The California Legal Update

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

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THIS EDITION'S WORDS OF WISDOM:

"*We must reject the idea that every time a law is broken, society is guilty rather than the lawbreaker. It is time to restore the American precept that each individual is accountable for his actions*." (Ronald Reagan)

IN THIS ISSUE:

ADMINISTRATIVE NOTES:

***Ignored Legal Update Subscription Requests*:** If you attempted to sign up to be added to the California Legal Update e-mail list during the last half of July, and did not receive a written response from me and were not automatically notified when Legal Update #9 was published on July 29th, the fault is mine. For reasons I cannot explain (my computer seemingly having a mind of its own), an unknown number of requests to be added to the *Legal Update* e-mail list that were sent to me in late July were automatically syphoned off into my computer's junk file. Up until now, I would typically delete my junk file en mass without checking to see what was in there (I get tired of the Viagra ads and illicit solicitations to be someone's "buddy" of one sort or another); anywhere from about 20 to several hundred such messages a day. So if you were in there, you got ignored. Please try again and I promise you won't be ignored again.

CASE LAW:

***Burglary of a Room within a Residence*:**

***People v. Garcia* (Nov. 14, 2017) 17 Cal.App.5th 211**

Rule: An invited guest can burglarize a room within a home even though he is otherwise lawfully using that room. Entering a room for the purpose of committing a felony not authorized by the home's owner is a burglary.

Facts: In April, 2011, the 47-year-old defendant Pedro G. Garcia was staying as a weekend guest at his sister-in-law's (Esmeralda's) home in Oakley, California, with other relatives, as the family celebrated a birthday party at Esmeralda's house on Saturday (the 16th) and a baptism and baby shower at another residence on the same street on Sunday (the 17th). Also staying at Esmeralda's house for the weekend was 12-year old Jane Doe I, who was both Esmeralda's and defendant's niece. Defendant (who was married to another of Esmeralda's sisters-in-laws) and his wife were using Esmeralda's bedroom while other family members stayed in other rooms throughout the house. At around 4:00 p.m. on the 17th, everyone except Jane Doe I and defendant walked down to the other house for the baby shower. As Jane Doe I was in Esmeralda's bedroom (the same room being used by defendant and his wife for the weekend) getting ready to go to the shower, defendant walked in and shut the door. Over the next five minutes, defendant raped and sodomized her. Just as he was finishing and getting ready to leave, Esmeralda, who had returned home, came into the room. Jane Doe I told Esmeralda what had happened. A later forensic examination revealed tears and bruising that was indicative of a sexual assault. Defendant was later interviewed by a detective from the Contra Costa Sheriff's Department. He eventually admitted to the sexual acts, but claimed that Jane Doe I was the

aggressor. At trial, defendant changed his story and denied the allegations. Esmeralda testified at trial that she never would have given defendant permission to go into her house or her bedroom to sexually assault Jane Doe I. Defendant was convicted (along with other charges) of having committed a forcible lewd act upon a child under the age of 14 (P.C. § 288(b)(1)), with an attached allegation that he did so during the commission of a first degree burglary (P.C. §§ 667.61(c)(4), (d)(4), & 460(a)), and sentenced to life without the possibility of parole (See P.C. § 661(j)(1); the so-called "One Strike Law"). (Defendant was also tried for a similar assault on Jane Doe II; the facts and results of which were not reported.) Defendant appealed.

Held: The First District Court of Appeal (Div. 2) affirmed. Defendant was convicted of having committed a forcible lewd act upon a child under the age of 14, as described in P.C. § 288(b)(1) (among other charges). The statutory punishment for this offense is normally 5, 8 or 10 years. However, attached to this charge was an allegation that he committed this offense during the commission of a burglary of an inhabited dwelling—a first degree burglary—as described in P.C. § 460(a). Pursuant to P.C. § 667.61(j)(1), with the jury finding this allegation to be true, defendant's sentence was upped to life without the possibility of parole. Attempting to avoid such a harsh penalty, defendant argued that the law did not support the theory that by entering Esmeralda's bedroom, which he was using as his own bedroom while visiting, was a first degree burglary. The issue on appeal, therefore, was whether an invited guest in a home—when that guest enters a room with the intent to commit a lewd act on a child—commits a residential burglary by entering the room with that intent even though he was staying in that room with the permission of the owner during the visit. In answering this question, the Court looked to the history and the purpose behind the One Strike sentencing law. The Court first noted that "(h)eightened sentences are intended when 'the nature or method of the sex offense "place[d] the victim in a position of *elevated vulnerability*."'" (Italics in original) Jane Doe I, at the age of 12 and trapped by defendant in Esmeralda's bedroom, was indeed vulnerable, justifying the imposition of an increased punishment. As for whether entering a room within a house is a burglary, the Court started with the statutory definition of burglary: A person commits burglary when he or she "enters any house [*or*] *room* . . . with intent to commit grand or petit larceny or any felony." (P.C. § 459; italics added.) "Every burglary of an inhabited dwelling house … is burglary of the first degree." (P.C. § 460(a)) There are two exceptions: It is *not* a burglary when the person making the entry at issue has "an unconditional possessory right to enter as the occupant of that structure." Nor is it a burglary when the person making the entry is "invited in by the occupant who knows of and endorses the felonious intent." Homeowners and permanent occupants, therefore, cannot commit a burglary in their own dwelling. Nor can an invited guest, such as defendant here, commit a burglary of the residence into which he is invited. But this second rule is limited to entries made with a lawful purpose, or with the resident's endorsement of the defendant's known unlawful purpose. As for defendant in this case, as an invited guest, the Court found that he did *not* have an "unconditional possessory right in Esmeralda's bedroom." More importantly, although invited to use Esmeralda's room for lawful purposes, he did not have Esmeralda's consent to enter her bedroom to rape Jane Doe I. As such, defendant did not fit into either of the two exceptions described above. "In short, (the Court) conclude(d) that as a matter of law, defendant, as an invited overnight guest in Esmeralda's home, could be found to have burglarized the room in which he was staying in order to commit a forcible lewd act against Jane Doe I."

Note: In reaching its decision in this case, the Court cited other cases where a lawful occupant of a residence was found to have committed burglaries of a room within that same residence: E.g.; *People v. Abilez* (2007) 41 Cal.4th 472, 508–509; defendant found guilty of burglarizing his mother's room in her home even though he lived in the home, and *People v. Richardson* (2004) 117 Cal.App.4th 570; defendant invited to stay on the living room couch burglarized the bedrooms of his sister and her roommate by his unauthorized entry into, and taking items from, those rooms. Within the last month and a half, a brand new case came down from the Fourth District Court of Appeal (Div. 1) where it was held that a person does not have an unconditional possessory interest in hotel room he himself rented, and can commit a burglary of that room by entering it with the intent to commit a felony. (*People v. Rodriguez* (July 19, 2018) 25 Cal.App.5th 1100.) Bottom line: Don't overlook the possibility of charging a suspect with the burglary of a room even in those cases where he or she is otherwise a lawful occupant.

***Detentions of Students*:**
***Searches of Students*:**
***School Resource Officers*:**
***Anonymous Informants*:**

In re K.J. **(Jan. 3, 2018) 18 Cal.App.5th 1123**

Rule: School officials may detain students without any reasonable suspicion to believe that the student is then engaged in criminal activity, so long as the detention is not arbitrary, capricious, or for the purpose of harassment. School officials may search students based upon "reasonable grounds." School resource officers (and their cover officers) adopt the same detention and search authority of students as enjoyed by school officials. Information from anonymous informants must be corroborated in order to justify the search of a student on campus.

Facts: Fairfield High School's assistant principal, William Cushman, received a text message from a student alerting him to the fact that a male student at the "Yeto campus" (a "credit recovery school") of the high school had a loaded gun. Vice Principal Cushman knew the identity of the student who had sent him the text, but declined to reveal her name due to her fear of retaliation. (The parties later stipulated that she would therefore be treated as an "anonymous tipster.") The police were called. The campus resource officer, Fairfield Police Officer Paula Gulian, met Vice Principal Cushman at the Yeto campus. Per department protocol, Officer Gulian called for a backup officer to assist. At Officer Gulian's request, Principal Cushman contacted the tipster for more information. The tipster told Principal Cushman that she had received a message via the social media application, "SnapChat," with a video showing a student, sitting in a classroom, displaying a gun and a magazine clip. The tipster didn't know the student's name, but described him as a black male with dreadlocks, and noted that he had previously attended Fairfield High. From this, they were able to narrow their suspicions down to two possible students. Given the names of the two students, the tipster identified defendant as the person she'd seen in the Snapshot with the gun. Upon arrival of Officer Quinn as backup, defendant was brought out of class by the Yeto campus principal. He was immediately detained by the officers. His backpack was removed from his possession and he was handcuffed. Defendant was searched, resulting in the recovery of an unloaded 9mm Taurus semi-automatic pistol and a magazine containing seven rounds. Following a combined motion to suppress

evidence and jurisdictional hearing in Juvenile Court, the magistrate sustained a petition alleging that defendant possessed a weapon on school grounds. On appeal, defendant argued that his motion to suppress should have been granted because he was detained and searched without reasonable suspicion.

Held: The First District Court of Appeal (Div. 4) affirmed. On appeal, defendant argued that the detention and search violated the Fourth Amendment in that Officer Gulian did not have a reasonable suspicion to believe that criminal activity was afoot or that he was armed and dangerous.

(1) *The Detention*: It has been held that students on a public school campus enjoy the same Fourth Amendment protections from unreasonable searches and seizures as does everyone else out in the world. And although the typical Fourth Amendment restrictions on governmental (i.e., law enforcement) actions do not typically apply to private citizens (i.e., non-law enforcement), the courts have held that 'the actions of public school officials are 'subject to the (same) limits placed on state (governmental) action. . . . '" Public school officials, therefore, "must . . . respect the constitutional rights of students in their charge against unreasonable searches and seizures." In balancing a public school student's legitimate expectation of privacy, however, with the school's obligation to maintain discipline and to provide a safe environment for all students and staff, the courts have, in effect, lowered the standards normally imposed on law enforcement, holding that school officials may detain a student for questioning on campus without any reasonable suspicion that the student is then engaged in criminal activity, so long as the detention is not arbitrary, capricious, or for the purpose of harassment. This lower standard applies as well to the actions of a school resource officer assigned to a school, such as Officer Gulian in this case. The fact that a second officer (i.e., Officer Quin), who was not a school resource officer, was involved, when his involvement was necessary for purposes of officers' safety and the safety of other students and staff (and in this case, in accordance with their department's protocol), does not affect the outcome. Defendant's detention by Officers Gulian and Quin, therefore, did not violate the Fourth Amendment even if they hadn't had a reasonable suspicion that defendant had a gun. In so holding, the Court further held that nothing occurred (by the school principal escorting him out of his class and into the hands of two law enforcement officers, handcuffed and searched) that could be considered as "more intrusive," necessitating a higher standard of proof. Handcuffing a suspect, when necessitated by concerns for officer safety, are not so intrusive as to require a higher standard of proof such as the "probable cause" required to justify an arrest. Here, with it being suspected that defendant may be armed, handcuffing him for purposes of safety was entirely appropriate.

(2) *The Search*: Defendant argued that he was searched without "reasonable grounds," and thus in violation of the Fourth Amendment. The issue here was not the scope of the search, but rather whether it was constitutionally "justified at its inception" (i.e., was there sufficient information to establish the necessary reasonable suspicion to legally justify the search?). Again, the standards for a search of the person when conducted by school officials (including school resource officers) are lower than typically required of law enforcement; i.e., "reasonable grounds" (or a "reasonable suspicion"), as opposed to full probable cause. Under the circumstances of this case, the court had no problem finding that reasonable grounds for the search of defendant's person clearly existed. Generally, information coming from an anonymous source (as the student tipster in this case was considered to be) is legally insufficient to constitute a reasonable suspicion. (*Florida v. J.L.* (2000) 529 U.S. 266.) However, when an anonymous source is "suitably

corroborated," reasonable suspicion (or even "probable cause") may be found. In this case, for instance, the anonymous tip came from a student at Fairfield High who sent a text message to the vice-principal, advising him that there was "a guy with a loaded gun" at the Yeto campus. It was known that the tip came from a tipster who had personally seen a SnapChat video of the student with the gun. The tipster knew who the defendant was although she didn't know his name. But she was able to describe him by gender, race, and hairstyle; all which fit defendant's physical description. When given the names of two possible suspects, the student tipster was able to identify defendant as the student in the video. All this detail showing the tipster's firsthand knowledge provided sufficient corroboration to establish the necessary reasonable suspicion to justify a search of defendant's person. It was also noted that the U.S. Supreme Court in *Florida v. J.L.* determined that in certain highly dangerous circumstances, such as with a firearm on a school campus, "the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability." (*J.L.*, *supra*, at pp. 272–273.) Either way, the Court found the search of defendant's person, resulting in the recovery of the firearm and its ammunition, to be lawful under the circumstances of this case.

Note: This is a great case for re-establishing the standard of proof necessary for school officials to detain, and then search, a student on a public school campus. The case also clearly provides that school resource officers (and their cover officers) adopt that same lowered standard of proof. But I think the People perhaps conceded a little too much by stipulating that the "tipster student" was to be classified as an anonymous source. More correctly, she was an untested, confidential informant. Either way, however, corroboration was necessary. In *Florida v. J.L.* the tipster was a true anonymous source who, while claiming that the defendant was armed, declined to identify himself and didn't report anything that any passerby couldn't have seen by just driving by J.L. as he stood on a street corner. How the tipster knew the J.L. was armed was not explained. Here, in contrast to *J.L.*, the student tipster, although wishing to remain anonymous, didn't have a problem with the vice principal knowing who she was as she freely worked with the vice principal, explaining to him the source of her knowledge and helping him establish defendant's identity.

***Searches of Vehicles; Inventory Search*:**
***Searches of Vehicles with Probable Cause*:**
***Searches of Hidden Compartments Within a Vehicle*:**

People v. Zabala **(Jan. 11, 2018) 19 Cal.App.5th 335**

Rule: The warrantless search of a hidden compartment in a vehicle is not lawful as a part of an inventory search, but is lawful with probable cause to believe that the vehicle contains contraband.

Facts: Defendant was subjected to a legal traffic stop. Upon discovering that his driver's license was suspended, the officer decided to impound defendant's vehicle. (Neither the stop nor the legality of the impound was contested.) A pre-impound inventory search of defendant's car was conducted. Four blue baggies filled with a white powdery substance were found under the driver's seat. Deputy Grant Dorsey of the Santa Clara Sheriff's Department, who was trained in recognizing how illegal drugs are packaged and transported and was subsequently accepted by

the trial court as an expert in recognizing controlled substances, believed the substance to be cocaine. He testified that because all of the bags were of the same equal size and were in packaging material, that this was indicative of the bags containing illegal controlled substances. However, a field test of the contents of the baggies came back negative. Deputy Dorsey therefore determined that the white powdery substance was probably a cutting agent for drugs, to be mixed with a controlled substance to increase its volume. After examining the baggies, Deputy Dorsey noticed that the radio console "looked loose, like it had been manipulated previously." Based upon Deputy Dorsey's training and experience, he believed this to be indicative of a hidden compartment in which drugs could be stored. Upon removing the console, several bags of a white crystalline substance that he recognized as methamphetamine were found behind the stereo and between the air-conditioning ducts. Charged in state court with a pile of narcotics-related charges, defendant's motion to suppress was denied, the trial court ruling that the methamphetamine was discovered during a lawful inventory search. Defendant therefore plead no contest to transporting a controlled substance, possessing a controlled substance for sale, and driving with a suspended license. Defendant appealed.

Held: The Sixth District Court of Appeal affirmed. The People's theory for justifying the discovery of the methamphetamine behind the vehicle's console was that it was found during a lawful inventory search. Inventory searches conducted in conjunction with the impoundment of a vehicle are indeed lawful. As noted by the Court: "Inventory searches are not subject to the warrant requirement because they are conducted by the government as part of a 'community caretaking' function." However, they are to be conducted in accordance with a law enforcement agency's standardized procedures, thus limiting the discretion of the officer conducting the search. Also, inventory searches are not to be used for purposes of investigating criminal wrongdoing, but rather to locate the vehicle's documentation and to note the presence of valuables. "The inventory must be reasonably related to its purpose which is the protection of the car owner from loss, and the police or other custodian from liability or unjust claim. It extends to the open areas of the vehicle, including such areas under seats (where the baggies were found), and other places where property is ordinarily kept, e.g., glove compartments and trunks." While the lawfulness of an inventory search has been extended to closed containers in a car, such a search is not to be conducted for the purpose of "the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." Defendant argued here that Officer Dorsey exceeded the scope of a lawful inventory search when he removed the dashboard console; a search that was done for the purpose of discovering criminal wrongdoing and inconsistent with the Sheriff's Department protocol. The Court agreed, ruling that a concealed area behind the dashboard console is not an area where people commonly put items of value, nor is it a closed container such as a suitcase, box, or backpack. Removal of car parts (i.e., the console in this case) in an effort to locate contraband and other property does not come within the purview of an otherwise lawful inventory search. However, that does not mean that the evidence discovered behind the console should have been suppressed. Although not lawfully discovered as a part of the inventory search, the methamphetamine was instead lawfully discovered during a "*probable cause*" search of the vehicle. A search based upon probable cause to believe that a vehicle contains evidence of criminal activity is lawful. With probable cause to believe a vehicle contains contraband, officers may conduct a warrantless search anywhere in the vehicle that a warrant could have authorized. (*Carroll v. United States* (1925) 267 U.S. 132, 150-153.) Here, an officer, trained in recognizing how illegal drugs are packaged and

transported, found baggies of a drug-cutting agent in the vehicle during a lawful inventory search. He also noted that the dashboard console had been tampered with, as if removed for the purpose of secreting something behind the console; an action recognized by the expert officer as a means of hiding drugs. This, the Court held, was sufficient probable cause to believe a controlled substance would be found in a hidden compartment behind the console. The warrantless search of that hidden compartment, therefore, was lawful.

Note: This is a good example of why a prosecutor must argue any and all viable legal theories that might apply to the circumstances of a particular case, throwing them all against the wall in the hopes that at least one of them sticks. Failing to do this could result in an appellate court holding that the un-argued theory was waived and won't be considered on appeal. But the real importance of this case is in its ruling that hidden compartments in a vehicle cannot be searched under the theory of an inventory search. They can be searched, however, if probable cause is developed to believe that the car contains contraband.

***Massiah Error*:**
***Sixth Amendment Right to Confrontation*:**
***Jail House Informants*:**
***Statements Against Penal Interest, per E.C. § 1230*:**
***Exception to the Aranda/Bruton Rule*:**

People v. Almeda et al. (Jan. 12, 2018) 19 Cal.App.5th 346

Rule: Use in evidence of a jailhouse informant to testify to an incarcerated defendant's admissions is lawful so long as the informant is acting on his own and not as an agent of law enforcement. Use of a suspect's admissions made to an informant are admissible against both the suspect and a co-defendant so long as such admissions are not "testimonial" in nature, come within a recognized hearsay exception, and are otherwise reliable.

Facts: At some time before January 17, 2013, someone did a "drive by shooting" at defendant Michael John Almeda's house. Almeda and his buddy, co-defendant Rodolfo Simon Villa, suspected that Alex Chavez was responsible. On January 17th, Almeda and Villa saw Chavez (in the company of his girlfriend, Jacqueline Jones) driving a white Chevrolet Suburban. A confrontation resulted with both Almeda and Villa shooting at the Suburban, striking Chavez in the upper neck, "transect(ing)" his spinal cord and killing him. Jones later identified Almeda as the driver and Villa as the passenger. Bullet fragments were recovered from the Suburban of two different calibers; .40- and .38-caliber. Several .40-caliber shell casings were recovered from the scene. A .40-caliber bullet was recovered from Chavez's body. Both defendants were later arrested and booked into county jail. They were then formally charged with first degree murder (P.C. § 187(a)) with special circumstances (that the murder was intentional and perpetrated by discharging a firearm from a vehicle (P.C. § 190.2(a)(21)), along with other charges and allegations, and arraigned in court. Both had attorneys appointed to represent them at that time. For several months while awaiting trial, Villa randomly drew Jeremy Rhodes (awaiting sentencing on an armed robbery conviction) as a cellmate. While housed together, Villa bragged to Rhodes about Chavez's murder, telling him all about the shooting in excruciating detail, including (for instance) that he used a .40-caliber Glock while Almeda had a .357 magnum pistol

(with later testimony that that pistol was capable of shooting .38-caliber bullets). Recognizing such vital information as his ticket to a shorter sentence, Rhodes contacted one of the Sheriff's jail deputies and told him he had information concerning a murder. Although the Sacramento County Sheriff has a policy of not asking inmates to inform on other inmates, and does not maintain any official informants themselves, Rhodes' request to talk to a prosecutor was passed on to the Sacramento District Attorney's Office. Defendant was eventually allowed to talk to a Sacramento Deputy District Attorney and a D.A. investigator. Over three meetings, Rhodes provided the DDA and her investigator with a lot of information about Villa's crimes (the murder and others), including details not previously known. Rhodes also provided information concerning Almeda's participation in Chavez's murder, as told to him by Villa. However, no deals were made with Rhodes concerning his pending sentencing (even though Rhodes specifically asked for a reduced sentence) until his attorney was included in the discussions. Eventually, with Rhodes' attorney on board, the prosecution agreed to a reduction in his sentence so long as he cooperated fully and it was determined that he had testified truthfully. At one point in the discussion, Rhodes asked if he should ask Villa anything in particular. The prosecutor clearly told Rhodes, "*No*." The D.A. investigator told Rhodes that if Villa volunteered anything, Rhodes could listen like he had done. But the prosecutor then told him; "*Don't try and pry. If he tells you something that's fine, but, you know, I don't want to get you in a situation where you have any issues with him*." At trial, Rhodes was in fact called as a witness and testified to all of the above (and more). Rhodes later received a four-year reduction in his sentence in exchange for his testimony. Both defendants were convicted of first degree murder with special circumstances (plus allegations), and were sentenced to life in prison without parole. Both defendants appealed.

Held: The Third District Court of Appeal affirmed. On appeal, both defendants challenged the admission into evidence of Rhodes' testimony regarding co-defendant Villa's jailhouse confession as it related to both Villa and Almeda.

(1) *Massiah Error*: Co-defendant Villa argued that admitting Rhodes' testimony violated his Sixth Amendment rights under *Massiah v. United States* (1964) 377 U.S. 201. *Massiah* prohibits the admission into evidence statements the government deliberately elicits from a defendant without counsel being present, after the right to counsel has attached (i.e., after his arraignment). Specifically, co-defendant Villa argued that Rhodes was a government agent through whom the government deliberately elicited his incriminating statements. Almeda joined in Villa's argument under *Massiah*. The Court rejected all these arguments. Specifically, the Court ruled that *Massiah* is not violated where the defendant fails to show that the informant, working in conjunction with the police, deliberately elicited incriminating statements, taking some action beyond merely listening (i.e., acting as a "listening post"). Specifically, the evidence must establish that the informant (1) was acting as a government agent, i.e., under the direction of the government pursuant to a preexisting arrangement, with the expectation of some resulting benefit or advantage, and (2) deliberately elicited incriminating statements. Here, Rhodes initially listened to and elicited Villa's incriminating statements completely on his own without any direction from law enforcement or the prosecution. And although an "agency" between the prosecution and the informant may be inferred from the circumstances (i.e., a "de facto" agency relationship), there was no evidence that that occurred here. To the contrary, once Rhodes had begun talks with the prosecution, and he asked if there was anything he should ask Villa, he was clearly told that he should do no more than listen to Villa should Villa volunteer any more

information concerning his crimes. Although Rhodes may have, at some point, solicited incriminating statements from Villa on his own initiative, doing so on his own is insufficient to establish a *Massiah* violation. Villa must also show that Rhodes solicited information under the government's direction and pursuant to a preexisting agreement, actual or implied. Villa failed to provide any such proof.

(2) *Testimonial nature and reliability of statements*: Almeda further argued that (1) admitting Rhode's testimony as it related to his own involvement violated his Sixth Amendment rights because the statements were testimonial and unreliable, and (2) the testimony was not admissible as statements against penal interest because it was untrustworthy. The Court rejected these arguments. At one time, the rule was that a co-defendant's hearsay statements (Villa's, in this case) implicating the defendant (Almeda, in this case), when made to a third party (Rhodes, in this case) who later testifies as to those hearsay statements (referring here to Villa's statements to Rhodes about Almeda's involvement in the murder, as testified to by Rhodes), were inadmissible against the defendant (Almeda), at least when the co-defendant himself (Villa) does not testify. This is because without the co-defendant testifying, the defendant is denied his right to confront his accuser, in effect, because he is deprived of his right to cross-examine the co-defendant as to what he told the testifying third party. (*People v. Aranda* (1965) 63 Cal.2nd 518; *Bruton v. United States* (1968) 391 U.S. 123.) However, since the U.S. Supreme Court's decision in *Crawford v. Washington* (2004) 541 U.S. 36, the new rule has been (and currently is) that *Aranda* and *Bruton* only apply when the complained-of statements are "*testimonial*," in nature. "If a statement is not testimonial, 'it does not implicate the (Sixth Amendment's) confrontation clause, and the issue is simply whether the statement is admissible under state law as an exception to the hearsay rule.'" (*People v. Arceo et al.* (2011) 195 Cal.App.4th 556, 573.) While what is, and what is not, testimonial is not always clear, it is a rule that to be testimonial, it must have been contemplated that such statements will be used as a substitute for courtroom testimony. The U.S. Supreme Court has held that a jail inmate's incriminatory statements made to a cellmate simply do not come within the rule. "'[S]tatements made unwittingly to a Government informant' and 'statements from one prisoner to another' are nontestimonial statements." (*Davis v. Washington* (2006) 547 U.S. 813, 825.) Being "*non-testimonial*," therefore, Villa's statements made to Rhodes, even as they implicated Ameda, are admissible (not violating the Sixth Amendment) so long as they come within the definition of an exception to the hearsay rule and are otherwise reliable. In this case, Almeda's statements fall with the statutory "*statement against penal interest*" (Evid. Code § 1230) exception to the hearsay rule. Under the facts of this case, where Villa's statements were not exculpatory or self-serving, fully implicating himself in Chavez's murder, they were definitely against his penal interest (i.e., subjecting him to potential criminal liability). He also provided Rhodes with information about Chavez's murder and other illegal activities previously unknown to law enforcement. Under these circumstances, Villa's statements were clearly trustworthy and reliable. His statements to Rhodes, therefore, were admissible through Rhodes' testimony, implicating both Villa and Almeda in Chavez's murder.

Note: The Courts do not like jailhouse informants. Such informants almost always have a strong motivation to lie, looking out for their own interests. History is replete with instances of jailhouse informants providing fabricated evidence in an attempt to mitigate their own pending sentence. So we know we have to be careful when we use them, if we use them at all. Note also that the plea deal we give to such informants in exchange for their testimony is something about which the defense is entitled to know, it being a *Brady* violation (*Brady v. Maryland* (1963) 373

U.S. 83.), and definite grounds for a reversal, should such information be withheld. But the prosecutor couldn't have done a better job in the way she handled Rhodes in this case, involving Rhodes' attorney and making the whole deal contingent on his full cooperation and that he testify honestly. She also made sure that Rhodes was not led to believe that he should pump Villa for any further information, which would have made him a "government agent" and creating a Sixth Amendment/*Massiah* issue; i.e., questioning a charged defendant without his attorney being involved. Good job by all concerned in this case.