The California Legal Update

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

Vol. 25 May 3, 2020 No. 6

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THIS EDITION'S WORDS OF WISDOM:

"*I just spent four weeks hanging out with myself. That being the case, I have to say that I am so sorry to every person I have ever spent time with.*" (unknown)

IN THIS ISSUE:

ADMINISTRATIVE NOTES:

Unanimous Jury Verdicts*:** The United States Supreme Court, overruling earlier authority to the contrary (see ***Apodaca v. Oregon (1972) 406 U.S. 404, and ***Johnson v. Louisiana*** (1972) 406 U.S. 356.), held late last month in a seriously fractured, split (6-to-3) decision, that jury verdicts in "*serious*" cases *must* be unanimous. (***Ramos v. Louisiana*** (Apr. 20, 2020) __ U.S. __ [__ S.Ct. __; __ L.Ed.2nd __; 2020 U.S. LEXIS 2407].) Both Oregon and Louisiana allowed for 10-to-2 convictions in criminal cases (although I read elsewhere that Louisiana has already changed its law on this issue, via a state constitutional amendment, a couple of years ago). The **Sixth Amendment**, applicable to the states via the **Fourteenth Amendment's** due process clause, provides that "(i)n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury*." While the Constitution does not specifically say that jury verdicts must be unanimous, the Supreme Court, tracing the intent of the **Sixth Amendment** back to early Common law, now holds that at least in felony trials, the **Sixth Amendment** is to be interpreted to require a unanimous jury verdict. California, of course, already requires unanimous jury verdicts for *all* offenses, misdemeanor and felony (see **Cal. Const., Art. 1, § 16**), so we're not affected. Note also that the ***Ramos*** decision only affects *felony* verdicts, and then only for those cases not yet final on appeal. Still, Oregon and Louisiana are both going to have to retry a whole bunch of felony cases, estimated to be about 100, in Louisiana.

Forced Self-Quarantining, Etc*:** "*So* (you might ask); *does a state have the legal authority to impose self-quarantining and other mandatory exposure-reducing requirements* (e.g., "social distancing," staying home, wearing face masks, etc.) *as a means of combating the COVID-19 coronavirus*?" The simple answer appears to be "*yes*," at least according to an ancient, 115-year-old, never overruled, U.S. Supreme Court decision. In ***Jacobson v. Massachusetts (1905) 197 U.S. 11, it was decided that absent evidence that a particular person's health might be jeopardized, a state, under its so-called "*police power*," can, in the face of an epidemic, enforce on its populace a mandatory vaccination program without violating the U.S. Constitution's **Fourteenth Amendment's** due process clause. In ***Jacobson***, the issue was a state law mandating small pox vaccinations for everyone, absent proof, on a case-by-case basis, that compliance might jeopardize a particular person's health. Per the Court: "The authority of the State to enact this (mandatory vaccination) statute is to be referred to what is commonly called the police power." . . . "(T)he police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety." (pp. 24-25.)

So "*yes*," given the current COVID-19 coronavirus "*pandemic*," a state has the power to enforce "*reasonable regulations*" geared towards protecting the public at large. One's contrary religious beliefs, by the way, was not discussed in this context. Neither was "equal protection," "right to privacy," nor any other more modern-day arguments for getting the Government out of your face. But any such alleged intrusions into your rights would seem to fall under the same rule as announced in ***Jacobson***. In determining the constitutionality of any governmental action, it has always been an issue of balancing the "nature and quality of the intrusion" into your life with the importance of the government's interest in doing so. (See ***Graham v. Connor*** (1989) 490 U.S. 386, at p. 396.) So don't fight it. At least when possible, *stay home*, *stay isolated*, and *stay safe*, so that we all might see a quicker end to the COVID-19 pandemic.

***The Coronavirus Pandemic (Part 2)*:** Two versions of the last *California Legal Update*, (Vol. 25, No. 5), dated April 16, 2020, were published. The first referenced you to a Johns Hopkins University memo concerning the COVID-19 coronavirus which I sent to those of you who requested it. The amended version of this same *Legal Update* told you that the Johns Hopkins memo was a fake, and inaccurate in many respects. (see https://www.snopes.com/fact-check/johns-hopkins-covid-summary/) So if you got that memo from me, but didn't get the subsequent correction, please disregard it. My thanks to Officer Matthew Sutterfield of the Sunnyvale Department of Public Safety for keeping me honest on this issue.

CASE LAW:

***Sixth Amendment, Massiah Violations*:**
***Invocation of One's Right to Silence and Subsequent Questioning*:**
***Questioning of an In-Custody Suspect by an Undercover Police Agent*:**
***Fifth Amendment, Self-Incrimination*:**
***The Potential Coerciveness of an Interrogation*:**
***A Court's Failure to Grant Bail as an Illegal Detention*:**
***The Sixth Amendment Right to Confrontation*:**
***Warrantless Search of a Cellphone Incident to Arrest*:**
***Doctrine of Inevitable Discovery*:**
***Citizen Informants and Probable Cause*:**
***Search Warrants and the Need for Specificity*:**
***Search Warrants and the Issue of Staleness*:**

People v. Fayed **(Apr. 2, 2020) 9 Cal.5th 147**

Rule: (1) A criminal suspect's Sixth Amendment right to the assistance of counsel is not effective until the state initiates adversary judicial criminal proceedings by way of formal charge or indictment. A criminal suspect's Sixth Amendment right to counsel, being "offense specific," applies only to the offense that is charged. (2) Questioning of an in-custody defendant by an undercover police agent does not require a *Miranda* admonishment or wavier. Such questioning, when it involves an uncharged offense, does not violate the defendant's Sixth Amendment right to counsel. A suspect's prior invocation of his right to silence, made weeks earlier and with an

intervening release from custody, does not preclude questioning by an undercover police agent. Questioning is not coercive absent evidence that it might have produced an untrue statement. (3) A trial court's failure to grant an in-custody suspect bail is not an unconstitutional illegal detention. (4) Failure of an undercover law enforcement agent to testify does not violate a defendant's Sixth Amendment right to confrontation because the agent's out-of-courts statements are neither hearsay nor testimonial in nature. (5) The contents of a cellphone, searched illegally, are still admissible in evidence under the "inevitable discovery" doctrine if the seized contents would have been lawfully discovered anyway by other lawful means. (6) Probable cause supporting the validity of a search warrant for computers may be found in "conclusory statements" from a "citizen informant" who is in a position to know that incriminating information may be contained in those computers, despite the lack of further specificity in the affidavit. Information from a "citizen informant" is "presumptively true."

The fact that a warrant asks for permission to do a second search of a location already searched once does not mean that the information justifying the second search is now stale, particularly in light of newly received information. A search warrant asking to seize and search all computers is not "overly broad" under circumstances where officers have no way of knowing which computer(s) at the premises might contain the evidence sought.

Facts: Defendant James Michael Fayed and his wife, Pamela, married in 1999 and lived in Camarillo, California. Together they started several Internet companies, one of which was called "Goldfinger Coin and Bullion." The Goldfinger business provided money and precious metal transfer services for a fee. The business was very successful, enabling defendant and Pamela to purchase a 200-acre ranch in Moorpark, named the "Happy Camp Ranch." Defendant hired Jose "Joey" Moya to help him on the ranch in effect as his "handyman." In 2007, Pamela purchased a "transmitting license" for Goldfinger, paying for it with a company check for $400,000. This upset defendant who didn't feel such a license was necessary. As a result (plus other issues), defendant filed for divorce, banned Pamela from the business, and fired Pamela's adult daughter from a previous marriage, Desiree, who, up until then, worked for Goldfinger.

In early 2008, shortly after filing for divorce, defendant and Goldfinger became the target of a federal investigation initiated by the U.S. Attorney, looking into a possible money laundering/Ponzi scheme, via Goldfinger, and making defendant a pile of money. On February 26, 2008, defendant and Goldfinger were indicted on federal charges of operating an unlicensed money transmitting business (18 U.S.C. § 1860) in a secret, sealed indictment. Although Pamela was not named in the indictment, she somehow learned of its existence. Pamela hired a criminal defense attorney and had him contact the U.S. Attorney's Office, offering to cooperate in their criminal investigation. However, Pamela never got the opportunity to follow up on this offer. On July 28, 2008, defendant and Pamela met with their respective divorce attorneys in Century City to discuss the ongoing federal investigation. Defendant apparently did not yet know that he had already been indicted. As Pamela was leaving this meeting, and while attempting to get into her car in a nearby parking garage, she was attacked by a knife-wielding assailant. Stabbed multiple times, she died from her wounds.

The initial investigation by LAPD homicide detectives, with the aid of a witness and a video surveillance camera in the parking garage, showed several persons fleeing in a red SUV that was

later determined to have been rented by the Goldfinger Corporation. When the vehicle was subsequently found in an Avis Rent-A-Car lot, a parking ticket for the garage where Pamela had been murdered was found in it. A fingerprint was lifted from this ticket. Meanwhile, defendant was arrested for murder the day after (July 29th) Pamela's death, but had to be released two hours later after he invoked his *Miranda* right to remain silent. Over the next couple of days (July 29th and 31st), two search warrants were issued for defendant's Happy Camp Ranch, resulting in the recovery of a lot of (unspecified) incriminating evidence. Several days after the murder—August 1st—the federal indictment was unsealed and defendant was arrested by federal agents.

On September 10th (some six weeks after defendant's prior *Miranda* invocation), with defendant sitting in the local men's federal detention center, his cellmate—one Shawn Smith—asked to talk to the police about Pamela's murder. Upon being interviewed by homicide detectives, Smith told them that defendant had cop'd to being involved in the murder of his wife. Smith was outfitted with a "wire" and returned to his cell he shared with defendant. Without telling Smith what to say, he was instructed to merely avoid the appearance of trying to elicit information from defendant and instead to have a regular conversation with him to see if he would "go ahead and reveal information that [defendant] had revealed before." Despite these instructions, Smith apparently pushed defendant for answers as to his involvement in Pamela's murder. As a result, defendant incriminated himself in the murder of his wife, telling Smith that he had paid Moya to kill her. Defendant also solicited Smith to hire a "hitman" to kill Moya, intending to eliminate him as a witness. The recording of this conversation was later entered into evidence at defendant's subsequent trial and played for the jury in its entirety.

Meanwhile, the fingerprint on the parking garage ticket led to a subject named Steven Simmons. Further investigation revealed that Simmons was the nephew of one Gabriel Marquez, who was the boyfriend of Joey Moya's niece. It was later determined that defendant had hired Moya—paying him $25,000—to kill Pamela. Moya brought Marquez and Simmons into the plot. (Moya, Marquez, and Simmons were tried separately from defendant, and, upon conviction, were all sentenced to prison for life-without-parole.) A complaint was filed on September 15, 2008, in state court, charging defendant with a special circumstance ("for financial gain" and "lying in wait") murder and conspiracy to commit murder. That same day, the United States Attorney moved to dismiss the federal indictment against defendant. In May, 2011, defendant was convicted of all charges and allegations, and sentenced to death. The appeal to the California Supreme Court was automatic.

Held: The California Supreme Court unanimously affirmed. On appeal, defendant raised a number of issues, the more important of which are discussed here:
(1) *Sixth Amendment Massiah Violation*: As noted above, defendant was in federal custody on September 10, 2008, having been federally indicted on a money laundering offense, when investigators used defendant's cellmate to question him concerning Pamela's murder. This, of course, was done without defendant's attorney being present. Defendant argued that even though at that point in time he had not yet been charged by the state with the murder of his wife, his Sixth Amendment right to counsel had been violated. The general rule is that once charged, a defendant is entitled to the presence of an attorney during any questioning by law enforcement or its agents. (*Massiah v. United States* (1964) 377 U.S. 201.) It was conceded for Sixth Amendment purposes that Smith was acting as an undercover government agent. However, "the Sixth

Amendment right to counsel 'does not exist until the state initiates adversary judicial criminal proceedings, such as by formal charge or indictment.'" (*People v. DePriest* (2007) 42 Cal.4th l, 33.)

Also, the Sixth Amendment right to counsel is "*offense specific*." (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 175.) This means that it only kicks in when the crimes he is questioned about have been formally charged. Although in custody on federal charges, defendant had not yet been charged with Pamela's murder when questioned by Smith. Defendant contended, however, that the federal and state prosecutions were so "*inextricably intertwined*" that having been charged with the one, the Sixth Amendment should protect him from being questioned about either absent the presence of his attorney. As further evidence of this, it was argued that the federal case was merely a "sham," done for the sole purpose of holding him in custody while Pamela's murder was investigated. Also, defendant pointed out that federal prosecutors argued the pendency of the murder investigation as an excuse to keep him in federal custody, and that the same day he was charged in state court with murder (September 15, 2008), the federal prosecution was dropped. The Court disagreed.

The U.S. Supreme Court has made it clear that there is no exception to the offense-specific requirement for uncharged offenses, and that whether or not the uncharged offenses are "*closely related*" to, or "*inextricably intertwined*" with a charged offense, is totally irrelevant. (*Texas v. Cobb* (2001) 532 U.S. 162, 173; see also *People v. Slayton* (2001) 26 Cal.4th 1076, 1082-1083.) The Court agreed that in this case, there was a "close collaboration" between the state and federal prosecutions, and that defendant's federal custody was used as an excuse to delay having to charge him with murder until further investigation was completed. But nothing about these tactics overcame the simple fact that defendant had not yet been charged with murder when Smith tape-recorded defendant's incriminating statements. Defendant's Sixth Amendment arguments, therefore, were without merit.

(2) *Fifth Amendment, Self-Incrimination*: Defendant invoked his right to remain silent, under *Miranda*, when originally arrested for murder, the day after (July 28th) Pamela was killed. He was immediately released without any charges being filed, only to get popped again three days later (August 1st) by the Feds on the money laundering indictment. Then, on September 10th (some six weeks later and while still in federal custody), without the benefit of a new *Miranda* advisal or waiver, defendant was questioned by his cellmate Shawn Smith, acting in an undercover capacity as a police agent. On appeal, defendant argued that this constituted a Fifth Amendment *Miranda* violation. The Court rejected defendant's argument. The Supreme Court first held that defendant was correct in noting that a *Miranda* invocation is "*not*" offense specific; i.e., that an invocation applies to any offense about which law enforcement (or, as relevant to this case, an agent of law enforcement) wishes to question him. However, with the six-week time interval between defendant's invocation of his right to remain silent, and with his intervening release from state custody, the Court held that his prior invocation was no longer effective.

As to being questioned by an undercover police agent, the Court first noted the lack of any need to provide a *Miranda* admonishment. "Conversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*;" i.e., "an incommunicado interrogation . . . in a

police-dominated atmosphere." Also, per the Court: "*Miranda* was not meant to protect suspects from boasting about their criminal activities in front of people whom they believe to be their cellmates." As to whether Smith "*coerced*" defendant into incriminating himself, the Court did in fact note that, contrary to the instructions he received by the detectives, Smith was much more than just a passive listener. In several instances, for instance, Smith specifically asked defendant what were arguably leading questions about Pamela's murder, including defendant's participation in the planning. Smith also appeared to "*ingratiate*" himself with defendant by expressing sympathy for him, and commiserating with him on how Moya and his cohorts had bungled the job. But the Court concluded that the record as a whole (i.e., the "*totality of the circumstance*") failed to show any coercive questioning on Smith's part, at least to the extent that he might have caused defendant to make an untrue statement. To the contrary, defendant seemed to be more than willing to talk about his involvement in Pamela's murder, indicating at one point that he had wanted to commit the murder himself. Defendant was also quite open in his solicitation of Smith to hire a hitman to kill Moya, drawing up a map of his ranch so that the alleged hitman would know where to find his targeted victim. Based upon this record, therefore, the Court ruled that defendant's tape-recorded incriminating statements were *not* the product of a coercive interrogation, and were properly admitted into evidence.

(3) *Fourth Amendment Illegal Detention*: Defendant sat in federal custody between August 1st and September 10th, at which point Shawn Smith goaded him into admitting to having set up Pamela's murder. On appeal, defendant argued that pursuant to the Bail Reform Act of 1984 (18 U.S.C. § 3142(f)), he should have been released by the feds on bail and that being held in custody was a violation of his Fourth Amendment rights (i.e., an unlawful seizure). Anything he said should have been suppressed as a product of this unlawful detention. The Court didn't buy it. Specifically, the Court held that there was no authority for suppressing evidence as a remedy for violating the Bail Reform Act (assuming, without deciding, that the Act was in fact violated). The "exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates" (*United States v. Leon* (1984) 468 U.S. 897, 916.) Whether or not defendant had been illegally detained, therefore, was irrelevant.

(4) *Defendant's Right to Confrontation*: As the trial proceeded, and after the tape-recorded conversation between Smith and defendant had been admitted into evidence, the prosecution decided *not* to put Shawn Smith on the stand. Defendant, on appeal, complained that because Smith did not testify, he had been deprived of his Sixth Amendment right to confront and cross examine Smith, as guaranteed by the Sixth Amendment. The Court rejected this argument. In order for a defendant's Sixth Amendment right to confrontation to be an issue, it must be shown that the witness's statements constituted both *non-admissible hearsay* (i.e., out of court statements offered for the truth of the matter asserted in those contested statements) and "*testimonial*" in nature. Here, the out-of-court statements from Smith that were presented to the jury were in the form of his recorded conversation with defendant in their jail cell. Smith's half of these statements were not hearsay in that they were not admitted for the purpose of proving the "truth of the matter asserted;" i.e., that anything Smith said to defendant was the truth. As pointed out by the prosecutor in closing arguments, it was not necessary that the jury accept anything Smith said to be truthful.

The purpose of admitting those portions of the tape recording when Smith was talking was to put into context defendant's responses; i.e., his incriminating statements. Defendant's statements made back to Smith were indeed hearsay—the truth of those statements being obviously important—but were admissible under the "*statement against penal interest*" exception to the hearsay rule (Evid. Code § 1230). It was also noted that Smith's statements were not "*testimonial*." To be considered "testimonial," a declarant's hearsay statement must be shown to have been made "with a primary purpose of creating an out-of-court substitute for trial testimony." There is case authority to the point that "statements made unknowingly to an informant or statements between fellow prisoners are 'clearly nontestimonial.'" (*Davis v. Washington* (2006) 547 U.S. 813, 825.) Therefore, defendant's Sixth Amendment confrontation rights were not violated.

(5) *Warrantless Search of Defendant's Cellphone; Inevitable Discovery*: When defendant was initially arrested on July 29th, his cellphone was taken from him and searched. All that was obtained from the phone was his cellphone number. Defendant argued that this warrantless "search" of his cellphone was illegal under *Riley v. California* (2014) 573 U.S. 373. The People agreed. However, the People further argued that under the "Inevitable Discovery" doctrine, defendant's cellphone number would have been discovered by other lawful means anyway, and that suppression of his phone number was therefore not required. The Court agreed. Pursuant to the "*Doctrine of Inevitable Discovery*," the prosecution must prove by a preponderance of the evidence that the contested evidence would have been inevitably discovered by other lawful means. In this case, defendant's cellphone number was also recovered from the contact list in Pamela's cellphone, found at the scene of her murder. The police also "obtained independently" defendant's cellphone number from a later search of Moya's cell phone as well as during a search of Goldfinger's office. Based upon this, the Court found that the doctrine of inevitable discovery applied, and that suppression of defendant's cellphone number was therefore not appropriate.

(6) *Validity of the July 31st Search Warrant*: Two search warrants for defendant's residence at his Happy Camp Ranch were obtained by investigators in this case. The first was obtained the day after Pamela's murder (July 29th) and was executed that same day. The next day (July 30th), the red SUV was located at an Avis Rent-A-Car facility and searched, resulting in the recovery of the parking garage ticket with Simmons' fingerprint. Neither of these two searches were challenged by defendant. However, a second warrant for defendant's residence was obtained on July 31st, incorporating the July 29th warrant and, via an amendment, added new information. This time, investigators sought, among other things, **"**personal computers, laptop computers, hard drives, electronic equipment used to store files or written documentation, (and) thumb drives." The probable cause for seeking to search for and seize these computers came from Pamela's adult daughter, Desiree, who told investigators that "her mother kept records and documentation that incriminates (defendant) on her personal computer," and that her computer "contain(ed) valuable information." A number of computers were seized as a result.

Defendant moved to quash this second warrant, arguing first that Desiree's statements—to the effect that there was incriminating evidence on Pamela's personal computer—were "*conclusory*" and "not supported by a single fact in the affidavit." The Court rejected this argument, noting that Desiree's relationship with both the victim and the suspect, which was "clearly set out in the affidavit," put her in a position where she "would naturally be knowledgeable about . . . (their)

contentious divorce," thus justifying the conclusory allegation that her mother would have incriminating information on her laptop computer. This set of circumstances also qualified Desiree as a "*citizen informant*," resulting, by law, in her allegations being "presumptively true." Secondly, defendant objected to the lack of specificity (i.e., "*overly broad*") in the warrant, where the investigator asked to seize and search any and all computers on the premises. Rejecting this argument, the Court noted that a warrant is not overly broad when it lists all the computers in a suspect's residence under circumstances where the officers have no way of knowing which computers might contain the incriminating information they had probable cause to believe might be there somewhere. And lastly, defendant argued that the affidavit to the second warrant (defendant referring to this warrant as "moot') contained no new facts sufficient to support the belief that more evidence had materialized after the first search, and that the information in the second warrant was therefore too "stale" to justify a second search. Again disagreeing, the Court held that neither the facts, nor the law, dictates a finding of "staleness" when a second warrant is issued for a location that has already been searched. In this case, the search of the red SUV (finding the parking garage ticket as well as dirt on the floorboards) and the information obtained from Desiree about the existence of relevant computerized information, both provided investigators with the need to return to defendant's ranch to search it again. The search based upon the July 31st warrant, therefore, was lawful.

Note: There is one glaring screw-up in this decision that left a major issue just hanging out there in the wind. Lost deep in defendant's voluminous challenges (and not described in the "Facts," above), he alleged that in addition to invoking his "*right to silence*" when first arrested for murder on July 28th (see argument 2, above), he also invoked his "*right to the assistance of counsel*" when arrested by the feds on August 1st, on the money laundering charge. (See pg.164) This second invocation, if it happened at all, was neither discussed, nor even mentioned, in the Court's "Statement of Facts." But if it did happen, it's an extremely important point in that the legal ramifications of invoking one's "*right to the assistance of an attorney*," as opposed to his "*right to silence*"—both pursuant to the Fifth Amendment/*Miranda*—are significantly different. And if it did happen, then this raises a still unresolved issue under *Maryland v. Shatzer* (2010) 559 U.S. 98.

Here's the rules: The law is clear that when a suspect invokes his "*right to silence*" only (e.g., "*I don't want to talk*"), then, even if still in custody, officers are allowed to come back to him later and ask him if he has changed his mind, at least so long as he's not pressured into doing so. (See *Michigan v. Mosley* (1975) 423 U.S. 96; and *People v. Warner* (1988) 203 Cal.App.3rd 1122.) If, however, the suspect invokes his *Miranda* "*right to the assistance of an attorney*" (e.g., "*I don't want to talk without an attorney being present*"), then the rule is that he's off limits to any and all further questioning, *on any case*, *so long as he remains in custody*. (*Edwards v. Arizona* (1981) 451 U.S. 477.) In *Maryland v. Shatzer*, the U.S. Supreme Court provided an exception to the *Edwards* rule, holding that officers may go back and re-question a *post-conviction* prison inmate who had previously invoked his right to counsel, so long as at least 14 days has expired. The issue still unresolved is whether Shatzer's 14-day rule applies to an in-custody suspect *prior* to conviction and sentencing. (*People v. Bridgeford* (2015) 241 Cal.App.4th 887; "*yes*." *Trotter v. United States* (Wash. D.C. 2015) 121 A.3rd 40; "*no*.") If James Fayed in this new case did in fact invoke his right to counsel on August 1st, when arrested on the federal money laundering indictment, then the legality of an undercover police agent questioning him six weeks later

(September 10th), while still being held in continuous federal custody, but not yet convicted and sentenced, would be a serious issue that needs deciding. The Court here never mentions this important issue.

On another issue, by the way, the legality of Smith, as an agent of law enforcement, questioning defendant about Pamela's murder is based upon defendant not yet having been formally charged with murder. If he had been formally charged, Smith having questioned him outside the presence of his attorney would have been in violation of *Massiah*, and illegal. The only legal way to use an undercover agent (whether another inmate or an undercover cop) under such a circumstance (i.e., after the suspect has been charged in court) is for someone in Smith's position to, in effect, "*act like a mere listening post*," not questioning him at all, and doing absolutely nothing to encourage the suspect to talk about his crimes. (*United States v. Henry* (1980) 447 U.S. 264; *Kuhlmann v. Wilson* (1986) 477 U.S. 436.) In such a case, any "volunteered" incriminating statements defendant might make are admissible against him. But it's a touchy area. Anything at all done by the undercover agent, even if to subtlety encourage a charged defendant to talk about his crimes, constitutes a *Massiah* violation.

***Kidnapping*:**

People v. Newman **(Sep. 19, 2019) 40 Cal.App.5th 68**

Rule: A Pen. Code § 207(a) simple kidnapping occurs whenever a victim's forced movement is *not* incidental to the commission of an underlying crime and the movement increases the risk of harm to the victim.

Facts: "H" was a junior in high school in 2013 when she began dating defendant Andrew Newman. Defendant started physically abusing her, however, after about six months into the relationship. The abuse included things like hitting her with a metal pole, pinching her stomach hard enough to leave a scar, holding her head underwater in the bathtub, punching her in the face, and abusing her dog. The record is very thin on what H did in each instance to provoke such abuse other than to note that at least on one occasion her crime was simply to fold his shirts instead of hanging them. In any case, H was afraid to leave defendant because he had threatened to find and torture her, and then kill her and her family. Despite this, however, she broke it off several times only to relent when defendant would promise that "things would change," and that she didn't need to be afraid of him anymore.

Finally, in 2016, H had had enough, trying to leave him permanently; blocking off all contact. Or so she thought. On March 6, 2017, at about 7:00 a.m., a loud crash woke H up as she slept in her bed. The noise was defendant breaking into her locked bedroom and pointing a gun at her chest. Screaming for help was to no avail in that no one else was home. Telling H that he had nothing to lose, defendant ordered her to go to his car. With defendant pointing the gun at her, H got out of bed and went to the front door; some 20 or 30 feet away. As H opened the front door, defendant got in front of her and commanded her to start running with him to his car; some 550 feet away. Moving as slowly as she could get away with, H followed defendant to the front gate—a distance of about 35 feet—with defendant turning around some three times, pointing the gun at her, and commanding her to run faster. H ran another 135 feet or so towards defendant's

car. At that point—believing that she would die if she got into his car—she veered off towards her neighbor's house. The neighbor's back door was some 25 feet from the gate. H ran to the neighbor's back door which, as it turned out, was unlocked. She ran inside, screaming: "He has a gun. He has a gun. He's going to kill me." The neighbors called the police. Defendant fled, but turned himself in to the police later that day. Charged in state court, defendant was convicted of first degree (residential) burglary, assault with a firearm, and kidnapping. Convicted on all counts, defendant was sentenced to fifteen years in prison. He appealed.

Held: The Second District Court of Appeal (Div. 8) affirmed. The controlling case authority on this issue is the California Supreme Court case of *People v. Martinez* (1999) 20 Cal.4th 225 (overruled on other grounds). In *Martinez*, the Supreme Court held that for the forced movement of a victim to be sufficient to support a charge of "kidnapping," pursuant to Penal Code § 207(a), it must be proved that (1) such movement "is not merely incidental to the commission of the underlying crime" and (2) the movement "increases the risk of harm to the victim over and above that necessarily present in the underlying crime itself." (pg. 232.) One factor to consider when determining whether the movement was incidental to the underlying crime is the total distance the victim was moved.

Defendant argued on appeal that he didn't move H far enough to constitute a kidnapping; i.e., that "the distance he forced H to move was 'short' and therefore insubstantial." The Court disagreed. In evaluating the first *Martinez* element (i.e., whether the movement was "incidental"), it is well settled that "the 'scope and nature' of the movement" must be considered. (pg. 233.) This includes a consideration of the actual distance moved. In this case, the Court calculated the distance H was moved before she escaped was about 190 feet. Defendant's argument, in effect, was that 190 feet was, as a matter of law, insufficient to constitute a kidnapping. Noting that no minimum distance is required, the Court declined to accept defendant's argument. The only requirement is that the distance a victim is moved "must be more than slight or 'trivial,'" and "must be substantial in character." Noting cases where the movement involved was considerably less (e.g., 15 feet; *People v. Arias* (2011) 193 Cal.App.4th 1428; and 9 feet; *People v. Shadden* (2001) 93 Cal.App.4th 164.), the Court held here that the jury could have easily found that 190 feet was enough.

In discussing the second *Martinez element* (i.e., an increased risk of harm), the Court again rejected the defendant's argument that taking H outside into a public place had the opposite effect; i.e., that it "*decreased*" the risk of harm. To the contrary, the jury was within its right to accept H's view of the situation (as she so-testified), that by removing her from her home and taking her to his car, she was likely heading into a situation where her life was at stake. "The jury could conclude the situation and the risks were spiraling upwards." The evidence as presented at defendant's trial, therefore, was sufficient to support his conviction for the crime of kidnapping.

Note: Another aspect of the first *Martinez* element—whether or not the movement of the victim was merely incidental to the commission of the underlying crime—other than the total distance moved, but not discussed here, is the defendant's purpose in moving the victim, and whether that purpose was "associated" with the underlying crime inflicted on the victim. The rule is this: If the movement of the victim was merely incidental to the underlying crime committed (or to be

committed) on the victim, then there is no kidnapping. For instance, in *People v. Delacerda* (2015) 236 Cal.App.4th 232, it was held that the victim being dragged from the living room into her bedroom for the purpose of committing an act of domestic violence is not a kidnapping. Similarly, in *People v. Williams* (2017) 7 Cal.App.5th 664, the Court held that moving a robbery victim to the back of the victim's store is merely incidental to the crime of robbery and not a kidnapping. When the movement of the victim is so integral to the underlying crime, it is typically referred to as an "associated" crime, precluding a separate charge of kidnapping. In this new case, however, defendant's act of taking H from her home was clearly independent from whatever he intended to do to her once he got her away from there (rape her, torture her, and/or kill her; we don't know), and not "associated" with that unknown intent. So this element was not even a factor considered by the court.

***Patdowns for Weapons*:**

In re Jeremiah S. **(Oct. 18, 2019) 41 Cal.App.5th 299**

Rule: Absent articulable reasons to believe a detained strong-arm robbery suspect may be armed, patting him down for weapons merely because he is a robbery suspect is illegal.

Facts: Fourteen-year-old Jeremiah S. and a buddy, while walking in the embarcadero area of San Francisco just before midnight on July 2, 2018, came upon Ornin Gosuwin walking in the opposite direction. Ms. Gosuwin was carrying a "crossbody bag" (i.e., a purse) and holding her cellphone. Wearing their required "hoodies," and taking up the entire sidewalk, as tough guys like to do, Ms. Gosuwin stepped aside to let them pass. As she did so, however, one of these brave young bullies pushed her to the ground. Both subjects then grabbed at her purse and reached for her cellphone as one of them demanded; "*Give me your phone, bitch*." Despite Gosuwin's resistance, the subjects were able to pull her purse and cellphone away from her, leaving her with scratches and bruises around her neck from the strap of her bag. With the help of a nearby security guard, Gosuwin called 911 and reported the strong-arm robbery.

San Francisco police officers immediately descended upon the area. Defendant and his buddy were quickly located through the use of a "Find My iPhone app." With defendant and his buddy matching the suspect descriptions, Officer Bryan Neuerburg and other officers stopped and detained them. Defendant stood at five feet, five inches tall and weighed a whopping 130 pounds. A compliant defendant made no objections when told to face a wall with his legs spread and his arms above his head. Defendant also didn't make any inappropriate movements nor attempt to run away. To this point, nothing was said or done that might have indicated that either defendant or his buddy were armed. Nor did Officer Neuerburg see any weapon-like bulges in defendant's clothing. "(T)here was nothing about (defendant's) appearance, behavior, or actions to make (the officer) believe (defendant) was armed and dangerous." Nevertheless, Officer Neuerburg believed that because the reported crime was a "robbery," and knowing that "most robberies involve a weapon or most robbers tend to have weapons on their persons" he decided to pat defendant down for weapons.

Two cellphones, including the victim's, were found on his person. (The victim's purse was later found discarded in the area.) A wardship petition was filed in Juvenile Court alleging a violation

of second degree robbery. After defendant's motion to suppress the cellphone was denied, the magistrate found the alleged robbery to be true. Following a similar disposition in another second degree robbery case in the neighboring Alameda County Juvenile Court, defendant was placed on probation in his stepmother's home. He appealed.

Held: The First District Court of Appeal (Div. 3) reversed. Defendant's argument on appeal was that the Juvenile Court erred in denying his suppression motion because the officer who patsearched him failed to articulable any specific facts supporting a reasonable suspicion to believe that he may have been armed. The People, on the other hand, submitted that the patsearch was lawful for the simple reason that defendant was a suspect in a robbery, and all forms of robbery, being by their very nature violent crimes (i.e., a theft by force or fear), are likely to involve a weapon. The Court agreed with the defendant's argument, ruling that his motion to suppress should have been granted. In so ruling, the Court specifically declined to sanction the use of a "per se" rule, i.e., that all robberies, being violent crimes, warrant the patdown of the suspect for weapons.

To the contrary, the U.S. Supreme Court in its landmark case decision of *Terry v. Ohio* (1968) 392 U.S. 1, made it clear that patdown searches for weapons are lawful only when the officer involved is able to articulate specific facts and circumstances justifying an objective reasonable suspicion to believe that this particular detained suspect, under the totality of the circumstances, may be armed. A patdown for weapons is exactly that; a means to discover the presence of a weapon for "officer safety" reasons. It cannot be used as an excuse to search for contraband or other evidence of a crime, but is allowed only to give a police officer a means of discovering offensive weapons so that the officer can protect himself and others. In this case, the officer could only say that it was his opinion that robberies, typically being violent, often involve weapons. The Court held that this was not enough. While the suspected crime being a robbery may be one factor to consider, by itself, it is not enough. In this case, for instance, there was never anything reported by the victim indicating that a weapon may have been involved or that defendant was otherwise armed.

When stopped, defendant was cooperative rather than evasive or belligerent. He was not wearing baggy clothes, nor were there any bulges in his clothing indicating the possible presence of a weapon. Physically, defendant was small of stature; certainly smaller than the four or more officers involved in his detention. Although the time of night and the location of the stop may sometime be a factor, the officer here never indicated that either of these were taken into consideration. Based upon this record, there being no articulated reasons to believe defendant was armed, patting him down for weapons was illegal. His motion to suppress should have been granted.

Note: Why "inevitable discovery" was not considered is unexplained. Certainly, he was to be arrested and transported, justifying a search incident to arrest during which the victim's cellphone would have inevitably been recovered. But that issue aside, the point here is that strong-arm robberies, without anything indicating that the suspect may be armed, does not justify the patdown for weapons. End of issue.