First District Appellate Project
Training Seminar
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SELECTED FOURTH AMENDMENT DECISIONS (2009-2010) AND PENDING ISSUES

Kathryn Seligman
Staff Attorney, First District Appellate Project
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3. *People v. Schmitz* (Supreme Court No. S186707; petition for review granted 12/1/10)

Decision Below: *People v. Schmitz* (2010) 187 Cal. App. 4th 722 [Fourth District, Division Three]: The officer's non-consensual search of the entire passenger compartment of the defendant's car could not be justified on the basis of the parole search condition of the front-seat passenger, because the passenger did not have common authority over the entire vehicle.

Question Presented:

When conducting a vehicle search authorized by a passenger's parole condition, can the police search any areas of the vehicle's interior that appear reasonably accessible to the passenger? 75

SELECTED FOURTH AMENDMENT DECISIONS (2009-2010) AND PENDING ISSUES

INTRODUCTION

In 2009 to 2010, the appellate courts took an active role in defining the limits of police power and Fourth Amendment protection. They decided cases establishing the circumstances under which the police could conduct a vehicle stop, an inventory search, a detention and frisk, or a home search without a warrant and probable cause. They struggled with the interplay between the Fourth Amendment and new technologies, weighing in on issues never imagined by the Founding Fathers, or even the Warren Court: When can the police search the contents of cell phones and computers without a warrant? Can the government search an arrestee's DNA without any individualized suspicion?

These materials discuss Fourth Amendment decisions published during this two-year period by the United States Supreme Court, the Ninth Circuit, the California Supreme Court, and the California Court of Appeal. I discuss cases (facts, reasoning and holdings) in five areas: Vehicle Stops, Stop and Frisk, Home Searches Without a Warrant or Probable Cause, Searches of Cell Phones, Pagers and Computers, and DNA Searches. Then, I include a series of "Quick Takes" – briefer summaries of the facts and holdings of cases in three other areas: School Searches, Probation and Parole Searches and Inventory Searches. Finally, I discuss cases currently pending before the United States and California Supreme Courts which are likely to be decided this year.

The two most significant cases decided by the United States Supreme Court in 2009 were *Arizona v. Gant* (2009) 129 S. Ct. 1710, and *Herring v. United States* (2009) 129 S.Ct. 695. In *Gant*, the Supreme Court redefined the circumstances permitting an officer to search a vehicle's passenger compartment incident to the arrest of a recent occupant. In *Herring*, the Court expanded the reach of the good faith exception to the exclusionary rule. Neither of those cases are discussed in these materials. *Arizona v. Gant*, as well as its origins and its aftermath, is discussed in a separate set of materials: THE EVOLUTION OF THE SEARCH INCIDENT TO ARREST DOCTRINE: *ARIZONA V. GANT* (2009) 129 S.Ct. 1710. *Herring* is discussed at some length in materials which chronicle a century of Supreme Court jurisprudence involving the exclusionary rule: THE RISE AND FALL OF THE EXCLUSIONARY RULE: CAN IT SURVIVE HUDSON, HERRING AND BRENDLIN? Both sets of materials are available on the FDAP website (www.fdap.org) in the "RESEARCH RESOURCES" section. A paper copy of the *Gant* materials is available at this seminar, having just been updated. The exclusionary rule materials were handed out at the 2010 FDAP seminar.

VEHICLE STOPS[1]

A. Reasonable Suspicion to Initiate the Vehicle Stop

1. United States v. Palos-Marquez (9th Cir. 2010) 591 F.3d 1272 [cert. denied 10/4/10]: Combined with other circumstances, an in-person tip from an unidentified informant provided reasonable suspicion for an investigative vehicle stop.

Here are the facts: Border Patrol Agent Staunton was driving on a road five miles north of the United States/Mexican border in an area "notorious for alien smuggling". The agent had to swerve to avoid colliding with an on-coming pickup that was speeding as it passed a UPS truck. The driver of the UPS truck gestured to Agent Staunton, directing his attention to the pickup. About one minute later, the UPS driver reported to another border patrol agent that he had seen the pickup load up with several suspected illegal aliens. This agent did not obtain the UPS driver's name or license plate number, but he passed this tip onto Agent Staunton. Staunton then radioed to all agents in the area, describing the make and model of the pickup and including the UPS driver's suspected smuggling report. Within minutes of this broadcast, other agents spotted the pickup, still traveling at a high rate of speed. Plainclothes agents in an unmarked car pulled up along side the pickup and observed that the occupants looked "nervous and shaky". Five minutes later, agents stopped the pickup and found four illegal aliens inside. Defendant was the driver. He was convicted of transporting illegal aliens after the trial court denied his motion to suppress evidence.

The Ninth Circuit affirmed the lower court's denial of the suppression motion, finding that the unidentified UPS driver's tip combined with other circumstances to provide a reasonable suspicion that the pickup driver was engaged in criminal activity. The court assessed the reliability of the tip provided in-person to Agent Simon by the unidentified UPS driver. This tip was located between an inherently reliable report from a known and proven informant (see *Adams v. Williams* (1972) 407 U.S. 143), and a totally unreliable tip from an anonymous informant. (See *Florida v. J.L.* (2000) 529 U.S. 266.) "When the tip is provided in a face-to-face encounter, even when the informant is unidentified, we have deemed it to be closer to the *Adams* end of this reliability spectrum." (*Palos-Marquez, supra*., 591 F.3d at 1275.)

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[1] For more on this topic, see the materials posted on the FDAP website (www.fdap.org): TRAFFIC STOPS AND VEHICLE SEARCHES, written in January 2007.

A tip delivered in-person has substantial indicia of reliability for two reasons: 1)By speaking face-to-face with an officer, the informant risks losing his anonymity. 2)The officer can observe the informant's demeanor and evaluate his credibility. The risk of lost anonymity was particularly great in this case, because the informant was a UPS driver on a specific route, so his identify would be easy to trace. Moreover, the UPS driver's tip – that he'd seen several suspected aliens load into the pick-up -- was based on personal observation and delivered soon after the event.[2]

Finally, the court noted that other circumstances known to Agent Staunton, combined with the reliable informant's tip, to support a reasonable suspicion of alien smuggling: 1)The pickup was traveling through an area close to the border that was known for smuggling. 2)The defendant was driving erratically at a high rate of speed. 2)Border patrol agents observed that the pickup's occupants appeared nervous and shaky. Standing alone, each of these factors would not have provided reasonable suspicion for an investigation. However, when viewed in their totality (in light of the agents' training and experience) and combined with the UPS driver's in-person tip, they justified the stop.

2. ***People v. Letner and Tobin (2010) 50 Cal. 4th 99: Officer's observation of raindrops on a moving vehicle's exterior hours after it had stopped raining, combined with the driver traveling slowly on the freeway, provided reasonable suspicion for a vehicle stop***.

A challenge to the trial court's denial of the defendants' motion to suppress was one of multiple issues raised in this automatic appeal to the California Supreme Court. The two defendants appealed after being convicted of murder and sentenced to death. In a four-to-three decision, the Supreme Court affirmed the convictions and sentences. Justices Werdegar, Moreno and Kennard dissented on only one issue; they disagreed with the majority's finding that the stop of the vehicle occupied by Defendants Letner and Tobin was supported by reasonable suspicion.[3]

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[2] If you have a case involving a tip relayed to the police by an anonymous or unidentified informant – either in person or over the phone – take a look at the materials posted on the FDAP website (www.fdap.org): "WHEN DOES AN ANONYMOUS TIP PROVIDE REASONABLE SUSPICION FOR A STOP AND FRISK?: An Analysis of Recent California Cases on Anonymous Tips", updated in November 2009.

[3] Justice Werdegar, joined by Justice Moreno, held that the vehicle stop was unconstitutional but found the admission of the evidence discovered during subsequent searches of the car to be harmless beyond a reasonable doubt. Consequently, they dissented from the ruling that the detention was lawful, but concurred in the majority's decision to affirm the convictions. Justice Kennard dissented from the ruling on the

Around midnight, Officer Wightman was patrolling a commercial area of Visalia when he spotted a car that's exterior was beaded with water. The officer believed this was significant because it had stopped raining more than two hours earlier. Only immobile vehicles were still beaded with water, so Wightman concluded the car had been parked until very recently. Wightman knew that in the past three months, car dealerships in the area had reported crimes, including vehicle tampering, car thefts and burglaries. Wightman followed the car because he thought it might have just been stolen from one of these local dealerships. However, when he radioed a police dispatcher to check the car's registration, he learned that it was registered to Ivon Pontbriant and had not been reported as stolen. As Wightman continued to follow the car on city streets, he noted that it did not break any traffic laws. When the car proceeded onto the freeway, the driver continued to go slowly, traveling at 40 mph even though the posted speed limit was 55 mph. No other cars were on the highway at this time. Officer Wightman believed that the slow rate of speed might indicate that the driver was intoxicated. After following the car for one mile on the highway, Wightman initiated a traffic stop. The car's driver was identified as Letner and the passenger as Tobin. The police subsequently learned that Pointbrian, the car's registered owner, had been murdered. During searches of the vehicle, the officers found evidence tying Letner and Tobin to that crime.

The Supreme Court affirmed the trial court's ruling denying suppression of this incriminating evidence. The Court held that the totality of the circumstances provided the patrol officer with reasonable suspicion that the car's occupants were engaged in criminal activity, likely auto theft. First, the fact that the car was beaded with water supported a reasonable belief that it had been parked until fairly recently, possibly at one of the dealerships that had reported vehicle crimes in the preceding months. Second, it was midnight in a commercial area and the streets were empty, circumstances under which a vehicle theft from a dealership might readily be committed. Third, because the car's driver traveled "well below the speed limit" on the freeway for more than one minute, the officer could reasonably suspect that he was attempting to avoid contact with the police, indicating consciousness of guilt.

The defense offered innocent explanations for the beaded water on the vehicle and the slow rate of speed (e.g. the car might have had mechanical difficulties because, as the officer admitted, the engine was "running rough"). The Court rejected these explanations, noting that it was "the principle function of [police] investigation to resolve that very

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Fourth Amendment issue and found that admission of the illegally seized evidence was not harmless. Consequently, Justice Kennard would have reversed both defendants' murder convictions and the judgments of death.

ambiguity and establish whether the activity is in fact legal or illegal". (*Letner, supra*., 50 Cal. 4th at 148, citing *People v. Souza* (1994) 9 Cal. 4th 224, 233.)

Justices Kennard, Werdegar and Moreno disagreed with the majority's finding of reasonable suspicion. Justice Kennard particularly objected to the reliance on the driver's slow speed as indicative of criminality. "It is not at all unusual for a driver to slow down upon seeing a police car, irrespective of any wrongdoing. Here the driver did not suddenly slow down when Officer Wightman began following the car. Rather the driver merely did not accelerate to the maximum speed limit after entering the freeway." (*Letner, supra*., at 218.) Moreover, there were many innocent reasons why Defendant Letner may have been driving slowly given the circumstances: the freeway could have been wet, the car may have had mechanical problems, the posted speed limit declined to 45 mph after the first mile of freeway. Finally, the presence of raindrops on the car indicated only that the car had not been driven a long distance. It did not support the "hypothetical assertion" that the car had been illegally taken from a nearby dealership, particularly as the officer learned before the stop that it was registered to a private owner and not reported stolen.

3. People v. Dotson (2009) 179 Cal. App. 4th 1045 [Third District; petition for review denied 3/18/10]: The officer had reasonable suspicion to stop a vehicle without license plates, even if a temporary operating permit was posted in the window; there was no evidence that the officer saw the permit and he was not required to look for it before initiating the vehicle stop.

This case presents another variation of an issue that has generated a fair amount of litigation in recent years: Under what circumstances may a police officer stop a vehicle for a suspected registration violation (i.e. expired registration tags, no license plates) when there is also a temporary operating permit posted in the vehicle's window?[4]

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[4] In California, if the owner of a vehicle has initiated but not completed the registration process (e.g. she has not done the required smog check), she can obtain a temporary operating permit to display in the vehicle's window. Temporary operating permits are also issued pending the issuance of license plates to show that all fees have been paid to the DMV, and that the vehicle owner is just waiting for the front and back plates. With a temporary operating permit, the vehicle can be lawfully driven on the roadways until the registration process is completed and the current tabs and/or license plates are received. A temporary operating permit is red with a large bold face white number, representing the month in which the permit expires. For example, if the number on the permit is "5", that means that the permit expires on May 31. (See *People v.*

In *People v. Brendlin* (2006) 38 Cal. 4th 1107, vacated on other grounds in *Brendlin v. California* (2007) 551 U.S. 249, the Supreme Court accepted the prosecution's concession that the vehicle stop was illegal because the officer lacked reasonable suspicion that the car's registration had expired. Prior to pulling the car over, the officer saw both expired registration tabs and an unexpired temporary operating permit taped to the rear window. He also phoned dispatch and received radio confirmation that the car's registration had expired two months earlier, but an application for renewal was in process.

In the companion case of *People v. Saunders* (2006) 38 Cal. 4th 1129, the Supreme Court held that the traffic stop was lawful even though there was a current temporary operating permit taped to the rear window. Before pulling over the defendant's truck, the officer had noticed both expired registration tabs and a missing front license plate. He did not recall seeing the temporary permit on the rear window. The officer had reasonable suspicion to initiate the traffic stop to investigate whether the temporary operating permit excused both the expired registration and the missing license plate. Also, the officer was not required to check with the DMV before making the stop.

In *People v. Hernandez* (2008) 45 Cal. 4th 295, the officer observed that the defendant's vehicle lacked both license plates required by California law, but he'd also observed a seemingly valid temporary operating permit in the rear window. The officer discounted the presence of the permit because, in his experience, such permits were often forged or otherwise invalid. The Supreme Court rejected the argument that the officer's subjective distrust of any and all temporary permits justified the stop. The officer lacked a particularized reasonable suspicion that the defendant was violating the law.

In *In re Raymond C.* (2008) 45 Cal. 4th 303, the Supreme Court found reasonable suspicion for the traffic stop. The officer observed that the car driven by the minor had no licence plates, and he did not see a temporary operating permit in the rear window. After making the stop, the minor pointed out that a temporary permit was affixed to the front window. The stop was held to be lawful, because there was no permit in the officer's view from the rear and the officer was not required to drive in front of the defendant's vehicle to look for a permit on the front window before pulling the car over.

Cognizant of this line of cases, the Third District decided *Dotson* in 2009. In that case, at about 4:00 in the morning, Sheriffs' Deputy Bakulich was patrolling a casino's poorly lit parking lot. He noticed that a truck driving through the lot lacked both the front

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Saunders (2006) 38 Cal. 4th 1129, 1132-1133, 1136.)

and rear license plates. Consequently, Bakulich stopped the vehicle. Discovering that the defendant-driver was under the influence of a controlled substance, Bakulich arrested him and searched the truck, discovering incriminating evidence. Apparently, there was a temporary operating permit displayed in the truck's rear window; the defendant testified to this at the trial but not at the suppression hearing. Testifying at the suppression hearing, Deputy Bakulich did not recall seeing this permit or looking for it.

The Court of Appeal affirmed the trial court's denial of the suppression motion. On appeal, the defendant contended and the prosecution conceded that the stop was unconstitutional because there was a temporary operating permit in the window, and the deputy did not search the exterior of the vehicle for this permit before pulling the truck over. The Court refused to accept this concession. Because the deputy observed that the truck lacked both license plates and there was no evidence that he saw a temporary operating permit, he reasonably suspected that the defendant was violating vehicle registration laws, justifying an investigative stop to confirm or dispel that suspicion. The officer was not required to look for the temporary operating permit before detaining the vehicle and its occupants.

4. People v. Greenwood (2010) 189 Cal. App. 4th 742 [Second District, Division Five; petition for review filed 12/8/10]: The officer had reasonable suspicion to stop a vehicle in order to resolve an ambiguity; a computer check of DMV records indicated that the vehicle's registration had expired two years before, but a seemingly valid temporary operating permit was displayed on the vehicle's rear window.

In May 2007, patrol officers spotted a vehicle driven by the defendant. They ran a computer check of DMV records and discovered that the vehicle's registration had expired almost two years earlier. The officers also observed a temporary operating permit affixed to the car's rear window. It bore the number "5" indicating that it was valid through the month of May. Nevertheless, the officers pulled over the car, searched it and discovered incriminating evidence.

After discussing the rules distilled from the four Supreme Court cases summarized above and *People v. Dotson*, the Court of Appeal held that the officers had reasonable suspicion to stop Defendant Greenwood's car in order to resolve the ambiguous evidence – the apparent inconsistency between the DMV's representation that the car's registration had expired two years earlier and the presence of the temporary operating permit, indicating registration in process. "The question [was] not whether the defendant's vehicle was in compliance with the law, but whether [the officers] had an articulable suspicion it was not". (*Greenwood, supra*., 189 Cal. App. 4th at 750.)

B. Police Questioning and Conduct During a Vehicle Stop

1. Arizona v. Johnson (2009) 129 S.Ct. 781: Law enforcement officers may order all occupants out of the vehicle during a traffic stop and question the driver or passengers about matters unrelated to the traffic violation, but they may not frisk for weapons without a reasonable belief that the vehicle occupant is armed and dangerous.

Three officers, members of Arizona's gang task force, were patrolling a Tucson neighborhood associated with the Crips gang. The officers pulled over a car for a suspected vehicle registration violation. There were three persons in the car, and the defendant was the back seat passenger. During the traffic stop, Officer Trevizo attended to the defendant while the two other officers dealt with the driver and the front sear passenger. Trevizo had noticed that as the police approached the car, the defendant stared at the officers. Also, he was wearing clothing associated with Crips membership, and he had a scanner in his pocket - a device often used by criminals to evade the police. Officer Trevizo questioned the defendant who admitted he had no identification, he'd been out of prison for a year, and he resided in Crips territory. Trevizo then asked the defendant to get out of the car and she frisked him for weapons, finding a gun. The defendant was ultimately convicted of unlawful weapons possession.

Relying on a series of precedents, the Supreme Court held that all of Officer Trevizo's actions were constitutional. Thus, the gun was lawfully admitted into evidence. In *Terry v. Ohio* (1968) 392 U.S. 1, the Court held that an investigative stop was justified when the police reasonably suspect that the person apprehended is committing or has committed a criminal offense. The police may proceed from a stop to a frisk if the officer reasonably suspects that the detainee is armed and dangerous.

The police can lawfully stop a car if they reasonable suspect that the driver has committed a Vehicle Code violation. In *Brendlin v. California* (2007) 551 U.S. 249, the Court ruled that for the duration of a lawful traffic stop, police officers effectively seize everyone in the vehicle, the driver and all passengers. Accordingly, "in a traffic stop setting, the first Terry condition – a lawful investigatory stop – is met whenever it is lawful for the police to detain an automobile and its occupants pending inquiry into a vehicle violation." If the officers reasonably suspect that the driver has committed a violation, they can briefly detain the driver and all passengers. They do not need an additional reasonable suspicion that the passenger is involved in unrelated criminal activity. (*Arizona v. Johnson, supra*., 129 S.Ct. at 784.)

However, in order to justify a patdown of the driver or a passenger during a traffic stop, the police officer must reasonably suspect, based on the totality of circumstances, that the person subjected to the frisk is armed and dangerous. And given the circumstances known to Officer Trevizo, her patdown of the defendant was lawful.

The Court also reviewed other rules that apply during a lawful traffic stop. In the general interest of officer safety, the police can order both the driver and any passengers to exit from the vehicle. (*Pennsylvania v. Mimms* (1977) 434 U.S. 106 [driver]; *Maryland v. Wilson* (1997) 519 U.S. 408 [passengers].) Officers can do this as a matter of course during every vehicle stop; they don't need to objectively believe that the vehicle occupants are armed and dangerous. However, once the occupants are out of the car, they cannot be frisked absent such a reasonable belief.[5]

The lawful traffic stop begins when the police pull the vehicle over to investigate the Vehicle Code violation. The "temporary seizure" of the driver and all passengers continues and remains reasonable for the duration of the stop. "Normally, the stop ends when the police have no further need to control the scene and inform the driver and passenger that they are free to leave". (*Johnson, supra*., 129 S.Ct. at 788, citing *Brendlin*, 551 U.S. at 258.)[6]

Finally, during the legitimate traffic stop, the police may ask both the driver and the passenger about "matters unrelated to the justification for the traffic stop". These questions "do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop". (*Johnson, supra*., at 788, citing *Muehler v. Mena* (2005) 544 U.S. 93, 100-101.)[7]

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[5] Even before *Johnson*, this distinction had been stated in *Pennsylvania v. Mimms* (434 U.S. at 112), and in "dictum" in *Knowles v. Iowa* (1998) 525 U.S. 113, 117-118. (See *Johnson, supra*., at 786, 787.)

[6] Note, however, that in *Ohio v. Robinette* (1996) 519 U.S. 33, the Supreme Court held that police officers are not constitutionally required, at the end of a traffic stop, to tell the driver that he is free to go before they may ask additional investigative questions and request consent to search the car.

[7] This is consistent with recent California decisions. See *People v. Brown* (1995) 62 Cal. App. 4th 493, 498-99; *People v. Gallardo* (2005) 130 Cal. App. 4th 234, 238-39.)

2. United States v. Burkett (9th Cir. 2010) 612 F.3d 1103: Applying the standard from Arizona v. Johnson, the court held that the passenger's furtive movements and his evasive answers provided reasonable suspicion for a weapons frisk.

In this case, a patrol officer observed a car speeding down the highway at 1:00 in the morning. The officer activated his emergency lights to effect a traffic stop, but the driver of the car did not pull over; instead, she continued for almost a mile, finally exiting the highway and stopping on a side road. Believing that the driver was attempting to evade the police, the officer called for back-up and shined his spotlight into the car's passenger compartment as he followed behind it. He observed the sole passenger, the defendant, making "furtive movements". He was leaning over while holding his head rigid, as though he was hiding or retrieving something from under the seat. After the car finally pulled over, the officer talked to both the driver and the defendant. He asked the defendant what he had been doing before the stop and told him he'd seen him place something under the seat. The defendant claimed he was having a drink and pointed to a cup of liquid in a holder on the center console. The officer felt this explanation was inconsistent with the movements that he'd observed. When the officer asked the defendant to exit from the car, he reached across his body to open the passenger door with his left hand, blocking the officer's view of his right hand and body. Once out of the car, the defendant appeared to be reaching with his right hand into the pocket of his knee-length jacket, causing the officer to grab him and commence the pat-down which the defendant initially resisted. Ultimately, a gun was found in his right jacket pocket.

The Ninth Circuit affirmed the district court's denial of the motion to suppress the gun. Citing *Arizona v. Johnson*, the court found that the circumstances provided the officer with a reasonable belief that the defendant was armed and dangerous, justifying the pat-down search after he was removed from the car. The Ninth Circuit emphasized the defendant's furtive and unusual movements, both before and after the driver pulled over the car, his evasive answers to the officer's questions, and the fact that he reached for his coat pocket when he got out of the vehicle.

ON-THE-STREET STOP AND FRISK

1. (V) In re H.H. (2009) 174 Cal. App. 4th 653 [First District, Division 5]: A minor's refusal to consent to search does not create reasonable suspicion for a pat-down search

The minor was stopped at 11:30 p.m. for riding his bicycle without proper lighting equipment, in violation of the Vehicle Code. The officer detained the minor and asked him to step away from his bike and take off his backpack. As the minor took off his backpack, he spontaneously stated, "I'm not on probation". He then said that he would not give consent to search. The officer regarded the minor's comment as a "kind of warning flag" so he advised the minor that he was going to conduct a pat search. The minor then stated for the second time, "I do not give consent to search". The officer patted the minor down and found a revolver in the pocket of his bulky jacket.

The minor was lawfully detained for the observed Vehicle Code violation, so the only issue was whether the circumstances supported a reasonable suspicion that the minor was armed, justifying a pat search. The Court of Appeal held that they did not. The court reiterated the important principle, recognized by California and federal courts, that the police cannot rely on an individual's refusal of consent, singly or in combination with other factors, as supporting reasonable suspicion or probable cause for a search. (See *People v. Miller* (1972) 7 Cal. 3d 219, 225-226; *People v. Dickey* (1994) 21 Cal. App. 4th 952, 954; *United States v. Freeman* (10th Cir. 2007) 479 F.3d 743, 749; *United States v. Boyce* (11th Cir. 2003) 351 F.3d 1102, 1110; *United States v. Smith* (6th Cir. 2001) 263 F.3d 571, 594; *United States v. Prescott* (9th Cir. 1978) 581 F.2d 1343, 1351.) As the Supreme Court stated: "[The] state may not transform a defendant's refusal to waive his Fourth Amendment rights into 'suspicious' activity evidencing criminal conduct". (*Miller, supra*, 7 Cal. 3d at 225-226.)

The government conceded this principle, but argued that "the form of the assertion of the right to refuse consent may be relevant to the justification for the search". Specifically, they emphasized that the minor's refusal in this case was unprovoked, similar to the defendant's unprovoked flight from the police in a high crime area which was considered sufficient to justify a detention in *Illinois v. Wardlow* (2000) 528 U.S. 119, 124.) The Court of Appeal rejected this analogy, and noted that in *Wardlow*, the Court distinguished the defendant's unprovoked flight from an individual's refusal to cooperate, noting that "refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure". (*Wardlow, supra*., at 125, quoting *Florida v. Bostick* (1991) 501 U.S. 429.)

The court noted that the other circumstances in the present case, did not justify the officer's decision to pat-search the minor: He was stopped for a traffic infraction, not a crime of violence. There was no evidence that the minor was stopped in a high crime area, and the late hour (11:30 p.m.) was insufficient, by itself, to justify the pat-down.

2. In re Richard G. (2002) 173 Cal. App. 4th 1252 [Second District, Division Six; petition for review denied 8/26/09]: An anonymous telephone tip reporting a disturbance involving a firearm outside of a residence in known gang territory justified a detention. Also, evidence of a new crime committed during an unlawful detention is not subject to the exclusionary rule.

After receiving an anonymous phone call, the police dispatcher radioed officers around midnight, stating that two males were "causing a disturbance" outside a designated residence and that one was "possibly in possession of a handgun". One male was reportedly wearing a black t-shirt while the other was wearing a blue Pendeleton-type jacket. They were walking towards Colonia Park, located across the street from the residence. The officers who responded had prior knowledge of this residence which was located in known gang territory. Only days before, officers investigating a daytime shooting at the residence had seized two firearms. Moreover, the officers knew that Colonia Park was frequented by gang members. Responding to the location, the officers saw two males (one of which was the minor Richard G.) and two females walking towards Colonia park. The males' clothing matched the anonymous caller's description and thus they were detained. The minor asserted that the detention was unlawful.

In re Richard G. joined *People v. Lindsey* (2007) 148 Cal. App. 4th 1390 (First District, Division Four), as the second published California Court of Appeal case relying on *People v. Dolly* (2007) 40 Cal. 4th 458, to uphold a detention based on an anonymous tip. In *Dolly*, the California Supreme Court defined an exception to the United States Supreme Court's seven-year old decision in *Florida v. J.L.* (2000) 529 U.S. 266.

In *Florida v. J.L.*, *supra*, at 268, 271-74, the Supreme Court held that an anonymous phone tip stating that a black male wearing a plaid shirt was standing at a particular bus stop and carrying a gun did not justify a detention and frisk, even though officers spotted a man meeting this description at the designated bus stop just six minutes after receiving the report. The anonymous tip was devoid of details indicating that the caller had inside information about the asserted illegal activity and it was uncorroborated. When they arrived at the bus stop, the officers did not observe anything corroborating the tipster's assertion of firearm possession, as opposed to his of her physical description of the subject.

In *People v. Dolly, supra*, 40 Cal. 4th at 462, 465-69, the California Supreme Court carved out an exception to the *Florida v. J.L.* rule for an anonymous 911 call that reported an actual threat of current gun violence. In *Dolly*, an anonymous individual twice called the 911 line reporting that an individual had "just pulled a gun" on the caller and was threatening him with the firearm. In two calls, he gave detailed descriptions of the assailant, his location and his vehicle. In the second call, the tipster identified himself as "Drew". Arriving at the location, officers found the defendant, who met the physical description and was sitting in the described car. Searching that vehicle, they found a firearm. The Court upheld the detention, distinguishing *J.L.* on three points: 1)In *Dolly*, there was a greater public safety interest, as the tipster reported threatened gun violence and actual brandishing rather than mere firearm possession. 2)The police could infer that the caller had personal knowledge of the defendant's criminal activity, enhancing the tip's reliability. 3)Drew, the 911 caller, put forth a plausible reason for remaining mostly anonymous - fear of gang retaliation.[8]

Relying on *Dolly*, *supra*., 40 Cal. 4th at 458, the Court of Appeal in *Richard G*., held that the anonymous phone call provided reasonable suspicion for the minor's detention. The informant in *Richard G*., like the tipster in *Dolly*, gave a contemporaneous description of activity posing a grave and immediate risk not only to the caller but to anyone nearby. The Court found it significant that the asserted "late night disturbance involving a firearm" was occurring in front of a specific residence where a shooting had recently occurred in known gang territory. This corroborated the anonymous caller's assertion of illegal activity. (*Richard G., supra*, 173 Cal. App. 4th at 1257-58.)

Finally, *Richard G.* discusses limitations on the exclusionary rule. When the officers had attempted to detain the minor and his male companion, by ordering them to stop and sit on the ground, the minor refused to obey any police command. The minor repeatedly threatened one of the officers. When that officer grabbed the minor and tried to put him in a control hold, he resisted and punched the officer. The minor was charged with resisting the officer with threats and violence, and sought to suppress the evidence of those crimes, asserting that they occurred in the course of an unlawful detention. As noted above, the court upheld the detention even though it was based on an anonymous tip. However, the court also noted that even if the detention was unlawful, the testimony describing the minor's violent behavior and threatening statements would not have been

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[8] To read more detailed analyses of *J.L., Dolly*, and related cases, see the materials posted on the FDAP website (www.fdap.org): "WHEN DOES AN ANONYMOUS TIP PROVIDE REASONABLE SUSPICION FOR A STOP AND FRISK?: An Analysis of Recent California Cases on Anonymous Tips, updated in November 2009.

suppressed. Agreeing with other federal and state appellate decisions, the court held that "an individual's decision to commit a new and distinct crime, even if made during or immediately after an unlawful detention, is an intervening act sufficient to purge the taint of a theoretical unlawful detention". Thus, evidence regarding those new crimes is not subject to the exclusionary rule. (*Richard G., supra*, at 1260-63.)

3. People v. Osborne (2009) 175 Cal. App. 4th 1052 [First District, Division Four; Petition for Review denied on 10/28/09]: Circumstances supported reasonable suspicion of auto theft or burglary which justified a detention, pat-search and handcuffing.

In mid-afternoon, two officers observed the defendant standing next to the open trunk of a Lexus vehicle. He appeared to be handling exposed wires in the trunk. The defendant looked at the officers' patrol car as it passed; he then shut the trunk and walked away from the Lexus, appearing "real nervous". The defendant came up behind the officers as they detained another individual. Concerned because the defendant was quite large, an officer ordered him to step back. The defendant walked back and sat down in the drivers seat of the Lexus. Believing that the defendant was a parolee, an officer looked inside the Lexus and observed that parts of the interior were stripped and that there were "burglary tools" strewn across the front passenger area. Suspecting that the defendant might be burglarizing the vehicle, the officer ordered him out of the Lexus and prepared to pat-search him. Because he seemed "real nervous" and was attempting to remove his hand from the officer's grasp, the officer handcuffed the defendant and asked him if he had a gun. He admitted that he did and the officer seized a loaded handgun from his pants pocket. The officer then entered the Lexus and removed a backpack from the passenger compartment. Opening the backpack, the officer found drugs.

The Court of Appeal affirmed the trial court's denial of the defendant's motion to suppress the firearm and drugs. First, the appellate court rejected the defendant's assertion that the detention was not supported by reasonable suspicion. Although its not entirely clear, the court seemed to assume that the defendant was not detained until after the officer saw the Lexus's partially stripped interior and the burglary tools strewn across the passenger compartment. When added to the earlier observation of the defendant handling exposed wires in the trunk, his walking away from the police and his very nervous appearance, the officer reasonably suspected that the defendant was engaged in auto theft or burglary. Thus, detaining the defendant was "more than reasonable". (*Osborne, supra*, 175 Cal. App. 4th at 1058-59.)

The Court of Appeal also upheld the officer's decision to frisk appellant for weapons. "Courts have consistently recognized that certain crimes carry with them a

propensity for violence [or weapons possession] and individuals being investigated for those crimes may be pat-searched without further justification". (*Osborne, supra*., at 1059.) Although automobile burglary is not recognized as "a classic violent felony", courts have upheld "so-called automatic pat-searches" when an individual is suspected of burglary, because burglars are likely to be armed with weapons, such as knives or firearms, or with burglary tools that could be used as weapons.[9] This same reasoning justifies a pat-down of individuals suspected of auto theft or burglary. Moreover, in the present case, the defendant's nervousness and large size also supported a reasonable suspicion that he was armed and dangerous. (*Id.*, at 1060-61.)

Next, the court that the officer's act of handcuffing the defendant prior to the pat search did not convert the detention into a de facto arrest, requiring probable cause. Under the circumstances, the handcuffing was necessary as the officer reasonably suspected that the defendant was armed, he was very nervous and he tried to pull out of the officer's grasp during the pat search. (*Osborne, supra*, at 1062.)[10]

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[9] The court cited prior cases approving pat-searches of suspected burglars. (See *People v. Myles* (1975) 50 Cal.. App. 3d 423, 430; *People v. Smith* (1973) 30 Cal. App. 3d 277, 279-280; *People v. Castaneda* (1995) 35 Cal.App. 4th 1222, 1230.) Although the California Supreme Court has not ruled on this issue, they have denied petitions for review which have questioned this presumption. In *Osborne*, the court acknowledged that a similar presumption applies to individuals reasonably suspected of drug trafficking – i.e. that drug dealers have a propensity to carry weapons to protect themselves, their narcotics supplies and their money. (See *People v. Limon* (1993) 17 Cal. App. 4th 524, 534-35; see also *People v. Glaser* (1993) 11 Cal. 4th 354, 367-368; *Ybarra v. Illinois* (1979) 444 U.S. 85, 106 [dis.opn. of Rehnquist, J.].) A 2008 California Court of Appeal case extended that presumption to suspected drug users. (See *People v. Collier* (2008) 166 Cal. App. 4th 1374 [Second District, Division Six; pet. for rev. denied 12/17/08].) In *Collier*, the court found reasonable suspicion to pat search the defendant who was a passenger in a car stopped for a Vehicle Code violation, because the police smelled the odor of marijuana emanating from the car's passenger compartment, the defendant was tall and he wore extremely baggy clothing.

[10] Two recent Court of Appeal cases discussed the circumstances under which officers may handcuff a suspect during a detention without converting the seizure into a de facto arrest which must be supported by probable cause. (See *In re Antonio B.* (2008) 166 Cal. App. 4th 435; *People v. Stier* (2008) 168 Cal. App. 4th 21.) Handcuffing is justified during a detention when the circumstances support a reasonable belief that the suspect presents either a flight risk or a safety threat (e.g. is armed or suspected of committing a violent offense), so that he must be restrained. (*Antonio B., supra*., at 441.)

HOME SEARCHES WITHOUT A WARRANT OR PROBABLE CAUSE

A. Co-occupant's Consent to the Search of a Residence

1. United States v. Brown (9th Cir. 2009) 563 F.3d 410: A co-occupant of the defendant's residence voluntarily consented to a search of their shared residence, and her consent was not rendered invalid by the fact that the police had arrested the defendant and placed him in a squad car prior to asking the co-occupant for consent.

The defendant, David Brown, was wanted on a warrant for felony assault. Federal Agent Watson received information from a confidential informant that Brown was staying at a residence on East Augusta Avenue and that he possessed two firearms. Agent Watson and other officers set up surveillance near the East Augusta residence and spotted Brown walking with Lacie Rishel, one of two co-occupants of the residence. The agents approached Brown and Rishel with guns drawn, ordered them to the ground, handcuffed them and frisked them for weapons, finding nothing. Brown was arrested and placed in a squad car for eventual transport to jail. He was never asked for consent to search the East Augusta residence before or after he was put in the car. Agent Watson talked to Rishel. After taking off her handcuffs, Watson told Rishel that Brown likely had weapons stored at the residence he shared with Rishel and her absent boyfriend. She denied this and invited the agent to come down and look for himself. Once they were inside the residence, Rishel consented to the agent's request to search the area where Brown slept. In that area, Watson found a semiautomatic pistol under a couch cushion.

Consent from an occupant possessing exclusive or common authority is an exception to the warrant and probable cause requirements, allowing officers to enter and search a home. First, the Ninth Circuit held that the government had satisfied its burden of proving that Rishel voluntarily consented to the search of the East Augusta Residence. She was not in custody at the time she gave consent. She was no longer in handcuffs and the officers had put away their weapons right after handcuffing Rishel and Brown. The agent did not misrepresent his authority or threaten Rishel in order to obtain her consent. He did not notify her that she had the right to refuse consent, but this is not an absolute requirement of voluntariness. (*Brown, supra*., 563 F.3d at 414-416.)

Second, the court held that Rishel's consent was valid even though the officers had placed Brown, a co-occupant, in the patrol car prior to asking for her consent and never asked him if he agreed to their search of the shared residence.

There are two main Supreme Court cases on this issue. In *United States v. Matlock* (1974) 415 U.S. 164, the Court had held that a co-occupant who possesses common

authority over the shared premises can validly consent to a search when the non-consenting co-occupant is absent from the home. In *Georgia v. Randolph* (2006) 547 U.S. 103, the Court held that a co-occupant's consent to the warrantless search of a shared residence is invalid if a co-occupant is physically present and expressly refuses consent. In *Randolph*, the defendant's estranged wife gave the police permission to search their shared marital residence for items of alleged drug use after the defendant, who was also present, unequivocally refused to give his consent.

In *Brown*, the Ninth Circuit noted that the Supreme Court, in *Randolph*, had distinguished and expressly preserved its prior holdings in *Matlock* and *Illinois v. Rodriguez* (1990) 497 U.S. 177. Basically, a co-occupant who is physically present and voices an objection can override the consent of a willing co-occupant. However, an absent co-occupant who is merely a potential objector has no such veto power, even if he is nearby (and in a patrol car). As the Supreme Court explained:

> The second loose end is the significance of *Matlock* and *Rodriguez* after today's decision. Although the *Matlock* defendant was not present with the opportunity to object, he was in a squad car not far away; the *Rodriguez* defendant was actually asleep in the apartment, and the police might have roused him with a knock on the door before they entered with only the consent of an apparent co-tenant. If those cases are not to be undercut by today's holding, we have to admit that we are drawing a fine line; if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out. (*Brown, supra*, 563 F.3d 410, quoting *Randolph, supra*, 547 U.S. at 121.)

In *Brown,* the defendant was a mere potential objector. He was not present to overrule co-occupant Richel's consent to the search. Moreover, there was no evidence that Agent Watson intentionally put the defendant in the patrol car in order to avoid asking him for consent to search. Brown did not refuse consent prior to being placed in the car, and the agent was not obligated to seek his consent before asking Rishel.

2. In re D.C. (2010) 188 Cal. App. 4th 978 [First District, Division One; petition for review denied 1/12/11]: A minor's parent validly consented to a search of the minor's bedroom, even though the minor was present and expressly objected

In this case, the Court of Appeal held that the principles regarding a co-occupants consent to a police search of shared premises, including the rule of *Georgia v. Randolph* (2006) 547 U.S. 103, do not apply when a home is shared by a parent and a minor child.

The minor D.C., age 15, shared an apartment with his mother and his adult brother. Officers went to their apartment building in response to a report regarding possible narcotics activity. While the police were there, another resident reported that his apartment had been burglarized. The officers detained the minor's adult brother, suspecting he was involved in the alleged narcotics activity. They learned he was on probation with a search condition, and escorted him to the apartment he shared with the minor and their mother. On the way there, the officers met the mother who consented, verbally and in writing, to a search of the entire apartment. The minor was outside the apartment, but nearby. As the officers approached the apartment's front door, the minor physically barred their way and told them, "you're not going to enter the apartment." When his mother told him to get out of the way, he stepped outside, The police searched the whole apartment, including the minor's bedroom where they found some items reportedly taken in the burglary.

The court acknowledged that adults sharing a residence, but maintaining separate bedrooms, do not have the apparent authority to consent to the search of one another's bedrooms. However, different rules apply in the parent-child context. Given a parent's legal rights and obligations towards her minor child, she has actual and apparent common authority over that child's bedroom. Proper exercise of a parent's supervisory duties demands that the parent have joint access and control to her child's bedroom. Therefore, "police officers may reasonably conclude that a parent can validly consent to the search of a minor child's bedroom". (*D.C., supra*, 188 Cal. App. 4th at 984-85.)

Moreover, the minor's express objection to the officers' entry into the shared home, delivered at the threshold of the apartment, did not invalidate the search. Under *Georgia v. Randolph, supra*, 547 U.S. at 103, an adult co-occupant can overrule the consent of another adult co-occupant if he is physically present and expressly refuses permission to enter and search. However, this rule does not apply when the objecting co-occupant is a minor child. (*D.C.,supra*, at 988-89.) Finally, even though an older minor child can validly consent to a search of a residence shared with his parents when the parents are absent from home, a minor child cannot overrule his parent's consent when they are present. (*Id.*, at 990.)

B. Exigent Circumstances

1. Michigan v. Fisher (2009) 130 S.Ct. 546 [7-2 decision]: Officers' warrantless entry into the defendant's residence was lawful under the "emergency aid exception", even though the police did not reasonably suspect a serious injury, after the officers saw drops of blood outside the house, saw the defendant inside with a cut on his hand, and observed the defendant screaming and throwing things

Police officers responded to a complaint of "a disturbance". As two officers approached the designated area, a couple directed them to a residence, claiming that a man was "going crazy". When the officers arrived at the house, they saw a pickup truck in the driveway with its front smashed, damaged fenceposts along the side of the property, and three broken house windows. They saw drops of blood on the truck, on clothes visible inside the truck and on the door to the house. Through a window, the officers saw the defendant, inside the house, screaming and throwing things. The back door was locked and a couch was blocking the front door. The officers knocked but the defendant refused to let them in. Through the window, they could see that the defendant had a cut on his hand, but he ignored their inquires as to whether he needed medical attention. The defendant demanded that the officers obtain a warrant before entering his home. One officer pushed the front door partway open and ventured into the house. The defendant pointed a long gun at him, so he withdrew. The defendant was charged with assault with a weapon and possession of a firearm during commission of that felony. The trial court granted his motion to suppress evidence, finding that the officer's warrantless entry was unconstitutional, and the state appellate court affirmed that holding

The United States Supreme Court reversed, finding that the officers did not need a warrant to enter the defendant's home. Their entry was justified by the exigencies of the situation, specifically the "emergency aid exception" previously defined in *Brigham City v. Stuart* (2006) 547 U.S. 398. Under this exception, officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant threatened with imminent injury. The officers must have an objectively reasonable basis for believing that a person within the residence is in need of immediate aid. (*Michigan v. Fisher, supra*, 130 S.Ct. at 548, citing *Brigham City, supra*, 547 U.S. at 403-05.)

The Court held that the circumstances observed by the officers supported a reasonably objective belief that the defendant might have hurt himself (albeit nonfatally), or that he "was about to hurt, or had already hurt, others". (*Fisher, supra*., at 549.) They saw a cut on the defendant's hand, and he was throwing objects that might have hit an unseen human target. It did not matter that they merely saw a cut on the defendant's hand and drops of blood likely attributable to that cut. "Officers do not need ironclad proof of a

likely serious, life-threatening injury to invoke the emergency aid exception." (*Ibid*.) Apparently, any injury will do. It did not matter that the officers did not see or have reason to believe that anyone else was in the house. The fact that, in hindsight, there was no emergency, does not affect the Court's objective assessment of the situation observed by the officers before they entered the home.

Justice Stevens filed a dissent, joined by Justice Sotomayor. They were of the opinion that the emergency aid exception only excuses a warrant when the officers objectively belief that they need to enter a home to protect or preserve life in order to avoid serious injury. (*Fisher, supra*., at 550.) In this case, the officers observations did not suggest that the defendant was seriously injured or that anyone else was in the house.

2. People v. Rogers (2009) 46 Cal. 4th 1136: Officers' warrantless entry into residential storage rooms controlled by the defendant was justified by the missing person exigency exception; the circumstances supported a reasonable belief that the woman who lived with the defendant was missing and might be locked in the storage room.

Once again, the California Supreme Court decided a Fourth Amendment issue in the context of an automatic appeal from multiple murder and attempted murder convictions and a sentence of death. The challenge to the denial of the motion to suppress evidence seized from the defendant's apartment, storage rooms and vehicles was one of several issues raised in this appeal which yielded a unanimous opinion.

Here are the facts: Barbara Slimak called the San Diego police and reported that a woman named Beatrice Toronczak was missing. Barbara made the call on behalf of Beatrice's mother who lived in Germany. The mother was concerned because she had not heard from her daughter in several weeks, and she feared the defendant was responsible for her disappearance. She had witnessed the defendant threatening to lock Beatrice in his apartment's storage area. Beatrice had been living with the defendant in a San Diego apartment, and they had a five-year old child. When the mother called the defendant, looking for Beatrice, he said she just took off and he didn't know where she was. He refused to call the police and report her missing. Detective Carlson received this missing persons report and called the defendant. The defendant curtly said that Beatrice had been gone about a week and one half and hung up on Carlson.

Carlson then took a number of officers to the defendant's apartment, where he and Beatrice had been living. A resident of the complex told Carlson that she had not seen Beatrice for several weeks. The defendant drove up after Carlson had arrived and stated that Beatrice had been gone in Mexico for about a week and a half. He did not deny that he had previously threatened to lock Beatrice in the apartment's storage rooms. As the

apartment manager, the defendant controlled access to those storage rooms. The defendant, who seemed nervous, repeatedly refused Carlson's request for consent to search the three storage rooms located under his apartment. Increasingly convinced that Beatrice might be in these areas, Carlson directed one of the officers to break down the door of the first storage room. In that room, Carlson saw a black nylon rope that looked as if it had been used to bind someone's wrists and ankles, indicia for the defendant and narcotics. The room's dirt floor looked as if it could have been dug up. Defendant was informed of these discoveries and placed in the officer's patrol car. He again refused consent to search the other two storage rooms. The officers forced entry into the second storage room where they found luggage tagged with Beatrice's name with her personal belongings inside. After forcing entry into the third storage room, the officers found cardboard and wood stained with dried blood, a hammer, saw and butcher knife. Carlson believed he was looking at a crime scene. He sealed off the three storage room and obtained a telephonic search warrant, authorizing re-entry and the seizure of evidence.

The California Supreme Court rejected the defendant's contention that exigent circumstances did not justify the officers' warrantless entry into the three storage rooms, and that the search warrant obtained by Detective Carlson was based on observations made during the initial illegal entry, tainting the warrant-authorized searches and the resulting seizures of evidence. The Court found that the officers' initial entries into the three storage rooms was justified by the missing person exigency exception to the warrant requirement. This exception was previously defined by the Supreme Court in *People v. Wharton* (1991) 53 Cal.3d 522 and *People v. Lucero* (1988) 44 Cal. 3d 1006. In each of those cases, law enforcement officers had received reliable reports that individuals were missing. Moreover, additional circumstances, along with those reports, led the officers to reasonable believe that they needed to quickly enter a home, without a warrant, to look for the missing individuals who might be in imminent danger.

Similarly, in the present case, the totality of circumstances known to Detective Carlson supported his assessment of "an objective emergency requiring immediate action" – a reasonable belief that Beatrice, the missing woman, might be in danger and inside the three storage rooms. These circumstances included: the credible reports that Beatrice was missing and had not been seen for some time; the information that the defendant had previously threatened to lock Beatrice in the storage area and his failure to deny that allegation; the fact that the defendant gave incorrect information about how long Beatrice had been gone and his failure to exhibit concern over her unexplained disappearance; and the defendant's sole control over the storage rooms. Once the officers where in the storage rooms, their observations provided probable cause for the warrant.

3. People v. Hochstaser (2009) 178 Cal. App. 4th 883 [Sixth District; petition for review denied 2/3/10]: Relying on the Supreme Court's recent decision in Rogers, the court held that exigent circumstances justified a warrantless police entry into the defendant's apartment to determine whether a missing domestic violence victim and her two-year-old child were injured and safe. Observations made in the home supported probable cause to search the defendant's mother's car parked just outside his apartment.

In this appeal from a first degree murder conviction, the sole issue raised on appeal was whether the trial court erred in denying the defendant's motion to suppress evidence, including the victim's dismembered body parts, discovered during a search of his mother's car conducted after a warrantless search of the defendant's home.

At around 9:45 at night, a woman called the Santa Clara Police Department and told the dispatcher that her mother's whereabouts were unknown. The previous night, according to the caller's grandmother (the missing woman's mother), her mother's boyfriend had struck her during a physical fight. The woman told the dispatcher that her mother. Dolores, lived with her boyfriend, the defendant, and their two-year old son. Neither the woman (Dolores's daughter) nor her grandmother had been able to contact Dolores all day. About fifteen minutes later, two officers were dispatched to the defendant's apartment to conduct a welfare check. The officers found the apartment completely dark and silent. The front door was secured and the blinds were shut. The officers repeatedly banged on the front door and knocked on the window. They identified themselves as police and asked out loud if anyone was inside, receiving no response. One officer then called back the Dolores's daughter and she added that Dolores's failure to answer her cell phone to repeated calls was highly unusual. Because the daughter lived in Sacramento, it would take about two hours for her to arrive with the key, so she asked the officer to continue the welfare check and see if anyone was inside the apartment.

Concerned about Dolores and her two-year-old child and believing that someone inside the silent apartment might be seriously injured and incapacitated, the officers decided to enter the apartment by removing the screen from a partially open window. As they entered the "pitch dark" apartment, the officers again identified themselves as police, receiving no response. In the last bedroom they checked, the officers found the defendant sitting on a bed in the dark, wearing a pair of ear plugs. When asked about Dolores's whereabouts, he said she was not home. The defendant's face was red and he had cuts on his hands. He acknowledged that he'd had an argument with Dolores the night before and said he'd received the injuries during that altercation. He said that Dolores had left after the argument, and he had then driven their two-year-old to his mother's house The defendant's demeanor was withdraw and emotionless and his answers were vague and evasive. The officers walked around the apartment, looking for a female and a small

child. They noticed Sawzall blades on the couch and the kitchen table. The apartment smelled strongly of fresh bleach or cleanser and the bathroom was very clean. On the kitchen table, one officer noticed a small fanny pack. Inside the fanny pack, he could see a woman's wallet, and shining his flashlight into the pack, the officer could see Dolores's driver's license, along with a cell phone, keys and credit cards.

The defendant admitted that he'd driven his mother's Jetta home from her house when he dropped off his son, but he refused officers' requests to search the Jetta. One officer looked inside the Jetta, noticing a tarp on the floor and several large Rubbermaid containers stacked on the rear seat. The containers looked like they were lined with garbage bags. The officer then decided to enter the Jetta and look inside the bins, Inside the first one, he found human flesh. The defendant was then taken into custody. Dolores's body parts were found in the containers, but the child was found, alive and safe, at his grandmother's house.

The trial court had held that the warrantless entry into the defendant's apartment was justified not by exigent circumstances, but by the "community caretaker exception" defined in *People v. Ray* (1999) 21 Cal. 4th 464. However, while this case was pending on appeal, the Supreme Court decided *People v. Rogers* (2009) 46 Cal. 4th 1136. The Sixth District found Rogers controlling "on the question of whether the situation confronting the officers in this case gave rise to exigent circumstances". (*Hochstraser, supra*., 178 Cal. App. 4th at 893-94.)

The court concluded that, as in *Rogers*, the officers responded to a reliable missing persons report and the circumstances known to the officers strongly suggested that the missing persons, Dolores and her young child, could be inside the defendant's apartment, injured or worse. The officers were justified in immediately entering the apartment without a warrant to look for Dolores and her son, to determine whether they needed emergency aid.

Once the officers were lawfully in the house, their plain view observations provided probable cause to continue searching the house and to search the Jetta. These plain view observations included: the bleach smell and spotless bathroom which suggested a crime-scene clean-up; the blades in the kitchen and the family room; the victim's fanny back with cell phone, keys and identification; and the defendant's evident injuries, demeanor and evasiveness. Pursuant to the automobile exception, the officers did not need a warrant to search the Jetta even though the police had a key and the car was parked and currently immobile, as it was capable of being used for transportation.

4. (V) United States v. Struckman (9th Cir. 2010) 603 F.3d 731: The officers did not have probable cause to enter the backyard, part of the curtilage of the home, in order to arrest the defendant and their warrantless entry was not excused by exigent circumstances. Therefore, the district court erred in denying the motion to suppress.

Here are the facts underlying this rare defense victory: Around midday, a woman called 911 and reported that she saw a white male wearing a black jacket and carrying a red backpack climb over her neighbors' fence into their backyard. She could not see what he was doing in the yard, but her neighbors were not at home. The dispatcher sent officers to investigate. When they arrived at the designated residence, the two officers found that the backyard was entirely enclosed by a six-foot-tall fence. However, by climbing atop a nearby object and peering through a hole, the officers were able to peek into the yard. They saw a person, the defendant, who met the 911 caller's description and they saw a red backpack lying next to a deck in the yard. The officers saw no signs of a forced entry. The defendant was walking towards the back of the yard where the officers were situated. He looked up, saw one of the officers staring at him from over the top of the fence, looked surprised, stopped walking, and took off his jacket. He did not attempt to run and the officers saw no visible weapons or burglary tools.

One of the officers then drew his firearm, pointed it at the defendant and told him to get down on his knees. The defendant complied. This officer then climbed over the fence and handcuffed the defendant while two other officers kicked open a padlocked gate and entered the backyard. The defendant was cursing the officers and repeatedly stating that he lived at the house. He offered the use of his cell phone to call his mother to confirm that he lived there. The officer ignored this and conducted a pat search. When the defendant tried to pull away, the officer forced him to the ground, at which time he felt a hard object in the defendant's pocket. This object was an unloaded handgun magazine. A second officer then lifted the top flap of the red backpack and saw the butt of a handgun, which he seized. Thereafter, the officers obtained the defendant's name and learned that he was on probation and that he lived at the house.

The Ninth Circuit overturned the district court's denial of the motion to suppress the magazine and gun, finding that the defendant was illegally arrested. First, the court found that the small, enclosed backyard adjacent to the house was part of the curtilage, subject to Fourth Amendment protection. Thus, the officers could not enter the yard in order to arrest the defendant without probable cause and either a warrant or exigent circumstances.

Second, the court held that the officers did not have probable cause to arrest the defendant for residential burglary or attempted burglary. There were no signs of forced

entry, no visible burglary tools, no indication that the defendant had entered the home or was trying to do so. Nor was there probable cause to believe that the defendant was committing a criminal trespass. The neighbor's information was not sufficient. Before handcuffing the defendant at gunpoint and thus effecting his arrest, the officers should have done some investigation – finding out who lived at the house and ascertaining the defendant's identity and his purpose for being in the yard.

Third, assuming arguendo that the officers had probable cause to arrest the defendant for misdemeanor trespass, they did not obtain a warrant and exigent circumstances did not excuse their failure to do so. The government did not sustain their burden of proving that an immediate arrest was necessary. The defendant was not fleeing, so the officers were not in hot pursuit. The circumstances did not reasonably suggest that he presented a danger to the officers or the general public. His look of surprise, when he saw the officer peering over the fence, did not suggest a threat. One officer testified that when the defendant took off his jacket, he believed he intended to flee. The officer's subjective motivation was irrelevant in determining whether his actions were reasonable under the Fourth Amendment. Moreover, criminal trespass is a minor offense, a misdemeanor, and it was not inherently dangerous. Thus, a warrant was necessary and should have been obtained.

SEARCHES OF CELL PHONES, PAGERS AND COMPUTERS

1. City of Ontario v. Quon (2010) 130 S.Ct. 2619: The Ontario Police Department did not violate an officer's Fourth Amendment rights by obtaining and reviewing the transcripts of text messages sent and received on his department-issued pager.

The United States Supreme Court waded into the dangerous waters of assessing the interplay between Fourth Amendment protection and new technologies. However, they were careful to limit their ruling to the facts of this particular case.

Officer Quon was employed by the Ontario Police Department as a SWAT team member. The department acquired pagers capable of sending and receiving text messages and issued them to Quon and other SWAT team officers to help them mobilize and respond to emergencies. Pursuant to a contract with the wireless service provider, the officers could only send and receive a limited number of text message characters every month. They were told that their text messages could be audited. For several months, Officer Quon exceeded the monthly limit. He was permitted to avoid an audit by reimbursing the department for the incurred overage fees. After another officer also went over the limit, the department decided to determine whether the existing character limit was to low – i.e. whether officers like Quon were going over on work-related or personal messages. To make this assessment, the department obtained transcripts of two months' text messages sent and received by Quon and the other officer. They discovered that most of the messages sent and received by Quon were not work-related and that many were sexually explicit messages sent during work hours. Quon was disciplined for violating department rules and he filed a civil rights action against the department and others alleging that the review of his text messages violated his Fourth Amendment rights.

The Supreme Court reversed the Ninth Circuit's findings that the department's review of Quon's text messages violated his reasonable expectation of privacy and was excessive in scope. The Court acknowledged that the Fourth Amendment protects government employees from unreasonable invasions of their privacy by government officials, including their employers. (See *O'Connor v. Ortega* (1987) 480 U.S. 709.) The Court assumed without deciding that: 1)Quon had a reasonable expectation of privacy in the text messages sent and received on the pager provided to him by the police department; 2)the department's review of the transcripts of Quon's text messages was a search within the meaning of the Fourth Amendment; and 3) "principles applicable to a government employer's search of an employee's physical office apply with at least the same force when the employer intrudes on the employee's privacy in the electronic sphere". (*Quon, supra*., 130 S.Ct. At 2630.)

The Court concluded that the review of the messages on Quon's employer-provided pager was less intrusive than a search of his personal e-mail account or a wiretap of his home phone line. The fact that the search revealed intimate details of Quon's life did not make it unreasonable, because, under the circumstances, a reasonable employer would not have expected that the review would intrude on such matters.

The Court applied the standard set forth by the plurality in *O'Connor v. Ortega*; a government employer's warrantless search that invades an employee's reasonable expectation of privacy and is conducted for "non-investigatory work-related purposes" is reasonable if it is justified at its inception and not excessive in scope, given the objectives of the search. In *Quon*, the search was justified at it's inception for the non-investigatory work-related purpose of determining whether the text message character limit imposed by the wireless service provider was sufficient to meet the police department's needs. The search of the transcripts was reasonable in scope as this was "an efficient and expedient way to determine whether [Officer]Quon's overages were the result of work-related messaging or personal use". Moreover, the department only reviewed the messages sent while the officer was on duty for a two-month period. (*Quon, supra*, at 2631.)

The Court took care to decide this case on narrow grounds, noting that it must proceed with care when considering one's privacy expectations in communications made on electronic equipment, including cell phones provided by government employers. "The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." (*Id.* at 2629.)

2. People v. Diaz (Cal. Sup. Ct. January 3, 2011) 2011 WL 6158: Search of the text message folder of the defendant's seized cell phone, conducted at the detention facility 90 minutes after the defendant's arrest, was a lawful search incident to arrest because the cell phone was personal property immediately associated with the defendant's person and thus lawfully subject to a delayed warrantless search.

The California Supreme Court just recently weighed in on an issue that will likely be resolved, at some future time, by the United States Supreme Court: Under what circumstances may law enforcement officers search the contents of a cell phone seized from an individual at the time of her arrest?

Here are the facts: Deputy Sheriff Fazio witnessed the defendant participate in a controlled sale of Ecstasy to an informant. The monitored transaction took place in the backseat of a car that the defendant was driving. Right after the sale, Fazio stopped the car and arrested the defendant for being conspiring to sell drugs. In immediate searches incident to this arrest, Fazio seized six tabs of Ecstasy and a small amount of marijuana.

The marijuana was found in the defendant's pocket. The defendant had a cell phone "on his person", but that phone was not seized until after the defendant was transported to the sheriffs' station. At the sheriffs' station, Fazio interrogated the defendant, who denied knowledge of the drug transaction. About 30 minutes after discovering the cell phone and approximately 90 minutes after arresting the defendant, Fazio looked at the cell phone's text message folder and discovered a message that said "6 4 80". Fazio interpreted this message to mean "six pills of Ecstasy for $80". Fazio showed the text message to the defendant who then admitted participating in the drug sale, for which he was subsequently prosecuted. The record does not establish whether the defendant's cell phone was a "smartphone" or a device with lesser capacity. Fazio did not recall if the phone was on when he picked it up to look at it. However, he did have to manipulate the phone and go through several different screens to access the text message folder.

The California Supreme Court, in a five-to-two-decision, affirmed the trial court and Court of Appeal's decisions denying the defendant's motion to suppress the fruits of the cell phone search – the text messages and the defendant's incriminating admissions.

The government conceded that the defendant had a protected expectation of privacy in his cell phone's text message folder and that Deputy Fazio's review of the text messages was a search. The defendant did not attack the legality of his arrest or challenge the officer's right to seize the cell phone from his person, without a warrant incident to that arrest. The only issue was whether Fazio needed a warrant to review information on the cell phone, specifically, the text message folder, because that search occurred 90 minutes following the arrest at a different location, after the defendant was secured in custody and law enforcement had exclusive control of the phone. According to the Supreme Court, resolution of this issue – the constitutionality of the warrantless delayed search -- turned on whether the cell phone, at the time of the arrest, was an item of personal property immediately associated with the arrestee's person or property within the arrestee's area of immediate control.

The California Supreme Court reiterated that incident to a lawful custodial arrest, the officer can promptly search the arrestee's person and the area within his immediate control (his reaching distance) for weapons and destructible evidence. These searches may be conducted without a warrant, regardless of whether there is probable cause to believe that the person arrested may have a weapon or any such evidence. It is the fact of

the lawful arrest that gives the officer the right to make an immediate search to protect police and public safety and preserve evidence.[11]

The *Diaz* decision then reviewed three cases from the United States Supreme Court regarding the distinction between the post-arrest search of property found on the person and the search of containers found within his area of immediate control. First, in *United States v. Robinson* (1973) 414 U.S. 218, the Court clarified the police may conduct a full search of the arrestee's person incident to a custodial arrest. In that case, police arrested the defendant for driving with a revoked license and then conducted a patdown. The officer felt an object he couldn't identify in the defendant's breast pocket, pulled it out, and found it was a crumpled up cigarette package. Determining by touch that it contained objects that were not cigarettes, the officer opened the package and found heroin. The Court held that the officer had the right to fully search the arrestee, seize the package from his pocket and inspect its contents.

Second, in *People v. Edwards* (1974) 415 U.S. 800, the Supreme Court held that a search or seizure of the defendant's person and effects "that could be made on the spot at the time of the arrest may legally be conducted later when the accused arrives at the place of detention". (*Edwards, supra*., at 803.) In *Edwards,* the police arrested the defendant late at night for attempting to break into a post office. He was taken to jail and placed in a cell. Ten hours later, suspecting that his clothes might contain paint chips from the window through which he had tried to enter the post office, police made the defendant change into new clothes and took his old clothes as evidence. Subsequent examination of those clothes revealed paint chips matching samples taken from the post office window. The Court held that once the defendant was lawfully arrested and taken into custody, the police had the right to seize the clothes he was wearing (property in his immediate possession) and examine them. They could have done this at the scene or when the defendant arrived at the place of detention. It did not matter that they did not actually seize and examine the clothing until hours after the defendant had been administratively processed and incarcerated in jail. The delay here was reasonable, particularly because the defendant was arrested and jailed late at night and new clothing could not be obtained until the next morning.

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[11] For further discussion of the search incident to arrest exception to the Fourth Amendment's warrant requirement, see materials posted on the FDAP website (www.fdap.org): THE EVOLUTION OF THE SEARCH INCIDENT TO ARREST DOCTRINE: ARIZONA V. GANT (2009) 129 S.CT. 1710.

In the third Supreme Court case, *United States v. Chadwick* (1977) 433 U.S. 1, the high court cut back on the seemingly broad rule of *Edwards*. In *Chadwick*, narcotics agents observed the defendant load a 200-pound, double-locked footlocker into a car. Having probable cause to believe that the footlocker contained controlled substances, the agents arrested the defendant and his two companions. The three arrestees were transported to the federal building, along with the car and the footlocker. There, the footlocker remained in the exclusive control of law enforcement agents in a secure place. About 90 minutes after the defendant's arrest and without obtaining a warrant, the agents opened the footlocker, with a key seized from one of the arrestees, and found substantial amounts of marijuana inside.

The question in *Chadwick* was whether the delayed opening and search of the footlocker was constitutional. The Court held it was not. The officers lawfully seized the footlocker at the time of arrest, as it was in the area of the defendant's immediate control, but they were not entitled to search that property at a remote time and place unless there was an exigency (e.g. a reasonable belief that the footlocker contained explosives or evidence that would lose its value if the officers delayed). "Once law enforcement officers have reduced luggage or other personal property *not immediately associated with the person of the arrestee* to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest". (*Chadwick, supra*, 433 U.S. at 15 [emphasis added].) The Court did not overrule *Robinson* and *Edwards*, but distinguished them as involving searches of "the person" rather than "searches of possessions within an arrestee's immediate control" (*Chadwick, supra*., at 16, n. 10.)

Based on these three cases, the California Supreme Court, in *Diaz*, reasoned that the crucial question was whether the defendant's cell phone was personal property immediately associated with his person (like the cigarette pack in *Robinson,* the clothing in *Edwards*, or the wallet in *United States v. Passaro* (9th Cir. 1980) 624 F.2d 938), so that the delayed post-arrest search of its contents was justified.[12] Or, alternatively,

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[12] *United States v. Passaro*, was cited by *Diaz* (footnote 7), and it exemplifies the *Chadwick-Edwards* distinction. In that case, the defendant was arrested and taken into custody for assaulting police officers who had stopped him for a speeding violation. At jail, his wallet was seized from his person. The police opened the wallet, examined its contents and seized a document incriminating the defendant in a drug conspiracy. The Ninth Circuit applied the rule of *Edwards*, finding that the wallet found in the defendant's pocket was an element of his clothing and his person (like the cigarette pack in *Robinson*) so that a delayed warrantless search of its contents was a valid search incident to arrest.

whether the phone was like the footlocker in *Chadwick*, an item separate from the defendant's person and merely within the area of his immediate control, so that the officers should have obtained a warrant, based on probable cause, before searching the phone's contents, including the text message folder, 90 minutes after the arrest.[13]

The Court answered this question by holding that the cell phone was an item of personal property immediately associated with the defendant's person at the time of arrest and during booking. Thus, the delayed warrantless search of its contents was valid. Presumably, the officers could have seized the cell phone and viewed the text message folder immediately after arresting the defendant. Thus, under the rule of *Edwards*, they could also look at the text messages 90 minutes after the arrest, even though the phone was within the officers' exclusive control and no longer accessible by the defendant.

Because they found the delayed search of the cell phone's text message folder was valid under *Edwards*, the Court declined to address the government's argument that exigent circumstances justified the warrantless search because the cell phone's contents were dynamic in nature and subject to change or deletion without warning (e.g. that new messages could replace old ones, a power loss could wipe out the data, or someone could contact the cell phone provider and have text messages remotely deleted.) The Court noted that the People had offered no evidence to support these claims. Nor had they shown that text messages deleted from a cell phone could not obtained from the cell phone provider.

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[13] The distinction recognized in *Diaz* -- between the search of effects associated with the person of the arrestee and the search of containers within the arrestees area of immediate control has significance for the validity of warrantless *delayed* searches – i.e. searches of the seized items conducted at a place and time remote from the arrest. If a container is seized from the vehicle's passenger compartment during a *Belton* search incident to arrest, or seized from the area within the arrestee's immediate control during a *Chimel* search, the contents of the container can be examined contemporaneously, at the arrest scene, even if officer has gained "exclusive control" of the item -- at least until the arrestee is secured in custody. (See *New York v. Belton* (1981) 453 U.S. 454, 462, n. 5; *United States v. Morales* (8th Cir. 1991) 923 F.2d 621 [approving the immediate search of a duffel bag that the defendant had been holding at the time of his arrest, conducted while the defendant stood unhandcuffed but spread-eagle against the wall about three feet away from the officer who had the bag under his exclusive control] but see *Arizona v. Gant* (2009) 129 S.Ct. 1710 [the police cannot conduct a *Belton* search of the vehicle's passenger compartment and containers therein, incident to arrest, after the arrestee has been secured and cannot access the vehicle's interior])

The *Diaz* majority then proceeded to reject arguments offered by the defense and the dissenting justices. First, the defense had argued that the constitutionality of the search should not rest on the fortuitous fact that the defendant was carrying the cell phone on his person at the time of arrest. After all, cell phones are often kept within the person's reaching area or at an even greater distance (e.g. in a purse, a backpack or a briefcase, on a desk, or plugged into a charger). Thus, the Court should focus on the cell phone's unique character rather than its location at the time of the arrest. The defense emphasized that cell phones contain large quantities of private data, much more than can be kept in an arrestee's pocket, his wallet, or other small containers carried on his person.

The California Court noted that nothing in *Robinson*, *Edwards* or *Chadwick* suggested that the necessity of obtaining a warrant for the search of property seized incident to arrest should depend on the character of the item rather than its location. Moreover, this theory has been rejected by Supreme Court cases holding that the nature of a lawfully seized container is irrelevant to the validity of a subsequent search. (See, *United States v. Ross* (1982) 456 U.S. 798 [if the police have probable cause to believe a lawfully stopped car contains contraband, they may search any container inside the car that might contain the object of the search, regardless of the nature of the container in which the contraband is secreted]; *New York v. Belton* (1981) 453 U.S. 454 [during a search incident to arrest of a vehicle any open or closed container found in the passenger compartment may be searched]; *Arizona v. Gant* (2009) 129 S.Ct. 1710, 1720 [noting that "*Belton* authorizes police officers to search not just the passenger compartment but every purse, briefcase, or other container within that space"].)

Moreover, the Court noted that individuals also carry highly personal materials, such as photos, letters and diaries, in their pockets, wallets, and pursues. Those items would be subject to examination, without the necessity of seeking a warrant, if seized from an individual's person during a search incident to arrest. In *Edwards*, the high court approved several court of appeal decisions which had upheld the delayed and warrantless examination of personal papers seized from arrestees, including those in wallets or purses. (See *Edwards, supra*., 415 U.S. at 803-804, fn. 4.)

The Court rejected any focus on the alleged high storage capacity of cell phones – that they could hold large amounts of private data, much more than small spacial containers like pockets or wallets. First, the record contained no evidence regarding the storage capacity of cell phones in general or the defendant's cell phone in particular. Second, the quantity of information stored should not be determinative of the constitutionality of the search. Under this theory, the police might be prohibited from searching a sophisticated smart phone with huge storage capacity, unless they obtained a warrant, but permitted to search an unsophisticated phone with limited storage capacity.

This could create significant line-drawing problems for police officers and the courts. Those charged with enforcing the law need a straightforward rule that is easy to apply – either they can examine the contents of cell phones seized from an arrestee at any time, or they cannot do so (at least many minutes after the arrest) without a warrant.

Next, the *Diaz* majority refused to distinguish between the cell phone itself and its contents – i.e. the stored data. Such a distinction is contrary to *Robinson*, which held that the police could open and examine any container found on the arrestee's person during a full search incident to arrest. It is also contrary to *Edwards*, which held that after the police had seized the defendant's clothing and reduced them to police control, they did not need a warrant before subjecting those clothes to laboratory testing. Thus, according to the Court, if the police have the right to seize the arrestee's cell phone incident to arrest, they can examine its contents at any time without getting a warrant.

The *Diaz* majority rejected the assertion that the rationale for allowing delayed warrantless searches should not apply to items, like cell phones, that are easily removed from the arrestee's possession and secured by the police. The Court emphasized that the whole point of *Edwards*, is that any item that can be seized from the arrestee's person at the time of arrest, and thereafter searched and examined on the spot, can also be seized and searched at a later time, without obtaining a warrant. It's up to the police to decide when and where to conduct the search of an item associated with the arrestee's person.

The Court concluded that the delayed warrantless search of the contents of the defendant's cell phone was valid under the United States Supreme Court's binding precedents."If, as the dissent asserts, the wisdom of the high court's decisions must be newly evaluated in light of modern technology, then that evaluation must be taken by the high court itself".

The majority opinion in *Diaz* was authored by Justice Chin and joined by Justices Kennard, Baxter, Corrigan and George. Acting Chief Justice Kennard wrote a short concurring opinion explaining why she joined the majority. She reasoned that the Court was compelled to uphold the search based on applicable United States Supreme Court precedents (*Robinson*, *Edwards* and *Chadwick*), even though there might be reason to reconsider or create exceptions to those precedents in light of new technology. Any such reconsideration would have to be performed by the Supreme Court.

Justice Werdegar filed a dissenting opinion, joined by Justice Moreno. The dissent was willing to recognize that electronic communication and data storage devices carried on the person – cellular phones, smart phones and handheld computers – present unique challenges to existing Fourth Amendment principles. In short, mobile phones are not like

an arrestee's clothing, cigarette packages, small spatial containers, or even wallets. They are capable of holding vast amounts of highly private personal and business information. Indeed, they may not qualify as "containers" at all, as the Supreme Court has defined a container as "any object capable of containing another object". (See *New York v. Belton, supra*, 453 U.S. at 460, fn. 4.) Mobile phones and other handheld electronic devices hold data, not physical objects.

In light of these distinctions, the dissent asserted that a context-dependent balancing of the individual's protected interests in informational privacy against the police interests in safety and preservation of evidence was called for. The dissent did not necessarily consider the Court bound by *Robinson*, *Edwards* and *Chadwick*, as those cases were factually distinct and not directly applicable precedents. The Supreme Court had recently emphasized, in *Arizona v. Gant*, that starie decisis should not be used "to justify the continuance of an unconstitutional police practice...in a case so easily distinguishable form the decisions that arguably compel it". (*Gant, supra*, 129 S.Ct. at 1722.)

The search of the contents of a persons mobile phone, smart phone or handheld computer poses an enormous threat to the individual's interest in informational privacy because of the large amount of private information stored on these devices (e.g. thousands of messages, photos, videos, contacts, financial records).[14] "The question of when and how they may be searched is therefore an important one".

The dissent acknowledged that the police were entitled to seize and secure a cell phone found on the person at the time of his arrest. The issue was whether they could search the phone's contents after it was secured and in the exclusive control of the police without obtaining a warrant based on probable cause. Such a search could not be rationalized by the traditional justifications for a search incident to arrest – protecting officer safety and preserving evidence. A weapon cannot be hidden in a cell phone. "[T]here is apparently no "app" that will turn an iPhone or any other mobile phone into an effective weapon for use against an arresting officer". Moreover, once a mobile phone has been seized from the arrestee and secured in the government's exclusive control, the

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[14] The dissent acknowledged that the record did not disclose whether Defendant Diaz possessed a smart phone or a less sophisticated device. However, the rule adopted by the Court would need to apply to all types of handheld electronic devices conceivable found on arrestees in today's world; the validity of the delayed search incident to arrest should not depend on the officer's assessment of the technical specifications of the particular device. Moreover, smartphones make up a growing share of the United States market and will soon be ubiquitous.

arrestee, who is also in police custody, cannot destroy any evidence stored upon it. Although some smart phones can be "remotely wiped" (data erased by an accomplice), remote wiping can be avoided by removing the smartphone's battery or storing the phone in a shielded container until a warrant is obtained. Thus, "[o]nce an arrestee's mobile phone or similar device is securely "under the exclusive dominion of police authority", the arrest itself no longer serves to authorize a warrantless search of its stored data".

The United States Supreme Court's recent decision in *Arizona v. Gant* (2009) 129 S.Ct. 1710, and the Sixth District Court of Appeal's decision in *People v. Leal* (2009) 178 Cal. App. 4th 1051, both holding that the rationales for a search incident to arrest, articulated in *Chimel v. California* (1969) 395 U.S. 752, do not permit a search of the vehicle's passenger compartment or of the area within the arrestee's immediate control, after the arrestee is secured in the patrol car, seem to support the dissent's analysis.

Moreover, the dissent's reasoning is also validated by the Ninth Circuit's very recent holding in *United States v. Maddox* (9th Cir. 2010) 614 F.3d 1046, decided in five months before *Diaz*. In *Maddox*, after stopping the defendant for reckless driving, the police officer discovered from a computer check that he had a suspended license. Just prior to handcuffing and arresting the defendant, the officer took a key chain with an attached vial, that the defendant was apparently holding in his hands, and tossed them on the front seat of the vehicle. After the defendant was secured in the officer's patrol car, the officer entered the defendant's vehicle, retrieved the key chain, unscrewed the top of the attached vial and discovered methamphetamine inside. The Ninth Circuit held that the search of the key chain vial was not justified as incident to arrest because the defendant could not access the item by the time of the search. The Court of Appeal did not treat the key chain and attached vial as an item intimately associated with the defendant at the time of his arrest – even though he was apparently holding the key chain right before he was arrested. Instead, the court treated the key chain search as a *Chimel-Chadwick* search of an item that was within the arrestee's reaching distance at the time of arrest. First, relying on pre-*Gant* Ninth Circuit precedent (*United States v. Turner* (9th Cir. 1991) 926 F.2d 883, 887), *Maddox* held that the search of the key chain vial was unreasonable because the defendant could not destroy evidence inside the vial once he was handcuffed in the patrol car. Second, relying on language from *Chadwick*, the Ninth Circuit emphasized that once the officer reduced the key chain with its attached vial to his "exclusive control", it could not be searched incident to arrest because the arrestee could not access the vial to obtain a weapon or destroy evidence. (*Maddox, supra*., 614 F.3d at 1049, citing *United States v. Chadwick, supra*., 433 U.S. at 15.) Arguably, this limitation could apply once the officer seized and secured the item even before the arrestee was placed in the patrol car. Under the reasoning of *Maddox*, once the police had exclusive control of Defendant

Diaz's cell phone, particularly because he was already in police custody, they should not have been able to examine its contents, including the text message folder.

The *Diaz* dissent noted that the majority had relied on the rule of *Edwards* – that because the mobile phone was an item on the defendant's person at the time of arrest, it could have been seized and searched at the time and place of arrest. Thus, it could also be searched later, after the defendant was securely in custody, without offending the Fourth Amendment. The dissent noted that the *Edwards* Court did not suggest that it's holding -- permitting the delayed warrantless seizure and inspection of the defendant's clothing until replacement clothing could be secured -- should necessarily apply to distinct factual situations. The high court did not explain what police interest justified a delayed warrantless search once the arrestee and his effects were safely in police control. Rather, the *Edwards* court suggested that the rationale was to avoid a logistically awkward or embarrassing public search – e.g. forcing the arrestee to remove his clothes at the arrest site. Indeed, many courts and commentators have suggested a narrow reading of *Edwards*, allowing delayed searches incident to arrest only of the arrestee's actual person or clothing. Nevertheless, the dissent acknowledged that subsequently, in *Chadwick*, the Supreme Court suggested that items beyond clothing, including containers, may be subject to delayed warrantless search if they are immediately associated with the person of the arrestee.

However, according to the dissent, even a broad reading of *Edwards* should not apply to mobile phones seized from an individual at the time of arrest. These handheld electronic devices, are very different from the clothing and small spatial containers which existed at the time of *Edwards* and *Chadwick*. They hold much more information and their owners have a much greater expectation of privacy in their stored data, an expectation that continues even after they are taken into custody.

The dissent would hold that "mobile phones, smartphones and handheld computers are not ordinarily subject to delayed warrantless searches incident to arrest". Indeed, it seems that except in rare circumstances, the dissent might require a warrant based on probable cause to examine the data stored on the seized cell phone, even at the scene of arrest. The dissent proposed that police could only examine an arrestee's phone without a warrant in exigent circumstances – e.g. where the arresting officers have reason to fear imminent loss of evidence from the device. Also, upon seizing the cell phone, the police might be permitted to look at the phone's "wallpaper" (but not its data folders) to discover identifying information regarding the arrestee.

Obviously, the California Supreme Court's divided opinion in *Diaz* will not be the end of the discussion of this particular issue, or of related issues regarding warrantless

searches of cell phones, handheld electronic devices, laptop computers and even desktop computers. As noted at the end of the majority opinion, the Supreme Court of Ohio, reached the opposite conclusion, holding that after seizing a cell phone from an arrestee, the police must obtain a warrant before intruding into the phones contents. (See *State v. Smith* (Ohio 2009) 920 N.E.2d 949.) Other appellate courts have upheld warrantless cell phone searches. (See *United States v. Murphy* (4th Cir. 2009) 552 F.3d 405; United States v. Finley (5th Cir. 2007) 477 F.3d 250; *United States v. Wurie* (D.Mass 2009) 612 F.Supp. 2d 104.) Although the United States Supreme Court denied the government's petition for certiorari in *State v. Smith*, they will likely have to take up this issue at some point.

3. (V) United States v. Payton (9th Cir. 2009) 573 F.3d 859: Search of the computer found in the defendant's bedroom exceeded the scope of a warrant which authorized a search for evidence of drug sales, including financial records, because the circumstances did not support a reasonable belief that items enumerated in the warrant would be found on the computer.

Unlike the majority of the California Supreme Court, the Ninth Circuit seems willing to treat computers slightly differently from other containers. In this case, officers obtained a warrant to search the defendant's residence for evidence of drug selling. The warrant authorized officers to search for items including methamphetamine, packaging materials, sales ledgers showing narcotics transactions (such as pay/owe sheets), financial records of persons in control of the residence, bank accounts and income and expense records. The officer's probable cause statement had requested permission to search any computer found at the residence but the warrant issued by the judge did not explicitly authorize the seizure or search of any computers. During the execution of the warrant, the officers found no evidence of drug sales in the residence. One officer found a computer in the defendant's bedroom, which was turned on with the screen saver activated. The officer clicked open a file on this computer which showed an image of likely child pornography. This and other images found on the computer led the government to charge the defendant with possession of child pornography.

The Ninth Circuit overturned the district court's denial of the defendant's motion to suppress evidence. The Court of Appeal held that the search of the computer exceeded the scope of the warrant.

The judge who had issued the warrant testified at the suppression hearing that he had intended to expressly authorize the search of any computer found in the defendant's residence, but had neglected to do so. The Ninth Circuit held that this after-the-fact testimony did not cure the warrant's failure to authorize the computer search. Moreover, the court held that the warrant's authorization of a search for sales ledgers and financial

records did not authorize the officer to look for such records on the computer, even though the computer was capable of holding this information.

The Court of Appeal found that the current case was controlled by its one-year-old decision in *United States v. Giberson* (9th Cir. 2008) 527 F.3d 882. In that case, the court upheld the seizure of a computer found during a residential search even though the warrant had not expressly authorized a computer search or seizure. In *Giberson*, officers had obtained a warrant to search the defendant's residence for evidence of his use of false identification. The warrant authorized the police to search for records, documents or correspondence related to the use of others' identity. During the search, the officers found a computer in the defendant's bedroom. Next to the connected printer were fake identification cards that looked like they'd been printed on that device. On the desk near the computer were other documents evidencing the production of false identification, including fake social security cards and birth certificates. Based on these discoveries, officers seized and secured the computer until they obtained a second warrant expressly authorizing a search of the computer for false identification documentation. The then officers searched the computer and found images of child pornography.

The Ninth Circuit, in *Giberson*, held the search was reasonable because the circumstances (e.g. the false identity documents found near the printer and on the desk) made it reasonable to believe that the computer contained documents enumerated in the warrant. The police thus had the right to seize the computer and then obtain a warrant to search it. The court reiterated that "we have long held that a search warrant authorizing the seizure of materials also authorizes the search of objects that could contain those materials", including locked briefcases and cassette tapes. (*Giberson, supra*., 527 F.3d at 886-887.) Computers, like briefcases and cassette tapes, can be repositories for incriminating documents and records, but they also can store large quantities of personal and private information that is intermingled with the material documents sought in a search warrant. Consequently, the defense had argued that computers are not like other containers, including briefcases and filing cabinets; they should be absolutely exempt from the general rule and given heightened Fourth Amendment protection. The court, in *Giberson*, declined to such a "bright line exception" to the accepted rule based on the quantity of information stored in computers or the form in which it is stored. (*Giberson, supra*., at 888.) The court held that under the circumstances of "this case", it was reasonable for the officers to secure the computer while applying for a warrant because they reasonably believed that items specified in the warrant were stored on that computer. (*Giberson, supra*., at 889.)

In *Payton*, the Ninth Circuit read Giberson as requiring something more to seizure a computer and to search its contents than required to search a filing cabinet or even a

locked brief cases. The *Payton* court stated that the rule of *Giberson* in this manner: Computers can be searched for documents and records specified in a warrant when there are circumstances objectively indicating that the specified evidence is likely to be found on the computer. However, the fact that the designated evidence is capable of being kept on the computer is not sufficient To this extent, computers are distinct from other physical containers. Nevertheless, computers are not so different from other containers that they can never be seized and searched without express authorization in the warrant.

The court applied this rule to the facts of *Payton* and found that the search of the computer found on the defendant's desk was not reasonable. In contrast to *Giberson*, there were no circumstances reasonably indicating that records specified in the warrant (e.g. pay owe sheets indicating drug sales) would likely be found on the defendant's computer, particularly as no evidence of drug dealing had been found in the residence. Moreover, it was significant that unlike in *Giberson*, the officers who searched the defendant's house did not merely seize the computer and then seek a second warrant.

DNA SEARCHES OF CONVICTED FELONS AND ARRESTEES

California law mandates the collection of DNA samples from all adults convicted of any felonies, all juveniles found to have committed felonies, and all adults arrested for any felony offense.[15] The provision requiring that DNA be taken from all adult felony arrestees, as soon as practicable after arrest, was passed into law by the voters in November 2004, as part of Proposition 69. However, this provision did not go into effect until January 1, 2009. (See Pen. Code, sec. 296(a)(2)(C).)

DNA samples are collected from felony arrestees and convicted felons for the sole purpose of seeking matches on unsolved cases, unrelated to the crime of arrest or conviction. After the sample is taken by buccal swab – repeatedly scraping the inner cheek with a small stick – it is sent to the DOJ laboratory for analysis and indefinite storage. An "offender profile" is created, revealing the individual's unique genetic identity. That profile is uploaded into California's data base, which is part of the nationwide Combined DNA Index System (CODIS); it is placed in the offender index with profiles from other arrestees and convicted felons, and then compared to DNA samples left at crime scenes by unknown perpetrators maintained in a separate crime scene index. The arrestee's or convicted felon's offender profile is compared to all of the crime scene profiles when the new profile is first entered into CODIS and on a weekly basis thereafter.

It is undisputed that the state's use of a buccal swab to extract DNA from the inner cheek of the arrestee or convicted felon is a search within the meaning of the Fourth Amendment. (See, e.g. *Haskell v. Brown* (N.D. Cal. 2009) 677 F.Supp.2d 1187, 1193; *United States v. Pool* (9th Cir. 2010) 621 F.3d 1213, 1217.) Moreover, several courts have held that the ensuing analysis of the extracted sample to create the DNA offender profile is also a search. (See, e.g.*United States v. Mitchell* (W.D. Pa. 2009) 681 F.2d 597, 600; *People v. King* (2000) 82 Cal. App. 4th 1363, 1370.)

Moreover, law enforcement officers take DNA from every convicted felon and felony arrestee as a matter of routine; neither a warrant nor individualized suspicion is required. The state need not reasonably believe that the individual has committed any

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[15] California's DNA program is consistent with the national trend. The federal government and all 50 states collect and analyze DNA from convicted offenders. Twenty other states mandate DNA collection from individuals arrested for some or all felony offenses, and the federal government currently requires DNA collection from individuals arrested for all felonies and any sex offenses or violent crimes.

crime, other than the crime of arrest or conviction, let alone a serious or violent crime likely to yield DNA evidence. Consequently, it is the state's burden to prove that the warrantless and suspicionless search is reasonable under the Fourth Amendment. To assess the reasonableness of DNA searches of convicted felons and arrestees, the courts have employed the balancing test used by the United State Supreme Court in *United States v. Knights* (2001) 534 U.S. 112 [no more than reasonable suspicion is required to conduct a search of a probationer's home authorized by a probation search condition] and *Samson v. California* (2006) 547 U.S. 843 [parolees can be searched without a warrant or any individualized suspicion]. Under this test, the court weighs the degree to which the search intrudes upon the individual's reasonable expectation of privacy against the degree to which it is needed to promote a legitimate governmental interest. (See *Knights, supra*, at 118-119; *Samson, supra*, at 848.)[16]

A. DNA Searches of Convicted Felons

California and other jurisdictions have been requiring convicted felons to submit DNA samples for many years. Although the matter has generated some sharply divided opinions, the Ninth Circuit and other federal circuit courts have upheld the constitutionality of federal and state provisions mandating DNA collection from

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[16] Employing this balancing test, the United States Supreme Court has only approved two types of suspicionless searches – special needs searches and parolee searches. The first type are permitted when special needs beyond the normal need for law enforcement render the warrant and probable cause requirements impracticable. (See, e.g. *Skinner v. Railway Labor Executive Assn'n* (1989) 489 U.S. 602 [upholding non-consensual suspicionless drug tests of railroad employees following rail accidents to promote the government's compelling "special need" to ensure the safety of the public, rail passengers and employees]. A search does not qualify as a special needs search when it is conducted for criminal law enforcement objectives. (See *Indianapolis v. Edmond* (2000) 531 U.S. 32, 44; *Ferguson v. City of Charleston* (2001) 532 U.S. 67, 83-86.) As recognized by the Ninth Circuit, mandatory DNA collection (whether from convicted felons or felony arrestees) does not qualify as a special need search as it serves a quintessential law enforcement interest – the solving of cold cases. (See *United States v. Kriesel* (9th Cir. 2007) 508 F.3d 941, 946; *United States v. Pool, supra*, 621 F.3d at 1218.) To date, the Supreme Court has approved only one type of suspicionless search conducted for law enforcement officers for criminal investigative purposes – a search of a parolee who has a severely reduced expectation or privacy and a documented propensity to re-offend, to assure that he does not commit new crimes while on supervised release. (See *Samson, supra*, 547 U.S. at 851-857.)

convicted felons. (See, e.g.*United States v. Kincade* (9th Cir. 2004) 379 F.3d 813 [a divided Ninth Circuit en banc panel upheld a federal statute requiring DNA collection from offenders convicted of violent felonies and placed on supervised release]; *United States v. Kriesel* (9th Cir. 2007) 508 F.3d 941. [by a two-to- one vote, the court validated a subsequent federal law, mandating the collection of DNA from all convicted felons]; *Jones v. Murray* (4th Cir. 1992) 962 F.2d 302 [a divided court upheld a Virginia statute authorizing the taking of DNA from all convicted felons]; *Padgett v. Donald* (11th Cir. 2005) 401 F.3d 1273, 1277-1278 [validating a Georgia statute requiring all convicted felons to provide DNA samples].)

No federal cases addressed the constitutionality of earlier iterations of the California law which required DNA collection only from convicted felons, but not from felony arrestees. However, several California Court of Appeal decisions validated this practice. (See *People v. Travis* (2006) 139 Cal. App. 4th 1271 [upholding post-Proposition 69 law that mandated DNA collection from all convicted felons]; *People v. Johnson* (2006) 139 Cal. App. 4th 1135 [upholding California law requiring designated convicted felons released on parole to provide DNA samples for profiling]; *People v. Adams* (2004) 115 Cal. App. 4th 243 [validating statute requiring DNA collection from offenders convicted of serious felonies]; *Alfaro v. Terhune* (2002) 98 Cal. App. 4th 492 [rejecting constitutional challenge by death row inmates to act requiring all persons convicted of specified felonies to submit DNA]; *People v. King* (2000) 82 Cal. App. 4th 1363 [upholding DNA collection from offenders convicted of designated felonies and released on parole].) The California Supreme Court did not weigh in on this constitutional issue until just last year when it validated a DNA search of a convicted felon in *People v. Robinson* (2010) 47 Cal. 4th 1104 (discussed below).

Most of the federal cases, including those decided by the Ninth Circuit, upheld the suspicionless DNA searches of convicted felons by applying the "totality of the circumstances" balancing test employed in *Knights* and *Samson.*(See, e.g. *Kincade, supra*., 379 F.3d at 832; *Kriesel, supra*., 508 F.3d at 946-947..) [17] These cases balanced the intrusion upon the convicted felons' privacy interests against the governmental interests promoted by DNA collection and analysis, concluding that the government's interests prevailed. (See, e.g. *Kincade, supra*., 379 F.3d at 839.)

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[17] A minority of federal circuits and the California Courts of Appeal used the same balancing test, but characterized DNA collection as a special needs search – an approach rejected by the Ninth Circuit. (See, e.g. *Green v. Berge* (7th Cir. 2004) 354 F.3d 675; *People v. Travis, supra*., 139 Cal. App. 4th at 1271; *People v. Johnson, supra*, 139 Cal. App. 4th at 1135.)

Convicted felons, whether in prison or on conditional release, have significantly diminished privacy expectations. (See, e.g. *Kincade, supra*., 379 F.3d at 833-835 [because of the restrictions on their liberty wrought by a lawful conviction and the accompanying term of supervised release, conditional releasees have severely restricted expectations of privacy relative to the general citizenry]; *Kriesel, supra*., 508 F.3d at 947 [as confirmed in *Samson*, parolees have severely diminished expectations or privacy].)Moreover, convicted offenders have demonstrably high rates of recidivism compared to the general crime rate. (See, e.g. *Kincade, supra*., at 833;.) The presumption that convicted felons are likely to re-offend after their release from custody underlies the government's interests in collecting their DNA.

The Ninth Circuit identified three governmental interests that are advanced by taking convicted felons' DNA and uploading their offender profiles into CODIS. By regularly comparing those profiles to crime scene samples stored in CODIS, including those newly added to the crime scene index, the government can ascertain whether probationers and parolees are committing crimes while at large – a concern due to the convicted offenders' extraordinary recidivism rates. (*Kincade, supra*., 379 F.3d at 838.) This process promotes two significant governmental interests. First, it enables the government to closely supervise the conditional releasees to assure they are not re-offending. (*Kincade, supra*., at 838-839; *Kriesel, supra*., 508 F.3d at 949.) Second, the process furthers the government's interest in deterring their recidivism by increasing the chances they will be caught. (*Kincade, supra*., at 838-840.)The third governmental interest promoted by collecting DNA from convicted offenders is the solution of past unsolved crimes. (*Id.*, at 839; *Kriesel, supra*., at 949.)

In summary, the offenders' status as convicted offenders on probation or parole affected both sides of the balance which is struck in favor of the governmental interests. Because convicted felons with high recidivism rates are being returned to society on supervised release, the government has a strong interest in closely monitoring their activities to assure they do not re-offend, and this intense supervision diminishes their reasonable expectations of privacy. (See *Kincade, supra*, at 834-835.)

1. People v. Robinson (2010) 47 Cal. 4th 1104: Although the 1999 collection of the defendant's DNA was not authorized by the state law in effect at that time, the unauthorized search did not violate the Fourth Amendment. And even if it did, the DNA evidence implicating the defendant in 1994 sex crimes was properly admitted in his prosecution for those crimes, as the erroneous collection was based on two clerks' negligent errors.

In last year's decision in *Robinson*, the Supreme Court finally held that DNA collection from a lawfully convicted felon did not violated the Fourth Amendment. Here are the facts: An offender profile was created from a DNA sample collected from the defendant in March 1999. The defendant's DNA offender profile matched a DNA profile created from a semen sample which had been left by an unknown perpetrator during a rape committed five years earlier, in 1994. The "cold hit" was discovered after the defendant was arrested on an unrelated warrant in September 2000, and the defendant was then prosecuted for the 1994 rape and other sex offenses. It turned out that the DNA sample had been unlawfully collected from the defendant in March 1999, three months after the DNA Act of 1998 went into effect. The 1998 Act required DNA collection only from persons convicted of specified "qualifying felony offenses". When law enforcement took the defendant's DNA in March 1999, they mistakenly believed – based on errors made by two different records clerks – that the defendant had been convicted of one of these qualifying felonies. They were wrong; he had not.

In his prosecution for the 1994 sex offenses, the defendant filed a motion to suppress evidence, arguing that the DNA evidence which linked him to those crimes should have been excluded, because its collection was not authorized by the law then in effect. The California Supreme Court upheld the lower court's denial of the defendant's suppression motion. First, the Supreme Court ruled that the trial court should only have excluded the DNA evidence if the DNA collection was unconstitutional, a violation of the Fourth Amendment, and not merely a violation of state law. (*Robinson, supra*, at 1119.)

Second, the Court held that the non-consensual extraction of blood for DNA profiling from the defendant, a lawfully convicted felon, did not violate the Fourth Amendment. The Court approved the prior California Court of Appeal decisions which had upheld post-conviction DNA searches. Applying the test from *Samson v. California*, the Court upheld the reasonableness of the DNA search after balancing its intrusion on the convicted felon's privacy interests against the search's promotion of legitimate governmental objectives. (*Robinson, supra*., at 1120-1121.) Relying on prior post-conviction DNA cases, the Court held that: "convicted criminals do not enjoy the same expectation of privacy that non-convicts have" (*Robinson, supra*., at 1120, citing *Adams, supra*., 115 Cal. App. 4th at 2580; "the intrusions authorized by the [DNA] act are

minimal" (*Robinson, supra*., at 1121, citing *Alfaro, supra*., 98 Cal. App. 4th at 506); and "DNA collection serves compelling governmental interests, including the overwhelming public interest in prosecuting crimes accurately". (*Ibid*.) Finally, the Court noted that the fact that the collection of the defendant's DNA violated state law, in effect at the time, did not alter the Fourth Amendment analysis. (*Robinson, supra*, at 1122; citing *Virginia v. Moore* (2008) 533 U.S. 16 [holding that as far as the federal constitution is concerned, whether state law authorized the search is irrelevant].)

After holding that the DNA search of the defendant did not violate the Fourth Amendment, the Supreme Court proceeded to engage in a wholly unnecessary exclusionary rule analysis. The Court stated: "However, even assuming without deciding, that the state statutory violation that led to the non-consensual extraction of defendant's blood for the [March 1999 DNA sample] constituted a Fourth Amendment violation, application of the federal exclusionary rule would not be appropriate for such a violation." (*Robinson, supra*, at 1124.)

The California court first reviewed the facts and holding of the United States Supreme Court's very recent decision in *Herring v. United States* (2009) 129 S.Ct. 695. In *Herring*, the Court expanded the good faith exception to the exclusionary rule to apply when the officer, conducting the search and seizure, reasonably relied in good faith on false information resulting from a law enforcement employee's negligent record keeping error. In *Herring*, a deputy sheriff arrested the defendant and searched his car, discovering incriminating evidence, because he relied on information supplied by the warrants clerk of a neighboring county indicating that the defendant had an outstanding arrest warrant. It was subsequently learned that this information was erroneous. The defendant's warrant had been recalled five months earlier, but a law enforcement employee had negligently failed to update the county's computerized records so that the recalled warrant still showed as active in the computer system. Because the deputy lacked probable cause to arrest the defendant and there was no outstanding warrant, the arrest and subsequent search were unconstitutional. (See *Herring, supra*., at 698-699, 705-706.) The Supreme Court held that the evidence seized during the unconstitutional search was nevertheless admissible because the deputy did nothing wrong. He reasonably relied in good faith on a negligent record-keeping error made by a law enforcement clerk in another county. Applying the exclusionary rule under these circumstances would not result in appreciable deterrence, the purpose of suppression. (*Herring, supra*, at 698-701.)

After a very brief discussion of *Herring*, the California Supreme Court found the facts of Defendant Robinson's case to be sufficiently analogous. The defendant's DNA was erroneously collected only three months after the 1998 DNA Act went into effect requiring wide-scale DNA collection from individuals convicted of qualifying serious and

violent felonies for the very first time. Apparently, there was a rush to train law enforcement personnel to determine which felons were eligible for DNA extraction, collect their DNA and get their profiles into the data bank. In this context, the two clerks who separately looked at the defendant's record and erroneously concluded that he'd been convicted of a qualifying offense were merely negligent. The law enforcement officer who collected the defendant's blood for DNA profiling then reasonably relied on this mistaken information. Consequently, the exclusionary rule would not apply – even if the DNA search had violated the Fourth Amendment. (*Robinson, supra*, at 1124-1129.)

B. DNA Searches of Felony Arrestees

As noted, the federal government and 21 states, including California, now mandate the collection of DNA from some or all felony arrestees. Our state has collected a DNA sample from every adult arrested for any felony since January 1, 2009.The sample must be taken during booking or as soon as administratively practicable after arrest.(Pen. Code, sec. 296.1(a)(1).) If the arrestee refuses, the DNA sample is forcibly extracted, and the individual may be charged with a misdemeanor. (§ 298.1.)

All adult felony arrestees must provide DNA samples, including: 1)persons who are released and never charged with a crime; 2)persons who are charged but have their charges dismissed following a judicial finding no probable cause or that the arrest was unconstitutional; and 3)persons who are prosecuted but acquitted. (See *Haskell v. Brown*, *supra*, 677 F. Supp. 2d at 1192.) Even if the arrestee is released the same day without charges being filed, his DNA sample will be stored indefinitely and his DNA profile (which takes 30 days to create) will remain in the nationwide data bank forever, compared to cold case DNA profiles on a weekly basis.[18]

DNA is collected from persons arrested for any felony offense. The crime of arrest need not be a violent felony or a sexual offense likely to produce DNA evidence. Those arrested for drug possession, check fraud, or resisting the police at a political rally are required to provide their DNA to the government. (See Health & Saf, Code §11350;

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[18] An arrestee who is never charged, who has his charges dismissed prior to adjudication or who is acquitted can have apply to have his DNA sample destroyed and his offender profile expunged from CODIS. But he must initiate and navigate a cumbersome and lengthy process. The prosecutor can prevent expungement by objecting and the court has the discretion to deny it. Moreover, individuals who are released before charges are filed must wait at least three years until the statute of limitations runs before they can apply for expungement. (See *Haskell, supra*., 677 F.2d at 1191-1192.)

§476(a); § 69.) The law gives unbridled discretion to the arresting officer. He need only claim probable cause to arrest the individual for an offense that can be considered a felony, and the arrestee's DNA will be seized. The arrestee's DNA is taken and analyzed on the mere chance that it will assist law enforcement in solving cold cases. (*Haskell, supra.,* at 1200-1201; *Friedman v. Boucher* (9th Cir. 2009) 580 F.3d 847, 857.)

The mandatory collection of DNA from all felony arrestees, including those never charged with any crime, raises much different Fourth Amendment issues than the extraction of DNA from convicted felons. To date, no California appellate opinion has addressed this latest version of the California program although it has been in effect for two years. On federal district court case, *Haskell v. Brown, supra*., 677 F.Supp. at 1187, has upheld this California law against a Fourth Amendment challenge. *Haskell* will not be the final word on this matter, as an appeal to the Ninth Circuit is pending and has already been fully briefed and argued, on July 13, 2010.

In 2009 and 2010, four federal cases addressed the constitutionality of collecting DNA samples from arrestees. Two cases held that the government conducts an unconstitutional search when it extracts DNA from an arrestee without individualized suspicion. The other two cases upheld the practice.

1. Friedman v. Boucher (9th Cir. 2009) 580 F.3d 847: A prosecution-ordered DNA search of an arrestee in pre-trial detention without individualized suspicion violated the Fourth Amendment.

Without authorization by state or federal law, a local prosecutor directed a police officer to obtain a DNA sample from Friedman, a Nevada arrestee held in pre-trial detention. She aimed to use the DNA to investigate unsolved crimes, even though Friedman was not a suspect in any cold cases. When the officer took Friedman's DNA sample, he "had no warrant, no court order, [and] no individualized suspicion". Nor had he "articulated an offense for which a DNA sample was required or justified." (*Friedman, supra*, 580 F.3d at 851.)

The Ninth Circuit held that the suspicionless search was not justified by the special needs exception, as Friedman's DNA was taken for "purely law enforcement purposes". (*Id.*, at 853.) The court then rejected the government's argument that the search was reasonable under the balancing test previously employed to uphold DNA collection from convicted felons. (*Id.*, at 857-858.) The court emphasized that Friedman was a pre-trial detainee, not a convicted felon on release. The state did not need to intensely supervise his activities to aid his re-integration into society. The government took Friedman's DNA

to solve crimes unrelated to the offense of arrest, "on the mere chance that desired evidence might be obtained". The DNA search was unconstitutional. (*Id.*, at 857-858.)

2. United States v. Mitchell (W.D. Pa. 2009) 681 F.2d 597: The collection of DNA from an arrestee held in pre-trial detention, authorized by federal law, was an unreasonable search.[19]

As authorized by federal statute, the defendant's DNA sample was taken following his arrest, and then analyzed and stored in CODIS for the sole purpose of solving past and future unsolved crimes. (*Mitchell, supra*, 681 F.2d at 604-605.) DNA collection for this criminal investigative purpose, conducted without "any measure of individualized suspicion" was not justified by a "special need". To determine if the suspicionless intrusion was nevertheless reasonable, the court applied the *Samson* balancing test and considered whether the legitimate government interest in crime solving outweighed the "expectation of privacy of an individual who has been arrested and incarcerated as a pretrial detainee". (*Id.*, at 605-606.)

The court emphasized that an arrestee has a much greater reasonable expectation of privacy than a convicted felon, particularly "in the comprehensive, inherently private information contained in his DNA". (*Mitchell, supra.*, at 606-609) The DNA sample is the individual's genetic blueprint. It may reveal private information regarding the arrestee's familial lineage, his health, his race and gender, his predisposition to over 4,000 types of genetic conditions and diseases, and genetic markers for traits including aggression, sexual orientation, substance addiction and criminal tendencies. (*Id.* at 608.) The court was also troubled by the fact that with continued technological advances, the information potentially obtained from the DNA samples, permanently stored by the laboratories, would be "ever evolving and increasingly comprehensive". (*Ibid.*)After weighing the competing individual and governmental interests (i.e. only to solve cold cases), the Court found that "a universal requirement that a charged defendant submit a DNA sample for analysis and inclusion in a law enforcement databank for criminal law enforcement and/or identification purposes is unreasonable under ... the Fourth Amendment". (*Id.*, at 610.)It did not matter that the defendant was held in pre-trial detention, because "the Supreme Court has never held that law enforcement officers may conduct suspicionless searches on pretrial detainees for reasons other than prison [or jail] security." (*Id.*, at 607.)

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[19] On its own motion, the Third District ordered that *Mitchell* be reheard en banc. (3rd Cir. No. 09-4718; order of Oct. 20, 2010.)

3.Haskell v. Brown (N.D. Cal. 2009) 677 F.Supp. 2d 1187: California's mandatory collection of DNA from every adult felony arrestee does not violate the Fourth Amendment.[20]

Several arrestees who had been released without charges or whose charges were dismissed before trial filed a federal civil rights suit challenging the California law.[21] The court declined to enjoin enforcement, upon finding that the plaintiffs were unlikely to succeed on the merits of their Fourth Amendment challenge. (*Haskell, supra.*, at 1190.)

Haskell found that suspicionless DNA searches, conducted for the law enforcement purpose of solving cold cases, did not qualify for the special needs exception. The court then analyzed the reasonableness of DNA collection by employing the balancing test used in *Kincade* and *Kriesel*. (*Id.*, at1193-1196.) The court acknowledged that individuals merely arrested or charged with a crime enjoy a much higher expectation of privacy than convicted felons. Yet they also have a lesser privacy interest than the general population, particularly in their "identity". (*Id.*, at 1196-1197.)

As for the state's purposes advanced by collecting arrestees' DNA, the district court admitted "the government interests in this case are not as great as those identified in *Kincade* and *Kriesel*". Arrestees, unlike convicted felons, are not in need of close supervision to assure that they do not re-offend. No evidence had been presented showing "that arrestees are more likely to commit future crimes than members of the general public". Nevertheless, the court held that the government's "compelling interest" in

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[20] The plaintiffs in *Haskell* appealed to the Ninth Circuit and that case was argued on July 13, 2010. (9th Cir. No. 10-15152).

[21] The named plaintiffs in *Haskell* included Ms. Haskell, who was arrested at a peace rally for allegedly trying to free another protestor who was taken into custody. Upon arrest, she was taken to jail and ordered, over her objection, to provide a DNA sample. She was released from custody and never charged with any crime. Another plaintiff was arrested on suspicion of possessing stolen property. After his DNA was extracted by buccal swab without his consent, he was released without ever appearing in court or any charges being brought. A third plaintiff was also arrested at a political demonstration for allegedly trying to take a person from police custody. After his DNA sample was taken, he was charged with a felony, but the charges were dropped. A fourth plaintiff was arrested on the University of California campus for protesting staff layoffs and tuition fee hikes. He was told he was being charged with felony burglary and after his DNA was taken, over his objection, he was released from jail. When he showed up at arraignment, he was told that no charges had been filed against him.

identifying arrestees (both who they are and what they have done) and in using their DNA to solve past crimes outweighed the arrestees' privacy interests. The DNA searches were reasonable under the Fourth Amendment. (*Id.*, at 1198-1202.)

4. United States v. Pool (9th Cir. 2010) 621 F.3d 1213: Collection of DNA arrestees upon pre-trial release, after a judicial finding of probable cause, does not violate the Fourth Amendment.[22]

A divided Ninth Circuit panel approved a provision of the Federal Bail Reform Act requiring DNA collection from arrestees as a condition of pre-trial release following a judicial finding of probable cause. (*Pool, supra*., 621 F.3d at 1214-1215.) "Taking [its] cue from *Samson*", the court evaluated the reasonableness of the DNA search conducted for law enforcement purposes by balancing the intrusion upon the arrestee's privacy against the government's interests. (*Id.,* at 1218.)The court acknowledged that there must be "a pre-requisite to the application of this test" – i.e. "some legitimate reason for the individual having less than the full rights of a citizen". That pre-requisite was met because the arrestee was not required to provide DNA until after a judicial or grand jury finding of probable cause. That finding and the decision to release the individual on bail allowed the court to restrict his privacy. (*Id.*, at 1219.)

Assessing the intrusion on privacy, the "compulsory profiling of qualified federal offenders" was minimally invasive - both in terms of the bodily intrusion and the information regarding the arrestee's identity that it produces. (*Id.*, at 1220-1222.) The government's interest in collecting the DNA and running offender profiles through CODIS is to identify the arrestee and solve cold cases. Also, after the probable cause finding, "the government has an interest in determining whether the individual may be released pending trial without endangering society" and ensuring compliance with pre-trial release conditions. (*Id.*, at 1222-1223.) "[W]here a court has determined that there is probable cause to believe that the defendant committed a felony" and he's released on bail, the government interests outweigh the individual's privacy interests. (*Id*., at 1226.)

In addition to the lead opinion by Judge Callahan, there were two other opinions in *Pool*. Judge Lucero's concurring opinion stressed the that the majority only approved DNA collection from individuals after a judicial finding of probable cause. They were not upholding DNA testing from mere arrestees. (*Pool, supra.*, 621 F.3d at 1231.)

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[22] In *Pool*, a petition for rehearing en banc, filed in October 2010, is currently pending before the Ninth Circuit (No. 09-10303).

Judge Schroeder dissented from the conclusion that suspicionless DNA searches of arrestees were reasonable. She criticized the majority for relying on *Kincade* and *Kriesel*, while ignoring the rationale of those decisions – that a lawful conviction reduced the individual's expectation of privacy while enhancing the government's interest in invading that privacy. (*Id*., at 1235-1237 [dis. opn. of Schroeder, J.]) Prior to *Pool*, in *Friedman v. Boucher, supra*, 580 F.3d 847, and in *United States v. Scott* (9th Cir. 2006) 450 F.3d 863, the Ninth Circuit held that suspicionless searches violate an arrestee's Fourth Amendment rights, even if he is held over for trial and released or detained in jail. (See *Scott, supra*., at 874 [police officers need probable cause to drug test an individual on pre-trial release or search his home]; *Friedman, supra*., at 847 [suspicionless DNA search of a pre-trial detainee is unconstitutional].) Judge Schroeder criticized the majority for ignoring their previous rulings in *Friedman* and *Scott* and holding that a judicial probable cause finding is the "watershed event" which diminishes the individual's expectation of privacy and justifies a suspicionless DNA search thereafter. (*Id*., at 1236-1237.) According to Judge Schroeder, the actual transformative event is a lawful conviction, as that is what distinguishes offenders on conditional release from members of the general public. (*Ibid.*)

QUICK TAKES[23]

A. School Searches

1. Safford USD v. Redding (2009) 129 S.Ct. 2633: **School officials had reasonable suspicion to search the 13-year-old middle school student's backpack and outer clothing for prescription and over-the-counter drugs, but a "strip search" of her underwear was excessive in scope and unreasonable.**

Savana Redding, age 13, was a student at Safford Middle School. School rules prohibited the possession or sale of any drugs on school grounds, including prescription or over-the-counter drugs without advance permission. School administrators had received tips from two students indicating that Savana had been giving prescription ibuprofen and over-the-counter naproxen to other students. Based on these reports, the assistant principal called Savana into his office where she was shown four ibuprofen tablets and one naproxen pill that had been taken from other students. Savana denied knowing anything about these drugs, but she agreed to let the assistant principal search her belongings. The assistant principal searched Savana's backpack, finding nothing. Savana was then sent to the school nurse's office where a female administrator and a female nurse searched her outer clothing for the pills, finding nothing. Savana was then subjected to a "strip search"; she was asked to strip down to her underpants and bra and to pull both garments away from her body, exposing her breasts and pelvic area to some degree. Again, no pills were found. Savana's mother filed a civil rights action against the school district and school officials, asserting that the strip search violated Savana's Fourth Amendment rights.

The Supreme Court began by reiterating the rules for school searches set forth in *New Jersey v. T.L.O.* (1985) 469 U.S. 325. In order to initiate the search of a public school student and/or her property, school officials need only reasonable suspicion – "a moderate chance of finding evidence of wrongdoing". (*Safford, supra*, at 2639.) A lawfully initiated school search is permissible it its scope "when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction". (*Ibid.*, citing *New Jersey v. T.L.O., supra*., at 342.)

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[23] Some of these "quick takes" are based, in part, on the Recent Case Summaries provided on the CCAP website (www.capcentral.org), another good research source for search issues. FDAP acknowledges the assistance of law clerk Tiffany Gates in writing this section.

Applying this standard to the current case, the Court held that the school officials had reasonable suspicion to search Savana's backpack and outer clothing for the prescription ibuprofen and the over-the-counter naproxen. However, the strip search – the intrusion into Savana's underwear and the exposure of her breasts and pelvic area – was excessive in scope given her age and sex, and the minor nature of the suspected infraction. "Here the content of the suspicion failed to match the degree of the intrusion." (*Safford, supra*, at 2642.) The officials had no reason to believe that Savana was stashing large quantities of contraband in her underwear.

2. In re K.S. (2010) 183 Cal. App. 4th 72 [First District, Division Five; petition for review denied 7/14/10]:* The *reasonable suspicion standard of New Jersey v. T.L.O. (1985) 469 U.S. 325, rather than the probable cause standard, applied to a search by a school official even though the search was initiated based on information provided by the police and conducted in the presence of police officers.

A reliable confidential informant gave an officer a tip that K.S., a high school student, possessed Ecstasy pills. The tip was passed on to the school resource police officer assigned to K.S.'s high school, who then relayed the information to the vice principal. The vice principal had two officers accompany her (for her comfort and safety) while she conducted a search of K.S.'s P.E. locker. The search yielded suspected Ecstasy pills, and a delinquency petition was filed against K.S., alleging drug possession. The appellate court upheld the search, holding that the reasonable suspicion standard of *New Jersey v. T.L.O.* applied, despite the presence of police officers during the search, because the vice principal, and *not* the officers, had made the decision to search to protect school safety. The fact that the police played a role in providing the information supporting the search did not require a higher standard than reasonable suspicion because the police's involvement was merely that of an information conduit. The informant could have just as easily called the vice principal directly.

3. In re Sean A. (December 22, 2010) 2010 WL 5175177 [Fourth District, Division One]: Searches of students in public schools conducted pursuant to a school policy are special needs administrative searches that do not require individualized suspicion.[24]

The defendant's high school had a written policy authorizing searches of students who had left campus and then returned during the school day. The defendant was seen leaving school, and upon his return, was ordered to the assistant principal's office and told to empty his pockets, which contained drugs. In a two-to-one decision, the appellate

[24] This decision is published but does not yet have an official California reporter cite as of the date of these materials.

court held that the search was unconstitutional. The Fourth Amendment is not strictly applied in public schools due to the societal interest in safe schools, and so all that is required to uphold a search is reasonable suspicion by school administrators. School-search cases are part of a body of law allowing "special needs" administrative searches without individualized suspicion. Since the search here was conducted pursuant to an established policy of which the student had notice and because the search was limited in nature, it was lawful. The dissenting justice would have reversed, finding that under *New Jersey v. T.L.O.*, this was an individualized search that required reasonable suspicion.

B. Probation and Parole Searches

1. People v. Watkins (2009) 170 Cal. App. 4th 1403 [Third District]: Because the estoppel doctrine applies in the criminal contest to prevent a defendant from profiting from his wrongdoing, a defendant who provides false identity to avoid a probation search is estopped from challenging that search as not being authorized by a known probation search condition

At around 2:30 a.m., an officers stopped the defendant's car after noticing that one of the brake lights was not operating. During the traffic detention, the defendant, Stephon Watkins, identified himself as "Marquis Watkins", his brother. He said he was on probation but did not indicate whether he had a search condition. He did not have a driver's license and a records check under Marquis Watkins' name revealed that the brother's license was suspended or revoked. At that point, the officer handcuffed the defendant and put him in the patrol car. Although the records check had not shown that Marquis Watkins was on probation, the officer relied on the defendant's statement to perform a probation search of the car, finding cocaine base. After his arrest, the defendant gave his true name and the officer learned he was on probation with a search condition. The appellate court declined to consider the defendant's claim that the vehicle search was invalid because the officer did not know that he was on probation with a search condition. (See, e.g., *People v. Sanders* (2003) 31 Cal. 4th 1180 [a search pursuant to a parole or probation search condition is valid only if the officer knows of the condition when he initiates the search].) The defendant concealed his true name and his probation search condition from the officer, and that information would have provided the officer with a valid basis for the search. Therefore, the defendant was estopped from challenging the validity of the search.

2. People v. Sardinas (2009) 170 Cal. App. 4th 488 [Second District, Division Five; petition for review denied 4/22/09]: A parole search of the defendant by the same officer, less than 24 hours after a previous parole search, was conducted for legitimate law enforcement purposes and not for purposes of harassment.

In the five years prior to the searches at issue, Officer Samuels had frequently seen the defendant associating with cocaine base addicts, and he had contacted the defendant at least six or seven times – the last time being about 30 days earlier. He always confirmed that the defendant was on parole. On the night of December 20th, Samuels pulled over a van driven by the defendant because the taillights were not working. During the traffic stop, he conducted a parole search of the defendant, finding nothing. That same night, Samuels searched the defendant's home and found nothing illegal. Less than 24 hours later, on December 21st, Samuels saw the defendant in a convenience store parking lot, in an area known for narcotics sales. Although he did not reasonably suspect that the defendant was engaged in criminality, the officer conducted a parole search and found several pieces of rock cocaine. The Court of Appeal upheld the trial court's denial of the motion to suppress. Although individualized suspicion is not required for a parole search, such a search would be unreasonable if it was performed for arbitrary or capricious reasons or purposes of harassment. (See, e.g. *People v. Reyes* (1998) 19 Cal. 4th 743, 753-54.) However, the facts of this case supported the conclusion that Officer Samuels searched the defendant on December 21, less than 24 hours after the prior parole search, for legitimate law enforcement purposes and not in order to harass him. There was no evidence that he was following the defendant or harbored any animus towards him.

3. (V) People v. Pearl (2009) 172 Cal. App. 4th 1280 [Fourth District, Division Three]: The three searches of the defendant's living area which produced all of the incriminating evidence were not justified as "parole searches" because the prosecution did not prove that the defendant was still on parole at the time of the searches. Moreover, the prosecution did not meet its burden of establishing that the good faith exception to the exclusionary rule should apply.

After the defendant was arrested on December 13, 2004, officers searched the room in which he was living three times – on December 13, 14 and 28, 2004. During these searches, the officers found evidence implicating the defendant in burglary and receiving stolen property. The officer who initiated the first two searches knew the defendant from previous arrests and believed he had recently been released from prison. At the suppression hearing, this officer testified that he talked to the parole department before the initial December 13th search, but he did not identify the person he spoke with or specify what that person said. The defendant testified that he was released from custody on December 12, 2000, and that his parole term, originally three years, was

increased to four years. He was never told that it extended beyond four years. Thus, defendant would have been discharged from parole by December 11, 2004– two days before the first search. Even after the trial court stated that it appeared, from the evidence, that the defendant's parole had expired prior to the first search, the prosecution did not present testimony from a parole officer or any other evidence clearly establishing that appellant was still on parole as of December 13, 2004. The Court of Appeal noted that pursuant to the applicable Penal Code sections, the defendant could only have been on parole for a maximum of four years. His parole period could only have been extended beyond that date for any period during which he was a fugitive from justice, and the evidence presented did not establish that appellant was a fugitive from justice during his four-year parole term. Thus, the prosecution failed to establish that the defendant was on parole as of December 13, 2004, the date of the first search. Moreover, it was the prosecutions burden to prove that the good faith exception to the exclusionary rule applied – i.e. that the officers reasonably relied in good faith on incorrect information regarding the defendant's parole status provided by the parole department. (See *People v. Willis* (2002) 28 Cal. 4th 22.) The prosecution did not argue that the good faith exception applied, in the trial court or on appeal, and they did not present any evidence to meet that burden. Consequently, the evidence discovered during the three searches must be suppressed. As this was the only evidence supporting the defendant's convictions, those convictions were reversed.

4. People v. Smith (2009) 172 Cal. App. 4th 1354 [First District, Division Five; petition for review denied 7/15/09]: A "reach-in" search of a parolee's underwear was reasonable when the police took proper steps to diminish the invasion of the parolee's privacy although the search occurred in a public area during daylight.

Two police officers detained the defendant on suspicion of burglary outside a hotel in an area with a "high incidence of drug activity." Upon learning that the defendant was on parole for possession of drugs for sale, one of the officers conducted a weapons frisk and searched the defendant's car. Finding nothing, the officer decided to check if the defendant was concealing drugs in his underwear. The officer removed the defendant's belt, unbuttoned and unzipped the defendant's pants and pulled them down approximately one foot, then pulled the elastic waistband of the defendant's underwear away from the defendant's body and looked inside. This search took place in the back of the hotel's parking lot (which faced away from the street), with the defendant positioned inside the crook of the patrol car's open back door Two other officers positioned themselves so as to block the view. The search yielded several baggies of heroin, cocaine, and methamphetamine. The appellate court upheld the search against the defendant's claim that it was unreasonable – arbitrary, capricious or harassing. The court explained that pulling back the waistband of defendant's underwear and visually inspecting his crotch

area did not constitute a public strip search and met constitutional standards, in light of defendant's parole status and his reduced expectation of privacy. The intrusion was limited to that necessary to determine whether defendant was concealing narcotics and there was no evidence that the officer acted with an improper motive.

5. People v. Smith (2010) 190 Cal. App. 4th 572 [Second District, Division Five]: Opening the door for officers, stating that they can search for a probationer, and stepping aside to allow them entry constituted substantial evidence that a defendant voluntarily consented to the entry; opening a clothes dryer during a search for a former resident was reasonable because the intrusion was minimal and stopping the noise emanating from the dryer was necessary to safely order persons who were upstairs to come downstairs.

At approximately 6 a.m., police and probation officers were conducting a series of probation compliance checks at a housing complex. They went to defendant's apartment to search for a probationer who had been convicted of domestic violence and had listed defendant's address as his residence. When they arrived at the defendant's apartment, one of the officers saw the defendant through a window next to the front door. The officer spoke to the defendant through the window and advised her of their reason for being there. The defendant stated that the probationer did not live there and indicated that only her brother and children were upstairs, but she agreed to allow the officers to check for themselves. Before opening the door for the officers, the defendant walked out of the officer's sight and the officer heard a clothes dryer being started. After the defendant opened the door, one of the officers noted that the clothes dryer was making a loud noise, as if there was something metal inside it. When he opened the door to turn the dryer off, he observed packaged marijuana and change inside the dryer. The appellate court upheld the trial court's denial of the motion to suppress. As to the initial entry, the appellate court found that there was substantial evidence that defendant voluntarily consented when she opened the door for the officers, stated that they could look for probationer, and stepped aside, allowing them to enter. The court further found that the intrusion of opening the dryer door to stop the noise was objectively reasonable. Although the defendant indicated that only her brother and children were upstairs, the sought-after probationer also could have been upstairs. There was evidence of narcotics present in the residence, and firearms are "tools of the trade" in the narcotics business. In order to safely order any people that were upstairs to come downstairs, the officer needed to stop the noise from the dryer. Opening the door to the dryer was a minimal intrusion to achieve this end which was reasonable under these circumstances. Once the dryer door was open, the contraband was in plain view.

C. Inventory Searches

1. People v. Shafrir (2010) 183 Cal. App. 4th 1238 [First District, Division One; petition for review denied 6/30/10]: The decision to impound and inventory a vehicle pursuant to the community care-taking function is evaluated under a "reasonable under all the circumstances" standard.

After arresting the defendant for driving under the influence of alcohol, two California Highway Patrol Officers decided to remove and store the defendant's vehicle for safekeeping pursuant to Vehicle Code section 22651, subdivision (h), rather than leave it parked where it was. The officers testified that they did so because: there was no passenger to drive the car away; the stop had occurred in a high crime area where auto theft was common; and the vehicle was a brand new Mercedes. During the subsequent inventory search of the vehicle, the officers found marijuana and a large amount of cash in the trunk. The appellate court upheld the search, explaining that the officers' decision to remove the vehicle for safekeeping was reasonable under all the circumstances and therefore did not violate the Fourth Amendment. Case law had not imposed a categorical test requiring that a decision to impound a vehicle be governed in all instances by standard criteria. Rather, the question was whether a decision to impound a vehicle pursuant to the community care-taking function was reasonable under all the circumstances. Here, the officers' reasons for impounding and searching the vehicle met the Fourth Amendment's criteria of reasonableness. Moreover, because the vehicle had been lawfully impounded, an inventory search of the vehicle, conducted pursuant to standard police procedures, was not unreasonable.

2. (V) People v. Torres (2010) 188 Cal. App. 4th 775 [Fourth District, Division Three; petition for rehearing denied 10/21/10]: An inventory search was unlawful where the officer's subjective motive for impounding the vehicle was investigatory.

A sheriff's deputy observed the defendant make an unsafe lane change and signaled him to stop. The defendant complied by pulling into a stall at a public parking lot. When the deputy learned that the defendant did not have a driver's license, he decided to impound the truck and conduct an inventory search of its contents. In court, the deputy admitted that a narcotics officer had asked him to develop some basis for stopping the defendant. The deputy also admitted that he decided the impound the truck in order to facilitate an inventory search to look for narcotics-related evidence. In the course of the search, the deputy found methamphetamine and a pay/owe sheet. Narcotics officers later searched the defendant's residence pursuant to a warrant and found methamphetamine, over $133,000 in cash, and a rifle. When the defendant's motion to suppress was denied, he pled guilty to various drug-related charges, possession of a firearm by a felon, and

driving without a license. The appellate court found that the initial traffic detention was lawful (despite being a pretext) because the deputy had observed the defendant commit a traffic violation and pretext stops are lawful if based on reasonable suspicion to believe the driver had committed a traffic infraction. (See *Whren v. United States* (1996) 517 U.S. 806, 813.) However, the court held that the inventory search was unlawful because the deputy's motive for impounding the car was investigatory (i.e., he used the impound and inventory search to look for criminal evidence). Furthermore, there was nothing in the record to justify impounding the defendant's truck for community care taking purposes. The truck was not illegally parked, was not at an enhanced risk of vandalism, was not impeding traffic or pedestrians, and there was no evidence that it could not be driven away by someone other than defendant.

PENDING ISSUES

A. Issues Pending Before the United States Supreme Court

1. Kentucky v. King (Supreme Court Docket No. 09-1272; argued 1/12/11)
Decision Below: King v. Commonwealth of Kentucky (Sup. Ct. of Kentucky 2010) 302 S.W. 3d 649: Neither hot pursuit of a fleeing suspect nor exigent circumstances, based on feared destruction of evidence, justified warrantless entry into the home.

Questions Presented:
1) When does unlawful police action impermissibly create exigent circumstances which preclude warrantless entry, and which of the five tests currently being used in the United States Courts of Appeal is proper to determine when impermissibly created exigent circumstances exist?
2)Does the hot pursuit exception to the warrant requirement apply only if the government can prove that the suspect was aware he was being pursued?

This is an appeal by the Commonwealth of Kentucky from a decision of that state's supreme court finding a warrantless home entry and search unconstitutional and reversing the denial of a motion to suppress evidence.

Here are the facts: Narcotics officers were conducting a buy-bust operation at an apartment complex. After a street-level dealer sold crack cocaine to a confidential informant, Officer Gibbons gave a prearranged signal directing other officers to move in and make an arrest. Gibbons radioed a description of the suspected dealer and stated that he had entered a specific breezeway at the apartment complex. Gibbons told officers to hurry and arrest the suspect before he entered an apartment. Hearing this broadcast, Officer Cobb and two other detectives headed towards the breezeway. They heard a door slam shut, but did not know which door had closed and did not see which apartment the suspect had entered. Because they were no longer near a police radio, the officers did not hear Cobb's message that the suspect had entered the back right apartment. As they reached the breezeway, the officers detected a very strong odor of marijuana emanating from the back left apartment. They inferred from this that the door to that apartment had recently been opened and that the suspect had entered. An officer knocked loudly on the left back apartment door and announced "police". The officers then heard movement inside the apartment which led them to believe that evidence was possibly being destroyed. They forced entry into that apartment and conducted a protective sweep looking for the suspected drug dealer. They did not find him. Instead, they observed the defendant and two other people sitting on couches. One person was smoking marijuana while the defendant sat nearby. Inside the apartment, the police found substantial

quantities of marijuana and powder cocaine in plain view. Upon further search, they found crack cocaine and paraphernalia associated with drug sales. Police eventually entered the back right apartment where they found the suspected drug dealer.

Defendant King and his co-defendants filed motions to suppress the evidence seized from the apartment, alleging that the police entry into the home was unconstitutional. The trial court denied the suppression motion, finding that both probable cause (based on the smell of marijuana) and exigent circumstances (feared destruction of evidence) justified the entry without a warrant. The intermediate appellate court affirmed and the Kentucky Supreme Court reversed.

The Kentucky Supreme Court reiterated the well-established rule that the police may not enter and search an apartment without a warrant unless they have both probable cause and exigent circumstances. In this case, the distinctive odor of marijuana emanating from the apartment provided probable cause "which would have been sufficient for the police to obtain a warrant". (*King v. Commonwealth, supra*, 302 S.W. 2d at 653.) The Court found, however, that the state did not establish exigent circumstances that justified their failure to seek a warrant. Neither hot pursuit nor feared imminent destruction of evidence justified the warrantless entry. The police officers could have and should have posted officers in the breezeway while they obtained a search warrant.

First, the police were not in hot pursuit of a fleeing suspect – an exigent circumstances that justifies a warrantless entry when accompanied by probable cause. "An important element of the hot pursuit exception is the suspect's knowledge that he is, in fact, being pursued". (*Id.*, at 653-654.) In this case, the prosecution did not present any evidence establishing that the suspected drug dealer knew that police officers were pursuing him after he sold the drugs to an informant. Nor did the police reasonably fear that he would escape from the apartment.

Second, standing alone, the odor of marijuana emanating from the apartment did not support a reasonable fear that persons inside the home would destroy evidence. Although, a drug odor will allow a warrantless search of a vehicle, it does not excuse the warrant requirement for a home search.

Third, the sounds that the police heard coming from inside the apartment did not justify the warrantless entry, based on feared imminent destruction of evidence, because the police created any exigency by knocking on the door and announcing their presence. Citing numerous federal circuit cases, the Kentucky Supreme Court stated that "police may not rely on an exigent circumstance of their own creation". They noted, however, that this rule "is rarely dispositive because 'in some sense the police always create the

exigent circumstances that justify warrantless entries and arrests'." (*King, supra*, at 655, quoting *United States v. Duchi* (8th Cir. 1990) 906 F.2d 1278.)

Because this was an issue of first impression in Kentucky, the court reviewed the four tests used by the various circuits to assess whether an exigency was police-created. The Kentucky court then cobbled together it's own fifth test. First, the court must determine whether the officers acted in bad faith, creating the exigent circumstance in a deliberate attempt to evade the warrant requirement. If so, then the police cannot rely on the resulting exigency. Second, even when the police did not act in bad faith, the court must determine whether it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances relied upon to justify the warrantless entry. (*Id.*, at 656.)

Applying this test, the court concluded that the officers did not act in bad faith to deliberately avoid the warrant requirement. When they knocked on the door of the left apartment, the officers were unaware that the suspected drug dealer had been seen entering the right apartment. However, even though the officers acted in good faith, "it was reasonably foreseeable that knocking on the apartment door and announcing police after having smelled marijuana emanating from the apartment would created the exigent circumstance relied upon, i.e. destruction of evidence", In other words, the police could infer that someone was smoking marijuana inside the apartment and that they would proceed to destroy the evidence once they knew the police were right outside the door. Because "any exigency that did arise when the police knocked and announced their presence was police-created" it could not be relied upon to justify the warrantless entry into the apartment, and the seized evidence should have been suppressed. (*Id.*, at 657.)[25]

Presumably, the Supreme Court granted review in this case because they want to clarify the test to be used when assessing whether an exigent circumstance was police-created – i.e. whether the warrantless entry should only be invalidated when there is some evidence of bad faith or, at least, "some showing of deliberate conduct on the part of the police evincing an effort intentionally to evade the warrant requirement. (See *United States v. Chambers* (6th Cir. 2005) 395 F.3d 563,566.)

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[25] The Kentucky Supreme Court also rejected the state's contention that because the officers mistakenly believed that the drug dealer was in the left apartment, the good faith exception to the exclusionary rule should apply and allow the admission of the evidence that was seized during the unconstitutional apartment search. The court rejected this broad reading of the good faith exception, and it does not appear that the United States Supreme Court has granted review on this issue.

2. Davis v. United States (Supreme Court Docket No. 09-11328; set for argument on 3/21/11)
Decision Below: United States v. Davis (11th Cir. 2010) 598 F.3d 1259: Although the Supreme Court's opinion in Arizona v. Gant applies retroactively to the search conducted two years earlier, and the search would be unconstitutional under Gant, the seized evidence need not be excluded as the police reasonably relied on the well-settled interpretation of Belton which allowed the search.

Question Presented: Does the good faith exception to the exclusionary rule apply to a search that was legal at the time it was done, but was later found to be unconstitutional?

The search in this case occurred in 2007, two years before the United States Supreme Court's decision in *Arizona v. Gant* (2009) 129 S.Ct. 1710. The defendant was a passenger in a stopped car. The driver was arrested for driving while intoxicated, and the defendant was arrested for giving a false name. Both the driver and passenger were handcuffed and placed in separate patrol cars. The officer then searched the vehicle they'd recently occupied and found a revolver in the pocket of the defendant's jacket, which he had left in the car. The trial court denied the defendant's motion to suppress, finding that the firearm was discovered during a lawful search incident to arrest. The court relied on established Eleventh Circuit precedent which, "like most other courts, read *Belton* [(1981) 453 U.S. 654] to mean that police could search a vehicle incident to a recent occupant's arrest regardless of the occupant's actual control over the passenger compartment --even if there was no possibility that the arrestee could gain access to the vehicle at the time of the search." (*Davis, supra*., 598 F.3d at 1261-1262.)

While the case was pending on appeal, the Supreme Court decided *Arizona v. Gant*, which rejected this "prevailing reading of *Belton*". (*Id.*, at 1262.) In *Gant*, the Court held that officers may only search the vehicle's passenger compartment, following the arrest of a recent occupant: 1)when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search; or 2)when it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle. (See *Gant, supra*., at 1714.)[26]

The Eleventh Circuit held: 1)that under the Supreme Court's retroactivity doctrine (see *United States v. Johnson* (1982) 457 U.S. 537; *Griffith v. Kentucky* (1987) 479 U.S.

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[26] For further analysis of Gant and Belton, see the materials posted on the FDAP website (www.fdap.org): THE EVOLUTION OF THE SEARCH INCIDENT TO ARREST DOCTRINE: ARIZONA V. GANT (2009) 129 S.Ct. 1710.

314), the rule announced in *Gant* applied to the defendant's case; and 2)that applying *Gant*, the vehicle search violated the defendant's Fourth Amendment rights. Both recent occupants, the defendant and the driver, were handcuffed and secured in separate patrol cars before the officer searched the vehicle. Moreover, the defendant was arrested for giving a false name. The police could not reasonably expect to find evidence of that crime in the car. (*Id.*, at 1263.)

However, the appellate court still needed to determine whether the exclusionary rule should apply to the evidence seized during the unconstitutional search. Citing the Ninth Circuit's decision in *United States v. Gonzalez* (9th Cir. 2009) 578 F.3d 1130 [*Gant* applies retroactively], and the Tenth Circuit's decision in *United States v. McCane* (10th Cir. 2009) 573 F.3d 1037 [regardless of whether Gant applies retroactively, the good faith exception precludes application of the exclusionary rule], the Eleventh Circuit noted that the circuits had split on this issue.

The Eleventh Circuit entered the fray by holding that "the exclusionary rule does not apply when the police conduct a search in objectively reasonable reliance on our well-settled precedent, even if that precedent is subsequently overruled." (*Id.*, at 1263-1264.) Because the police officer who searched the defendant's vehicle reasonably relied on clear, well-settled and unequivocal precedent which permitted the intrusion, the good-faith exception to the exclusionary rule applied. "Relying on a court of appeals' well-settled and unequivocal precedent is analogous to relying on a statute, or a facially valid warrant." (*Id.*, at 1267-1268, citing *Illinois v. Krull* (1987) 480 U.S. 340, *United States v. Leon* (1984) 468 U.S. 897.)

This case presents a nexus between the Court's most significant rulings of 2009 – *Arizona v. Gant*, which redefined the circumstances under which officers could search a vehicle incident to arrest, and *Herring v. United States* (2009) 129 S.Ct. 695. In *Herring*, the Court expanded the good-faith exception, holding that the exclusionary rule does not apply with the officer conducting the arrest and search reasonably relied on false information resulting from a police employee's record-keeping error when that error was the result of isolated negligence attenuated from the arrest. (*Herring, supra*, at 698-700.)[27] Now, by granting certiorari in *Davis*, the Supreme Court has the opportunity to further limit the reach of the exclusionary rule.

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[27] For a full discussion of Herring, its background and its potential impact, see the materials posted on the FDAP website (www.fdap.org): THE RISE AND FALL OF THE EXCLUSIONARY RULE: CAN IT SURVIVE *HUDSON, HERRING*, & *BRENDLIN*.

Given their recent jurisprudence, it seems likely that the Supreme Court will side with the government in this case and hold that *Gant* applies retroactively, but that the good faith exception precludes exclusion of the illegally seized evidence because the searching officer reasonably relied on the prevailing precedent which interpreted *Belton* to permit such a search. This outcome would seem to follow, not just from *Herring*, but from the Court's earlier precedents in *Illinois v. Krull* (1987) 480 U.S. 340 and *United States v. Peltier* (1975) 422 U.S. 531.

Krull, the better known of these two cases, was decided three years after *United States v. Leon* (1984) 468 U.S. 897. *Leon* had established the good faith exception by holding that the exclusionary rule does not apply when the officer conducting the challenged search relied in good faith on a subsequently invalidated search warrant. In *Krull*, the searching officer relied on a subsequently invalidated statute. The officer conducted an administrative search of an auto wrecking yard which had been permitted by statute However, on the day after the search the Seventh Circuit Court of Appeal ruled that the authorizing statute violated the Fourth Amendment. The Supreme Court ruled that the evidence seized during the illegal search should not be excluded as the officer had reasonably relied in good faith on a statute subsequently found unconstitutional. The statute was not clearly unconstitutional, and the officer had no reason to question the judgment of the legislature.

United States v. Peltier, a case that the Supreme Court decided in 1975, nine years before *Leon* (and cited in that subsequent case), presents an even closer analogy. In *Peltier*, a border patrol agent conducted a random stop and search of the defendant's truck, finding drugs. At the time, the search was authorized by statute, administrative regulations, and federal court of appeal decisions. Four months after the search, the Supreme Court decided *Almeida-Sanchez v. United States* (1973) 413 U.S. 266, which required probable cause for a search conducted within a reasonable distance of the border. Even the prosecution conceded that the search of the defendant's car was unconstitutional under *Almeida-Sanchez*. Nevertheless, *Peltier* held that the seized evidence should not be excluded because the searching officer relied in good faith on current law --a statute and lower court precedent subsequently overturned by the Supreme Court. The deterrent purpose of the exclusionary rule necessarily assumes that the police officer conducting the search engages in willful or negligent conduct depriving the defendant of his Fourth Amendment rights. However, if the officer reasonably believes, in good faith, that the search he is about to conduct is lawful, he will not be deterred by the prospect of exclusion. (*Peltier, supra*., 422 U.S. at 536-542.)

Writing on pending Supreme Court criminal cases in the San Francisco Daily Journal (Thursday, December 30, 2010; "Looking Forward to 2011: Key Criminal

Procedure Cases"), Loyola Law School Professor Laurie L. Levenson predicted that the Supreme Court's anticipated decision in *Davis* could be another "blockbuster". At a minimum, Professor Levenson postulates that *Davis* could lead to further extension of the good faith exception to the exclusionary rule. If the Court adopts the Eleventh Circuit's reasoning, they may hold that "the exclusionary rule does not apply when the police conduct a search in reasonably objective reliance on well-settled precedent, even if that precedent is subsequently overturned". (*Davis, supra*., 598 F.3d at 1264.) But how settled does that precedent have to be? What if there a split of authority? Will exclusion depend on the searching officer's reasonable understanding of the law? On the other hand, Professor Levenson warns that the Supreme Court may go even further. Relying on language in *Herring*, a majority of justices may be willing to go along with a push by law enforcement "to reduce all exclusionary rule decisions to a question of whether the searching officer's conduct was deliberate, reckless or grossly negligent." Only then, will the remedy of suppression be applied.

3. Tolentino v. New York (Supreme Court Docket No. 09-11556; argument set for 3/21/11)
Decision Below: People v. Tolentino (Ct. of Appeals of N.Y. 2010) 14 N.Y.3d 382: DMV records acquired by the police after they learned the defendant's name during an unconstitutional traffic stop are not subject to suppression as the fruit of the poisonous tree

Question presented: Whether pre-existing identity related governmental documents, such as motor vehicle records, obtained as a direct result of police action violating the Fourth Amendment, are subject to the exclusionary rule

This case will be argued on the same day as *Davis v. United States*, providing the Supreme Court with another opportunity to limit the reach of the exclusionary rule. However, this matter involves the fruit of the poisonous tree doctrine rather than the good faith exception.

Here are the facts: The defendant was driving in New York City. The police stopped him for playing his music too loudly. During the traffic stop, the police learned his name and ran a computer check of Department of Motor Vehicle (DMV) files. When the check revealed that the defendant's license was suspended, he was arrested and charged with unlicensed operation of a motor vehicle in the first degree.

The defendant argued that he was illegally stopped and moved to suppress his driving record as the tainted fruit of the Fourth Amendment violation. The New York Court of Appeals affirmed the lower court's denial of this motion.

The defendant did not argue that his name or identity would be subject to suppression, even though it was obtained by the police during the unconstitutional stop. Indeed, the Supreme Court has held the "identity of a defendant in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search or interrogation occurred." (*Tolentino, supra*, 14 N.Y. 3d at 384-385, quoting *INS v. Lopez-Mendoza* (1984) 468 U.S. 1032, 1039.) Rather, the defendant contended that the preexisting DMV records are subject to suppression because without the alleged illegality, the police would not have learned his name and been able to access these records.

The Court of Appeal rejected this argument, relying on federal circuit cases that have declined to suppress preexisting immigration records discovered during a records check after the defendant gave his name to law enforcement officers during an illegal arrest or search. As emphasized in these cases, immigration files like DMV records are already in the government's possession, and could have been discovered even without the unconstitutional intrusion. The records were obtained from a source independent of the unlawful seizure. "The exclusionary rule enjoins the Government from benefitting from evidence it has unlawfully obtained; it does not reach backward to taint information that was in official hands prior to any illegality". (*Tolentino, supra*, at 386, quoting *United States v. Crews* (1980) 445 U.S. 463.)

In *Tolentino*, the New York court distinguished Supreme Court cases holding that fingerprint evidence is subject to the exclusionary rule. (See.e.g. *Davis v. Mississippi* (1969) 394 U.S. 721, 724; *Hayes v. Florida* (1985) 470 U.S. 811, 815.) First, the defendants in those cases were illegally stopped for the purpose of obtaining their fingerprints as evidence that might connect them to crimes under investigation. Second, this "identity evidence" was not pre-existing. Third, the fingerprints were not used to establish the identity of those apprehended but to match their prints to latent prints recovered from crime scenes – to establish their identities as perpetrators.

The court concluded: "We merely hold that a defendant may not invoke the fruit-of-the-poisonous tree doctrine when the only link between improper police activity and the disputed evidence is that the police learned the defendant's name". (*Id.*, at 388.)

As Professor Levenson states in her Daily Journal article on cases pending before the Supreme Court, the only danger here is that the Court might use this case as an opportunity to further restrain the application of the fruit of the poisonous tree doctrine.

Indeed, police officers regularly perform computerized record checks during traffic stops. Two years ago, in *People v. Brendlin* (2008) 45 Cal. 4th 262, the California

Supreme Court held that when, as a result of such a record check conducted in the course of an unconstitutional traffic detention, the police discover that the driver or passenger has an outstanding arrest warrant, he can make a lawful arrest. The discovery of the warrant from an independent source attenuates the taint of the antecedent illegal detention, assuming that the police violation of the Fourth Amendment is neither purposeful nor flagrant. (*Brendlin, supra*., at 265.) Under the reasoning of *Brendlin*, it would seem that the license suspension discovered in *Tolentino* as a result of the DMV records check would be admissible in California, despite the illegality of the initial vehicle stop.

B. Issues Pending Before the California Supreme Court

1. People v. Branner (Supreme Court No. S179730; briefing completed on 11/10/10, but case not yet calendared for oral argument)
Decision Below: People v. Branner (2010) 180 Cal. App. 4th 308 [Third District]: A prolonged traffic detention, as defined by People v. McGaughran (1979) 25 Cal. 3d 577, does not violate the Fourth Amendment, because federal law permits an arrest for a minor Vehicle Code offense. As to the search incident to arrest, the Gant rules apply retroactively, but under the exclusionary rule, evidence seized by the police in reasonable reliance on the prevailing interpretation of Belton is not subject to suppression.

Questions Presented:
1)Did this court's opinion in People v. McGaughran [citation omitted] survive the passage of Proposition 8?
2)Is the defendant entitled to retroactive application of Arizona v. Gant [citation omitted], in which the high court limited vehicle searches incident to the arrest of a recent occupant after the arrestee has been secured and cannot access the interior of the vehicle.
3)If so, did the Court of Appeal err by applying the good faith exception to the exclusionary rule?]

The facts of *Branner* are as follows: In December 2004, officers were conducting surveillance of an apartment complex because of complaints of drugs sales in the parking lot. They observed the defendant's vehicle travel from a public street into the complex. The officers had previously seen the defendant and his vehicle at this complex, and they knew he was a registered narcotics offender. The officers observed two Vehicle Code equipment violations – the defendant's rear license plate light was not working and one of the headlights was misaligned. Consequently, the officers initiated a traffic stop. During the ensuing detention, the police conducted a records check which took less than five

minutes. Based on information gleaned from this check, the officers determined that the defendant had not reported a change of address, in violation of his drug registration requirements. They arrested him for this violation, placed him in the back of their patrol car, and then searched the passenger compartment of his vehicle, finding a gun and cocaine. The entire encounter from stop to arrest took approximately 15 minutes.

a. The Unlawfully Prolonged Detention Issue

The defendant argued that the arrest was illegal, because the information supporting the arrest was gained during an unduly prolonged detention. This argument was essentially based on the Supreme Court's 30-year old decision in *People v. McGaughran* (1979) 25 Cal. 3d 577. In that case, after stopping a car driven by the defendant because he had driven in the wrong direction on a one-way street, and after discussing the violation and examining the driver's license for three to four minutes, the officer did not issue a citation or a warning. Instead, he detained the defendant for an additional ten minutes while he conducted a warrant check which revealed that both the defendant and his passenger had outstanding warrants. The Supreme Court held that after stopping the motorist for a traffic violation for which he cannot be taken into custody, and after detaining him for the period necessary to perform the functions arising from the violation, the officer cannot lawfully detain him for an additional time period solely for the purpose of conducting a warrant check. (*McGaughran, supra*., at 586.) The additional detention required reasonable suspicion of criminality. (*Id*., at 587-591.) *McGaughran* did acknowledge that a warrant check is not improper if it can be completed within the time necessary to discharge the duties of the traffic stop. (*Id.*, at 584.)

In *Branner*, the Third District held that "the *McGaughran* limit on the time an officer may detain a Vehicle Code violator is no longer the law in California for purposes of Fourth Amendment analysis". (*Branner, supra*., 180 Cal. App. 4th at 316.) In other words, a prolonged traffic detention is not unconstitutional; thus, evidence discovered during such a detention will not be suppressed.

The court noted that three years after *McGaughran*, California voters passed Proposition 8 which added a provision to the state Constitution precluding the suppression of relevant evidence in a criminal case unless compelled by federal law. Almost twenty years later, in *Atwater v. City of Lago Vista* (2001) 532 U.S. 318, the United States Supreme Court expanded police officers' federal constitutional authority to make a custodial arrest of the driver during a routine traffic stop. The Court held that the custodial arrest of an individual for a very minor offense, including a traffic violation punishable only by a fine, did not violate the Fourth Amendment. The very next year, the California Supreme Court decided *People v. McKay* (2002) 27 Cal. 4th 601.) In *McKay*,

the Court held that although a custodial arrest of a an individual for a fine-only Vehicle Code violation is precluded by California law, it is not unconstitutional pursuant to *Atwater's* interpretation of federal law. Evidence seized during a search incident to that illegal-but-not-unconstitutional arrest would not be suppressed.

Applying these rulings to the facts of *Branner*, the Third District reasoned that "the 'prolonged detention' of defendant for a 'records check' while defendant was detained for vehicle code offenses did not violate the United States Constitution, which would have permitted the officers to immediately place defendant in custody." (*Branner, supra*., 180 Cal. App. 4th at 317, citing *People v. Gomez* (2004) 117 Cal. App. 4th 531.) In other words, because the officers could have made a custodial arrest as soon as they observed the Vehicle Code violations, without offending the federal constitution, the length of the traffic detention did not matter. For practical purposes, whenever an officer has probable cause to believe that a driver has violated the Vehicle Code, a prolonged detention argument is effectively dead.

It seems likely that the Supreme Court will find that *McGaughran* is no longer good law, to the extent that it has been interpreted as placing limits on the scope of the officer's activities during a routine traffic stop (e.g. discouraging warrant checks during a traffic stop). It is well-established that officers can conduct a computerized record check during a legitimate traffic stop. Pursuant to cases decided by the California courts after the passage of Proposition 8, a police officer who initiates a traffic stop for a Vehicle Code violation may briefly detain the driver and all passengers while she expeditiously performs the duties incident to the citation process, duties that include running warrant and license checks. (See *People v. Miranda* (1993) 17 Cal. App. 4th 917, 926-27.) There are no limits on the scope of a lawful traffic detention. The officer can ask questions about matters unrelated to the Vehicle Code violation (e.g. are you carrying drugs or weapons?), inquire about parole and probation status, or request consent to search, so long as the officer's conduct and questions "do not prolong the stop beyond the time it would otherwise take". (*People v. Brown* (1998) 62 Cal. App. 4th 493, 498; see also *People v. Gallardo* (2005) 130 Cal. App. 4th 234, 238-239.)[28]

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[28] Actually, these holdings are consistent with in *McGaughran*, which stated that conducting a warrant check during a routine traffic stop was permissible so long as it could be completed within the time necessary to discharge the duties incurred by virtue of the traffic stop (e.g. examining the driver's license and registration, carrying out any equipment inspection and tests, assuring that the driver understands the conduct to be avoided), (*McGaughran, supra*., 25 Cal. 3d at 584.) The problem in *McGaughran* was that the officer performed all of these duties and then did a warrant check which took ten

In other words, as long as she doesn't take too long, the officer can ask any question and do just about anything during the traffic stop. The only thing the officer can't do is to search the vehicle without consent or independent justification, at least until the an occupant is actually arrested. (See *Knowles v. Iowa* (1998) 525 U.S. 113.) Thus, under current law, it is still possible to raise a "prolonged detention" argument if the officer conducting the traffic stop takes too long, because she is performing a records check or waiting for back-up officers or a drug detection dog. But how long is too long? Quite frankly, prolonged detention arguments rarely succeed.

Nevertheless, if the California Supreme Court affirms the Third District's ruling in *Branner*, there would be no distinction between a traffic detention and a de facto arrest in cases in which the officer has probable cause to believe that the driver committed any Vehicle Code violation. As a practical matter, any limits on the length of a detention following a traffic stop would disappear.

This outcome seems inconsistent with recent Supreme Court cases that continue to recognize a distinction between a brief and limited traffic detention and an actual arrest. (See *Knowles v. Iowa* (1998) 525 U.S. 113 [no right to search incident to a traffic detention, when the officer elects to issue a citation rather than making a custodial arrest].) Moreover, the Supreme Court has recently reaffirmed that a traffic stop may become unduly prolonged. In *Illinois v. Cabellas* (2005) 543 U.S. 405, 407, the Court stated: "A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably necessary to complete that mission". Finally, in *Arizona v. Johnson* (2009) 129 S.Ct. 781, the Court re-affirmed that during the legitimate traffic stop, the police may ask both the driver and the passenger about "matters unrelated to the justification for the traffic stop". These questions "do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop". (*Johnson, supra*., at 788, citing *Muehler v. Mena* (2005) 544 U.S. 93, 100-101.)

b. Gant Retroactivity/ Good Faith Exception Issue

The arrest and vehicle search in this case occurred in 2004, more than four years before *Arizona v. Gant*. After arresting the defendant for violating his drug registration requirements, the officer put him in the back of a patrol car and then searched his vehicle's passenger compartment, finding a gun and cocaine base.

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minutes. In our computer age, records checks are much quicker.

The Third District rejected the defendant's contention that the Supreme Court's recent *Gant* decision compelled suppression of the gun and drugs seized during the post-arrest search of the defendant's vehicle, while the defendant was secured in the officer's patrol car. In *Gant*, the Court revisited its prior ruling in *Belton*, which the Court acknowledged had "been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search". (*Branner, supra*, 180 Cal. App. 4th at 317, citing *Gant, supra*, 129 S.Ct. at 1716.) *Gant* changed the law so that police could only search the arrestee's vehicle if the arrestee was within reaching distance of the passenger compartment at the time of the search, or the officer reasonably believed that the vehicle contained evidence of the offense of arrest.

The Court of Appeal, in *Branner*, agreed with the defendant that *Gant* applies retroactively because his case was still pending on direct review. Thus, the search of the defendant's vehicle while he was secured in the back seat of the patrol car violated the Fourth Amendment unless if was reasonable for the officer to believe that evidence of the crime of arrest (violation of drug registration requirements) would be found in the vehicle. However, the court declined to decide that question. Instead, it upheld admission of the seized evidence by applying the good faith exception to the exclusionary rule.

The officer who searched the defendant's vehicle after arresting him and placing him in the patrol car reasonably relied on the then prevailing view of *Belton*, which permitted a search of the passenger compartment, incident to the arrest of a recent occupant, even if the arrestee could no longer reach the compartment at the time of the search. This understanding of *Belton*, was commonly accepted by federal and state appellate courts and taught to law enforcement officers in police academies for 28 years.

The Third District continued with a discussion of the exclusionary rule's deterrent purpose and the consequent evolution of the good faith exception, which applied when suppression of the evidence would not effectively advance that purpose. The court concluded that the reasoning of the good faith cases "must be extended to the officer's search in this case". "Just as the officers in *Leon, Krull* and *Evans* could not be faulted for relying on judges decisions or [false] information provided by a court clerk, surely the officers here cannot be faulted for acting in conformity with the United States Supreme Court's decision in *Belton*, which for more than a quarter century, had been understood and applied by other courts to allow officers to conduct a vehicle search incident to arrest even though the defendant was in the back of the patrol car.". (*Branner, supra*, at 322.) Because the officer who searched the car reasonably relied on established precedent interpreting *Belton*, excluding the seized evidence would have no deterrent effect.

In *Branner*, the California Supreme Court has granted review on the same issue pending before the United States Supreme Court in *Davis v. United States*. Although the California court granted the defendant's petition for review three months before the U.S. Supreme Court granted certiorari in *Davis*, it is almost certain that *Davis* will be decided first, as it is calendared for oral argument on March 21, 2011. The briefing in *Branner* was just completed and the case has not yet been set for oral argument.

2. People v. Troyer (California Supreme Court No. S180759; argued on 12/7/10) Decision Below: People v. Troyer, unpublished opinion (Third District, 1/27/10, Westlaw cite is 2010 WL 891852): Forcible entry and warrantless search of locked upstairs bedroom was not justified by the protective sweep or emergency aid exceptions to the warrant requirement.

Question Presented: Did either the protective-sweep exception or the emergency-aid exception to the Fourth Amendment's warrant requirement permit police officers to make a forcible entry into a locked bedroom while responding to a report of a shooting with injuries at the house.

This is a people's appeal from an unpublished Third District decision reversing the trial court's denial of a motion to suppress evidence. Here are the facts: A police officer received a radio call that a man had possibly been shot twice at a designated residence and that the perpetrators were possibly driving a two-door Chevrolet. When the officer arrived at the house, he did not see the described vehicle. He did find two injured and bleeding people on the house's front porch – a woman who appeared to have been shot and a man bleeding profusely from a head injury. The bleeding man identified two suspects, a White male and a black male, and said they had driven away. He was equivocal about whether there was anyone in the house. The officer saw droplets or smudges of blood on the front door and inferred that a bleeding individual had walked in or out of that door. The officer did not see or hear anything going on inside the house but decided to enter. After the officer threatened to kick down the locked front door, the bleeding man – who had declined consent to enter – handed over the keys. Four police officers then entered the two-story house and saw no signs of struggle or blood. They searched the first floor and found nothing of interest. They began to search the second floor and encountered a locked bedroom door. After announcing his presence and receiving no response, one officer broke down the door. As soon as he entered the bedroom, the officer smelled a strong odor of marijuana and saw a glass jar filled with marijuana and a scale. Officers then obtained a warrant, searched the house more thoroughly and found more marijuana and a gun.

The gun and marijuana were linked to the defendant and during his prosecution, he filed a motion to suppress evidence which was denied. The trial court found that the officer's warrantless entry and search of the upstairs bedroom was justified by the emergency aid exception. The Court of Appeal reversed.

First, the appellate court found that the warrantless entry into the home was not justified as a protective sweep. According to *Maryland v. Buie* (1990) 494 U.S. 325, to justify a warrantless search as a protective sweep, the prosecution must show: 1)that the intrusion was a quick and limited search of the premises, incident to an arrest and conducted to protect the safety of the police and others; and 2)that the circumstances supported the officer's reasonable belief that the area to be swept harbored an individual posing a danger to those on the arrest scene. The Third District held that even assuming a protective sweep is not limited to arrest situations, there were insufficient facts supporting a prudent officer's reasonable belief that there were one or more dangerous persons inside the house. The suspects' described car was gone. The bleeding man said the shooters had fled. The door was locked and the officer could not hear or see anything inside the house.

Second, the Third District held that although the emergency aid exception justified the officers' entry into the home, it did not justify their entry into the locked upstairs bedroom. Under the emergency aid exception set forth in *Brigham City v. Stuart* (2006) 547 U.S. 398, officers may enter and search a home without a warrant when they have an objectively reasonable belief that an occupant is seriously injured or imminently threatened with such injury. Under the facts of the current case (two bleeding people, blood on the door), the Third District agreed that the officers had the right to enter the home to look for another victim. But once they entered, they did not see any blood or signs of a struggle. Even if they had the right to search the upper floor as well as the first floor, there was no justification for kicking in the locked door of the second story bedroom. The facts did not support a reasonable belief that there was a person inside that bedroom who was in need of aid.[29]

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[29] It is interesting that in this case, the Third District did not cite the Supreme Court's most recent exigent circumstances/ emergency aid doctrine case, *Michigan v. Fisher* (2009) 130 S.Ct. 546, which allowed a warrantless entry even though there was no reason to believe that the man they could see inside the house was seriously injured. (See pages 20-21, supra.) Of course, *Fisher* is not directly applicable here, because in that case, as in *Brigham City*, the police were certain that an injured individual was inside the house.

One justice filed a dissent, asserting that the emergency aid exception applied and that the police had acted reasonably in every way, including their forced entry into the locked bedroom.

3. ***People v. Schmitz (Supreme Court No. S186707; petition for review granted 12/1/10) Decision Below: People v. Schmitz (2010) 187 Cal. App. 4th 722 [Fourth District, Division Three]: The officer's non-consensual search of the entire passenger compartment of the defendant's car could not be justified on the basis of the parole search condition of the front-seat passenger, because the passenger did not have common authority over the entire vehicle.***

Questions Presented: When conducting a vehicle search authorized by a passenger's parole condition, can the police search any areas of the vehicle's interior that appear reasonably accessible to the passenger?

The state filed a petition for review in this case after the Court of Appeal overturned the trial court's denial of the defendant's motion to suppress evidence found in the rear passenger area of his vehicle. Here are the facts: A deputy sheriff observed the defendant drive his car into a small alley, make a U-turn, and the proceed back to the main street. Thinking the driver might be lost, the deputy pulled her patrol car into the alley. As the defendant's car neared the deputy's vehicle, she stopped, and the defendant stopped his car as well, parallel to the deputy. The deputy saw three adults and a small child in the car. In response to the deputy's question, the defendant said he was not lost; he just wanted to make a U-turn. The deputy then got out of her car, approached the defendant and asked if he minded showing her his driver's license. As the defendant was retrieving his license, the deputy noticed that his arms were covered with abscesses, indicative of possible drug use. She asked the defendant if he was on probation or parole. He said "no". The deputy then directed the same question to the other occupants, and the male front seat passenger said he was on parole. At that point, the deputy called for back-up and asked the defendant for permission to search his vehicle. He did not answer. Thereafter, the deputy asked all the occupants to get out of the car and conducted a search based on the front seat passenger's parole status. She searched the entire passenger compartment and found two syringes in a chip bag on the rear floor, methamphetamine in a pair of shoes, also on the floor of the rear passenger area, and a syringe cap in a purse belonging to the female back seat passenger. The defendant was prosecuted for unauthorized possession of the syringes, as well as other offenses.

First, the court found that the deputy's interaction with the defendant – through the time when she learned of the front seat passenger's parole status – was consensual. The defendant-driver (and the other occupants) were not detained within the meaning of the

Fourth Amendment. Second, the defendant did not consent to a search of his car. He was asked for consent and did not reply. "[H]is silence cannot be construed as acquiescence" or implied consent. (*Schmitz, supra*., 187 Cal. App. 4th at 729.)

Finally, the court held that the front seat passenger's admitted parole status did not give the deputy the right to search the defendant's entire passenger compartment, because there was no showing that the parolee-passenger had a possessory or ownership interest in the car or common authority over all areas of the car's interior. The passenger's parole status could not override the driver's right to refuse consent or obliterate his reasonable expectation of privacy in his vehicle.

If a parolee or a probationer, subject to a search condition, shares a home with others, officers can search all portions of the home over which the parolee or probationer has superior or common authority, complete or joint control. The court noted that while there are numerous cases applying the "common authority" standard to situations involving the search of residential premises shared between a parolee or probationer and another person, they could find no cases involving the search of a car rather than a residence. (*Schmitz, supra*., at 731.)

The rule set forth in *United States v. Matlock* (1974) 415 U.S. 164, and applied to probation searches of shared residences in *People v. Woods* (1999) 21 Cal. 4th 668, states that "the common authority over property which confers the power to authorize its search is founded 'on mutual use of the property by persons generally having joint access or control for most purposes so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that others have assumed the risk that one of their number might permit the common area to be searched'." (*Schmitz, supra*., at 732, quoting *Matlock, supra*., at 172, fn. 7.)

The court then applied this rule to the facts of the defendant's case. There was no evidence that the defendant had ceded to the parolee-passenger any authority over the car at all, including the authority to permit searches of all portions of the vehicle, specifically including the back seat. Nor could the deputy have reasonably assumed that the passenger had such authority over the vehicle. Consequently, the officer could not search the entire vehicle based upon the passenger's parole status.