirmed to the extent that the trial court held that the deputies were liable for a violation of the Mendezes' Fourth Amendment rights. The case was further remanded to the trial court to amend the judgment to award all damages arising from the shooting in the Mendezes' favor as proximately caused by the officers' unconstitutional entry, and proximately caused by the failure to get a warrant. Lastly, the Court ordered that judgment shall also be entered in the Mendezes' favor on the California negligence claim for the same damages arising out of the shooting. Just to add insult to injury, the Mendezes were also held to be entitled to reasonable attorneys' fees.

Note: When I was first made aware of this case, upon reading the Ninth Circuit's 2016 appealed decision, and then briefing the U.S. Supreme Court's 2017 response in *County of Los Angeles v. Mendez*, *supra*, I was left with the impression that the two deputies at issue here, tasked merely with watching the back of the house, were *not* aware that the Mendezes' shack was someone's home, or that anyone was living in there at the time, except for the possible presence of Ronnie O'Dell; an armed and dangerous parolee-at-large. The current rendition of the facts, however, notes that the deputies did indeed know, or should have known, about the Mendezes living there. The existence (or not) of this prior knowledge makes a big difference in how the deputies' actions are to be evaluated. I also note that the Ninth Circuit appeared to be of the opinion that California law dictates that a "*knock and announce*" (or "*knock and notice*") violation is automatically a constitutional fourth Amendment violation. This, to my knowledge, is not true. California case law has held that entry into a residence without compliance with California's knock and notice statutes (i.e., P.C. §§ 844 & 1531) is but "*one factor*" in determining whether the entry was "*reasonable*," or otherwise, a Fourth Amendment violation. (E.g., see *People v. Byers* (2016) 6 Cal.App.5th 856, 862-864.) Lastly, if you're having difficulty deciphering the difference between "*provoking*" a violent reaction and the law on "*proximate cause*," go back and read my brief of the U.S. Supreme Court's decision in *County of Los Angeles v. Mendez* (May 30, 2017) __ U.S. __ [137 S.Ct. 1539], in *California Legal Update*, Vol. 22, #7 (July 22, 2017). I can send it to you if you don't have it. It points out that just because an officer's illegal

act might *provoke* a violent reaction does not mean that such a response was "*foreseeable*," which is a necessary element of a proximate cause finding. If you think about it in that context, it begins to make some sense.