

San Diego District Attorney

D.A. LIAISON LEGAL UPDATE

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Remember 9/11/01; Support Our Troops

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THIS EDITION'S WORDS OF WISDOM:

"It's not that I'm afraid to die. I just don't want to be there when it happens."
(Woody Allen)

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ADMINISTRATIVE NOTES:

Thanksgiving Holiday Schedule: The Presiding Judge of the San Diego Superior Court, Janis Sammartino, has advised that there will be a 9:30 a.m. cutoff for

filing in-custody felony complaints on Wednesday, November 22, 2006. In order to have felonies processed in a timely manner, the District Attorney must receive all in-custody arrest reports no later than *1:00 p.m. on Tuesday, November 21, 2006*. You may submit arrest reports later than the deadline if you have made arrangements with the prosecutor specifically assigned to that case.

**November 22, 2006 (Wednesday) Arraignments:
BY NO LATER THAN 1:00 P.M. on TUESDAY, NOVEMBER 21, 2006**

In order to comply with the mandate of P.C. § 825, all persons arrested during the following time period who remain in-custody must be arraigned by no later than Wednesday, November 22, 2006.

ALL ARRESTS: *Beginning Friday, November 17, 2006 at 1700 hours and Ending at 1700 hours on Monday, November 20, 2006.*

Please also be advised that the San Diego Courts and the San Diego District Attorney's Office will be closed on Friday, November 24, 2006.

CASE LAW:

Miranda; Implied Waivers:

Williams v. Stewart (9th Cir. Mar. 28, 2006) 441 F.3rd 1030

Rule: A *Miranda* waiver may be implied when an in-custody criminal suspect, after having received a *Miranda* admonishment, initiates an incriminating conversation.

Facts: In March, 1981, defendant was observed by half a dozen witnesses wandering around a Scottsdale, Arizona, residential neighborhood. He knocked on Sylvia Bunchek's door and asked her if the people next door were home. When told that they were not, he went to that house and kicked the door in, intending to burglarize it. Sylvia became concerned when she saw defendant head in that direction and told her husband, John Bunchek. John went next door to check. When he didn't return, Sylvia went looking for him and found him in a pool of blood dying from a single gunshot wound to the chest. A composite sketch of defendant was made and televised. He was quickly identified by his roommates. Defendant, however, had already fled the state. Three months later, defendant was arrested in New York after being wounded in a shootout (using the same gun he used to kill John Bunchek) with the FBI. Defendant was immediately advised of his *Miranda* rights and transported to a hospital. At the hospital, a nurse, in defendant's presence, asked the FBI agent who was accompanying him what he had done. When the FBI agent responded that "he killed a bunch of people down south," defendant was heard to mumble: "No, no, no." The FBI agent then asked him; "What about the old man in Scottsdale." To this, defendant replied something to the effect that: "None of this would have happened if I hadn't been framed in the first place." (This comment, it was later determined, was a reference to a 1975 murder

conviction defendant sustained in West Virginia only to later escape from custody, killing a guard in the process.) Defendant filed a motion to suppress this statement, arguing that his silence during the time interval between the admonition and the later making of these statements should be interpreted as an invocation of his right against self-incrimination. The trial court disagreed, holding to the contrary that by interjecting himself into the conversation between the FBI agent and the nurse, defendant had *impliedly* waived his rights, and that his incriminating admission was therefore voluntary and admissible. Defendant was convicted and sentenced to death. The Arizona Supreme Court affirmed. Defendant subsequently filed a petition for Writ of Habeas Corpus in federal court, which was denied. This appeal to the Ninth Circuit Court of Appeal followed:

Held: The Ninth Circuit Court of Appeal affirmed. The Court agreed with the trial court's conclusion that when the defendant initiated the conversation that led to his incriminating statements—voluntarily interjecting himself into the FBI agent's conversation with the nurse—he impliedly waived his rights under the *Miranda* decision. Also, it was noted that the People did not even seek to use his statements against him; that it was defendant himself who chose to present evidence of these statements. But either way, the prosecution was entitled, at the very least, to use such statements for purposes of impeachment once defendant took the witness stand and lied. That's all the prosecution did here in this case.

Note: The Court didn't attempt to get into much of a discussion on this issue. On its face, the situation seems to include all the necessary elements of a *Miranda* custodial interrogation; i.e., (1) custody, (2) interrogation (or questions you would expect to elicit an incriminating response) (3) by a law enforcement officer. But rather, the Court just notes that by interrupting the FBI agent's flirting with a nurse, he, in effect, impliedly waived his rights under *Miranda*. That works, I guess. But other courts might very well have delved into a more in-depth discussion of the situation, noting that this brief, non-coercive verbal exchange was not really the type of "*incommunicado interrogation*" that *Miranda* had intended to address. The Court also notes two lesser *Miranda* issues: (1) The lack of a need for a mental health expert to admonish the defendant when it is the defendant who requested that he be interviewed by that expert; and (2) the necessity for a *Miranda* admonishment and waiver when interviewed by a probation officer in preparation for a sentencing hearing; the "sentencing hearing" in this case apparently being the penalty phase of this death penalty case under Arizona law.

Miranda; Volunteered Statements:

Invocation of Rights as Evidence of Guilt:

The Sixth Amendment and Deliberately Eliciting Incriminating Statements:

***People v. Huggins* (Apr. 10, 2006) 38 Cal.4th 175**

Rule: (1) Volunteered statements, not made in response to an interrogation, are admissible. (2) Evidence of a subsequent invocation of rights may be admissible if relevant to something other than defendant's consciousness of guilt. (3) A law enforcement officer telling a capital case defendant that he deserves to get the death

penalty, prompting an incriminatory response, is neither a Fifth Amendment (self-incrimination) nor a Sixth Amendment (right to an attorney) violation.

Facts: Defendant was an escapee from a California Youth Authority (CYA) work crew. While in flight, he took refuge in the nearby home of Sarah Anne Lees. When Ms. Lees arrived home, defendant confronted her with a shotgun he had found in her home and shot her in the back and, with the butt end of the shotgun, hit her in the face. He then dragged her to the bedroom where he attempted to rape her. He took her jewelry from her person and money from her purse, and escaped in her truck. Lees subsequently died from the gunshot wound. Defendant was later arrested and charged with murder with special circumstances, burglary and robbery. When first taken into custody, detectives were setting up a tape recorder in preparation for an interview as they explained to him that he was a suspect in Sarah Lees' murder. Defendant volunteered at that point that he had escaped from a CYA work detail, but denied having any contact with Lees. He then asked to speak with a public defender. With this invocation to his right to an attorney, the interview was terminated without a *Miranda* advisal. At trial, the prosecutor had one of the detectives testify to defendant's pre-invocation statements and the fact that the interview was then ended due to defendant's request to talk to an attorney. The prosecutor later argued to the jury that in light of all the evidence proving he did in fact have contact with Sarah Lees, defendant had lied and therefore could not be believed. After being convicted, while being brought to court during a penalty phase hearing, one of the escorting deputies told defendant that he was glad he was facing the death penalty and hoped he would be executed. A second deputy clapped in approval when she heard this comment. Defendant asked the deputy who clapped whether she would clap if he was in fact given the death penalty, to which the deputy said that she would. A third deputy then told defendant: "I see you're still making friends." To this, defendant replied: "Don't nobody like me anyway, and if I had it to do again, I'd do it the same way. I don't have any remorse. If I did have remorse, I wouldn't have done it in the first place." The prosecution was allowed to have these deputies testify to this comment during the trial's penalty phase. Upon being sentenced to death, his appeal to the California Supreme Court was automatic.

Held: The California Supreme Court, in a 7-to-2 decision (the two dissenting justices contesting other issues), affirmed defendant's conviction and death sentence. Among the issues raised by defendant in his appeal was the use at trial of his statements made in response to being told that he was a murder suspect, without benefit of a *Miranda* admonishment and waiver. The Court agreed that defendant was in custody, but found that merely telling him that he was a murder suspect was not an "*interrogation*." Before *Miranda* applies, an in-custody suspect must be subjected to an interrogation, or at least the "*functional equivalent*" of an interrogation. An "*interrogation*" includes "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response." Merely telling him that he is a murder suspect was not calling upon him to confess. Defendant's comments about not having had contact with the victim being nothing more than an unsolicited, volunteered statement, using them against him at trial did not violate *Miranda*. Defendant also objected to the detective's testimony to the

effect that he had asked for a public defender. It is error to use a defendant's *Miranda* invocation as evidence of guilt. But it is *not* error when the fact of an invocation is relevant to something other than a defendant's consciousness of guilt, and is not offered for the purpose of penalizing a defendant for invoking a constitutional right. Here, the evidence of his invocation was offered solely for the purpose of showing the jury why the interview had abruptly ended after defendant's denial that he knew the victim. The prosecutor never argued defendant's invocation as evidence of guilt. "(T)his brief and mild reference to the fact that defendant asked for an attorney did not prejudice defendant." Lastly, defendant argued that his Fifth (self-incrimination), Sixth (right to an attorney) and Fourteenth (due process) Amendment rights were violated by the admission at the penalty phase of his comment to the sheriff's deputies that he didn't feel any remorse for having murdered Sarah Lees. The Court again ruled here, as it did earlier, that there was nothing said or done by these deputies that they should have expected would elicit an incriminating response. As volunteered statements, *not* in response to an "interrogation," they were admissible. Similarly, the deputies did not violate defendant's Sixth Amendment right to the assistance of his counsel. Although the test is different for an alleged Sixth Amendment violations (i.e., whether the deputies did something to "*deliberately elicit*" an incriminating response), their conversation with defendant deserving to die did not rise to that level. Because neither the Fifth nor the Sixth Amendments were violated, defendant's due process rights were accordingly respected.

Note: We don't get many cases any more on what constitutes an "*interrogation*," or its functional equivalent, so this is a good refresher. And it's also beneficial to throw in a Sixth Amendment, right to an attorney, issue, as well. Correctional officers are often involved in casual conversation with a defendant who has a pending case and an appointed attorney. It's important that these conversations be reported to the assigned prosecutor. But it's also important that officers not purposely do or say anything that can be interpreted as "*deliberately eliciting*" incriminating responses. It is often a very fine line between the two. When in doubt, give the information to the prosecutor and let him or her evaluate it. But at least we now know from this case that telling a capital case defendant who cold-bloodedly assaulted and murdered an innocent woman that he is a piece of putrid pond scum with absolutely no redeeming social value and that he deserves to be drawn and quartered in the public square, slowly and methodically pulled to pieces by four lame horses taking their own sweet time, does not constitute the "*deliberately eliciting*" of an incriminating statement as prohibited by the Sixth Amendment.

Wiretap Authorizations:

Denying Ownership in a Vehicle and its Effects on One's Expectation of Privacy:

United States v. Decoud (9th Cir. Aug. 2, 2006) 456 F.3rd 996

Rule: (1) A wiretap authorization is lawful despite the incarceration of the government's informant, a pen register was not used, and surveillances were not working out. (2) A defendant's denial of ownership of a vehicle and its contents prevents him from proving standing to challenge a search of the vehicle.

Facts: Defendant Sedrick Decoud was involved in the manufacturing and sale of crack cocaine in Riverside County with a number of other individuals in an organization led by a person named Cleo Page. Drug Enforcement Administration (DEA) agents began an investigation of Page's organization. About six or seven months into the investigation, DEA requested a wiretap authorization from the federal district court, seeking permission in a 54-page affidavit to intercept calls to and from a cellular telephone primarily used by Page. Through the use of this wiretap, Page was overheard in December, 2001, talking about defendant Decoud "cooking" a batch of cocaine base. DEA solicited the help of the California Highway Patrol (CHP), asking them to stop Decoud's automobile if a legitimate, independent basis for doing so could be developed. A CHP officer traveling with a narcotics canine pulled Decoud over soon thereafter for speeding and having improperly tinted windows. During the stop, it was determined that defendant was driving on a suspended driver's license. Defendant was arrested and his car was impounded, pursuant to V.C. § 22651(p). The officer conducted an impound search of the vehicle and found a locked metal briefcase (along with a cooking pot, duct tape, sandwich-size plastic baggies, cellular telephones, and cash) in the trunk. When asked about the briefcase, defendant claimed that the car had been borrowed, that the briefcase belonged to the vehicle's owner, and that he didn't know how to open it. After the officer's canine alerted on the briefcase, it was forced open. In the briefcase was found a large supply of cocaine base, a digital scale, and a loaded semi-automatic handgun. Defendant was charged by indictment in federal court with eleven other defendants (9 of whom pled out prior to trial) on a variety of drug-related charges, including conspiracy to distribute cocaine. Defendant was also charged with being a felon in possession of a firearm. After various motions to suppress, challenging the legality of the wiretap and the search of defendant's car, were denied by the trial court, defendant and the other two remaining co-defendants were convicted and appealed.

Held: The Ninth Circuit Court of Appeal affirmed defendant's conviction. In response to the various defendants' arguments that the necessity for the wiretap had not been sufficiently justified by the DEA's wiretap application, the Court noted that the government's confidential informant ("C.I.") had been imprisoned during the investigation. Although the government is required to exhaust all standard investigative techniques before seeking a wiretap order, including the use of informants, there is no legal obligation to seek a CI's release from prison in order to continue an investigation. Secondly, the use of a "pen register," which would not establish the identity of persons being called nor reveal the contents of any conversations, was not a required prerequisite to seeking a wiretap order. "The necessity for the wiretap is evaluated in light of the government's need not merely to collect some evidence, but to 'develop an effective case against those involved in the conspiracy.'" Lastly, because a surveillance had apparently been detected by Page, continuing the surveillance was neither sufficient nor necessary. Having demonstrated the need for the wiretap, its use was lawful. Defendant further challenged the lawfulness of the inventory search of the vehicle, arguing that the search was not conducted in accordance with any standardized policy and was merely a ruse for a general rummaging to find incriminating evidence. The Court declined to even consider this issue, noting that by denying ownership or any possessory interest in the

vehicle or its contents, he gave up any expectation of privacy he might otherwise have had. Defendant, therefore, deprived himself of any legal standing to challenge the search.

Note: The Government, perhaps, dodged a bullet on the inventory search issue. It's becoming more and more common to challenge a searching officer's compliance with their department's standardized policy or procedure for conducting vehicle inventory searches. We recently had a search invalidated in an unpublished decision in San Diego for that very reason. (*People v. Medina* (July 27, 2006) Super Ct. No. SCS189408; see *Legal Update*, Vol. 11, No. 10, page 1.) While in *Medina*, the officer's department had such a policy, the officer, when he testified, was not familiar enough with it to describe it accurately. As a result, the search was invalidated. In the present case, defendant Decoud's stop and detention was concededly brought about because of his drug involvement. The traffic violations were nothing more than the legal pretext for the stop, lawful under *Whren v. United States* (1996) 517 U.S. 806. So while the stop was lawful, the interesting issue for the Court to decide, if defendant had had the legal standing to raise the issue, would have been the legality of the inventory search that was really no more than a pretext to look for suspected evidence of drug involvement. There is case authority to the effect that *Whren* does not apply to inventory searches, and that such a search, as occurred in this case, might not be lawful. (See *People v. Valenzuela* (1999) 74 Cal.App.4th 1202, at pages 1208-1209.)

Computer Searches in the Workplace:

***United States v. Ziegler* (9th Cir. Aug. 8, 2006) 456 F.3rd 1138**

Rule: There is no reasonable expectation of privacy in the contents of a person's company computer which is knowingly monitored by the company.

Facts: The FBI received a tip, originating with an employee of a Bozeman, Montana, business called "Frontline Processing" (which services Internet merchants by processing on-line electronic payments), that another employee had accessed child-pornography from a workplace computer. FBI Special Agent James Kennedy contacted Frontline's Internet Technology Administrator, John Softich. Softich told Kennedy that the company had in place a firewall which permitted constant monitoring of the employees' Internet activities. Through such monitoring, Softich was aware that an employee, defendant, who was Frontline's Director of Operations, had accessed child pornography via the Internet using a company computer. Frontline owned and routinely monitored all workplace computers; a fact of which employees were aware. Softich had already placed a monitor on defendant's computer to record its Internet traffic by copying its cache files. Agent Kennedy asked Softich to make a copy of defendant's hard drive because he feared it might be tampered with before they could make an arrest. (Kennedy testified that Frontline had already done this. However, without expressing any opinion as to Kennedy's credibility, and for the sake of argument, the Court assumed that Softich did this at Kennedy's direction and that Softich was thus acting as an agent of law enforcement.) Softich did this by going into defendant's office using a key he obtained from a Frontline administrator, opening defendant's computer's outer casing, and making

two copies of the hard drive. The Frontline administration further cooperated by later voluntarily turning over defendant's computer along with the copies that had been made of its hard drive to the FBI, and giving them permission to search the computer without a search warrant. A resulting warrantless forensic examination of the computer discovered many images of child pornography. Defendant was indicted by a federal grand jury with various charges relating to the receipt and possession of child pornography. The federal district court denied defendant's motion to suppress the recovered child pornography, ruling that defendant did not have a reasonable expectation of privacy in the contents of his computer and, as such, did not have legal standing to challenge the search of the computer. Defendant pled guilty and appealed.

Held: The Ninth Circuit Court of Appeal affirmed. The Government did not dispute that defendant had a "*subjective*" (i.e., in his own mind) expectation of privacy in his company computer. The question is whether that expectation of privacy was also "*objectively reasonable*" (i.e., as viewed by a reasonable person). The Court agreed with the trial court in ruling that defendant's expectation of privacy, under the facts of this case, was not *objectively reasonable*. It is possible that a person's expectation of privacy can be objectively reasonable when we're talking about private papers or effects in a desk drawer or a file cabinet. (See *O'Connor v. Ortega* (1987) 480 U.S. 709; *Schowengerdt v. General Dynamics Corp.* (9th Cir. 1987) 823 F.2nd 1328, 1335.) And it was recognized that people tend to keep some of their most private information in their computers. But under the facts of this case, defendant's subjective belief that what he had in his computer was his private business was not objectively reasonable. The computer belonged to the company. By policy, the right of employees to use the company computers for private purposes was restricted. Employees were put on notice that the company retained the right to "complete administrative access to anybody's machine." It was also known to the employees that the company had installed a firewall comprised of "a program that monitors Internet traffic . . . from within the organization to make sure nobody is visiting any sites that might be unprofessional." Therefore, these factors, primarily with Frontline's policy of routine monitoring, had the legal effect of seriously diminishing an employee's right to argue that any expectation of privacy he might have had in the contents of his computer was objectively reasonable.

Note: Defendant also argued that the entry into his office to get to the computer was a violation of his right to privacy. The Court relegated this argument to a mere footnote (fn. 9), noting that defendant's office wasn't searched; only his computer. Although they had to get into his office to get to his computer, going through the office was no more than an "operational realit[y] of [defendant's] workplace [that] diminished his legitimate privacy expectations." In other words, because he can't complain about them searching his computer, he also can't complain that they had to get into his office to do that.

Protective Sweeps of a Residence:

People v. Ormonde (Aug. 25, 2006) 143 Cal.App.4th 282

Rule: A “*protective sweep*” of a residence for other suspects who might constitute a danger to officers and others requires a “*reasonable suspicion*” to believe that there is in fact someone there about whom the officer should be concerned.

Facts: Detective Patrick Clouse of the Santa Clara Police Department responded to a call about a domestic violence (“DV”) incident that had occurred in the area of Homestead Road. When other officers made contact with the victim, the detective was directed to a particular apartment in a nearby complex. Christopher Olson, the victim’s estranged husband, was found standing near a car that was parked in front of the apartment. Olson was about 10 feet from the apartment’s open front door. When contacted, Olson immediately became argumentative. From information received via radio from officers who were simultaneously interviewing the DV victim, Detective Clouse determined that Olson was the suspect. He was therefore arrested. It was also determined that Olson either worked or lived in that apartment and that that was where the DV incident had occurred. Detective Clouse knew that DV calls were among the most dangerous calls with which officers are asked to deal. With people being emotionally charged, events at such a call are “highly unpredictable.” They usually occur in someone’s home where guns and knives are accessible, and where other persons, sympathetic to the involved parties, must often be dealt with. Feeling vulnerable, Detective Clouse was concerned because although he could see into the apartment through the open front door and a front window, much of his view of the inside of the residence was blocked by an inside closed door. Concerned that there might be someone in the apartment who might be armed, Detective Clouse decided to check. With another officer holding onto the still uncooperative Olson, Detective Clouse stepped two to three feet inside the apartment and announced his presence. The closed door opened and defendant, a woman and a young child all came out. Detective Clouse asked them all to step outside to talk to him, which they did. While talking to defendant, Detective Clouse was informed by other officers that Olson was a methamphetamine user. When asked for permission to search the apartment for any evidence of drug use by Olson, defendant told Detective Clouse that Olson only had access to the kitchen, but that he could search there. While searching the kitchen, Detective Clouse received more information from other officers that defendant himself was a drug dealer and that he had a quantity of drugs in the top dresser drawer in his bedroom. When asked about this, defendant admitted to possessing drugs and gave the officers permission to go into his bedroom and seize it. This led to another consent to seize more drugs from a backpack. (Defendant and others at the residence gave a much different version, testifying that Detective Clouse and other officers entered the apartment without permission and made threats to defendant to get him to admit to possessing drugs.) Charged in state court with numerous drug-related offenses, defendant’s motion to suppress the evidence was denied. He pled guilty and appealed.

Held: The Sixth District Court of Appeal reversed. Defendant’s argument on appeal was that Detective Clouse’s initial entry into the apartment, labeled as a “*protective*

sweep,” was illegal, and that his later various consents were “inextricably bound up with” (i.e., were the direct products of) this illegal entry. The Court of Appeal agreed. A warrantless entry into a residence normally requires “*probable cause*” and either a search warrant or exigent circumstances. Here, it was already known that the domestic violence victim (Olson’s estranged wife) was not in the apartment, and Olson himself was in custody outside. And there was nothing to indicate that there were any other victims or suspects who might be inside. An exception to the probable cause requirement is when an officer has a “*reasonable belief*” (or “*reasonable suspicion*”) to believe that other people might be inside who constitute a danger to the officers or others at the scene. In such a case, the law allows a limited “*protective sweep*” to insure that no one might be there who constitutes such a danger. A “*protective sweep*” is defined as “a cursory visual inspection of those places in which a person might be hiding.” In this case, there was nothing to indicate that there might be anyone inside who constituted a danger to the officers or others. In fact, the detective specifically testified that: “I don’t think that I thought there were people in the house, I was just trying to determine if there were people in the house.” The fact that domestic violence incidents tend to be dangerous is not enough. If it were, then the Court would be authorizing a “domestic violence” exception to the warrant requirement, and the Court was not willing to do that. There has to be some other specific articulable facts in the case at issue providing the necessary individualized “*reasonable suspicion*” to believe that there is someone inside who constitutes a danger. There was no such information in this case justifying a protective sweep.

Note: This has been the rule on “*protective sweeps*” for a long time, although many officers don’t (or refuse to) recognize this fact. The natural thing to do is to want to check a residence where an arrest is being made for other people who might feel the urge to rescue their loved ones from the grasp of those big, bad police officers who are disrupting the residents’ otherwise useless lives by arresting one of their own. When I’m appointed to the Supreme Court, no reasonable suspicion will be needed. I’ve seen too many instances where there have been other dangerous individuals, totally unbeknownst to the officers, hiding in the house. But in the mean time, other than perhaps to check immediately adjoining rooms for someone who might suddenly come out of hiding and assault you, the rule is that you need a reasonable suspicion to justify doing a protective sweep. (*Maryland v. Buie* (1990) 494 U.S. 325.) On another issue, I do have a problem with this Court’s undiscussed conclusion at the very end of the written decision that: “Because the illegal entry inexorably led to the search and seizure of contraband challenged here, defendant’s motion to suppress should have been granted.” Detective Clouse didn’t even do a protective sweep even though he certainly intended to (i.e., an “*attempted protective sweep?*”). He did no more than step two to three feet into the residence and announce his presence. This is what prompted defendant to step out of his bedroom. At worst, this is a “knock and notice” violation, not a protective sweep. And the Supreme Court has recently ruled that a knock and notice violation does not warrant the suppression of any evidence. (*Hudson v. Michigan* (2006) 126 S.Ct. 2159.) Why everyone got so hung up in a long dissertation about protective sweeps merely because this is maybe what Detective Clouse had intended to do is beyond me. Am I missing something here?