The California Legal Update

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

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THIS EDITION'S WORDS OF WISDOM:

"*Yesterday I did nothing and today I'm finishing what I did yesterday.*" (*Anonymous*)

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ADMINISTRATIVE NOTES:

***The Medicinal and Adult-Use Cannabis Regulation and Safety Act*:** I'm embarrassed to admit that the California Legislature slipped one in on me and I didn't even notice until reading an article in the Los Angeles Daily Journal. Effective June 27, 2017, an extensive revision of the "*medicinal*" and "*recreational*" use of marijuana laws took effect as Senate Bill 94; *all 149 pages of it*. As a result, the outline I've been providing on marijuana is now totally out of date and, for the most part, obsolete. So I'm in the process of redoing the whole thing, just as soon as I get done toking on this dooby. (*Just kidding*. Marijuana in any form is still illegal where I live, and where we choose to pickle our brains the old fashion way; *alcohol*. For myself, I'll stick to my Vodka and Kahlua Black Russians and the occasional dark beer.) I'll let you know when the revised outline is ready for publication.

Warrantless Searches for Firearms and W&I § 5150 Subjects: Upon committing a person to a mental facility for a 72-hour evaluation pursuant to W&I § 5150, and discovering that he or she owns or has possession of one or more firearms or other deadly weapons, the goal of law enforcement is to take those weapons from him or her so that upon release the patient will not have ready access to them. Taking such weapons from 5150 patients is authorized under W&I § 8102(a), which dictates that you "*shall*" (meaning it's mandatory) confiscate all firearms and other deadly weapons owned or possessed by someone committed pursuant to W&I § 5150 (or is a person as described in W&I §§ 8100 [*Patients Under Treatment for a Mental Disorder and Who May be Dangerous to Self or Others*] or 8103 [*Committed Mental Patients*]). However, unless those weapons are taken pursuant to a free and voluntary consent (which some argue is difficult to get from someone with mental issues), or they are in plain sight, it has been held that to go looking for them is a "*search*" which under the Fourth Amendment, as a general rule, requires a search warrant. (See *People v. Sweig* (2008) 167 Cal.App.4th 1145; petition granted.) The Legislature subsequently made it easy for you, authorizing such a search warrant under subdivision (a)(10) of P.C. 1542; "(w)hen the property or things to be seized include a firearm or any other deadly weapon that is owned by, or in possession of, or in the custody or control of, a person described in W&I § 8102(a)," which includes section 5150 patients. It is strongly suggested that you abide by this authority and get a warrant whether or not you also charge the person with a criminal offense. Even if not criminally charged, using a search warrant negates any issue as to the lawfulness of such a search and/or seizure. And getting such a warrant is your best protection against a lawsuit or other accusation that you acted unlawfully, and to help insure that all such weapons are located and safely secured.

CASES:

***Use of Deadly Force and Failure to Warn*:**
***Civil Liability, Qualified Immunity, and Clearly Established Precedent*:**

White v. Pauly **(Jan. 9, 2017) __ U.S. __ [137 S.Ct. 548; 196 L.Ed.2nd 463]**

Rule: In determining whether a police officer is entitled to "qualified immunity" from civil liability for the use of deadly force, there must be clearly established prior precedent for the officer to follow, placing the statutory or constitutional question beyond debate. An officer arriving late at the scene of a volatile situation may lawfully assume that officers already there have complied with the legal prerequisites to the use of deadly force, such as issuing a warning.

Facts: Two women observed Plaintiff Daniel Pauly on a highway near Santa Fe, New Mexico, driving erratically—"*swerving all crazy*"—between 9 and 10 p.m. one evening. They called 911 as they followed Daniel's car close behind him with their bright lights on. Reportedly feeling threatened, Daniel pulled over at an off-ramp and confronted the women. After a brief, nonviolent encounter, Daniel left the women at the off-ramp and drove a short distance to a secluded house where he lived with his brother, Samuel Pauly. Officers Kevin Truesdale, Ray White, and Michael Mariscal responded to the women's 911 call, meeting them at the off-ramp. After talking to the women, the officers decided that although they did not have sufficient probable cause for an arrest, they would at least contact Pauly to get his side of the story, making sure nothing else happened, and finding out if Pauly was intoxicated. So while Officer White waited at the off-ramp in case Pauly returned, Officers Truesdale and Mariscal drove to the address listed in Pauly's vehicle registration information less than a half mile away. At that location, Pauly's pickup truck was found at a second residence behind another house. Lights were on inside and two men could be seen moving around inside. Officer White, called to the scene by Officers Truesdale and Mariscal, left the off-ramp and headed in their direction. Before White arrived, however, Daniel and the other male, later identified as Daniel's brother, Samuel, became aware of the officers' presence outside and called to them; "*Who are you*?", and "*What do you want*." According to Daniel's version of the facts, the officers "laughed and responded; '*Hey*, (*expletive*), *we got you surrounded. Come out or we're coming in*.'" Identifying themselves, both officers demanded that the Paulys open the door, warning the occupants that they were coming in. Daniel Pauly later claimed that he never heard the officers identify themselves. The Paulys armed themselves—Samuel with a handgun and Daniel with a shotgun —informing the officers at the same time that "*We have guns*." Officer White arrived just in

time to hear that statement, causing him to draw his own gun and take cover behind a stone wall some 50 feet from the front of the house. Just a few seconds after the "*We have guns*" statement, Daniel, screaming loudly, stepped part way out of the back door and fired two shotgun blasts. A few seconds after those shots, Samuel opened the front window and pointed a handgun in Officer White's direction. Officer Mariscal immediately fired at Samuel, but missed. Four to five seconds later Officer White shot and killed Samuel. Daniel (and Samuel's estate) sued the officers in federal court pursuant to 42 U.S.C. § 1983, alleging that they violated the Fourth Amendment in their use of excessive force. The officers filed a motion for summary judgment (i.e., a pretrial motion to dismiss), which was denied by the trial court. In a pre-trial appeal of that decision, a divided Tenth Circuit Court of Appeal affirmed. The United States Supreme Court granted certiorari.

Held: The United State Supreme Court reversed in a unanimous decision, holding that at least Officer White (if not the others) is entitled to qualified immunity from civil liability. Assuming the plaintiffs' version of the facts are true (as an appellate court must do in such an appeal), the issue was whether the officers are entitled to qualified immunity in a lawsuit alleging the excessive use of force; a Fourth Amendment "seizure" issue. The trial court had held that under established precedent, reasonable officers should have known that the Paulys would defend their home in the manner they did, and that Officer White, hiding behind a wall, didn't need to use deadly force under the circumstances. And even if he did, he should have issued a verbal warning first. A majority of the Tenth Circuit agreed with the trial court. But the U.S. Supreme Court, in reversing this decision, ruled that prior appellate court precedent describing the use of deadly force in such a circumstance in which Officer White found himself was not clearly established. The rules allowing for qualified immunity in a civil case such as this one are clear: "Qualified immunity attaches when an official's conduct '*does not violate* (italics added) clearly established statutory or constitutional rights of which a reasonable person would have known.' (Citation) While this Court's case law 'do[es] not require a case directly on point' for a right to be clearly established, 'existing precedent must have placed the statutory or constitutional question beyond debate.' (Citation) In other words, immunity protects 'all but the plainly incompetent or those who knowingly violate the law.' (Citation)" While the Supreme Court has laid out general "use of force" principles (e.g.: *Graham v. Connor* (1989) 490 U.S. 386; *Tennessee v. Garner* (1985) 471 U.S. 1.), such precedent does not necessarily provide officers in the field with "fair and clear warning" as to what constitutes a lawful use of force in a particular circumstance. Without expressing any opinion as to whether Officers Truesdale and Mariscal are entitled to qualified immunity, the Court ruled that Officer White is, finding no specific prior case decision which Officer White could have used to guide him in his actions. "Clearly established federal law does not prohibit a reasonable officer who arrives late to an ongoing police action in circumstances like this from assuming that proper procedures, such as officer identification (and warning that deadly force may be used), have already been followed. No settled Fourth Amendment principle requires that officer to second-guess the earlier steps already taken by his or her fellow officers in instances like the one White confronted here." So at least as to Officer White, the trial court should have ruled in his favor in evaluating his right to qualified immunity.

Note: The Supreme Court was critical of the Tenth Circuit, as well as other federal appellate courts (citing as an example a similar Ninth Circuit use-of-deadly-force case which was reversed in *City & County of San Francisco v. Sheehan* (May 18, 2015) __ U.S.__ [135 S.Ct. 1765; 191 L.Ed.2nd 856]; see *California Legal Update*, Vol. 20, # 6, June 2, 2015.), for not understanding what "*clearly established*" means in such cases. As noted by the Court: "(*I*)*t is again necessary to reiterate the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality*.'" Also, it was noted that Officers Truesdale and Mariscal are not necessarily entitled to qualified immunity. For instance, a civil jury will likely have to decide whether they did in fact properly identify themselves and then issue a warning. But their case was remanded as well for an evaluation of the issue using the correct "clearly established law" test. Officer White, on the other hand, *is* entitled to believe that everything Truesdale and Mariscal had done up to that point was by the book, including notifying the Paulys that they were police officers and warning them that failure to submit might be met with deadly force. At least there is no prior case saying that he couldn't reasonably so believe as a late-comer to an already volatile, in-progress situation. But even as to Officer White, the Court noted that there may be other reasons not yet litigated for denying him qualified immunity, such as if necessary to decide whether he did in fact arrive too late to have witnessed Officers Truesdale and Mariscal's actions that may have precipitated the shootout. So no one is off the hook yet. *But why is this important to you*? In this era of lawsuit-happy criminal defendants, the Supreme Court here is telling the intermediate appellate courts that unless they (the courts) can find a prior published case decision more on point and more specific than just some one-size-fits-all general case authority, law enforcement officers are to be protected from being sued under circumstances where they had no way of knowing that what they were doing was illegal or a violation of the Constitution. But this also makes it important for you to be aware of the cases that are on point in that you are going to be held to that knowledge. Hence, the importance of reading and being familiar with the legal resources available to you, such as (but not limited to) the *California Legal Update*.

***Detentions Based Upon Telephone Tipster Information*:**
***Arrests*; *Flight from an Attempted Detention*:**
***Searches Incident to Arrest*:**
***Searches of Vehicles with Probable Cause*:**

United States v. Williams **(9th Cir. Jan. 11, 2017) 846 F.3rd 303**

Rule: (1) Information from an identified telephone tipster, corroborated by the circumstances, is sufficient reasonable suspicion to detain. (2) Flight from a lawful detention constitutes probable cause to arrest. (3) Search of a person incident to his custodial arrest, including the pockets of his clothing, is lawful. (4) The warrantless search of a vehicle with probable cause to believe an occupant is dealing in drugs is lawful.

Facts: At about 4:40 a.m. one morning, a private citizen called into the Las Vegas police hotline to report a specifically described individual (i.e., "an adult black male sleeping inside a grey Ford

Five Hundred."), who, according to the citizen, was engaged in a particular type of criminal activity (i.e., "known to sell drugs in the area."). The citizen provided the address which was known to be a "high crime area." The citizen, who "just wanted the person moved out of the area," identified himself by name, address, and phone number. Officers Alvin Hubbard and Thomas Keller of the Las Vegas Metropolitan Police Department (LVMPD), working patrol in a marked police car, were sent to the scene to investigate. The officers immediately found the described vehicle in a parking lot, boxed in by two other cars on each side and a parking curb in front of the vehicle. The Ford had temporary license plates, preventing the officers from doing an initial vehicle check. The officers stopped their vehicle immediately behind the Ford, blocking it in, and turned on their overhead lights and "take-down" lights, with their spotlights shinning into the vehicle's windows. Defendant, the sole occupant of the car, was apparently asleep in the front seat. As the officers got out of their vehicle and approached from both sides, with Officer Keller on the passenger side with his gun drawn, a startled defendant immediately sat up, looked both right and left, and the started his car. He put the Ford into reverse, but then apparently realizing he had nowhere to go, shifted back into park. Officer Hubbard, on the driver's side, yelled at defendant through the closed windows to turn off the engine and get out of the vehicle. Defendant complied, turning off the ignition and exiting the car. But then as Officer Hubbard got to within three or four feet of him, defendant ran. Officer Keller ran after defendant. Officer Hubbard got back into their patrol unit and followed suit. The pursuit lasted about a minute before defendant, who had gotten two or three buildings away from the parking lot, suddenly fell down. He remained on the ground with his hands spread out where he was held by Officer Keller at gunpoint until Officer Hubbard got there. Officer Hubbard performed a "protective sweep of his backside" (?), and handcuffed him. Hubbard then did a patdown of Defendant's backside. Defendant was lifted from the ground and brought to the front of the patrol vehicle where Officer Hubbard searched defendant's front side, reaching into all of his pants' pockets. In the right front pocket, Officer Hubbard found a plastic bag containing crack cocaine. In the left front pocket, $1,165.00 in cash was found. The officers then brought defendant back to the Ford which was also searched. It was found to contain all the comforts of home; pots, pans, food, and utensils. A purse was found in the back seat which, when unzipped, was discovered to contain a gun. Defendant was subsequently charged in federal court with being a felon in possession of a firearm and with being in possession of a controlled substance with the intent to distribute, plus an allegation that he possessed a firearm in furtherance of a drug trafficking offense. Defendant filed a motion to suppress the gun and the drugs. The district court judge ruled that defendant had been subjected to an unlawful detention and arrest, suppressing the resulting evidence. The government appealed.

Held: The Ninth Circuit Court of Appeal reversed.

(1) *Reasonable Suspicion to Detain*: The trial court had ruled that the officers, upon initially arriving at the location of the parked Ford, lacked sufficient reasonable suspicion to detain defendant. The Ninth Circuit Court of Appeal disagreed. While a detention must be based upon something more than a mere "hunch," the information known to the police officers at the time need not amount to a preponderance of the evidence nor even probable cause. Only a "reasonable suspicion" of criminal activity must be present. The totality of the circumstances must be

considered. It is true that information from anonymous informants is insufficient to justify a detention. (E.g., *Florida v. J.L.* (2000) 529 U.S. 266.) Here, however, the officers had information received from a "telephone tipster" who fully identified himself, including his phone number and address. This tipster described current on-going criminal activity (i.e., a trespass), also indicating some knowledge of other more serious wrongdoing by the person described (i.e., selling drugs in the area). The area itself was known by the officers to be a "high crime area." Upon arrival in the area, the described vehicle, with defendant sleeping inside, was exactly as the telephone tipster had indicated. The officers would have been remiss had they not at least checked the parking lot for the described vehicle and, upon finding it, contacted the driver. Upon contacting defendant, his immediate actions added to the officers' suspicions; i.e., looking around furtively and attempting to drive away. And then when he was contacted, defendant attempted to flee on foot. With all this, the officers were held to have had more than enough reasonable suspicion to detain defendant for investigation.

(2) *Probable Cause to Arrest*: In Nevada, it is a crime for a person to "willfully resist[], delay[] or obstruct[] a public officer in discharging or attempting to discharge any legal duty of his or her office." (i.e., Nevada Revised Statute (N.R.S.) § 199.280.) (In California, the equivalent section is P.C. § 148(a)(1).) Also by statute in Nevada (N.R.S. § 171.123), a police officer may detain a suspect when the officer has a reasonable suspicion that the suspect has committed, is committing, or is about to commit a crime, in order to obtain that individual's identity. (See Note, below) As noted above, the officers had sufficient reasonable suspicion to justify defendant's detention. Because the officers had a right to detain him, N.R.S. § 171.123 provided the officers with the legal right to obtain his identity. Defendant's refusal to provide his identity, as evidenced by his attempt to flee from the scene, constituted probable cause to arrest him for obstructing the officers in the performance of their duties pursuant to N.R.S. § 199.280. The trial court had ruled that defendant's flight only allowed for his lawful detention—not his arrest—based upon language in *United States v. Smith* (9th Cir. 2011) 633 F.3rd 889, and *Illinois v. Wardlow* (2000) 528 U.S. 119. The trial court, however, failed to consider the interplay between N.R.S. §§ 171.123 and 199.280, which, together, make it an arrestable offense for a lawfully detained individual to refuse to identify himself. (See *Hiibel v. Sixth Judicial District Court of Nevada* (2004) 542 U.S. 177.) Defendant, therefore, was lawfully arrested. (See Note, below, for how this might play out in California.)

(3) *Search Incident to Arrest*: The law is well settled that when a person is subjected to a lawful custodial arrest, his person may thereafter be searched incident to that arrest. This includes "'a relatively extensive exploration' of the areas within the arrestee's immediate control" (*United States v. Robinson* (1973) 414 U.S 218), including inside the pockets of his clothing. Having already decided that defendant had been lawfully arrested, the search of his clothing, and the recovery of the money and the dope, was also held to be lawful incident to his arrest.

(4) *Search of the Vehicle*: The rule is that "(o)fficers may conduct a warrantless search of an automobile, including containers within it, when they have probable cause to believe that the vehicle contains contraband or evidence of criminal activity." Here, having just found defendant sleeping (and maybe living) in his vehicle, followed up by finding crack cocaine and a large amount of money on his person, in considering the totality of the circumstances, the Court held that there was sufficient probable cause to believe that more contraband, or other evidence of

drug dealing, would be found in his car. The search of the car and any containers in it (i.e., the purse, where the gun was found) was held to be lawful.

Note: While you may be shocked that the Ninth Circuit came down on the side of the government for a change, this really isn't a close case. The federal district court judge was way off base by granting defendant's motion to suppress. Under California jurisprudence, the individual who called in and complained about defendant sleeping in his car, and that he sold dope from his car, would be classified as a "*citizen informant*" whose information is presumed to be reliable. (*People v. Ramey* (1976) 16 Cal.3rd 263, 269.) There would have been an issue about the basis for the tipster's conclusion that defendant was dealing dope, not knowing what expertise the tipster had on this topic, but with all the corroboration noted by the officers when they found defendant's car just as the non-anonymous tipster had predicted it would be, their attempt to detain defendant for investigation was clearly lawful. The next issue, if we were reviewing this case under California's rules, would have been the lawfulness of his arrest. California does not have a statute that specifically says that a detained individual's refusal to identify himself is a crime in itself, as Nevada does. Under what little case law there is, it is an issue whether a simple refusal to identify oneself during a lawful detention is a violation of P.C. § 148(a)(1), i.e., by "delaying" the officers in the performance of their duties. (I think it *is* a crime. Not everyone agrees.) However, while the lawfulness of an arrest of a detainee for simply refusing to identify himself may be an issue, the flight itself from an attempted lawful detention is not. It has been held that refusal to submit to a lawful detention, such as by attempting to run away, is probable cause to arrest the subject pursuant to Penal Code § 148(a)(1) (*In re Gregory S.* (1980) 112 Cal.App.3rd 764, 780.) (Don't confuse this with running from an attempted "*consensual encounter*." Flight from an attempted consensual encounter is *not* a crime: *People v. Souza* (1994) 9 Cal.4th 224.) So whether in Nevada, or California, defendant's flight in this case was a crime justifying his arrest. The legality of the subsequent search of his person incident to that arrest, and of his vehicle with probable cause, are not really difficult issues.

***Texting While Driving, Vehicular Manslaughter, and Gross Negligence*:**

People v. Nicolas **(Feb. 23, 2017) 8 Cal. App. 5th 1165**

Rule: Texting while driving and making cellphone calls may be the basis for a felony gross vehicular manslaughter finding where such actions lead to a fatal vehicle collision.

Facts: Defendant had an apparent addiction to her cellphone. On April 27, 2011, at about 10:59 a.m., she was driving her Prius on northbound Interstate 405 (the San Diego Freeway) in Orange County, moving along at about 80 miles per hour; late for a lunch date with her boyfriend. She was texting while driving ("*TWD*"). Phone records later showed that in the preceding 17 minutes, defendant had sent eight text messages, received six others, and answered two phone calls lasting 27 and 20 seconds, respectively. Suddenly, she came upon stop-and-go traffic that had been stopped for some 20 to 30 seconds. Defendant, with her attention on her cellphone,

never looked up as she plowed full speed into the rear of a Hyundai, killing its passenger, Deanna M. Pulled out of the passenger side of her destroyed Prius by another motorist, a dazed defendant asked; "*What happened*?" Told by her rescuer that she had "hit somebody incredibly fast, and they're not doing well," defendant said that she had been in a "*big hurry*" to meet her boyfriend for lunch. As she stood near the center divider surveying the damage she had done, apparently unconcerned that another person was in the process of dying due to her negligence, defendant was observed yelling, "*Oh, my God, my car*." At some point she asked the person who had pulled her from her car to retrieve her cellphone for her. That person attempted to do so, but found it damaged, offering instead to let defendant use his. Another person who spoke to defendant later testified that "any question I asked her she would answer; '*Where is my phone*?'" Defendant eventually retrieved her cellphone herself and made two short calls. She was on her phone when a California Highway Patrol Officer arrived on the scene. When the officer asked defendant for her license and registration, she glanced at the officer and just "kept talking on the phone." There was no evidence of defendant showing any concern for the dying passenger in the other vehicle, Deanna M. Charged in state court with vehicular manslaughter with gross negligence (P.C. § 192(c)(1)), defendant was convicted and sentenced to six years in state prison. She appealed.

Held: The Fourth District Court of Appeal (Div. 3) reversed, but only due to instructional error. On appeal, defendant first challenged the sufficiency of the evidence showing gross negligence. Gross vehicular manslaughter is defined as "driving a vehicle in the commission of an unlawful act, not amounting to a felony, and *with gross negligence*; or driving a vehicle in the commission of a lawful act which might produce death, in an unlawful manner, and *with gross negligence*." (Italics added; P.C. § 192(c)(1).) Gross negligence has been defined in prior cases as the exercise of so slight a degree of care as to raise a presumption of conscious indifference to the consequences. The state of mind of a person who acts with conscious indifference to the consequences is simply one of; "*I don't care what happens*." The test is objective; i.e., whether a reasonable person in the defendant's position would have been aware of the risk involved. Per California Jury Instruction CALCRIM No. 592: "Gross negligence involves more than ordinary carelessness, inattention, or mistake in judgment." In this case, the Court had no problem finding that the jury's finding of gross negligence was supported by the evidence. Per the Court, this was not a case of ordinary carelessness or a momentary lapse of attention. Defendant had been engrossed in her cellphone for at least 17 minutes leading up to the crash, texting and talking while driving at 80 miles per hour. There was no evidence she took any evasive actions prior to the impact, which suggests she was oblivious to what was right in front of her. Immediately following the collision, defendant continued to be preoccupied with her phone (and her car) while showing indifference to the condition of the victim or the consequences of her actions. This post-collision evidence, per the Court, supported a reasonable inference that defendant displayed that same indifference just prior to the collision. The jury's finding of gross negligence, therefore, was supported by substantial evidence. However, the Court made several errors in its instructions to the jury. First, it failed to properly tell the jury that Vehicular Manslaughter involves two different mental states; general intent in the driving of the vehicle, and gross negligence while committing a traffic violation (in this case "*speeding*"), or gross

negligence in the commission of a lawful act not amounting to a traffic violation (in this case "*driving with inattention*"), and that there must exist a union, or joint operation of act and intent, or criminal negligence. More importantly, the trial court committed instructional error by lowering the standard of proof for the alleged acts (phone use) that were part of the charged crime of vehicular homicide with gross negligence; an error that requires automatic reversal. Mischaracterizing the defendant's texting and phone calls prior to the collision as "*character evidence*," as that term is defined in Evid. Code § 1101(b), the jury was told that they need only find this necessary element of driving with gross negligence by a "*preponderance of the evidence*." However, defendant's texting and phone calls were not section 1101(b) character evidence. "(T)hey were an indivisible part of the offense itself." Being a factor a jury must find in determining the existence of gross negligence, her cellphone use had to be found by the jury "*beyond a reasonable doubt*." Having misinstructed the jury on this issue required that her conviction be reversed. The case, therefore, was remanded for a new trial.

Note: I briefed this case primarily to point out that texting while driving can (depending upon the circumstances) be the basis for a felony charge of gross vehicular manslaughter (or misdemeanor vehicular manslaughter when done with "ordinary negligence") when a driver's texting, or even just making or receiving phone calls, leads to a fatal collision. Misdemeanor vehicular manslaughter (P.C. § 192(c)(2)) was offered to the jury as a lesser included offense, and requires only a finding of "ordinary negligence" (as opposed to "gross negligence"). The difference between the two is a matter of the degree of the defendant's negligent actions. Here, her negligence could not have been much more aggravated. It is also interesting to note that the Court specifically found defendant's "postcrime actions and statements;" e.g., her lack of concern for anything other than missing lunch with her boyfriend, being separated from her cellphone, and the damage done to her own car, to be factors a jury could use to show her indifference to the havoc she had caused, and as relevant evidence to the "gross negligence" finding. The instructional errors are issues for prosecutors to consider, so I seriously glossed over the problems involved in making sure a jury is properly instructed. I would expect any prosecutor who does one of these cases to properly research the issues for him or herself. The necessary instructions in these types of cases are exceedingly complex, so I didn't even make the effort to try to properly explain them here out of fear of confusing everyone (including myself).

***P.C. § 632(d)*; *Confidential Communications*:**
P.C. § 633.5, as it relates to the "Vicarious Consent Doctrine":"

People v. Trever P. **(Aug. 14 2017) __ Cal.App.5th __ [2017 Cal.App. LEXIS 705]**

Rule: As an exception to the suppression requirements of P.C. § 632(d), the "Vicarious Consent Doctrine" applies whenever a child is a party to a confidential communication and a parent for that child consents to its recording that otherwise meets the requirements of P.C. § 633.5.

Facts: Four-year-old Ralph lived with his mother (Kim) and her boyfriend in a trailer in Merced County. On June 10, 2015, Kim arranged to have 12-year-old Trever, Ralphs's cousin, babysit Ralph while both Kim and her boyfriend were at work. Ralph was excited to have Trever there. But when Trever returned to babysit again the next day, Ralph cried, telling Kim he didn't want her to leave; that he was afraid that Ralph would leave him alone in the trailer. She left him in Ralph's care away. But by that evening, Kim started to think that Ralph might be verbally abusing Ralph, hitting him, or leaving him alone. So when Trever returned for a third day of babysitting, Kim set her cellphone on record and hid it in a cupboard. Checking her cellphone after returning, Kim discovered two and a half hours of recording which included Trever ordering Ralph to submit to numerous anal and oral sex acts, with Ralph telling Trever that it hurt and for him to stop, and Trever threatening Ralph not to tell Kim. Giving the recording to police, a petition was filed in Juvenile Court alleging nine counts of child molest-related charges. Trever filed a motion in limine to exclude the recording from evidence, arguing that the recording was inadmissible under P.C. § 632 which makes it a criminal offense to use a device "*to eavesdrop upon or record*" a "*confidential communication*" without "*the consent of all parties*" to the communication. (Subd. (a).) Subdivision (d) of section 632 specifically provides that evidence obtained in violation of the section "*is not admissible in any judicial, administrative, legislative, or other proceeding*." The People argued in response that P.C. § 633.5 provides an exception to section 632, which specifically says that one party to a confidential communication is permitted to record the communication secretly when done "*for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication*" of certain crimes, including "*any felony involving violence against the person.*" The People's position was that where one party to the confidential communication is a child, the parent may vicariously consent for him. The People also argued that pursuant to the "truth in evidence" provision of Cal. Const. Art I, § 28(f)(2), as enacted by passage of Proposition 8, the evidence is admissible. The Juvenile Court magistrate denied defendant's motion to suppress, agreeing with the People's first argument (i.e., P.C. § 633.5), but declined to rule on the Proposition 8 argument. The court sustained the petition on 6 of the 9 counts and committed defendant to the Division of Juvenile Justice (DJJ). Defendant appealed.

Held: The Fifth District Court of Appeal affirmed. Defendant argued on appeal, as he did in the Juvenile Court, that the audio tape should not have been admitted into evidence in that it violated the suppression requirements of P.C. § 632(d). Defendant also argued that section 633.5 did not apply because Kim was not a party to the recorded communication, as required by the statute. Indeed, section 633.5 specifically says that the exception to the suppression rule of section 632(d) is limited to a party to the confidential communication. Defendant and Ralph were the two parties to the communication in issue here; not Kim. However, the People argued, as they did in the trial court, that Kim can vicariously consent for Ralph. Interpreting sections 632(d) and 633.5, the Court agreed with the People. With a lack of any prior authority in California, the Court noted that the weight of the authority from other jurisdictions heavily favors adoption of a "*vicarious consent doctrine*." Pursuant to this doctrine, "where a child is one party to a communication, the statute should be construed as if it stated that a child's parent can validly consent to the surreptitious recording of the communication on the child's behalf, in situations

where a party's consent would make the recording lawful." This is based upon recognition of the fact that a mother has both a right and an obligation to take, on the child's behalf, actions necessary for his or her protection. As a result, the Court established the following rule: Under the "vicarious consent doctrine . . . section 632 does not prohibit a parent from recording a confidential communication to which his or her minor child is a party if (a) the purpose of the recording is to obtain evidence reasonably believed to relate to the commission by another party to the communication of a crime enumerated in section 633.5, and (b) the parent has a good faith, objectively reasonable belief that the recording is in the best interest of the child." Further, "(t)he requirements of the consent exception can be satisfied when a parent gives consent on behalf of a minor child based on an objectively reasonable belief that the recording will produce evidence of an enumerated crime and that the recording is in the best interest of the child." It not being disputed in this case that Kim had objectively reasonable grounds for believing the recording would result in evidence of a felony involving violence, the Court found the vicarious consent doctrine to apply in this case. The Juvenile Court magistrate, therefore, properly used the evidence of the recording to make a true finding as to defendant's criminal acts.

Note Unfortunately, the Court declined to consider the applicability of Proposition 8 on the admissibility of confidential communication recordings that, on their face, violate the suppression requirements of P.C. § 632(d). Under Proposition 8 (effective June, 1982), amending the California Constitution to add Art I, § 28(f)(2), the so-called "Truth in Evidence" provision, and which allows for the admissibility of evidence so long as its use does not violate U.S. Constitutional suppression requirements, the argument is that a simple statute, like subdivision (d) of P.C. § 632, cannot validly mandate the suppression of the resulting evidence. However, despite this Court's refusal to decide the issue, the answer is possibly coming to us in another case; i.e., *People v. Guzman* (2017) 11 Cal.App.5th 184, where it was decided by the appellate court that Proposition 8 does in fact negate the suppression requirements of P.C. § 632(d). A petition for review in *Guzman* was granted by the California Supreme Court on June 27, 2017. So hopefully, the California Supreme Court will decide this issue for us in the near future.