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# **UNITED STATES CRIMINAL LAW AND PROCEDURE**

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Patrick J. McKinley  
Chief Assistant District Attorney  
Santa Barbara, California  
(Retired - 2008)  
[Cats2roses@aol.com](mailto:Cats2roses@aol.com)

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**Introduction: Prior to the first class, please read through the outline to note the relevant words and topics. This should assist in your understanding of the cases and legal concepts to be discussed in the class. Print and bring your outline to class or have it available on your laptop in class. Please read in its entirety the search warrant affidavit that is also being provided to you, and the Riley v. California U.S Supreme Court case and **read both prior to attending the first class.****

**PP#1-Introduction /Santa Barbara, California**

**US and German law clerks and teaching in Europe, etc. {I have an article about how the idea of teaching in Germany and other countries occurred. If interested I can e mail it to you}**

## **I. The Role of the District Attorney in State Criminal Prosecutions**

[I have an article I wrote for the legal journal in Lublin, Poland in 2020 regarding prosecuting in a democracy. If interested I can e mail it to you]

- **Pre-Arrest investigation —very close relationship between the police and District Attorney- much different than in the Federal Jurisdiction and other countries: The “Exclusionary Rule” is the main reason! (See post.-4<sup>th</sup> Amendment) The reasoning underlying the rule is to DETER the police from making illegal searches/arrests/detentions**
- **Search and Arrest warrants. See post re: Emergency Search Doctrine.**
- **Felony and Misdemeanor arrests without a warrant.**

- **Post arrest investigation and preparation-first hours/days are important-**
- **Criminal Discovery and documentation of what has been provided**
- **Filing of charges -and discretion vested with the District Attorney.**

**Jurisdiction-Did the crime occur in Santa Barbara County? (Multi county offenses /ok with consent of DA/common carriers.)**

- **Almost unlimited discretion - the very reason when abused it is so dangerous. This is probably the most important decision we make.**

**California Prison Population is dropping:**

**Was 200,000, now :November 2022- 96,000!**

**[ 32 CSP-male=95,000+; 3 CSP-female=4,000+] California State Prison Population-August 2021:28 % Black; 43% Hispanic; 21% White; 6% Other//97,840 males//3,510 female**

**Juveniles- persons under the age of 18-Estonia age 14.**

**+DA can file case in adult court-with court approval- treat juvenile as any other adult.**

**But 14-15-year-olds- must be in Juvenile Court!**

**16-18-DA can petition judge to prosecute in adult court:**

**No DP for juvenile offenders/ No LWOP for non-homicide /No mandatory LWOP /No “functional equivalent” LWOP for non-homicide juvenile —e.g.- 110-life/ 84-life=No/ 30-life with parole eligibility at age 47=OK**

**Juarez PP#18**

- **The Statute of Limitations must be observed. Almost all misdemeanors-1 year from commission.**
- **Exceptions for theft of public money, many sex offenses and fraud offenses-4 years from discovery of crime.**
- **Commencing prosecution stops S/L-filing of complaint and issuing arrest warrant/indictment or information filed/and for**

- misdemeanors: filing of complaint. A copy of a criminal complaint and an arrest warrant is included in your material.**
- **Important- as California DNA data bank (4<sup>th</sup> largest in the world) is getting 300 matches of forensic evidence a month!**
  - **Note-Maryland v. King-2013-DNA taken at arrest ok.**
  - **P v. Robinson- 47 Cal.4<sup>th</sup> 1104 (2010) DNA warrant upheld.**
  - **Discriminatory prosecution - will result in the case being dismissed. – Conflict of interest--Usual route is to ask California Attorney General to take case- or “wall off” the Deputy D.A.**
  - **We decide whether to charge someone with a crime, what charge to be filed, the level of the charge -Felony or Misdemeanor? Death Penalty? Three strikes? Two Strikes? Whether to make someone a witness or a defendant, and whether to arrest and incarcerate or send a letter for a voluntary appearance.**
  - **Filing a “felony” as a misdemeanor very common.**
  - **Some Common Crimes**
    - **Theft –Grand Theft [\$950]- [important for making in the presence- arrests] California Farm Produce=\$250**
    - **Theft of a vehicle/firearm/from the person and cumulative thefts over \$950 in a year for embezzlement-felony!**
    - **Robbery -Taking property by force and fear--**
    - **Burglary -entering a building or “locked” vehicle to commit theft (or a felony)**

**Domestic Violence - /Restraining Order Violations-includes fiancée, current or past dating relationship! /Mandatory arrest if PC and RO on scene!**

- **PP#6- Varela Murder-See p.14- [Public Safety exception to Miranda]**
- **Gang Crimes and Gang Enhancements-PP #17-**
- **Vehicle Manslaughter -traffic violation plus a fatality= a misdemeanor/if intoxicated/reckless etc. =felony**

- **Conspiracy- an agreement by 2 or more persons to jointly commit a crime- Important because of evidence rule that allows statements of co-conspirators to be admissible against ALL defendants if made during the conspiracy. Also an exception to the Hearsay Rule-see post.**
- **Conspiracy to commit a misdemeanor is a felony! (Important because of laws of arrest for only a misdemeanor)**
- **Murder/Manslaughter/Lying in Wait-DV victim kills sleeping husband-Bogdanoff case.**
- **Felony Murder Rule=1<sup>st</sup> degree Murder only if (1) (actual killer) (2) with intent to kill aids and abets actual killer or (3) the person was a major participant in the underlying felony and acted with reckless indifference to human li**
  
- **What is Voluntary manslaughter and “Heat of Passion/”- You intend to kill or act with conscious disregard for human life-Can be reduced if sudden impulse or heat of passion-defendant provoked/provocation would cause a reasonable person to act rashly and without due deliberation-that is – from passion and not judgment. Also— “Imperfect self-defense”—a person who kills because he/she unreasonably but actually believes that he/she is in imminent danger of death or GBI does not act with “malice” and therefore crime is voluntary manslaughter.**
- **Examples-**
- **Not Heat of Passion-name calling/smirking or staring/insulting words and gestures/**
- **Note-PC 192-2015 amended- “For purpose of determining sudden quarrel or heat of passion...the provocation was not objectively reasonable if it resulted from the discovery of, knowledge about, or potential disclosure of the victim’s actual or perceived gender, gender identity...sexual expression, orientation, including under circumstances in which the victim made and unwanted non forcible sexual advance towards the defendant...” (Wharton example)**
- **Note- In California all D’s who commit the crime and all who aid and abet are equally guilty.**

## II. POST FILING-Arraignment

- **The Arraignment - first court appearance**
- **Bail / Own Recognizance release on a promise to appear.**
- **In re Humphrey-2021-Judge must consider defendants ability to pay=poor defendants freed unless dangerous-**
- **Appointment of attorney -Gideon v. Wainwright- 1963**
- **The Public Defender - overworked but very competent attorneys.**
- **Conflict free attorneys are required.**
- **Argersinger v. Hamlin- 1972- free lawyer for any offense that involves jail.**
- **Faretta v. California- 1975- a 6-3 decision. Dissent-If there is any truth to the old proverb that “one who is his own lawyer has a fool for a client”, the Court by its opinion today now bestows a constitutional right on one to make a fool of himself.”**
- **Faretta motion (request) must be timely- (trial date, ready for trial, number and availability of witnesses, likelihood of delay) **A copy of a Faretta waiver is included in your documents.****
- **People v. Espinosa-2014-Court cannot revoke pro-per status for jail behavior (violence in jail) If defendant engages in serious and obstructionist misconduct- inside or outside the courtroom- that threatens the integrity of the trial –Faretta status can be revoked.**
  
- **Interpreters - Spanish, Vietnamese, Hmong, sign language, etc.**
- **Discovery - now a two-way street!**
- **Restraining orders in domestic violence cases -issued on scene and at arraignment!**
  
- **Huge numbers of cases—in a small jurisdiction like Santa Barbara- 60-80 cases every day—from murder to speeding.**
- **60% of lesser charges (Misdemeanors settle at arraignment.**
- **Plea and Sentence Bargaining - extremely common (What did the defendant do? What is the strength of the case? What is the Defendants record? How bad is the damage, the loss or the injury? Restitution? Age of the defendant? Numerous other factors, probation status, D.A. can take a chance even where Judge would not!**

- A plea bargain is a contract- specific performance unless judge/good cause intervenes. **A copy of a plea bargain form is included in your material.**

### ***POST FILING - Pre-Trial Motions***

- Note- while very, very few cases result in a Jury Trial, the existence of the Right to Jury trial impacts numerous pretrial motions!
- Discovery motions — reports, experts and their professional background
- Rough notes of lab experts, statements, photos, tapes, records, prior crimes/ of witness, psychiatric/psychological reports, counseling of sex offense /domestic violence victim. Beware of experts who want to help too much: BWS/RTS/DVAS/CAAS--etc.- “Compassion Satisfaction” and Bias! —part of coping mechanism of forensic experts is being compassionate towards victims! Experiment- who was paid to review SAME offender case file-different result based on who was retained!
- NIST-National Institute of Standards and Technology-Committees: Biology/DNA, Chemistry/Crime Scene Death Investigation/Digital/Pattern/ Documents/Trace/Tool marks/Footwear/tires/Accounting! “Follow the money, often involves complex accounting. ++Need-Professional competence/due professional care/supervision/sufficient relevant data/integrity and objectivity— Beware testimony from “experts” who claim that only they can see the truth---extremely dangerous!
- 2019-P. v. Wilson-Trial court abused its discretion by admitting the testimony of a prosecution expert on child abuse...” that studies show only a very small percentage of allegations of child sexual abuse are false” ...because “it tells the jury nothing about whether *this particular allegation* is false.”
- **2020**-P.v. Munch-CSAAS expert admissible [delay in reporting/change story] **2021**- P.v. Lapenias-Error for allowing expert to answer: “is it common for children to make up a story that abuse occurred? “No, that’s rare.”
- Note: MMPI in Poland: Volume 18, Polish Psychological Bulletin (1987) Cf: Bogdanoff case
- Forensic science is NOT personal opinion or advocacy: “if the law has made you a witness, remain a man of science. You have no victim to avenge, no guilty or innocent person to convict or save...” [Paul Broussard, Chair of Forensic Medicine, Sorbonne, 1897]

- PP#7- NELSON-- Dependent Adult Sexual Abuse

*Lineups and Lineup Motions*

- Eyewitness identification is important, common, and dangerous in that it is not reliable in many cases!
- Judge can order a lineup—and order defendant to be in it.
- cross racial identification is a common problem.
- in the field showups are allowed-must be timely/not suggestive.
- 6 pack photo lineups are common -done on laptop now and preserved.
- Defendant has a right to a lawyer at a court ordered lineup-lawyers presence can help avoid problems.
- Jury told to consider: the time and opportunity of the witness to view the suspect; was the witness paying attention? Stress; accuracy of prior identifications; cross racial id? Expert testimony. Time between crime and the identification, what were the circumstances? -ability to observe? lighting? weather? distance? duration of observation? How closely was the witness paying attention?? NOTE- **2021-Cal. S. Ct eliminated “how certain is the witness??”**

*Motion to Suppress evidence - the Exclusionary Rule-Mapp v. Ohio*

U.S. Constitution-4<sup>th</sup> Amendment: The right of the People to be secure in their persons, houses, papers and effects, against **unreasonable searches** and seizures, shall not be violated, and no Warrants shall issue, but upon **probable cause**, **supported by oath** or affirmation, and **particularly** describing the place to be searched, and the person or things to be seized.

- Illegal search and arrests- evidence cannot be used.
- Emergency search/enter to arrest/hot pursuit (many of the cases in PP#2!)
- People v. Ovieda (2019) 7 Cal. 5<sup>th</sup> 1034-A Santa Barbara case-suicidal suspect outside with 3 friends/handcuffed/no shots fired/guns outside/no noise from inside/no report of domestic violence-warrantless entry illegal and all evidence suppressed (including a sub machine gun/dope etc.) Cf: SB case of Elliot Rogers-18 shot/6 killed.

- **Emergency Aid Exception-Safety/Health risk is life threatening- someone needs immediate aid-entry necessary to prevent serious injury- ok without a warrant.**
- **Felony/Misdemeanor- “in the presence” requirement for almost all misdemeanors. No requirement like this for a felony- police can arrest on “probable cause.”**

*Arrest – Search and Seizure law*

- **Mechanics of doing and getting a warrant.**
- **Warrants are preferred-every effort to uphold it if obtained!**
- **Probable Cause and the US Constitution’s 4<sup>th</sup> Amendment**
- **Facts---not conclusions! Let the Judge decide....**
- **Franks v. Delaware- 1978—ok to challenge warrant for deliberate false statements.**
- **Particularity—both for the location and the items to be seized. Now the police use Google Maps!**
- **Knock-notice is required.**
- **Katz v. United States-1967- reasonable expectation of privacy test**
- **Trash searches ok with no probable cause/warrant**
  
- **Residence arrests without a warrant are unlawful in most cases- Payton v. New York- 1980-emergency exception- hot pursuit; 2021-Lange v. Calif. USS CT-pursuit of a fleeing misdemeanor defendant does not always justify a warrantless entry into a home. Police created exigencies: Kentucky v. King (2011): Police may rely on exigent circumstances so long as they have not violated or threatened to violate the 4th Amendment.**
  
- **California v. Acevedo-1991- vehicle- movable- search with probable cause and without warrant ok. A particularly important case! P.v. Tousant-2021-D. perpetrated 2 187’ s as revenge for his son’s gang related murder. Police on scene of second 187 found D’s car parked across the street/parked awkwardly/rental car/ unfamiliar to residents/shell casings and gun magazine nearby-PC search OK- Cell phone in car- Illegal- but S/W upheld as police had enough PC without the cell phone info.**
  
- **Chimel v. California- 1969- arm’s length/weapons-evidence**

- Search of car's SDM (sensing and diagnostic module) without pc is not allowed. P. v. Gomez-2011-with pc ok P v. Diaz (2013) (speed and when brakes applied) But-newer model cars can download what is on your phone! -See Carpenter below—now: rental car inspected-70 phones-call logs/contacts/SMS history/music/Facebook/Twitter! When doors opened/lights turned on/speed etc.! To law enforcement- get a warrant~!
- Incident search of arrested PERSON is OK.
- But- (incident search of text messages on defendant's cell phone-Not without warrant or emergency (2014 –Riley v. California).
- Carpenter v. U.S. (2018) (5-4 decision) S/W required to obtain cell phone location data from wireless carrier. 4<sup>th</sup> A. must evolve to accommodate seismic shifts in digital technology.
- DNA and Genetic Genealogy-3<sup>rd</sup> cousin is close enough! Effective 11/1/2019-DOJ policy re these searches: violent crimes (homicide/sex crimes, including homicide where FGGS is used to identify remains of victim) +some others. Note-4 murder victims- **two double murders in Santa Barbara**, plus 8 other murders, and 45 rapes throughout California solved by using FGGS to find and arrest the Golden State Killer in 2018. [Robert DeAngelo's crimes began in 1976!!!] Use of “23 and Me”, “Ancestry DNA” etc. more and more common now. [March 2020- 50-year-old murder in Vallejo, Calif. solved by Ancestry DNA submission by relative] December 2022-Giovanni Borja's -LWOP in LA for 2011 kidnapping, rapes and murders of 2 young women in LA- Solved by testing D's spit on sidewalk plus FUGS!
- FGGS has resulted in 2 innocent, incarcerated inmates being released after years in custody-In 2020 California inmate release after doing time since 1985- Received \$750,000 under California statute.
- Technology and crime solving- no limits-2020-FBI arrested arson suspect based on photos of scene/ETSY sold shirt/a “review” of the product she posted/google search of her moniker/led to Instagram photo or masked arsonist (her!) with the tattoos of the suspect—and so it goes!
- 2022-California too-Under federal law the inclusion of a VICTIM'S DNA in CODIS prohibited! California S/O victims DNA tied her to later committed property crime! Not anymore!

- **2022**-Private company trying to market Forensic DNA Phenotyping and Facial Recognition! [ analyzing DNA-physical profile- then to facial recognition database...] What could possibly go wrong!
- Munich 187 case and expert testimony in USA vs. Germany
- Consent to search - third party consent/reasonable belief of authority to consent. *Fernandez v. California*-(2014)-Police can consensually search a jointly occupied dwelling when an objecting occupant is no longer present.
- Probation/parole search and seizure waivers-OK [*People v. Schmitz* (2010)187CA4th722-parolee in passenger seat] [search in back seat of car ok-glove box?]
- Administrative searches ok-customs, airport/weapons/drugs/border searches. Also-Administrative searches by school officials ok- all that is needed is “reasonable suspicion”-In re Rafael C-March 28, 2016-**school search** of student’s cell phone-Not affected by Riley!
- *Terry v. Ohio*- 1968- Temporary detention for investigation and questioning is ok—e.g., Suspected Drunk Driver—not a crime to weave in the roadway. Lawrence Rosenthal in LADJ-May 2013: Stop and frisk policing builds on a critical insight of the great liberal Chief Justice Earl Warren...he ruled that the constitutional prohibition on unreasonable search and seizure does not require that the police wait until a crime has been committed before they can stop and frisk a suspect. Police can use stop and frisk to prevent crime, as long as they act on objectively reasonable suspicion. An enduring drop in crime rates followed, including a 2/3 reduction in NYC murder rate. Criminologists can find no non police related explanation for NYC’s success. Also-Criminals are the worst racial profilers: after Terry, crime drop in minority areas was disproportional- most lives saved were minorities! Note- 2016-City of Chicago has @ 500 187’s per year- arrests in @ ¼ of the cases. January 2016- 50 murders in one month! -**2021** 836 murders in the city alone! [Chicago has pop. Of 2.7 million] [The “Ferguson” effect?] {200,000 stop and frisks!}
- **Poland** has population of 38 million- and @ 300-400 187’s a year} Rate in Poland dropped by ½ since year 2020 (from 2 per 100,000 to 0.08 per 100,000); **Slovakia** 1.2/100,000-63 individuals. **Hungary** 0.8/100,000-80 individuals. **Estonia** 3.2/100,000 {USA=6.52}

- If the detention is lawful, a pat search for weapons is ok only if officer “...has reason to believe that he /she is dealing with an armed and dangerous individual, even if there is **not** probable cause to arrest.” [baggy clothing/criminal record/nervousness/failure to consent not enough!]
- Drug detecting dog-not a “search” =PC- ok to search a moveable! But- 2015-USSCT-cannot extend traffic stop to wait for drug dog. P.v. Ayon- **2022**-lawful traffic stop of suspected dope dealer- police delayed 10 minutes waiting for drug dog- evidence suppressed!
- Florida v. Jardines-2013-Drug dog sniff at front door is a search- requires PC-subsequent S/W ruled illegal and evidence suppressed (5-4 decision)
- U.S. v Jones-USSC-(2012): Installation of GPS on vehicle = a “search” and requires S/W: you can get time, date and location on laptop, plus door openings and closings! GPS in cell phones, pre-installed GPS in vehicles, even satellite images will be issues now! -
- **2020-Geo Fence Warrants**-person seen on surveillance video on phone- S/W for google for all cellphones in the area of the bank=19- narrowed to 3 then another S/W for subscriber info-tracked movement same as witnesses described flight!
- **2021**-P.v. Hardy- “ShotSpotter” Evid. Requires Kelly/Frye hearing.

**School searches**-New Jersey v. T.L.O.=searches of students and their possessions at schools permitted if officials have reasonable suspicion to believe the search was warranted! In re Rafael C-2016-Riley inapplicable to a school search of student’s cell phone if based on reasonable suspicion.

- No driver’s license stops for no reason/ sobriety checkpoints /border patrol stops/truck weigh stations.
- 1990 USSCT upheld sobriety checkpoints: set rules for stopping cars made by a supervisor; safety and identification that it is a police checkpoint (lights, police cars, signs, uniformed police), an effective location to deter others, duration short. —2,500 a year in California-California traffic deaths at lowest level since record keeping began in 1946 (3,434 in 2008/3,081 in 2009 and 2,715 in 2010) dropping at a rate of @11% a year! Note-2,816 in 2011, 2,857 in 2012, 3,104 in 2013, 3,387 in 2015, 3,623 in 2016! [cell phones, texting, non-citizens with CDL-bicycle and pedestrian deaths up];3,540 in 2019; 3,723 in 2020; 3, 847 in

**2021 and 4,258 in 2022! (a 10% increase!) Cell phone/texting is the reason!**

- No searches that “shock the conscience” - *Rochin v. California*- 1952-
- *Schmerber v. California*- 1966-drunk driver and forced draws –that is-taking the blood sample by force- was legal.
- *Missouri v. McNeely* (2013) - S/W required. (In *Schmerber* defendant in accident and hospitalized-McNeely was arrested w/o accident and judge was available....) California implied consent law –ok without a warrant if no force used.
- Force may be used with S/W -*People v. Rossetti*-2014-4 officers-may use no more force than necessary to safely draw blood.

**\*\* IMPORTANT EXCEPTIONS TO THE EXCLUSIONARY RULE \*\***

- Not applicable to civil cases, immigration matters, lawyer disbarment, probation violation hearings, and others. *Emslie v. State Bar* case.
- The Fruit of the Poisonous Tree- all that follows will be excluded unless the chain of illegality is broken.
- *United States v. Leon*- good faith exception if S/W used – No exclusionary rule! Not obviously defective warrant reviewed by officer’s superior, DDA and neutral judge.
- Attenuation-intervening event-something happens that is removed sufficiently from the first illegal arrest. Not a ‘but for’ test. Note-
- Inevitable Discovery —like what happened in the “*Christian Burial Case*” (*Nix v. Williams*- 1984- (search would not have been stopped and would have found the victim anyway)
- *Harris v. New York*- 1971- illegally seized evidence can be used for impeachment.
- “Standing”—only the person whose rights were violated can suppress the evidence!

- **Overnight guest in home- standing.**
- **Visitor for a few hours- no standing**

***Motion to exclude Defendants Statement - The Miranda Decision***

- **Prior to Miranda- terrible cases of police violence to obtain confessions- including beatings, threats and delays in bringing before the court for arraignment. “Involuntary” confessions barred by US Constitution’s “Due Process” Clause- Factors: the totality of the circumstances/were there threats? /Physical force? /The length of the interrogation/the location of the interrogation/ number of officers present/ length of it/guns visible/age/experience/mental health issues etc.---The test- is the statement extracted by any sort of threats or violence or obtained by direct or indirect promises, undue influence etc.**
- **Miranda v. Arizona- 1966- A most famous case. The 4 rights and waiver requirements. The purpose of Miranda is to negate the coercive effects of an interrogation conducted by law enforcement.**
- **Police lies are permissible- we found your prints! Co Defendant confessed!**
- **Note- evidence that is found still admissible- unlike a 4<sup>th</sup> Amendment violation- where it is inadmissible!**
- **Multiple attempts and means to avoid Miranda: Must be in custody -- station house questioning; telephonic; undercover officers; not applicable to traffic stop.**
- **No promises of leniency allowed getting statements: 2012 case- defendant invokes, parole agent says to him: “I don’t want to recommend maximum custody because you are not cooperating”- Miranda violation [P. v. Gonzalez 10/12/12] 46 years after Miranda! P.v. Westmoreland (2013) police told D you won’t get a life sentence if you admit and unpremeditated killing during a robbery- not true-suppressed. [Felony murder rule]**
- **Not in custody, free to leave etc.-telephone conversation-**
- **J.D.B. v. N. Carolina (2011)-minors AGE is to be considered in determining whether or not he would have believed he was in custody and not free to leave=Miranda.**
- **P. Nelson-2012-Juvenile who waived Miranda must make clear and unambiguous invocation of right to remain silent- Asking to speak to mom not enough. California-Police MUST advise of Miranda rights**

when a juvenile is taken in to custody. 17 years of age or younger CANNOT be questioned or waive Miranda unless juvenile has first consulted with an attorney! Exception- imminent threat!

- Rhode Island v. Innis- 1980-Robbery- gun tossed- “too bad if a little girl found the gun and killed herself”-offhand remark not an interrogation- not enough reason to expect a response.
- Brewer v. Williams- 1977- the Christian Burial Speech-police designed to get a statement without questioning at all. [the statement inadmissible but the body ok]
- Public Safety- where is the gun?
- Since 1984 times have changed-Public Safety Exception expansion to consider terrorism? Treat captured terrorists as enemy combatants and try them in military courts [one of the six WWII German saboteurs captured in the US and executed was a US citizen] Question to get information not just about “ticking time bombs” but about future bombs/plots etc.??
- Example-Faisal Shahzads arrest 53 hours after car bomb left at Times Square –advice would be not to give Miranda at all. (Including Eric Holder-AG under President Obama)
- Test: whether there was an “objectively reasonable need to protect the police or the public from any immediate danger.” Terrorists seldom act alone, and simultaneous acts are common. Exception governs even if no advisement, or advisement and a refusal!
- Routine booking (Jail) questions are ok.
- Impeachment of the defendant with statement taken in violation of Miranda.
  - Motion to Dismiss for Procedural reasons, or for “outrageous” police (Law Enforcement- including District Attorney Misconduct), or insufficient evidence at The Preliminary Hearing or for legal errors by the judge at the preliminary Hearing or the Grand Jury proceeding.*
- e.g., Zepeda murder case; Attias tape recording of attorney phone call.
- People v. Alvarez-2014-Bad faith destruction of evidence-video surveillance existed of 2 committing a strong-arm robbery- DA and police said that videos would not be destroyed-robbery case dismissed-bad faith. What...”is so disturbing about un-retained or destroyed evidence is that we can never truly know what was lost.”

- **Conflict of interest/Attorney General/motion to recuse DA. (allegation that children of DA would be called as witnesses)**

### **III. JURY TRIALS**

- **US Supreme Court: right only if penalty is more than 6 months in custody- California and most states: ANY jail time = Jury Trial.**
- **6-person jury and 10-12 for conviction is constitutional in misdemeanors/ 12 or 12 in felony cases. See Santa Barbara Lawyer Article:**
- **Picking the Jury - voir dire examination {12volunteers?}**
- **Questioning by judge and the attorneys, juror questionnaires, and alternates.**
- **Tweeting/Texting/Google/searches/new problems every day! Judges must do more to prevent problems. Effective 2012-trial judge required in civil and criminal cases to explain that the prohibition re research, dissemination of information and conversation applies to all forms of electronic and wireless communication!**
- **“Facebook is every jury profiler’s greatest friend”—Wi-Fi in courtrooms-law firm associates in the rear of the courtroom with a laptop running online searches of jurors! In **2020-Facebook** has **2.7 billion** users! You Tube and What’s App have 1 billion users each=1 in 3 people in the World using social media and 2/3<sup>rd</sup> of all Internet users!**

**Civil /Criminal parties and defendants- get off it during litigation!**

- **Challenges - for cause and for no reason at all.**
- **Challenges of jurors for improper reasons---Race or any cognizable class—P v. Cisneros-2015- “...failure to articulate anything about the excused jurors did nothing to dispel the reasonable inference the prosecutor preferred women to men and was exercising peremptory challenges to affect that preference.”**
- **Batson/Wheeler-social worker, gang friends, knew defendant’s family, relative incarcerated unfairly, prejudice against police, ambiguous answers, young-single-not registered to vote=no responsibility, occupation (probation officer- nurse), prior hung jury**

- **California 2020-Peremptory -race-ethnicity-gender-gender identity-sexual orientation-national origin religious affiliation-judge can refuse unless an objectively reasonable person would view the challenge as unrelated to the listed groups- if YES- challenge disallowed. CCP Sec. 231.7-**
- **Change of venue- too much prejudicial pre-trial publicity. [Michael Jackson case]**
- **The Jury Trial- most common on American TV but in fact very few cases are tried at all. Of those that are, 8—8.5 out of 10 will be found guilty.**
- **The Opening Statement. (See PP #8-The Vandenberg Case)**
- **Direct Examination - no leading questions --A leading question is one that suggests the answer or has the answer in the question.  
Some examples: “Was the get-a-way car a red Volvo?”  
“Did you arrive home at 10:37 PM?”  
“Did you give the defendant your money because you were afraid for your life?”**
- **Cross Examination- almost anything goes. —Bias, inconsistent statements, prior crimes or bad acts, reputation and character witnesses, ...as a District Attorney – do not make the mistake of attacking every witness- e.g., the defendant’s mother etc.**
- **Leading questions are permitted on cross examination- “Is it not true that every word you said is nothing but a big fat lie, and that you and your witness are just making things up as you go along?”**
- **“Sarah, you’re a witness. And it’s the defense’s job to show the jury that you’re a rotten witness because you’ve got a rotten character.” [Kelly McGillis (playing the DA) to Jodie Foster in “The Accused” (1988)]**
- **Direct and Cross of experts---DNA, etc.- As in any case- criminal or civil- the attorney has to understand the technical material and make sure the JURY understands it too!)**
- **The District Attorney should NEVER be afraid to ask a question in fear of the truth.**
- **Closing Arguments by District Attorney and Defense Attorney.**
- **Instructions to the Jury**

- **COMMON DEFENSES**

- **The most common approach by the defense in a jury trial is to attempt to raise a reasonable doubt as to the defendants' guilt, and to argue that the defendant is presumed to be innocent unless guilt is proved beyond a reasonable doubt.**
- **In California- ALL 12 jurors must agree to any verdict.**
- **Entrapment -Is what the Government did likely to get a law-abiding person to commit the crime?**
  - **“Reverse stings” are legal.**
  - **Internet child molest stings are legal**
    - **Insanity- Power Point- Attias video (10) and PP#11**
    - **Did the defendant know the difference between “right” and “wrong” and did the defendant understand what he/she was doing?**
  - **Double Jeopardy**
  - **multiple jury trials are permitted-2016-P. Verducci-Calif 187 ok after 4 trials! Quasaglino-3 trials!**
  - **State and Federal prosecutions for the same acts are permitted.**
  - **civil case for money can follow unsuccessful criminal case (O.J. Simpson- police assault cases)**
- ii. **SENTENCING Note: Germany has @65,000 inmates-90/per 100,000. Austria has 99/per 100,000-Poland has 194/per 100,00—Estonia has 155/per 100,000--USA Has 8 X rate of 707/per 100,000! —recidivism, guns, gangs, poverty, organized crime-- murder.**

**Murder Rates-El Salvador/Jamaica/Venezuela (61/57/41 per 100,000) highest. Lowest=Japan/Switzerland/Italy/Austria (0.2/0.5/.67/.66) Hungary=0.8/Bulgaria=1.5/Poland=0.7/Germany=1/ Slovakia=1.2 USA = 5.3 [2020 statistics]/Estonia=3.1 (2022)**

- **Plea bargaining- almost all cases –many believe coercive and should not be used/others plead because threatened by harsher sentencing, avoid jail, or get out of jail (like 2/3 strike defendants)**
- **Plea bargaining “is not some [part] of the criminal justice system; It IS the criminal justice system” [Justice Kennedy/ 94 % of all state convictions via plea bargain!**
  
- **Probation Report PP#13-Hulsey Sentencing**
- **Felony cases and determinate sentencing**
- **The Three Strikes Law- Changed in 2012 by electorate in California. Now law requires ALL to be “serious or violent” felonies with few exceptions. [any felony plus a weapon= 3 strikes] {eg-10851 and knife} [Any felony and intent to cause GBI] 2012 change cut sentence to 2,700 inmates.**
- **“Serious” =22 crimes by name [Murder, Rape, Robbery, Kidnapping, Residential Burglary etc. Plus, ANY felony with GBI/Firearm and others....**
- **“Violent” =45 crimes by name plus attempts and conspiracy to commit the crime...**
- **Three Strikes sentence = 25-Life- must do 80% of it**
- **Felony Probation**
- **Conditions of Probation - any reasonable condition is OK: no alcohol, no checks, residence in drug rehab program, attends domestic violence classes; waive 4<sup>th</sup> Amendment protections allowing search and seizure for no reason at all.**
- **Restitution-**
- **Drug Courts-Mental Health Courts-**
- **Diversion programs**
- **State Prison Sentences—Determinate Sentencing- 2-3-4: 3-4-5: 3-5-9, etc.**
- **Enhancements- Prior Prison/ excessive taking/ on bail enhancement/10-20-life for weapons use.**
- **Gang Enhancement-**

## **THE HEARSAY RULE**

**Note-the Hearsay Rule is a rule of evidence, not having anything at all to do with the legality of the arrest/search -it is a rule concerning the admissibility of evidence (usually witness testimony) at the trial or hearing. The leading legal text on the Hearsay Rule and its exceptions in California is 400 pages in length!**

**California Evidence Code Section 1200. (a) “Hearsay Evidence” is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.**

**(b) Except as provided by law, hearsay evidence is inadmissible {Considered unreliable because not under oath, no opportunity to cross examine witness, jury cannot see demeanor of the witness, no chance to confront and cross examine the witness (a Constitutional right)}**

**Example- Police officer in drunken driving trial is asked; “When the defendant was arrested did his wife say to you; “I told him not to drive because he was too drunk!”**

**Exceptions are many.**

**\*Confessions or admissions of the defendant. Note- Self-serving statements are not admissible; “I did not do it- I am innocent” Not a confession or admission.**

**\*Declarations against interest**

**\*Spontaneous Statements-made at or near exciting event under stress- no time to fabricate: “Who shot you?”**

**\*Prior Consistent or Inconsistent Statements-Special rules before admissible**

**\*Dying Declarations- no one will die with a lie on their lips-But circumstances must show person knows they are dying and the cause of the injury.**

**\*Some statements of young victims/DV victim (Confrontation issues and problems)**

**2015-Ohio v. Clark-USSC-a 3-year-old abused child’s statement to a teacher re black eye, belt marks and bruises not testimonial and admissible-Note child incompetent to testify!**

**\*Business Records-made in the normal course of business**

**-person with knowledge testifies in court about how collected**

**-entries in records made at or near the time of the event**

**-custodian attempts to keep records accurate**

**\*Former Testimony under oath**

**\*Statements of identification**

**\*Allowed in search/arrest warrants and probable cause hearings**

**\*All statements made by all conspirators during the conspiracy**

### **The Death Penalty or Life without parole.**

**California's Death Penalty Law [1977-78] adopted to comply with USSCT decisions by (1) limiting the kinds of murders that are subject to the death penalty (2) allowing defense evidence in mitigation and (3) providing guidelines for the jury to make the choice and to leave discretion with the jury, avoiding mandatory death penalty.**

**First- only if one of 17 Special circumstances are present- not all first-degree murders are eligible for the death penalty. (To minimize the risk of arbitrariness)**

**Special Circumstances—felony murder, multiple murder, murder with a prior murder, murder of a judge, police/fire officer, witness/ Murder for race religion sexual orientation/ murder for hire or for financial gain/ lying in wait murder, etc.---17 of them.**

**2019-Felony Murder rule severely limited now to the actual killer or active participants in the actual killing, not just the crime! -ALSO- “major participant” or on duty peace officer killed.**

**2022-People v. Vang-D had a long history of domestic violence vs. wife-followed her, forced her car to a stop-kidnapped her and threw in to his car and was speeding off- W jumped out of the vehicle and was killed-Held- D not the “actual killer”. P.v. Duran-2022-Direct aiding and abetting of implied malice 2<sup>nd</sup> degree 187 still the law-D aided and abetted the perpetrator knowing perpetrator intended to commit the act/knew it was dangerous to human life. P.v. Schell-2022-Ventura case-gang attack on 187 victim: head blows heard by neighbors/stop it you're killing him/D's pants covered in blood/ Witness: like a bunch of rats going for cheese! +187 2<sup>nd</sup> degree; Similar, P v. Vargas-2022-aid and abet 1<sup>st</sup> degree 187- “Shoot! Shoot that motherfucker!”**

**Plus, in 2019 Governor of California stopped all death sentence executions for all inmates on death row.**

**Second: Aggravating and mitigating circumstances are listed, and the jury told what they can consider, and what they cannot consider.**

- **Power Point#9- above- the Noriega case.**
- **Alpha Dog- the Hollywood case-PP# 19**
- **Adams-triple murder-PP# 20**
- **Adams penalty phase-LADA**

**California as of 2012: 726 inmates on death row since 1976 when punishment was reinstated. In 2014 total is 746. In 2015 total is 749. In 2016 total is 746 again, 2018 total was 744, 2019 total was 734-2022 total is 694-, 2023 total is 669--15 have been executed. (2 in other states)-23+ have committed suicide. 69 ++have died in prison. @Cost [?] \$184 million a year in California. Race 32% Caucasian, 35% Black, 25% Hispanic, and Other 6%. All but 21 are males.**

## **V. Appeal and Habeas Corpus**

- **Appeals are free and common.**
- **Death Penalty appeals go directly to the California Supreme Court**
- **Federal Habeas Corpus can follow California- not unusual to take more than 20- 25 years!**
- **Habeas Corpus is always available to prevent injustice.**
- **Brady v. Maryland-1963- Again...never have to fear the truth coming out. Note- Brady is 50 years old—and yet:**
- **Connick v. Thompson (2011) Brady violation [lab report with different DNA-hidden by DA]**
- **Smith v. Cain (2012) “I can’t ID anyone” statement hidden by DA-only witness against defendant.**
- **2014-Santa Clara DA removed from case for having an affair with the DNA crime lab technician who isolated the DNA on a cold case hit.**
- **Note: wrongful convictions almost always (1) eyewitness id (2) faulty science (3) jailhouse informers and often 2 of the three:2015/DOJ/standards.**
- **2016 California refers Brady (and “incompetent” defense attorneys) to State Bar now!**

## **VI. Victims and Witness Assistance Programs**

- Crime leaves a terrible wake in many cases- Vandenberg video, Attias case.
- Victim Compensation Programs- money collected from every criminal.
- Claims filed on behalf of victims and surviving relatives-medical expenses, burial costs, counseling, lost wages, witness protection matters.
- Huge and dramatic increase and impact on the victim assistance aspects in the day-to-day processing of cases.
- Victim assistance regarding going to court, status of the case, preparation for sentencing statements, being physically present in the courtroom, telephone /e-mail availability; bi-lingual assistance; child witnesses. **2022-P. v. Bracmonte- Calif. S. Ct-teacher can testify to victim impact of students' death.**
- Civil lawsuits by crime victims against other persons deemed “responsible.”—Tarasoff- decided in 1976- Cf: Regents v. S. Ct. (Rosen) California Supreme Court 2018: Universities have a legal DUTY, under certain circumstances, to protect or warn their students from foreseeable violence in the classroom or during curricular activities! [Thompson- a student- hearing voices, complaining in person and in e mails to professors and Dean 2 other students harassing/talking/ unwanted sexual advances, sounds of gun clicking- followed by psychiatric evaluation but not hospitalized, not taking meds, moved from dorm-then stabbed Rosen – with a butcher knife during Chemistry lab!] {Related cases-common carrier, hotels, employer, -rape in parking structure—But not 261 after fraternity drinking party-must be engaged in educational activity etc.}
- Where are we now and where are we going?
- In 1860 Kleindeutschland- 120,000 Germans in NYC- only exceeded by Berlin and Vienna-1904 “Ship Ablaze”

**Huge growth in national and local victim services: 1965 first Crime Victim Compensation program in USA - California;1972-1<sup>st</sup>VictimAssistancePrograms established—thereafter- Rape Crisis Centers, Battered Women’s Shelters/Programs;(1976); Mandatory Arrest laws in DV , Victim Restitution a Constitutional Right, Drinking age raised to 21(1984)/ Elder Financial and Physical Abuse laws/investigative assistance/immunity for banks/Expert testimony in BWS and SO cases [Note dangers here]/ Hate Crime legislation-race religion national origin and sexual**

orientation/ Notoriety for Profit laws/ International Parental Child Kidnapping Act ( Hague convention)/Megan’s law-notify community of residence of SO and photo!/ Identity theft and deterrence laws/ after 9-11-01 special statute for people connected to the 2,974 people killed in Twin Towers attack [Air Transportation Safety and Systems Stabilization Act- loss of wages/ enjoyment of life/waive civil actions(**Note Kenneth Feinberg, post**)Human Trafficking/ Amber Alert ( 2002) it really works! / DNA funding and labs-[reminder- see p.2- California alone getting 300 hits a month!] and mandatory samples of convicted persons

**Kenneth Feinberg:** the minute you go down the road of deciding that certain victims are entitled to **PUBLIC** money but not others, you get into a very serious political and philosophic question. Every victim of a death, whether it be a stockbroker, a policeman or a soldier, should get the same amount? [9/11, Virginia Tech, BP, GM, Agent Orange, Boston Marathon-it WAS done] Katrina? /Fort Hood? / Erfurt/Paris/Brussels/Norway’s Ander’s Breivik killed 8 with a bomb and shot and killed 69 more, mostly children/Columbine H.S., First WTC attack? Oklahoma City Bombing? USS Cole? San Bernardino? Paris attacks? Christchurch attacks in 2019?

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