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TDC Tip

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California Case Alert: Child Abuse Victim Interviews

By Charles Gillingham

CALIFORNIA CASE ALERT¹

The Ninth Circuit has done it again. I have received multiple phone calls from sexual assault investigators about the newest debacle from the Ninth Circuit, *Green v. Camreta*, 588 F.3d 1011. I have consulted with numerous prosecutors throughout the state, the written work of the Alameda County District Attorney's Office, and consulted with members of the California District Attorney's Association sexual assault mentor group. It seems as though everyone involved in the protection of children is dumbfounded by this decision. If it is followed to its logical conclusion, the Ninth has made it almost impossible to investigate child abuse.

The Ninth Circuit consulted a law review article, (neither the most politically balanced place to look at the law nor a location that anyone has dealt with real world issues) and decided that because only a quarter of child abuse complaints were true, investigations of that abuse may cause more harm than good. The judges then made the incredible leap to conclude two things: when a child is interviewed at school the child is seized; and two, in this instance the seizure was unreasonable as there was no reason to believe the victims were in continuing danger.

SEIZURE

The Court amazingly found that the victim in this case was seized when removed from class to speak with uniformed officers and the equivalent of a CPS worker. That ruling is a disaster for investigators of child abuse and molest. The only issue then is whether such actions are reasonable or not.

Note that the uniformed officer asked no questions. Only the CPS worker asked questions.

SEIZURE---REASONABLE?

The court then found that the seizure was not reasonable because the situation constituted a "non-emergency."

The facts of the case appear to be as follows:

¹ The views expressed here are the author's; they do not necessarily reflect those of Third Degree Communications or the Santa Clara County District Attorney's Office.

- Suspect molested the victim for years and apparently was continuing in his behavior
- The suspect's wife knew that the victims slept in the same bed when the suspect was drunk
- Most often the suspect would molest when he was drunk
- The authorities were aware that the suspect was out of custody and in contact with children

Let's be clear, the Ninth Circuit found, that even though the suspect was out of custody, even though his wife let minors sleep in his bed when drunk, there was no reason to have taken the victim out of class in school to interview her.

THE RULING

The court ultimately held that the officers and school administrators would be indemnified from civil liability if they obtained a search warrant? (amazing) or a court order of some type...

It defies imagination that the court would believe a search warrant necessary, or even applicable. What are officers supposed to search? A generic court order does not exist in California.

Finally, the court took issue² with the interview being done without consent of the parents. Amazingly, the court said the authorities should have asked the defendant, or the capitulating wife, for permission to interview the victim. Play that out to its logical conclusion and one sees the magnitude of this ruling.

WHAT DO YOU DO?

What you do from here is unclear. In California, we have Penal Code section 1174.3 that allows an interview during school hours on school premises. School administrators cannot preclude officers from doing their jobs. Interview in plain clothes and tape the interview. Both of these precautions will allow officers to argue that there was no seizure and that the interview was completely consensual. Finally, check whether your jurisdiction has set up a protocol to allow for court orders authorizing the interviews of child victims.

Chuck Gillingham is a veteran prosecutor. He is also an instructor for the California District Attorneys' Association and for Santa Clara University School of Law.

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² The court did not like the fact that the officer and the CPS worker interviewed the victim without their parents' knowledge.