The California Legal Update

Remember 9/11/2001: Support Our Troops; Support our Cops; Stand Up For Our Country

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THIS EDITION'S WORDS OF WISDOM:

"*I told my wife I wanted to be cremated. She made me an appointment for Tuesday.*"

IN THIS ISSUE:

ADMINISTRATIVE NOTES:

Profanity and the First Amendment: Some of us were brought up in an atmosphere where the use of profanity was severely frowned upon, some believing that its use merely reflects a lack of intelligence and culture, or maybe just bad manners. For others, expressing oneself through language laced with "bad words" seems to be just a fact of life. Either way, the courts have been telling us now for some time that the public use of profanity is, under most circumstances, constitutionally protected free speech under the **First Amendment**. (See ***Cohen v. California*** (1971) 403 U.S. 15, where defendant's wearing of a jacket in a county courthouse with lettering on the back expressing his discontent over the Vietnam war and the draft—"*F__k The Draft*"—was held to be protected by the **First Amendment**.) We also now know that a person has a **First Amendment** constitutional right to be critical of the police, even to the point where he or she directs profanity or obscene gestures at an officer. Such conduct does *not* constitute "disorderly conduct" or any other form of resisting an officer in the performance of his duties, and thus does *not* provide the necessary probable cause for an arrest. (***Duran v. City of Douglas*** (9th Cir. 1990) 904 F.2nd 1372, 1377-1378; ***Velazquez v. City of Long Beach*** (9th Cir, 2015) 793 F.3rd 1010, 1019-1020.) The U.S. Supreme Court just issued a new decision reemphasizing the constitutional protections inherent in the use of profanity: ***Mahanoy Area School District v. B.L.*** (June 23, 2021) __ U.S. __ [2021 U.S. LEXIS 3395]. In ***Mahanoy***, the High Court (in an 8-to-1 decision) ruled that a public high school violated a student's **First Amendment** rights by suspending her from the school's cheerleading team when, outside of school hours and away from campus, the student transmitted on social media vulgar language and gestures (i.e., posting pictures on the social media "snapchat," showing the minor and a friend with middle fingers raised, bearing the caption: "*F__k school f__k softball f__k cheer f__k everything*"), criticizing the school and its cheerleading team. The Court ruled that although the school's regulatory interests remained significant in some off-campus circumstances, certain features of off-campus speech diminished the strength of the unique educational characteristics that might call for special **First Amendment** leeway. Under the facts of this case, the school's interest in prohibiting students from using vulgar language to criticize a school team or its coaches did not overcome the student's **First Amendment** interests in free expression. Contrary, perhaps, to what authority the school might have, had she expressed the same sentiments while on campus during school hours, the student in this case spoke under circumstances where the school did not stand in "loco parentis," and there was no evidence of a substantial disruption of any school activity. Bottom line is that this young lady, under these circumstances, had a constitutional right to demonstrate to all who might be interested her lack a character and maturity by expressing her sentiments in such a crude and crass manner. Her parents must be so proud. If you are interested, I have a written 39-page memorandum on **First Amendment** freedom of expression issues (including the rights of solicitors to use big box stores' private property to pass out leaflets, etc.) that is available upon request, and which I constantly update as new relevant cases come out.

The "*Weaponizing*" *of Social Media by Law Enforcement*: It is well established that a private citizen has a **First Amendment** right to videotape public officials, including, but

not limited to, police officers while performing their duties in any public place. (e.g., see ***Gericke v. Begin*** (1st Cir. 2014) 753 F.3rd 1; ***Glik v. Cunniffe*** (1st Cir. 2011) 655 F.3rd 78, 82-84.) This is sometimes done at the scene of a public demonstration or protest as an intimidation tactic in an attempt to prevent officers from performing their duties, capitalizing on the officer's knowledge that the resulting video will later be publicly posted on one or more of the available social media sites, one of the more popular being YouTube. In response, a new tactic has been developed by some inventive law enforcement officers, not to prevent the recording of their actions, but rather to prevent the resulting videos from going viral. When the protesters' cellphone cameras come out, an officer might simply pull out his or her own cellphone, playing as loudly as possible any copyrighted music recording such as one by the popular recording artist Taylor Swift. When a protester later attempts to post the video on a social media cite such as YouTube, with Taylor Swift's melodious singing in the background, the video will predictably trigger YouTube's automated content ID system as it picks up on Swift's copyrighted music, and automatically trigger a block on the entire video. If not actually blocked, use of a copyrighted record label will at the very least cause the social media cite to request that the video be removed. Referred to by some as "*weaponizing*" YouTube's copyright flagging system, such a tactic won't prevent protesters or on-lookers from recording what the officers do, but will effectively prevent the resulting video from going viral. Note, however, that there is no case law telling us whether the use of such a tactic itself implicates in some way a protester's **First Amendment** rights. And the *California Legal Update* is not advocating that you try it. Just know that should you choose to use this tactic to prevent your public actions at the scene of a protest from going viral, you might well be making case law should you get sued.

CASE LAW:

***Fleeing Misdemeanants*:**
***Warrantless Residential Entries by Law Enforcement in Misdemeanor Cases*:**
***Exigent Circumstances Allowing for the Warrantless Entry of a Residence*:**

Lange v. California **(June 23, 2021) __ U.S.__ [141 S.Ct. 2011; __ L.Ed.2nd __]**

Rule: Flight from law enforcement into one's home by a misdemeanor suspect, by itself, without any articulable reason to believe an exigency exists above and beyond the flight itself, does not allow for an officer's warrantless pursuit into the residence. An exigency, such as a need to prevent (1) imminent harm or violence, (2) the possible destruction of evidence, or (3) the escape of the suspect from the home, must first be shown before a warrantless entry into the suspect's residence is allowed.

Facts: Defendant Arthur Lange—having consumed a bit too much alcohol (later showing a blood-alcohol level of over three times the legal limit for driving)—was enjoying himself on the drive home from where ever he'd been drinking, playing his radio as loud as he could (with his windows rolled down) while repeatedly honking his horn to the beat of Merle Haggard's classic, "*I Think I'll Just Stay Here and Drink*." (I'm significantly embellishing on the facts here.) This attracted the attention of a California Highway Patrol Officer who—apparently not appreciating

the talents of Merle Haggard (still embellishing)—began to follow defendant. Eventually hearing enough, the officer flipped on his overhead lights, attempting to make a traffic stop. Being about a hundred feet (four-seconds driving time) from this home, defendant decided to make a dash for it, ignoring the officer's attempt to stop him and driving straight into his attached garage. Not in the least deterred, the officer followed defendant into the garage (presumably parking in his driveway) and made contact. Upon observing signs of intoxication, the officer subjected defendant to a field sobriety test on which he did not do well. He was therefore busted and transported to jail. Defendant was charged in state court with the misdemeanor offense of driving while under the influence of alcohol plus a lower-level noise infraction. He thereafter filed a motion to suppress the products of the officer's warrantless entry into his garage (e.g., the FST results, blood alcohol level, etc.), which was denied by the trial court; a decision that was upheld by the appellate division of the superior court. Division 5 of the First District Court of Appeal affirmed in an unpublished decision, specifically ruling that an "officer's 'hot pursuit' into the house (which includes an attached garage) to prevent the suspect from frustrating the arrest" is always permissible under the exigent-circumstances exception to the warrant requirement. (*People v. Lange* (Oct. 30, 2019) 2019 Cal. App. Unpub. LEXIS 7266.) In other words, the appellate court held that as a "categorical rule," it is always lawful for law enforcement to pursue a fleeing misdemeanant into his home. With the California Supreme Court denying review on the matter, defendant appealed to the United States Supreme Court.

Held: The United States Supreme Court unanimously (with three concurring opinions) reversed. The issue discussed was whether a misdemeanor suspect fleeing into his own home, with law enforcement in "hot pursuit," justifies the warrantless entry into the home by the pursuing police officers as a "categorical rule." In other words, does flight alone justify law enforcement's warrantless hot pursuit into a misdemeanor suspect's home, without regard as to whether an exigency, over and above the flight itself, exists? California's lower appellate courts in this case, in affirming the trial court's denial of defendant's motion to suppress, answered this question in the affirmative. The U.S. Supreme Court disagreed. The well-settled rule is that pursuant to the Fourth Amendment, judicial warrants are necessary in order for law enforcement to make entry into areas where a suspect has a reasonable expectation of privacy. One's home is accorded even more protection than other private areas might. "[W]hen it comes to the Fourth Amendment, the home is first among equals." (*Florida* v. *Jardines* (2013) 569 U. S. 1, 6.) Per the Court: "(T)he ultimate touchstone of the Fourth Amendment is 'reasonableness.'" (*Brigham City* v. *Stuart* (2006) 547 U. S. 398, 403.) "That (reasonableness) standard 'generally requires the obtaining of a judicial warrant before a law enforcement officer can enter a home without permission." (*Riley v. California* (2014) 573 U.S. 373, 382.) However, like every other such rule, there are exceptions. The presence of "exigent circumstances" is one such exception to the warrant requirement. Whether or not the exigent circumstances exception applies must be determined on a "case-by-case basis." The "exigent circumstances" exception applies whenever "the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable" (*Kentucky v. King* (2011) 563 U. S. 452, 460.), and when under the circumstances, there is insufficient time to obtain a search warrant As for the issue of whether a fleeing misdemeanant, taking refuge from pursuing police officers by running into his own home, constitutes such an exigency all by itself (i.e., a "*categorical rule*"), allowing for law enforcement's immediate entry into the home, the Court noted that there are conflicting opinions by the lower courts throughout the country. (See footnote #1, in the published opinion, for an

extensive list of such cases.) Resolving this conflict, and while noting the various degrees of seriousness of those offenses classified as misdemeanors, the Court held here that a "categorical rule" to the effect that a fleeing misdemeanant running into his own home justifies law enforcement's warrantless entry in pursuit, absent a showing of exigent circumstances over and above the fact of the flight alone, violates the Fourth Amendment, and is therefore illegal. A showing of exigent circumstances might involve something such as an articulable need to prevent (1) imminent harm or violence to the officer or others, (2) the possible destruction of evidence, or (3) the escape of the suspect from the home. And while one or more of these exigent circumstances is likely to apply to the vast majority of cases, the courts below in this case never reached this issue, denying defendant's suppression motion based solely on the "categorical rule" that the hot pursuit of a fleeing misdemeanant alone is constitutionally sufficient to justify an officer's warrantless entry into the suspect's home. This case, therefore, was remanded back to the trial court for a determination of whether exigent circumstances (other than just the defendant's flight) justified the officer's entry into defendant's garage.

Note: As noted in the concurring opinions, this case does not alter the general rule that the warrantless pursuit of a "*fleeing felon*" into his home is lawful whether or not other exigencies apply. (e.g., see *United States v. Santana* (1976) 427 U. S. 38, 42-43.). Also, once an arrest is make, the arrestee escaping from the officer and fleeing into his home justifies law enforcement's pursuit of the arrestee into his home, whether for a felony or a misdemeanor. There's also mention in several of the concurring opinions (see concurring opinions by Justice Clarence Thomas and Elena Kagan.) about the lawfulness (based upon "common law" concepts) of chasing suspects into their homes when that suspect has committed an "affray" (i.e., "public fighting."), a "pre-felony" ("a dangerous wounding whereby [a] felony is likely to ensue."), or a "breach of the peace" (see footnote #7 in the written decision: "(Encompassing) many kinds of behavior." *Atwater* v. *Lago Vista* (2001) 532 U.S. 318, 327, fn. 2.), without any serious discussion of what these terms really mean or when they might apply. Bottom line is that there are any number of exceptions to the rule of this case that the Court here left hanging in the wind. As noted by Chief Justice John Roberts in his concurring opinion, the exceptions to the rule as announced in this decision all but eat up the rule itself. Justice Thomas in his concurring opinion also includes an interesting discussion of the fact that even though the officer's pursuit of defendant into his garage in this case may have violated the Fourth Amendment, suppression of the evidence is not a viable remedy. Citing *Herring v. United States* (2009) 555 U. S. 135, it is noted that the Exclusionary Rule "does not apply when the costs of exclusion outweigh its deterrent benefits." (See also *Utah v. Strieff* (2016) 579 U.S. 232, 235.) Aside from the officer's good faith reliance upon what many authorities considered to be lawful (i.e., hot pursuit of a fleeing misdemeanant), Supreme Court "precedents make clear that the exclusionary rule does not apply when it would encourage bad conduct by criminal defendants." "(C)riminal defendants cannot use the exclusionary rule as 'a shield against' their own bad conduct." (Citing *Walder* v. *United States* (1954) 347 U. S. 62, 65.) If the evidence in this case is in fact suppressed, such a result would encourage other misdemeanants to do the same; flee from the police when a detention for investigation is attempted. This fact alone justifies, upon remand, the denial of defendant's motion to suppress. *Lastly*, note that the all the officer had in the way of probable cause when he entered the garage was the defendant's violation of what the court referred to as "a lower-level noise infraction." It apparently wasn't noticed that defendant was intoxicated until after the officer had already entered the garage. The Court, however, whether in

the lead decision or any of the concurring opinions, does not discuss the potential issue whether or not the rule as established here includes infractions. The Court having failed to make a distinction, it is arguable that the justices just assumed the same rules apply. But in considering the "totality of the circumstances," it is also arguable that even if the same rules do apply, the prosecution will at least have to prove even stronger exigent circumstances concerning the likelihood of (1) imminent harm or violence, (2) destruction of evidence, or (3) the escape of the suspect, justifying the officer's entry into a residence when the only probable cause for stopping the defendant in the first place was the violation of an infraction. This is certainly an issue Lange's counsel needs to bring up on remand. Also, however, an alternative argument for the prosecution is that by fleeing, defendant was then in violation of Penal Code § 148; a misdemeanor. (See *Stanton v. Sims* (2013) 571 U.S. 3, at pg. 5, and fn. 1.) Unfortunately none of this was discussed in this new case.

***Resisting Arrest, per P.C. §§ 69 and 148(a)(1)*:**
***Relevant Jury Instructions in a Resisting Arrest Case*:**

People v. Southard **(Mar. 24, 2021) 62 Cal.App.5th 424**

Rule: It is reversible error for a trial court to instruct a jury in a criminal case that the defendant's unlawful resistance to his arrest negates the prosecution's need to prove that the officers acted in the lawful performance of their duties.

Facts: On December 18, 2018, defendant John Wesley Southard was observed by two California Highway Patrol (CHP) officers (Officers Brenton Dunaj and Spencer Good) on Highway 101 (a two-lane stretch of highway, with one lane in each direction) in Del Norte County, driving a pickup truck at about 35 mph in a 55-mile-per-hour speed zone. It was also observed that defendant was straddling the white line separating the roadway from the shoulder. Suspecting that the defendant might be driving while under the influence (but apparently not sure that they had enough), the officers followed him. Defendant eventually pulled to the side of the road and stopped on his own initiative. The officers pulled up behind him. At this point, it was observed that defendant's license plate tab was expired. Although initially intending to conduct a consensual encounter only, at least until they were able to determine whether defendant was in fact driving while impaired, Officer Dunaj, upon noting the expired license plate tab, turned on their vehicle's emergency lights. In so doing, the officers conceded in later testimony that by turning on their emergency lights, the situation had been converted into a detention. Officer Dunaj also later testified, in what the prosecutor conceded was confusing and contradictory testimony, that he activated his vehicle's emergency lights due to the observed violation of V.C. § 21658 (requiring the driver to drive in a single lane), even though this statute only applies to roadways with two or more lanes in one direction, and even though Officer Dunaj did not list this section in his reports. In his arrest report, Officer Dunaj instead listed V.C. § 22107 (failure to signal a traffic lane change) because, as he testified, he considered driving over the line marking the edge of the roadway to be an unsafe movement. The Appellate Court also noted that Officer Junaj admitted in his testimony that "only one of (these Vehicle Code violations) seem[ed] to factually apply," and that it was an infraction. However in testimony, both officers testified that they believed that defendant may have been DUI. But whatever the reason (see Note, below), defendant was considered to be detained at this point. Upon Officer Dunaj turning on the

vehicle's emergency lights, defendant got out of the pickup, ignoring the officers' orders to stay in his vehicle. Instead, defendant took off running, getting about 200 feet before tripping and falling. Officer Dunaj caught up with defendant and, when defendant resisted, used his Taser on him a couple of times, "drive-stun(ning)" him in an attempt to subdue him. The struggle itself was captured on a cover officer's body camera, the resulting video conflicting with Officer Dunaj's testimony concerning whether defendant's right hand was unsecured up until being handcuffed, and whether or not defendant was reaching for his right pocket in which two folding knives were later found. Officer Dunaj also, in his testimony, changed his account as to what had occurred, admitting that defendant's right hand was underneath his body and not visible, and that he could not say whether defendant was in fact reaching for his right pocket. And just to complicate manners even more, the cover officer's testimony conflicted with Officer Dunaj's on the issue of the positioning of defendant's right hand while resisting efforts to subdue him. But in either case, defendant was eventually taken into custody, charged with resisting arrest, and taken to jail. (Why he ran from the officers is never explained.) A week later, on Christmas day (Dec. 25), defendant was riding as a passenger in the right front passenger's seat in another person's (David Bonde's) vehicle. At a little after 7:00 p.m., CHP Officer Tyler Krueger (presumably no relation to the "Freddie Krueger" of "*A Nightmare on Elm Street*" and subsequent horror movies fame) observed that the license plate light on Bonde's car was not working. So he pulled his car over and contacted the vehicle's occupants. Upon doing so, Officer Krueger recognized defendant, having been told about his December 18 arrest. While dealing with Bonde, Officer Krueger also asked defendant for his full name and date of birth, to which defendant responded by asking why he "was messing with" him. Officer Krueger decided to check defendant for warrants despite knowing that it was unlikely any existed because defendant had just been released from jail. While talking with Bonde, defendant unbuckled his seatbelt and moved his hand towards the center console. Defendant ignored Officer Krueger's demand that he put his seatbelt back on, continuing to "dig . . . for something on his left side." At this point, CHP Officer Brian Wilson arrived as backup. While Officer Wilson made small talk with defendant, Officer Krueger received information from dispatch that defendant did in fact have an outstanding felony warrant for his arrest. With a third officer (CHP Officer Levi Sackett) arriving at the scene, defendant was ordered to get out of the car. Defendant refused, denied that he had a warrant, and continued to dig between the seats to his left where at some point one of the officers observed a knife. More officers arrived, including Crescent City Police Department Officer Gene Votruba with his German Shepherd Django. Defendant violently resisted being extricated from the vehicle. But after breaking a window, and with the assistance of Django, Officer Krueger's baton, and several officers' Tasers, defendant was eventually subdued and arrested. At one point during the struggle, defendant was held to the ground by several officers putting their knees on his neck and back, with defendant screaming "*I can't breathe, I can't breathe*!" "*That's illegal*," and "*You're killing me*!" (I wonder where he got that from.) Several knives were eventually recovered, along with a small canister of methamphetamine found in defendant's belt. Defendant was given oxygen because he complained that he was having trouble breathing, and then taken to the hospital to be treated for dog bites. He was subsequently charged in state court with three counts of felony resisting arrest by force (P.C. § 69), four counts of misdemeanor resisting arrest (P.C. § 148(a)(1)), plus the possession of methamphetamine (H&S Code § 11377(a)). Convicted of all counts, plus a true finding on a prior prison term allegation, defendant was sentenced to five years and four months in state prison. Defendant appealed.

Held: The First District Court of Appeal (Div. 2) reversed. The primary issue on appeal was the validity of a special jury instruction read to the jury before deliberations. It is conceded that a necessary element of all the charged resisting arrest counts (both P.C. §§ 69 and 148(a)(1)) was that the officers were acting lawfully while performing their duties at the time defendant resisted. The California Supreme Court has observed that in order to be "perform[ing] a lawful duty," the officer must be acting lawfully. (*In re Manuel G.* (1997) 16 Cal.4th 805, 818.) "In short, if the arrest is unlawful, the defendant may not be convicted of violating section 69 or section 148." The jury in this case was instructed accordingly. CALCRIM No. 2652 pertains to the misdemeanor resisting arrest counts (i.e., P.C. § 148(a)(1)), and CALCRIM No. 2656 to the resistance by force counts (i.e., P.C. § 69), both of which were read to the jury. Both require the People to prove that "when the defendant acted, the officer was performing his lawful duty." Both instructions go on to instruct that "(a) peace officer is not lawfully performing his or her duties if he or she is unlawfully arresting or detaining someone or using unreasonable or excessive force in his or her duties." Additionally, CALCRIM No. 2670, also read to the jury, further explains that "a peace officer is not lawfully performing his or her duties if he or she is unlawfully arresting or detaining someone or using unreasonable or excessive force in his or her duties." As noted by the Court: "*So far, so good*." But then the trial court followed these correct instructions with another "special instruction" (not from CALCRIM) that is the point of contention in this case. As read to the jury, this special instruction said: "An individual's (i.e., the defendant'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 theoretically illegal detention. If you believe that the defendant was acting lawfully and that the police detained him unlawfully, a defendant's subsequent conduct in obstructing, resisting, or delaying the officers, if it occurred, can be an independent act that dissipated the taint from the initial unlawful seizure. [¶] If there was (an) unlawful detention, you may conclude that a choice to flee or to resist arrest are independent intervening acts sufficiently distinct from an illegal detention to dissipate the taint of an illegal detention." In other words, the jury was told that defendant's illegal resisting was sufficient to negate the need for the prosecution to prove the otherwise necessary element of both P.C. §§ 148(a)(1) and 69 that the officers were acting in the performance of their duties; i.e., that they were acting lawfully. The Appellate Court held that this was reversible error. The misconception as to what the law requires in this regard apparently comes from the rule that in a pretrial "motion to suppress" (pursuant to P.C. § 1538.5), a defendant's subsequent illegal conduct in resisting the officers was an independent act that dissipated the taint from an unlawful seizure. The two cases cited by the People in support of their argument, and that were used by the trial court in constructing the jury instruction at issue here, both involve motions to suppress. (See *People v. Cox* (2008) 168 Cal.App.4th 702, and *In re Richard G.* (2009) 173 Cal.App.4th 1252, 1262.) Neither case supports the argument that the same rule applies to the defendant's trial, where the prosecution is obligated to prove beyond a reasonable doubt each and every element of a charged offense. While noting that it is always dangerous for a judge to write a special jury instruction using the language of a prior case decision, particularly when the issue in that prior case involved a different context, rather than sticking with the established CALCRIM instructions, the Court held here that it was reversible error to tell the jury that an officer's possible illegal act (e.g., arrest without probable cause and/or with the use of excessive force) was excused (i.e., need not be proved) if the defendant had illegally resisted arrest.

Note: Note that the Court does *not* hold here that the officers in either arrest did in fact act illegally, at least as a matter of law. In determining what jury instructions were to be read to the jury, the Court was only saying that the legality of the officers' actions was something the jury had to consider when it determined whether or not all the necessary elements of each of the resisting arrest counts, including "acting in the performance of their duties," had been proved beyond a reasonable doubt. In other words, did Officers Dunaj and Good unlawfully detain defendant, and/or use excessive force in the December 18th incident, and did Officers Krueger, Wilson, Sackett, and Votruba use excessive force in the December 25th incident? If they did, then this is a fact, per the Court, that excuses defendant's resistance in the trial context (although it doesn't in the motion to suppress context). I don't usually brief cases that pertain to the correctness of jury instructions, this being an issue for the attorneys and the judge in the courtroom and not for the officers in the field. But I briefed this case because it was news to me, and an extremely important point, that the rule of *Cox* and *Richard G.* pertains only to motions to suppress. In a case not mentioned by the Court here—*Evans v. City of Bakersfield* (1994) 22 Cal.App.4th 321—it was ruled "that the trial court committed error in instructing the jury that plaintiff had a right to use reasonable force to resist an unlawful detention, because no such right existed." As a result of the *Evans* case, I've always believed that a defendant's illegal resistance to arrest did in fact negate the need for the People to prove that an officer's actions were lawful. But *Evans* is a civil case. *Cox* and *Richard G.*, as pointed out by this Court, involved motions to suppress. And this new case deals with what needs to be proved at trial in a criminal case. The different settings require different rules; an extremely important fact that all trial attorneys and judges need to know. *Secondly*, and more importantly to police officers, I also briefed this case to illustrate how necessary it is for officers to be properly prepared when they testify. The Court went to great lengths to point out the inconsistencies in the testimony provided by Officers Dunaj and Good (particularly the former), casting serious doubt as to the officers' credibility; a problem the jury had to have picked up on. This problem can be avoided by the officers' proper preparation for trial, including the reviewing of their reports and existing video tapes, as well as going over their proposed testimony with the prosecutor in pretrial interviews, refreshing everyone's recollection as to what actually occurred. It did not appear that any of these completely legal and proper preparations were done in this case, based upon the embarrassing inconsistencies of Officers Dunaj's and Good's trial testimony. As the record stands, there are only two possible explanations: Either the officers were lying, making up explanations for their actions on the fly, or they were just not properly prepared. We like to assume that it was the latter. Complete and accurate reports, and proper preparation for trial, would have cleared all this up. As for the meth possession charge, defendant's conviction was also reversed, it being noted that the trial court again erroneously instructed that jury, telling the jurors that it was *not* necessary to prove that defendant intended to break the law (CALCRIM No. 250) while also telling them that the People had to prove beyond a reasonable doubt that defendant "knew of [the drug's] presence" and "knew of the substance's nature or character as a controlled substance." In reversing defendant's meth possession conviction, the Court noted the express boldface warning in the Bench Notes to CALCRIM No. 250 that "this instruction must not be used if the crime requires a specific mental state, such as knowledge . . . , even if the crime is classified as a general intent offense." The fault here lies with the prosecutor and the trial court for not properly researching the law when preparing the jury instructions that needed to be given.

***Body Cavity Searches of Jail Inmates*:**

***Brown v. Polk County* (Apr. 19, 2021) __ U.S. __ [141 S.Ct. 1304; 209 L.Ed.2nd 573]**

Rule: Intrusive body cavity searches of jail inmates may be unlawful, depending upon the availability of a less intrusive means of determining whether the inmate is hiding contraband in her body.

Facts: In May, 2017, plaintiff Sharon Lynn Brown was arrested for petty theft (shoplifting) and taken to jail in Polk County, Wisconsin. The day after her arrest, two inmates ratted her off, telling jail staff that plaintiff was hiding drugs in her body. The Polk County jail had a written policy at the time permitting officials to have medical personnel perform "an inspection and penetration of the anal or vaginal cavity . . . by means of an instrument, apparatus, or object, or in any other manner" whenever they had "reasonable grounds" to believe a detainee was concealing "weapons, contraband, or evidence," or otherwise "believe[d] that the safety and security of the jail would benefit" from such a search. Based upon this information, and without seeking any corroboration or conducting any further investigation, correctional officer Steven Hilleshiem sought permission from the jail administrator, Wes Revels, to take plaintiff to a doctor for a body cavity search. With Revels' approval, plaintiff was therefore transported to a local hospital where a male doctor performed an ultrasound. This procedure, however, failed to reveal any foreign objects. So the doctor took it a step further and inserted a speculum into her vagina, spread open the vaginal walls, and shined his headlamp inside. He did the same to her anus. Still not finding any contraband, plaintiff was simply returned to jail. Plaintiff later sued in federal court, alleging a violation of her Fourth Amendment right to be free from unreasonable searches, arguing that such a search requires full probable cause and a search warrant. In her lawsuit, plaintiff alleged that after the doctor removed the speculum from her anus, she "immediately started crying. I couldn't stop. I cried myself to sleep. I cried all the way back to the jail. I cried the whole time I was getting dressed." When she returned to the jail, she "asked to stay in the holding cell because [she] couldn't quit crying." She further alleged that she suffered continued anxiety and depression, interfering with her sleep at night, and experiencing flashbacks. She testified that he feared leaving her home because she was terrified that the police would pull her over and send her back to jail. Nearly two years later, plaintiff was still afraid of being alone in a room with a man; even her own brother. The federal district (trial) court granted the civil defendants' motion for summary judgment, dismissing the lawsuit; a decision that was upheld by the Seventh Circuit Court of Appeal. In so holding the Seventh Circuit also ruled that such a "penetrative cavity search of a pretrial detainee requires only (a) reasonable suspicion," specifically ruling that full probable cause was not required. (See *Brown v. Polk County* (7th Cir. July 13, 2020) 965 F.3rd 534.) Plaintiff appealed.

Held: The United States Supreme Court denied certiorari, declining to decide the issue. However, Justice Sonia Sotomayor wrote an opinion, concurring in the denial of certiorari, that

is instructive. In her concurring opinion, Justice Sotomayor first notes that her concurrence is not because she agrees with either the Seventh Circuit or the trial court's rulings, but rather that "further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date." (She did not identify what specific future cases, if any, she might be referring to.) First, she specifically wrote that she was *not* deciding whether the civil defendants had sufficient information to establish a reasonable suspicion, whether more (e.g., "probable cause") was needed, or whether a warrant might have been required, noting that these issues depend upon the specific circumstances of any particular case. What Justice Sotomayor did hold is that the Seventh Circuit errored in failing to consider whether something less intrusive than "prying open (plaintiff's) vagina and anus" would have been sufficient to ensure jail security, and that this failure alone was sufficient to reverse the trial court's dismissal of the lawsuit. Per Justice Sotomayor, whether or not the intrusive measures employed in this case were lawful "must . . . 'be judged in light of the availability of . . . less invasive alternative[s].'" (Citing *Birchfield* v. *North Dakota* (2016) 579 U. S. ___, ___ (136 S.Ct. 2160, at pp. 2165 & 2184.) "When such (a less intrusive) option exists, the State must offer a 'satisfactory justification for demanding the more intrusive alternative.'" (*Ibid.* See also *Florida* v. *Royer* (1983) 460 U. S. 491, 500; "[T]he investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion')." Both the trial court and the Seventh Circuit failed to consider any less intrusive means of determining whether plaintiff was in fact hiding contraband in her body. Some such possible alternatives include, but are not limited to, a simple visual search, multiple visual searches over time, or an X-ray or transabdominal ultrasound (as was in fact done here, and which produced negative results). They could have also possibly isolated the plaintiff while they investigated further in order to obtain stronger evidence (e.g., probable cause). Or they could have merely awaited for a monitored bowel movement. The potential effectiveness of each, in this case, was not discussed, the point being that these are issues that should have been explored by both the trial court and the Seventh Circuit, but were not. Instead, the State sought "a categorical exception to the Fourth Amendment's warrant requirement," accepting the word of other inmates alone and unilaterally determining that this was enough to establish a "reasonable suspicion," and that this reasonable suspicion (instead of probable cause) was sufficient to allow for the warrantless intrusive measures taken here. Justice Sotomayor hinted that all of this is of questionable legality, particularly when you consider that persons booked for minor misdemeanors are to fall under the same rules as those in custody for more serious offenses. Per Justice Sotomayor, these are issues that need to be considered in future cases.

Note: Other than to say that the lower courts are to be faulted for failing to take into consideration less intrusive measures, Justice Sotomayor does not attempt to answer, let alone analyze, any of the other potential issues she raises, telling us only that they are to be considered in some future, more appropriate case. Both California and the Ninth Circuit have already attempted to answer some of these questions. For instance, it has been held that the constitutionality of a visual inspection of a prison inmate's unclothed body, including body cavities, depends upon a balancing of (1) the scope of the particular intrusion, (2) the manner in which it is conducted, (3) the justification for initiating the search, and (4) the place in which it is conducted. (*People v. Collins* (2004) 115 Cal.App.4th 137, 152-153.) The *Collins* Court also noted that the more intrusive, "*physical body cavity search*" requires judicial authorization (i.e., a search warrant) and the use of properly trained medical personnel. (*Id*., at p. 143; see also *Bouse*

v. Bussey (9th Cir. 1977) 573 F.2nd 548, 550; and *United States v. Fowlkes* (9th Cir. 2015) 804 F.3rd 954, 960-968.) Although *Collins* is a prison case, the same arguably holds true for general population county jail inmates. Also, the California Code of Regulations, Title 15, § 3287(b), allows for a visual search of an inmate, clothed or unclothed, whenever there is a "*substantial reason* to believe the inmate may have unauthorized or dangerous items concealed on his or her person." (Italics added) Judicial authorization (i.e., a search warrant), and the use of "medical personnel in a medical setting," is only required in the case of a "*physical* (as opposed to a non-contact *visual*) *body cavity search*." And lastly, California's Pen. Code §§ 4030 & 4031 place all sorts of restrictions on body cavity searches, including restricting such searches to inmates that are in the general jail population. So we're not without some guidance in California. But it will be interesting to see what the U.S. Supreme Court has to say on these issues when, or if, the unidentified future cases referred to by Justice Sotomayor are decided, discussing this important topic.