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Remember 9/11/01: Support Our Troops

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THIS EDITION'S WORDS OF WISDOM:

"He that spits against the wind, spits in his own face." (Benjamin Franklin)

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ADMINISTRATIVE NOTES:

Depublished Case; Miranda: When an Out-Of-Custody Suspect Invokes: On April 1, 2009 (*Legal Update* Vol. 14, No. 4, pg. 2), I briefed *People v. Garcia* (2009) 171 Cal.App.4th 1649, which held, in effect, that when a "detained" suspect invokes his rights under *Miranda*, even though he is not yet *in custody* (i.e., hasn't been arrested), he has effectively triggered his Fifth Amendment self-incrimination protections and you must therefore terminate any attempts to question him, at least for the time-being. As an "anticipatory invocation," you

should be allowed to reinitiate questioning again at some later time (see *People v. Buskirk* (2009) 175 Cal.App.4th 1436, 1448-1449.). But under *Garcia*, because he is invoking his self-incrimination rights, you are required to stop any attempts to interrogate him *at that time*. I have passed this rule onto several of you since *Garcia* was published. But *Garcia* has since been “*depublished*,” meaning it is no longer citable as legal authority. *So what’s the rule* when an out-of-custody suspect invokes? There is prior U.S. Supreme Court authority to the effect that a suspect, in or out of custody, can assert his Fifth Amendment rights “in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory . . .”, if it might subject the person to potential criminal liability. (*Kastigar v. United States* (1972) 406 U.S. 441, 444; see also the *Spielbauer* case, briefed below.) Although these cases are not directly on point with the issue of whether a suspect detained on the street can effectively cut off questioning with a *Miranda* invocation, I believe that *Garcia* was correct when it indicated that an officer must respect a suspect’s attempts to invoke no matter when, where, and at what stage of the process, it occurs. In reality, most judges *will* suppress any statements obtained during an interrogation when the suspect invokes anyway, whether he’s in custody or not. So that’s one envelope I’d think twice about pushing.

CASE LAW:

Search Warrants for Computerized Information:

***United States v. Comprehensive Drug Testing, Inc.* (9th Cir. Aug. 26, 2009) __ F.3rd __ [2009 WL 2605378]**

Rule: Searches of computer files with information other than that listed in a search warrant require diligent efforts to avoid searching areas not authorized by the warrant.

Facts: Beginning in 2002, federal authorities launched an extensive investigation into the use of steroids by professional baseball players. The investigation developed probable cause to believe that at least 10 major league baseball players received illegal steroids from the “Bay Area Lab Cooperative” (“Balco”). A grand jury subpoena was eventually issued to Major League Baseball (“MLB;” an unincorporated association of the two professional baseball leagues) seeking drug testing information for 11 (later reduced to 10) players with connections to Balco. MLB responded that it had no such information. Believing therefore that two companies hired to do the testing, Comprehensive Drug Testing (“CDT”) and Quest, must have testing records, subpoenas were issued to both. Both companies filed motions to quash the subpoenas. Upon discovering that motions to quash were pending, the Government sought and obtained search warrants for CDT’s Long Beach office and Quest’s Los Vegas office. Eventually, during the month of April, 2004, a total of five separate search warrants were obtained and executed. The warrants authorized the seizure of drug testing records and specimens for ten named Balco-connected players, as well as innumerable other manuals, booklets, etc. The warrants further authorized the search of computer equipment, computer storage devices, and, where an on-site search would be impracticable, seizure of either a copy of all data or the

computer equipment itself. If seizure of all data or equipment was determined to be necessary, “appropriately trained personnel” would be tasked with reviewing the data, retaining the evidence authorized by the warrant and designating the remainder for return. The first two warrants were executed beginning on the morning of April 8, 2004. At CDT’s office, the employees were uncooperative, requiring agents to spend a considerable amount of time checking records, files’ and computers. Information discovered during this search led to the obtaining of other warrants and the seizure of considerably more records and files than pertained to the originally listed ten ballplayers. The Los Vegas Quest office was searched at the same time with more files seized. Several weeks later, the Players Association filed motions in federal court for the return of the seized records. Meanwhile, with all the new information recovered from the already-seized files—connecting many other baseball players to the use of steroids—two new search warrants were obtained and executed, resulted in more records being seized. The Player’s Association filed another motion for the return of these files as well. In August, a federal district court judge in Nevada granted the Players Association’s motion and ordered the return of all records other than those related to the first 10 ballplayers. In so ruling, the judge was very critical of the Government “callously disregard(ing) the affected players’ constitutional rights.” A second judge in California made a similar ruling, rejecting the government’s argument that “*plain view*” allowed for the seizure of records not listed in the search warrant. Both courts further criticized the searching agents’ failure to follow the procedures as set forth in *United States v. Tamura* (9th Cir. 1982) 694 F.2nd 591, which would have restricted the agents’ unnecessary rummaging around the companies’ computer files. (See below) While these two motions were pending, a grand jury issued more subpoenas asking for the records relating to the alleged steroid use by more than 100 other MLB players. Also, new search warrants were sought for CDT’s records, alleging that the earlier warrants did not provide all the information that was needed for the investigation. In a motion on these issues, a third judge found that the Government’s conduct was unreasonable and constituted harassment. This judge quashed all the subpoenas and ordered the return of all the records seized by the search warrants. The government appealed all three rulings. The Ninth Circuit Court of Appeal initially affirmed in part and reversed in part, holding that the seizure of records that were intermingled with those listed in the warrant was lawful. (See *United States v. Comprehensive Drug Testing, Inc.* (9th Cir. 2008) 513 F.3rd 1085.) However, the Ninth Circuit voted to rehear the issues by the court en banc (i.e., an 11-judge panel).

Held: The Ninth Circuit Court of Appeal, on rehearing en banc (by a 6-to-2 vote, with 3 justices concurring and dissenting in part), upheld the rulings of the first two district court trial judges and dismissed the appeal of the third judge’s ruling as filed untimely. The Court first incorporated the statement of facts from the 9th Circuit’s prior three-judge ruling at 513 F.3rd 1085. In upholding the lower court judges’ conclusions and agreeing with their respective criticisms of the procedures used by the searching agents, the Court noted that the searchers failed to follow specific restrictions contained in the warrants that were intended to protect the rights of third parties (e.g., other baseball players) who were not targets of the original warrant. The Court also agreed with the lower court judges in their criticism of the searching agents for not following the dictates of *United States v. Tamura*. Specifically, *Tamura* disapproved of the wholesale seizure of records even

though hand-searching them at the scene might be too time consuming, suggesting procedures to be used to help protect the privacy of third parties. In such a situation, *Tamura* suggested that “(i)n the comparatively rare instances where documents are so intermingled that they cannot feasibly be sorted on site, . . . the Government [should] seal . . . and hold . . . the documents pending approval by a magistrate of a further search.” The Ninth Circuit agreed with the trial judges that the agents in this case ignored both *Tamura* and the Government’s own self-imposed restrictions contained in the warrant. Specifically, the warrants (and *Tamura*) provided that should the information be intermingled with other files (as it was), the seized documents should be screened and segregated by qualified computer personnel before the officers involved in the investigation were allowed to review the materials. The agents here failed to do this. Instead, the case agent himself (instead of “qualified computer personnel”) went through the materials, finding in “*plain sight*” indications of steroid use by baseball players other than the ten who were originally targeted. This new information became the subject of the follow-up warrants and subpoenas. Ignoring the suggested *Tamura* procedures resulted in the violation of the privacy rights of numerous other baseball players. The Court here recognized that locating specific records in a suspect’s (or, as in this case, in a third party’s) computers, without unnecessarily looking through the private information of other persons for whom there is no probable cause, is indeed a daunting task. The Ninth Circuit justices therefore felt duty-bound to suggest the following “guidance” for judges who review and approve search warrants, to be taken into account before approving warrants whenever it’s necessary to examine computer files, or when a search for evidence might result in the seizure of a computer: (1) The officers should waive reliance upon the plain view doctrine. (2) Segregation and redaction must either be done by specialized personnel or an independent third party. If the segregation is to be done by government computer personnel, it must agree in the warrant application that the computer personnel will not disclose to the investigators any information other than that which is the target of the warrant. (3) Warrants and subpoenas must disclose the actual risks of destruction of information as well as prior efforts to seize that information by other judicial means. (4) The officer’s search protocol must be designed to uncover only the information for which it has probable cause, and only that information may be examined by the case agents. (5) The officers must destroy or, if the recipient may lawfully possess it, return non-responsive data, keeping the issuing magistrate informed about when they have done so and what they have kept. (I altered the specific terminology here slightly to fit the state court situation.) Agreeing with the district court judges that the Government agents in this case unnecessarily went through and viewed the private records of other third parties, their rulings were upheld.

Note: If you are troubled by this decision, you are not alone. I briefed this case while the ink is still wet because I’ve already received a number of concerned e-mails and calls about it. The real question is: Do we need to be concerned with this federal decision at all when we are state and local officers and prosecutors? Certainly, federal agents do. But the good news is that Ninth Circuit Court of Appeal decisions are *not* binding on state courts. The bad news is that such cases cannot be totally ignored. Published federal trial and circuit court decisions are entitled to “*great weight*” and are considered to be “*persuasive*,” even if *not* “*controlling*,” in California state courts. There is also the

“*theoretical*” possibility that should you ignore the dictates of this decision, you could be held civilly liable if sued in federal court (i.e., 42 U.S.C. § 1983). Back to the good news: I can’t find any language in the decision making the Court’s “*guidelines*” mandatory. They appear to me to be mere suggestions to judges and magistrates who approve warrants for minimizing the likelihood that searching officer and agents might recklessly tromp through files and records for which there is no probable cause. But although not binding on most of us, as indicated above, I don’t think this case should be ignored. Like any red flag, the Court’s suggestions should, at the very least, be considered as a warning to make some effort to tighten up your searches of computers as much as possible. Showing some diligence in attempting to avoid viewing computer files that are not authorized by the search warrant is important. I’m not experienced enough in computer searches and the problems involved in separating out irrelevant files to make any suggestions on how you go about this. But I do know that an officer should *never* waive the right to seize illegal items observed in “*plain sight*,” i.e., evidence of other crimes not covered in the warrant, but observed during the lawful execution of a search warrant. It was not the “*plain sight*” observation of other information that should have been criticized here, but rather the fact that those observations were made while the agents were “*allegedly*” unnecessarily rummaging through records not authorized by the warrant. There is absolutely no authority for making a waiver of the plain sight rule a condition to the issuance of a search warrant. I wouldn’t do it.

Miranda; Internal Investigations of Public Employees:

***Spielbauer v. County of Santa Clara et al.* (Feb. 2, 2009) 45 Cal.4th 704**

Rule: A public employee may be questioned by his superiors concerning job-related activities even though the responses are incriminatory. The employee’s responses, or refusal to respond, may be used against him for internal disciplinary purposes even though they are inadmissible in a criminal proceeding. Formal immunity is not required.

Facts: Santa Clara County Deputy Public Defender Thomas Spielbauer, plaintiff in this lawsuit, represented a person named Michael Dignan who was charged in a criminal case with being a felon in possession of ammunition. In an attempt to disassociate Dignan from the ammunition, Spielbauer proposed to offer evidence from a third person, Troy Boyd, to the effect that the house in which the ammunition was found belonged to Boyd’s parents and that Boyd himself rented the property from them. Spielbauer told the trial court that Boyd was unavailable to testify and that he wanted to introduced Boyd’s hearsay statements (i.e., Boyd’s statements through another witness) about Boyd renting the residence from his parents. While attempting to prove Boyd’s unavailability, Spielbauer told the trial court that Boyd had an outstanding \$5,000 warrant for his arrest and couldn’t be found. Eventually, the trial court ruled in Spielbauer’s favor, allowing the hearsay into evidence. Three days after this ruling, however, a police sergeant found Boyd at the house, Boyd telling the officer that he’s been contacted by a public defender investigator. Confronted with this information in court, Spielbauer admitted to the court that he himself had contacted Boyd at the house the day before telling the court that Boyd couldn’t be located. It was also later determined that Spielbauer’s likely motivation for

his misrepresentations to the court was because if Boyd had been cross-examined thoroughly, it would have been discovered that although Boyd did in fact rent the house from his parents, he also sublet a portion of it to Michael Dignan, Spielbauer's client, seriously undermining his argument that Dignan did not have possession or control of the ammunition. The Chief Assistant Public Defender later learned of this incident and initiated an internal investigation. Spielbauer was ordered by his superiors to appear for an interview, which he did with his own legal counsel. During this interview, upon advice of counsel, Spielbauer refused to answer any questions concerning the incident. He was advised that his silence would constitute insubordination, leading to administrative discipline up to and including termination. He was also advised that any statements he did make could not be used against him in any subsequent criminal proceedings. Spielbauer's lawyer responded that this rule only applied to peace officers, and for his client to answer questions would require a formal grant of immunity from the court. Spielbauer continued to refuse to answer questions. He was thereafter fired. A prediscipline administrative hearing officer upheld the charges and the discipline. Spielbauer's petition to the Superior Court for mandamus relief was denied. He appealed this ruling to the Court of Appeal which, upon agreeing with Spielbauer that he couldn't be forced to answer questions without a formal grant of immunity, reversed. The County appealed to the California Supreme Court.

Held: The California Supreme Court, in a unanimous decision, reversed the appellate court, reinstating the decision of the Superior Court. The primary issue in this case involves the question whether a public employee who is asked by his superiors to submit to an administrative interview concerning his job performance, when the employee's responses might also subject him to criminal liability, has a Fifth Amendment self-incrimination right not to answer those questions. And, if so, must the employer provide the employee with a formal grant of immunity from criminal prosecution before being allowed to penalize the employee for his refusal to answer those questions. First, the Court noted that the Fifth Amendment self-incrimination privilege goes beyond protecting a person from having to testify against himself in a pending criminal proceeding. It may be invoked in any other proceeding as well, whether "civil or criminal, formal or informal," whenever "he or she reasonably believes the answers might incriminate him or her in a criminal case." This includes those situations where a public employer is seeking information about the employee's job performance. Providing the employee with immunity from criminal prosecution is the best way to resolve this conflict between an employer's right to seek information about the employee's job performance and the employee's right not to incriminate himself. When such immunity is in effect, the employee can be required to answer his employer's questions, or, if he refuses, be disciplined. (*Garrity v. New Jersey* (1967) 385 U.S. 493.) Because the employee's statements under these circumstances are "*compelled*," the employee's Fifth Amendment protections are triggered, precluding the "*direct use*," or the use of any other evidence to which those responses might lead (i.e., "*derivative use*"), of those statements against him in any subsequent criminal case. Spielbauer was specifically told that his responses could not be used against him in any criminal case. He is wrong in his belief that this protection only applied to law enforcement officers, and that for him to be protected as a public defender, a formal grant of immunity was

necessary. California Courts have consistently attached an increased importance to ensuring the proper performance of all public duties. So long as the public employee is not required to relinquish his Fifth Amendment self-incrimination protections, he may be punished by his employer for refusing to answer job-related questions asked during an administrative investigation. (*Lybarger v. City of Los Angeles* (1985) 40 Cal.3rd 822.) But there is no authority for the argument that the employee is entitled to a formal grant of immunity. In fact, it is questionable whether such a court-authorized grant of immunity is even legally possible. (See P.C. § 1324.) Because Spielbauer's responses could not have been used against him in any criminal case, he had no grounds for refusing to answer questions and was properly disciplined for his refusal to do so.

Note: I briefed this case both for my education as well as yours. I've been able to avoid this whole *Garrity-Lybarger* mess throughout my entire career. This case offers, all in one neat package, an excellent review of the theory and procedure involved in the collection of incriminating information from *all* public employees (not just cops) by an employer, while not being allowed to use the same information in any subsequent criminal prosecution of the employee. So for those of you (cops, prosecutors, public defenders, or any other public employees) who tend to push the envelope a bit on your professionalism, be aware (or "*beware*"). Also note that although a police officer must, by statute, be advised of his right against self-incrimination, and that his statements, although compelled for administrative purposes, cannot be used against him in any subsequent criminal case (See Gov't. Code, § 3303(h)), it is an open issue whether other public employees must also be so-advised. Because an answer to that question was not necessary to the resolution of this case, the Court declined to answer it (see fn. 5). Prior authority cited by the Court, however, seems to say that the Fifth Amendment protections kick in automatically, with or without such an advisal, by virtue of the simple fact that the incriminating responses are being "*compelled*."

Probationary Fourth Waiver Searches:

***People v. Watkins* (Feb. 9, 2009) 170 Cal.App.4th 1403**

Rule: A suspect subject to search and seizure conditions is estopped from complaining about being searched by an officer who was unaware of the search conditions when the officer's failure to know of the conditions was because the suspect misidentified himself.

Facts: Elk Grove Police Officer Chris Reese noticed that defendant's vehicle, as it pulled up to a stop sign at 2:30 a.m., had a burnt out brake light. Officer Reese stopped defendant's vehicle for this equipment violation. Defendant did not have a driver's license, but identified himself as Marques Watkins. He told the officer that he was on probation but did not indicate whether his probation included search conditions. A records check showed that Marques Watkins' license was suspended or revoked. After checking defendant for weapons, he was detained unhandcuffed in the backseat of the officer's car. Although the records check did not show that Marques Watkins was on probation, and still with no indication whether he was subject to search and seizure conditions, Officer Reese searched defendant's car. In so doing, enough cocaine base

was found to justify a charge of “possession for sale.” After arresting him, it was determined that defendant’s real name was Stephon Watkins, and that he’d used his brother’s name. Stephon Watkins (defendant) was in fact subject to search and seizure conditions (i.e., a “Fourth Wavier”). Defendant filed a motion to suppress, arguing that the search of his vehicle, done without a warrant and without probable cause, was not justifiable as a Fourth waiver search because Officer Reese was unaware at that time that he was subject to a Fourth waiver. The trial court denied defendant’s motion. Defendant was convicted by a jury of possession of cocaine base for sale (H&S § 11351.5) and transporting cocaine base (H&S § 11352(a)). Defendant appealed.

Held: The Third District Court of Appeal (Sacramento) affirmed. Defendant was correct in arguing that a probation or a parole search is valid *only* if the officer knew of the search conditions when he did the search. Discovering after the fact that the target of an otherwise unlawful search was subject to search and seizure conditions does not validate the search. (*People v. Sanders* (2003) 31 Cal.4th 318; *In re Jaime P.* (2006) 40 Cal.4th 128.) In the cases that have said this, however, the respective defendants did not prevent the officers from discovering their probation or parole status by misrepresenting their identities. At play here is the “*equitable principle*” that “*no one can take advantage of his own wrong.*” (Civ. Code, § 3517) This principle applies to criminal cases as well. The only reason Officer Reese in this case failed to discover defendant’s search and seizure status was because defendant had misrepresented his identity. He is therefore “*estopped*” from taking advantage of his own wrongdoing by arguing that the officer searched his car without prior knowledge of his search conditions. Defendant’s motion to suppress, therefore, was properly denied by the trial court.

Note: If there is any question that this search would have been lawful except for the defendant’s Fourth Waiver, then you can get that thought out of your head. There was obviously no probable cause justifying the search. There was some discussion in the decision that it was a valid “*search incident to arrest.*” However; (1) defendant was not arrested, but detained only, and, more importantly, (2) securing defendant in the backseat of the police car where he could no longer reach for weapons or evidence likely torpedoed that theory anyway. (*Arizona v. Gant* (2009) 556 U.S. __ [173 L.Ed.2nd 485].) The officer’s actions in this case just happened to fall into an exception to the general rule that an officer is required to know about the suspect’s search and seizure conditions before he can use the Fourth wavier as justification for a warrantless search.

Miranda; Tape-Recording an Interrogation, Invocations, Rescue Doctrine, Fruit of the Poisonous Tree, Offers of Leniency, Deceptions during an Interrogation:

People v. Davis (June 1, 2009) 46 Cal.4th 539

Rule: (1) Tape-recording an interrogation avoids any ambiguity in the waiver of rights. (2) An invocation of one’s *Miranda* right to counsel must be clear and unequivocal. (3) The “*rescue doctrine*” applies no matter how unlikely it is that the victim is still alive. (4) “*Fruit of the Poisonous Tree*” does not apply to a *Miranda* violation. (5) Telling a suspect that confessing isn’t going to make any difference in the long run is not an “*offer*”

of leniency.” (6) Telling a suspect that the officer has evidence that he does not have, when the officer believes he does, is not an improper misleading of the suspect, and isn’t a deception that might cause a false confession anyway.

Facts: Twelve-year-old Polly Klaas was abducted by a large “scary” man from her Petaluma home late at night during a slumber party with friends. Her disappearance, which resulted in a massive search and investigation, made national news. She remained missing for over two months until a local ranch owner found some of Polly’s clothing in the same spot where she had confronted a stranger, the defendant, the same night Polly had disappeared. The rancher had called the Sonoma County Sheriff’s Department that night. Responding deputies contacted defendant and helped him pull his car from the ditch where he’d been stuck. But no one connected him with Polly’s disappearance until the discovery of her clothing two months later. Defendant, who had a long criminal history and had recently been paroled, was soon arrested on a parole violation. Although he initially denied any involvement in Polly Klaas’s disappearance, he eventually, after several interrogations extending over 5 or 6 days, admitted to strangling her and burying her in a shallow grave. His motion to suppress his confession was denied by the trial court and he was convicted by a jury. Defendant appealed his sentence of death.

Held: The California Supreme Court, in a unanimous decision, affirmed. Among the issues raised on appeal was the admissibility of his confession. (1) Defendant first argued that the fact that one of the questions on a written *Miranda* waiver form used by his interrogators was not answered (i.e., “*Understanding that right [to talk to a lawyer], do you wish to talk to me now?*”) showed that he did not intend to waive this right. However, because the interrogation had been tape-recorded, the Court was able to determine that defendant had in fact affirmatively waived his right to counsel (i.e., “*Sure.*”), but that the officer who was writing defendant’s responses on the form merely forgot to write it down. (2) In that same interrogation, defendant argued that he eventually invoked his right to the assistance of counsel but that his invocation was purposely ignored. Specifically, when confronted with the possibility that DNA evidence might be available, defendant responded with; “*Well then book me and let's get a lawyer and let's go for it, you know.*” He then said that while he didn’t mind answering routine questions, he didn’t like being accused of Polly Klaas’s abduction. This was followed by “*Let's s__t or get off the pot,*” and “*Well, let's go for it. That's the end, the end.*” But when asked if this meant he didn’t want to talk, defendant asked if the officer thought he should. He was (wisely) told that it was his decision. Defendant then issued another expletive and started denying his involvement once again. The Court rejected defendant’s argument that this all amounted to an invocation of his right to counsel. Such an invocation must be “*clear and unequivocal.*” In this case, it was not. To the contrary, the Court found that defendant was merely issuing “*a challenge*” to his questioners: “*If you can prove it, go for it.*” Defendant’s comments were not an unambiguous invocation of the right to the assistance of counsel as would be understood by a reasonable officer. In contrast, defendant later blurted out: “*Get me a lawyer,*” and that he was “*over and done*” answering any questions. When this was said, the initial interrogation was ended. (3) Having effectively invoked his right to counsel at this point, and remaining in continuous custody, defendant next argued that when detectives questioned him again

four days later, they violated his *Edwards (v. Arizona)* (1981) 451 U.S. 477) right to the presence of an attorney. However, it is really not quite so simple. The officers' contact with defendant four days later was prompted by their need for a full set of finger and palm prints. While there, and just before leaving, one of the detectives told defendant that if there was "any hope" that Polly, whose body had not yet been found, was still alive, he "ought to give thought to talking to" him. Shortly thereafter, defendant recontacted the detective and told him that he had "*f__ked up big this time.*" When asked again if Polly was still alive, he said that she was not. Defendant volunteered to show the detectives where she was buried. A later two-hour recorded full confession was obtained before defendant led the officers to the decomposed body of twelve-year-old Polly Klaas. This, the Court ruled, was a proper use of the so-called "*rescue doctrine*" and a reinitiation of the interrogation by the defendant. The rescue doctrine is intended to allow law enforcement, when necessary, to attempt to save a human life without being hindered by the rules of *Miranda*. Finding human life more important than the prophylactic purposes of *Miranda*, the Court held that it mattered not that Defendant had already invoked his *Miranda* rights. The Court further noted that; (a) the officer's subjective intent in asking about whether Polly Klaas might still be alive is irrelevant, (b) it mattered not that she had been missing for over two months, and (c) so long as Polly was still missing, it was also irrelevant that the detective had waited four days before asking about her welfare. (4) The Court also noted that even if the officers had violated *Miranda* at some point, Polly's body and the evidence derived from it would have been admissible anyway in that it is a rule of law that the "*fruit of the poisonous tree*" doctrine does not apply to *Miranda* violations. (5) Also, the Court rejected defendant's argument that encouraging him to tell the truth; to "*get it all out in the open*" and "*get it off [his] chest,*" and that admitting whether he had sexually assaulted Polly wasn't "*going to make a difference to anything that happens,*" was an improper offer of leniency. (6) Lastly, defendant contended that the detective had unlawfully mislead him by claiming that semen had been found on Polly Klaas's body; a fact that was later determined to be untrue; or at least not provable. The Court first noted that the detective in good faith believed at that early stage of the investigation that semen had in fact been found on Polly's body. This cannot be construed as an intentional attempt at misleading a criminal suspect. But also, in order for such an interrogation tactic to be unlawful, even if it was intentional, it must be shown to be the kind of deception that would "*be reasonably likely to procure an untrue statement.*" Telling defendant that there was semen on the body is not something that would have motivated him to falsely confess.

Note: Richard Allen Davis provides an excellent argument for maintaining the death penalty in California. One can only imagine the horror of having your own child disappear out of your house as you slept down the hallway, and then finding out that she was later brutally assaulted and murdered by an animal like this. But on a less emotional note, this case also makes a good argument for tape-recording interrogations, at least in serious cases. While not legally required (at least in California), the recording in this case easily and quickly resolved the very serious issue of whether he had waived his rights. Also, this is a great case to read on the "*rescue doctrine*, the Court providing a thorough history behind the development of this very important exception to the *Miranda* rule. The case itself as a whole is an excellent refresher for the various rules of *Miranda*.