The California Legal Update

Remember 9/11/2001; Support Our Troops

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THIS EDITION'S WORDS OF WISDOM:

"*Friendship is like peeing on yourself: everyone can see it, but only you get the warm feeling that it brings.*" (Robert Bloch)

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ADMINISTRATIVE NOTES:

New V.C. § 21760; The "Three Feet for Safety Act:" Effective 9/16/2014: "The driver of a motor vehicle overtaking and passing a bicycle that is proceeding in the same direction on a highway shall pass in compliance with the requirements of this article applicable to overtaking and passing a vehicle, and shall do so at a safe distance that does not interfere with the safe operation of the overtaken bicycle, having due regard for the size and speed of the motor vehicle and the bicycle, traffic conditions, weather, visibility,

and the surface and width of the highway" (subd. (b)). More specifically, it is illegal for the driver of a motor vehicle, when overtaking and passing a bicycle proceeding in the same direction on a highway, to pass with less than three feet between any part of the motor vehicle and any part of the bicycle or its operator (subd. (c)). If traffic or road conditions don't allow for compliance with subdivision (c), then the driver of the motor vehicle must slow to a speed that is "reasonable and prudent," and then pass only when doing so does not endanger the safety of the bicyclist, "taking into account the size and speed of the motor vehicle and the bicycle, traffic conditions, weather, visibility, and the surface and width of the highway" (subd. (d)). The penalty for a violation is $35, or $220 with an injury to the "operator of the bicycle" (subd. (e)). There is no increased penalty provided for injuring or killing the three-year-old child sitting in the jump seat behind the bicycle operator or in the trailer attached to the bicycle. And no provision is made for the idiot, suicidal, bicyclist who refuses to stay as far to the right as possible or practical, or who inexplicably swerves in front of you without warning. *Who writes this stuff*?

***Preventing Trial Counsel from Consulting with His/her Client as a Sixth Amendment Issue*:** Under the category of "*You Learn Something New Every Day*," I ran across an interesting tidbit in the Los Angeles Daily Journal (Aug. 20, 2014) in an article entitled "*Don't let opposing counsel coach witnesses during recess*" (by Robert Hutchinson and Joanna Licalsi; of the law firm of Cotchett, Pitre, and McCarthy). In this article, the authors cite the U.S. Supreme Court case of *Perry v. Leeke* (1989) 488 U.S. 272, where it was held that a criminal defendant does *not* have a constitutional right to consult with his attorney during a brief (e.g., 15 minute) recess between his direct and cross-examination. At the trial court's discretion (albeit at the prosecutor's suggestion), a judge may forbid defense counsel from consulting with his or her client during such a brief recess in the proceedings. In reading *Perry*, the Court cites *Geders v. United States* (1976) 425 U.S. 80, where it was held that preventing an attorney from consulting with his client during an over-night recess *is*, as a matter of law, a Sixth Amendment violation. *Perry* provides an exception to *Geders*. As the High Court explains, this, as a means of preserving the truth-seeking value of an effective cross-examination, is only fair. There's no reason why, by the way, *Perry* doesn't also apply to brief breaks in any witness's testimony, in a criminal or civil case, to the prosecution's as well as the defendant's witnesses. It's unknown, however, whether an hour and a half lunch break comes within the rule of *Perry* or *Geders*. It's probably closer to *Perry*, but you'll be making case law if you try it.

CASES:

***Miranda, Custody, and Interrogation of Minors*:**

United States v. IMM **(9th Cir. Mar. 31, 2014) 747 F.3rd 754**

Rule: An in-custody minor must be read his rights under *Miranda* before being interrogated. Whether or not a minor is in custody depends upon whether a reasonable person under the circumstances would have felt that he was free to terminate the questioning and leave.

Facts: IMM was 12 years old when he was playing with MM, his six-year-old female cousin, and her five-year-old brother, outside their grandfather's trailer on an Arizona Indian reservation. At some point, their grandfather found MM standing in front of the boys with her pants down. He yelled at her, asking her what she was doing. MM replied that, "They told me to take my clothes off." Although the testimony was conflicting, there was apparently a lot of yelling at all three of the kids and an attempt to apply some spankings. MM was eventually found hiding in a closet, crying. When asked if IMM had done anything to her, she nodded her head in an affirmative gesture, and said, "(*IMM*) *made* (*her*) *do it*." The police were called and a report taken. However, MM was not checked physically for indications that she'd been sexually abused, and she was never asked what specifically IMM had done to her. IMM was not interviewed at the time. Seven months later, a plain-clothes (but visibly armed) detective picked up IMM and his mother, transporting them voluntarily to a police station some 30 to 40 minutes away from their home. They were put into a small interview room with the door was shut. The detective, with apparently no training in interviewing minors, read a "Parental Consent to Interview a Juvenile Form" to IMM's mother. Although IMM was present, he was not asked whether he understood what was on the form. IMM's mother, giving her consent, agreed to allow the detective to interview IMM while she waited in the lobby. IMM was not read his rights under *Miranda*, but was instead told: "*I read your mom those rights, okay, so at any time throughout the, the interview you don't feel comfortable, you can stop and you don't have to answer any questions*." When asked if he understood, IMM replied, "*Uh-huh*." IMM was still 12 years old at the time of this interview. Although in sixth grade, he was in special education classes and could only read at a second grade level. He also reportedly suffered from emotional problems stemming from his troubled home life. His grandfather, who he called "dad" and with whom he was "pretty close," was his only positive male role model. In the ensuing 55-minute interrogation, the detective pressed IMM for the details of what had happened outside his grandfather's trailer seven months earlier. For the first half of the interrogation, IMM denied that he had done anything wrong. But then the detective began using what he referred to as a "deception," falsely telling IMM that his grandfather had seen him sexually abuse MM. Although admitting that MM had sat on his lap, he claimed that he had his pants on when that happened and that there was no sexual contact. But the detective asked questions such as, "*Would you consider your grandpa a liar*?" Halfway through the interrogation, the detective told IMM that MM's brother had told him that "*you* (*were*) *putting your weenie in her butt*." This was the first time the words "*weenie*" and "*butt*" had been used. IMM replied, "*I know*." The detective also told IMM that to believe what IMM was telling him meant that both his grandfather and MM's brother were liars. IMM was soon repeating the detective's words, reluctantly admitting that, "*Um, um, put my, put my weenie in her butt I guess*." IMM thereafter confessed to telling MM to take off her clothes and to sit on his lap. He soon admitted that he "*um, put* [*his*] *weenie in her butt or something.*" Tried as a minor in federal court, IMM's lawyer's motion to exclude these inculpatory statements was denied by the district court trial despite the admitted lack of a *Miranda* admonishment and waiver, the judge holding that IMM was not in custody at the time and that his statement was voluntary. At trial, MM's brother, who was seven years old by the time of trial, testified. After being found to be sufficiently competent to testify, MM's brother indicated that he's seen IMM "*having sex*" with MM, with MM sitting on IMM's lap with both of them having their pants pulled down. And although he admitted that he didn't know what "*having sex*" meant, he stated that he'd seen IMM put his "*dingamajiger*" into MM's "*private*;" the part that "*poops*." He also testified, however, that his mother had told

him what to say (which she denied). The trial court convicted IMM based upon this evidence for having sexually abused MM (per 18 U.S.C. §§ 2241 and 2246). IMM appealed.

Held: The Ninth Circuit Court of appeal reversed, remanding the case to the district court for further proceedings. The primary issue on appeal, obviously, was whether IMM's inculpatory statements were properly admitted into evidence against him. IMM's argument was that contrary to the district court's ruling, he was "*in custody*" at the time of his interrogation and that he was therefore entitled to a *Miranda* admonishment before questioning, which he didn't get. Without a "knowing, intelligent (and) voluntary" waiver of his rights, as described by *Miranda*, his statements should have been suppressed. The Ninth Circuit agreed. It is now recognized (by some, at least) that "a frighteningly high percentage of people . . . confess to crimes they never committed." The Court here contributed the opinion that this "risk is all the more troubling—and recent studies suggest, all the more acute—when the subject of (a) custodial interrogation is a juvenile." The *Miranda* decision itself was premised on the inherently coercive nature of a custodial interrogation, which is why the High Court set out "a set of prophylactic measures designed to safeguard the constitutional guarantee against self-incrimination;" i.e., the so-called "*Miranda* rights." This applies to juveniles as well. The Court first held that IMM was in fact in custody when questioned in this case and was therefore entitled to a *Miranda* admonishment. Taking into consideration the "totality of the circumstances," recognizing that the test is how a reasonable person in the suspect's position would have felt under the circumstances, and evaluating the recognized factors relevant to a custody inquiry, the Court reached the following conclusions. First, IMM's age had to be considered. Being only 12 years old, he was particularly susceptible to the pressures of an interrogation conducted by law enforcement. Next, it was noted that he was driven to the police station, some 30 to 40 minutes away from his home, in an unmarked police car by an armed law enforcement officer. There was no evidence that, although his mother voluntarily went along with this procedure, he was given any choice in the matter. During his interrogation, IMM was repeatedly confronted with fabricated evidence of guilt by an interrogator who engaged in elaborate deceptions, forcing IMM to admit to the detective's version of the event or concede that his grandfather, who IMM looked up to as his father, and the victim's brother, were liars. "(T)he detective's aggressive, coercive, and deceptive interrogation tactics created an atmosphere in which no reasonable twelve year old would have felt free to tell the detective, an adult making full use of his position of authority, to stop questioning him." Next, the physical surroundings of the interrogation, being a small room with a closed door which IMM may have assumed was locked, while at a police station some 30 to 40 minutes away from his home, and where IMM was isolated from his mother, weighed strongly in favor of a finding of custody. The Court further found the "duration of the detention" (i.e., some 55 minutes after a 30 to 40 minute drive to the police station) to favor a finding of custody. Lastly, the Court found the "degree of pressure applied," as a "full-fledged interrogation (and) not a brief inquiry," where the questioning was "both hostile and accusatory," all favored a finding that IMM did not feel free to end the questioning. Considering all the above, IMM reasonably would have felt that he was "in custody" for purposes of *Miranda*. As such, he should have been read his rights before being questioned. The Court also concluded that reading the "Parental Consent to Interview a Juvenile Form" (the contents of which were not described) to IMM's mother, with no evidence that IMM even listened, let alone understood, was insufficient to constitute a *Miranda* admonishment. Telling IMM simply that if he didn't "feel comfortable" he could stop the interview is legally insufficient to constitute a *Miranda*

admonishment. As such, there was no evidence that IMM understood his rights under *Miranda* or that he voluntarily waived them. The case was remanded to the trial court for retrial.

Note: Neither the detective nor the agency he worked for is identified in this decision. Having occurred on an Indian reservation, it had to have been either an Indian law enforcement officer or the FBI. But I also note that the decision was written by Ninth Circuit Justice Stephen Reinhardt, who never met a law enforcement officer he didn't distrust. So you have to take the rendition of the facts in this case with a grain of salt. But should the facts as described be anywhere near what actually happened, the detective not having recognized the need for a *Miranda* admonishment and waiver under these circumstances is inexcusable. In fact, given IMM's age and emotional issues, unless the *Miranda* rights had been spoon-fed to IMM, one by one, taking extra care at each step to insure that he understood what they meant, a simple reading of the rights by themselves might not have been legally sufficient in this case to insure a knowing, intelligent and voluntary waiver. And then compounding this grievous error with the use of "deceptions," to literally twist a confession out of a slow-learning 12-year-old minor, and a reversal in this case was preordained. I have to assume the detective felt that in reading the "Parental Consent to Interview a Juvenile Form" to IMM's mother was sufficient. And as I recall, this federal form does in fact contain the individual rights as contained in a standard *Miranda* admonishment. But getting mom's approval is not the same as getting a waiver from the minor, and it's the minor's rights with which you have to be concerned. *Think.*

***Special Needs School Searches*:**

In re J.D. **(Apr. 15, 2014) 225 Cal. App. 4th 709**

Rule: A search of student's locker on a high school campus by school administrators is lawful so long as there is "reasonable grounds" to believe that the locker searched contains contraband. Involvement of local law enforcement does not convert a school administration-initiated search into a government search with its higher probable cause standards.

Facts: On February 9, 2011, a shooting occurred on an AC Transit bus in Richmond. The next day, a female student at Richmond High School told Charles Johnson and Rose Sanders, campus security officers (CSO), that T.H., a student at the school, had been the shooter and that she'd also been told what T.H. had done with the gun. (The Court doesn't tell us what she'd been told in that regard.) The school's administration was informed. School administrators directed Johnson to locate and detain T.H. and determine if he had any weapons. Sergeant Russell of the Richmond Police Department, who happened to be on campus at the time, was advised of the situation. He directed Johnson to find T.H., but not confront him yet. CSO Driscoll, who was responsible for student lockers, was asked to find out what locker was assigned to T.H. CSO Driscoll, however, told CSO Johnson and Sgt. Russell that T.H. didn't normally hang around his own locker, but was seen several times in the area of locker #2499. In fact, on the day of the shooting, Driscoll had seen T.H. and his girlfriend standing in front of locker 2499, although it was unknown which specific locker in that area they might have been using. This occurred at a time when the students were not supposed to be in the hall area where T.H. had been seen; an occurrence that seemed suspicious to Driscoll. CSOs Driscoll and Johnson were also aware that Richmond High students would often share their assigned lockers with other students in an

attempt to conceal contraband such as drugs and other items not permitted on campus. With this knowledge, CSOs Driscoll and Johnson, along with Sgt. Russell, went to locker 2499 and opened it, but found nothing but books inside. So they opened the lockers immediately adjacent to it. In locker #2501, next to 2499, they found a backpack which, when removed from the locker, was found to contain a sawed-off shotgun. Miscellaneous papers in the backpack had defendant J.D.'s name on them. J.D. was contacted by the officers and *Mirandized*. After waiving his rights, he admitted to possessing the shotgun, saying that he had been bothered by other students at the school and had the weapon for his own safety. (Meanwhile, T.H. was located and was found to have a handgun in his own backpack which he was carrying with him. The disposition of his case is not described in the decision.) A petition was filed in Juvenile Court alleging, among other charges, that J.D. possessed a firearm in a school zone; a felony per P.C. § 626.9(b). His motion to suppress the shotgun was denied and the petition was sustained. J.D. appealed.

Held: The First District Court of Appeal (Div. 1) affirmed. In upholding the search of the locker in which J.D.'s shotgun was found, the Court first discussed some very frightening statistics involving school violence, from high-profile school shootings to individualized acts of violence. As for the merits of the case, it was noted that because the "government has a heightened obligation to safeguard students whom it compels to attend school," the courts use a relaxed legal standard in determining whether or not a search of a student's locker is lawful. "*Probable cause*" is not required. "Neither a warrant nor probable cause is inevitably required "when '*special needs* [exist] beyond the normal need for law enforcement." Protecting students and staff is just such a "*special need*." "*Reasonableness*" is the applicable standard, balancing the relevant interests. Students continue to have a privacy interest. That privacy interest, however, must be balanced with the government's interest in educating and training young people in a safe, secure, and peaceful environment. The issue here, therefore, was the reasonableness of the school officials' conduct under the circumstances. The courts look primarily at two factors in determining the reasonableness of such a "*special needs*" search: (1) Whether the action (i.e., the search) was justified at its inception, and (2) whether the search as actually conducted was reasonably related in scope to the circumstances which justified an interference with the students' privacy interest in the first place. A search of a student by a teacher or other school official is "*justified at its inception*" when there are "*reasonable grounds*" for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Here, the CSOs had specific information from an identified student informant that another student had shot someone the day before, and that he might have the gun he used on campus. As to the second factor, such a search is permissible in its scope when the measures adopted are reasonably related to the objectives of the search and are not excessively intrusive in light of the age and sex of the student and the nature of the infraction, and when the execution of the search is not arbitrary, capricious, nor for the purpose of harassment. In this case, with the information the officers had, they initiated an investigation that was narrow in its scope; i.e., to locate and contact a minor suspected of having a gun, and to search specific lockers in which they had reason to believe the gun might be hidden. Based upon the information CSO Driscoll had, it was reasonable to concentrate on locker #2499 and those immediately surrounding that locker. The fact that J.D.'s shotgun, and not T.H's pistol, turned up in the locker searched is irrelevant to the issue as to whether the search was lawful in the first place. Also, the involvement of the Richmond city police officers did not make this search any less of a search authorized and conducted by school administrators, done for purposes of ensuring the safety of

others on the Richmond High School campus. "(T)he secondary role of the police officers does not cancel the fundamental feature of this case—administrators seeking to secure the school premises from potential for violence." The search of the locker in which J.D.'s shotgun was found, therefore, was lawful.

Note: The "*reasonable grounds*" justifying the search may also be described as a "*reasonable suspicion*." Even requiring only a reasonable suspicion, however, on its face, the CSOs in this case were acting on very weak information. The student who ratted T.H. off knew from her own firsthand information, having apparently witnessed it, that T.H. shot someone the day before. But she only knew from another unidentified student what T.H. might had done with the weapon. And then the choice of lockers to search was determined by where T.H. "hung out," and even then it was the locker next to the one they primarily suspected that turned out to contain J.D.'s shotgun. But given the potential dangerousness of the situation, the CSOs really couldn't just ignore the possibility that a student was carrying a pistol around campus. So as weak as the information might have been, what would have been grossly *unreasonable* was to expect the officers to do nothing. There comes many instances in a police officer's career where he or she wonders whether there is enough information to act, but where ignoring the possibility that a crime is being committed or others are in immediate danger simply dictates that the situation not be ignored. This was one of those occasions. And note that the court specifically held that the involvement of the local police did not jack it up to the "*probable cause*" standard applicable to government searches. This is consistent with prior case law that has held that a school search by a "*School Resource Officer*" who, although employed as a municipal police officer but while working full time on a high school campus, is still guided by the relaxed "*reasonable suspicion*" standard applicable to school officials. (See *In re William V.* (2003) 111 Cal.App.4th 1464; and *In re Alexander B.* (1990) 220 Cal.App.3rd 1572, 1577-1578.)

***Fighting, per P.C. §§ 415(1) and/or 415.5(a)(1), on School Campuses*:**

In re Fernando C. **(June 26, 2014) 227 Cal. App. 4th 499**

Rule: Students "fighting" on a high school campus aren't violating the law absent a provable assault or battery. Such offenses are to be left to school officials to handle administratively.

Facts: Fernando C. was a 15-year-old student at a high school where he was "having some trouble" with another student. So the two of them decided to settle their differences by staging a fistfight behind an equipment shed. The police were eventually called in and interviewed the combatants. Defendant admitted to exchanging punches with the other boy. A delinquency petition was filed against defendant alleging a violation of P.C. § 415.5(a)(1); fighting on a school campus. When it was noted that subdivision (f) of section 415.5 specifically excludes from its provisions students enrolled at that school, the Juvenile Court found that defendant had violated P.C. § 415(1), fighting in a public place, as a "lesser included offense," and sustained the petition on that basis. Defendant was placed on probation and appealed.

Held: The First District Court of Appeal (Div. 5) reversed, dismissing the petition outright. On appeal, defendant argued that sustaining the petition on the theory that he violated section 415(1) was improper in that he was not initially charged with violating that section and it is not legally a

"lesser included offense" of the charged P.C. § 415.5(a)(1). The Court agreed. There was no argument that P.C. § 415.5(a)(1), fighting on a school campus, didn't apply to defendant in that, as noted by the trial court, subdivision (f) specifically excludes from the section's provisions persons who are enrolled at the school in question. Defendant, as a student of that school, cannot violate section 415.5(a)(1). The Court then found section 415(1), fighting in public, is not a lesser included offense of section 415.5(a)(1). To be a "*lesser included offense*," all the statutory elements of the lesser offense must be included within the elements of the greater offense. Or, as stated differently, if a crime cannot be committed without also necessarily committing a lesser offense, the latter (415(1)) is then a lesser included offense within the former (415.5(a)(1)). Here, 415(1) cannot be a lesser included offense of section 415.5(a)(1) in that the two sections have distinctively different elements. Section 415.5(a)(1) applies when the defendant unlawfully fights "within any building or upon the grounds of any school," while section 415(1) requires the fight to occur in a "public place." As such, the trial court improperly sustained the petition for a P.C. § 415(1) which was not originally alleged; a "due process" violation. Also, section 415(1) would not have applied anyway in that a public high school is not a "*public place*," as required by the section. Because the term "*public place*" is not defined in the statute (or any other statute), the Court analyzed the legislative history of the section. Although "(v)iewed in the abstract, a school has both public and nonpublic aspects," it was noted that "(i)t is not open to all who wish to enter, as is a public square or park." After citing the many statutory provisions for exclusion of the public in general from school campuses, the Court retuned to subdivision (f) of section 415.5 (where it provides that students registered at the campus in question are excluded from the provisions of the section), finding an overall legislative intent to leave student fights on school grounds to disciplinary measures as administered by school authorities rather than prosecution under the juvenile justice system. This legislative intent logically slops over into how section 415(1) should be applied, necessitating a finding that school campuses are not "public places" for purposes of this section. It was further noted that in those cases where there is a provable assault or battery, there are any number of other penal statutes available to the state with which to prosecute a suspect (e.g.; assault [P.C. § 240], assault on a person on school property [P.C. § 241.2], assault on a school district peace officer [P.C. § 241.4], assault on a school employee [P.C. § 241.6], battery [P.C. §§ 242, 243], battery on a person on school property [P.C. § 243.2], and battery against a school employee [P.C. § 243.6]. But for the "*relatively minor offense*" of simply fighting, such instances are best left to the school officials to handle administratively.

Note: I suppose what this comes down to is that in any instance where you have students fighting in what we commonly refer to as a "*mutual combat*" situation (i.e., where we can't prove who started it or threw the first punch, and who was merely defending himself), and the fight occurs on a school campus, grades K through 12, then we don't have a crime. Write the incident up (it may become relevant in a later prosecution of a subsequent dispute where we have a clear, provable aggressor) and leave the handling of the dispute to the school administrators. On the other hand, where you have a provable assault or battery, and we can prove any of the sections listed above other than just 415(1) or 415.5(a)(1), then take the appropriate enforcement actions and submit it to your local prosecutor. The only alternative is legislative action to remove subdivision (f) of section 415(a)(1), or the "public" element contained in section 415(1).

***Consensual Encounters and Detentions within the Curtilage of a Home*:**
***Detentions in a Residence by Ordering a Suspect to Come Out*:**

People v. Lujano (Aug. 26, 2014) __ Cal.App.4th __ [2014 Cal. App. LEXIS 771]

Rule: Consensual encounters within the curtilage of a residence are lawful so long as conducted at a location where the public is inferably invited. Detentions at that same location are also lawful when a "reasonable suspicion" of criminal activity exists. But, ordering a subject out of his home without probable cause constitutes an illegal detention in the home.

Facts: A Riverside liquor store was robbed at gunpoint on December 19, 2010, by two suspects. Both robbers wore black hooded sweatshirts, gloves, and masks, as noted by several surveillance cameras in the store. One of the suspects, who brandished what appeared to be a revolver, was estimated to be about six feet tall and 300 pounds. The other was shorter and thinner. The store manager and a friend who was present at the time were both sprayed in the face with pepper spray. Neither victim could later identify either of the robbers. Nine days later (Dec. 28th), mid-afternoon, Riverside police officers Henry Park and Bryan Galbreath were on patrol when they observed a man in the driveway of a residence stripping copper wire from an air-conditioning unit. The driveway was enclosed within a low, chain-link fence. Passing through an open or unlocked gate to that fence, the officers made contact with the man who identified himself as Albert Vargas. He told the officers that he was visiting the resident, who he knew only as "Rick" (later identified as defendant). He further explained that he was stripping copper wire from the air-conditioner because it no longer worked. While talking to Vargas, it was noted that a side door that led from the driveway into the house was ajar; partially open but not enough to walk through. Officer Galbreath approached the door, leaned inside, and identified himself as a police officer. Calling into the house, he "command(ed)" anyone in the house to come to the door. In response, defendant came out from the bedroom area and into Officer Galbreath's view. Officer Galbreath ordered him to turn around and walk backwards out of the door and onto a concrete step. At that point, Officer Galbreath "took physical control of him" (described as putting his "hands on him"), requiring him to keep his hands clasped behind his back (but not handcuffed). Defendant consented to a search of his person, resulting in the discovery of a plastic baggie containing methamphetamine. He was arrested at that point. A consensual search of the residence resulted in the recovery of a semiautomatic pistol (not the one used in the robbery) and a speed loader for a .38-caliber revolver. Also recovered were a pair of shoes, three pairs of work gloves, two black hooded sweatshirts—one sized 2XL, the other 3XL—and two cans of pepper spray; one empty and one full. Everything except for the smaller of the two sweatshirts were recovered from defendant's bedroom. It was noted at that time that the clothing all matched that worn by the suspects from the earlier liquor store robbery, as shown on the surveillance video. Also, defendant matched the height and weight of the larger of the two robbers, as well as having similar facial hair. Charged with armed robbery, being a felon in possession of a firearm, receiving stolen property (the firearm), and various narcotics-related offenses in state court, defendant's motion to suppress the evidence recovered from his person and his home was denied. Defendant then pled guilty to everything except the robbery (with a

use of a firearm enhancement), for which he went to trial. Convicted by a jury, defendant was sentenced to prison for 14 years and four months. He appealed.

Held: The Fourth District Court of Appeal (Div. 2) reversed, ruling that defendant's motion to suppress should have been granted. First, after acknowledging the well-established rule that "the physical entry of the home is the chief evil against which . . . the Fourth Amendment is directed," the Court first held that the officers were legally entitled to make contact with Vargas in the driveway of defendant's residence. Defendant argued that since his driveway was enclosed behind a low chain-link fence, it came within the curtilage of his home. Assuming (without specifically deciding) that the driveway was in fact within the curtilage of his home, the Court upheld the legality of the officers' entry into that area to contact Vargas. The "officers were entitled to enter onto the driveway without a warrant to attempt to initiate a consensual conversation with Vargas, in addition to approaching the house to speak with any occupants." In so doing, they exercised the same "license to intrude" as might any other citizen, such as a door-to-door salesman. It is not unlawful to conduct a "consensual encounter" under these circumstances even though such a contact required entry into the curtilage of defendant's home. Also, having observed Vargas in the apparent act of stripping copper wire from an air conditioner, even though not enough to establish probable cause, was, taking into account the officers' training and experience, sufficient for them to reasonably suspect that some type of illegal activity might be in progress (e.g., "theft or trespassing"). A warrantless entry into the curtilage to investigate that possibility was legally justified to "confirm or dispel their reasonable suspicion Vargas may have been engaged in criminal activity." In contrast, the contact with defendant inside his own home was found to be "more problematic." The officers' contact with Vargas did no more than substantiate their reasonable suspicion, at best, to believe that something illegal was going on. The partially open door to the residence did not help to establish probable cause. Nor did anything Vargas said or did. By commanding anyone who might be in the house to show themselves, and then ordering defendant to back out of the house and taking control of him physically after he did so, Officer Galbreath detained defendant. But the detention was initiated while defendant was still in the house; i.e., when he was commanded to show himself and then to back out onto the outside step. Such a warrantless intrusion into a suspect's residence (even if only verbally) requires full probable cause, just as if the officer had entered the house to conduct the detention. "[I]t is the location of the arrested person, and not the arresting agents, that determines whether an arrest (or detention) occurs within a home." As a product of this unlawful detention, defendant's consent to be searched, and the subsequent consent to search his home, were invalid. The evidence should have been suppressed.

Note: If it provides you with any comfort, you might like to know that only the evidence found in the house, related to the robbery, was suppressed. When defendant pled guilty to the drug charges, prior to going to trial, he also waived his right to appeal on those issues. So the drug-related convictions were upheld. Also, don't take this case as requiring probable cause to effect all detentions. Detentions still require only a "*reasonable suspicion*" of criminal activity. It was, in effect, only the verbal intrusion into the residence, by ordering defendant to show himself and then to back out, that required probable cause. Recognizing this, the Court noted that "(i)f Officer Galbreath had *invited* defendant to step outside of his home to talk, and defendant did so voluntarily, then any detention would be treated as if it occurred outside the home, and our analysis would be quite different." (Italics added) The Court also suggested that if Officer Galbreath had taken it a little slower, making reasonable inquiries as to defendant's status as it

related to the residence, it would have been apparent that no crime was occurring and no detention would have been necessary. Not bad advice.