The California Legal Update

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

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Robert C. Phillips (858) 395-0302
Deputy District Attorney (Retired) RCPhill101@goldenwest.net

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THIS EDITION'S WORDS OF WISDOM:

"*Be good to your spouse. Remember: Right now, he/she could poison you and it would be counted as a Covid-19 death.*" (Unknown)

IN THIS ISSUE: pg.

ADMINISTRATIVE NOTES:

Aerial Surveillance*:** In April, 2020, the Baltimore City Policy Department entered into a contract with an organization called "Persistent Surveillance Systems," or "PSS," for the purpose of conducting an "Aerial Investigation Research" ("AIR") pilot program in Baltimore. During the AIR six-month pilot program, PSS plans to fly aircraft over Baltimore for approximately twelve hours a day, every day. Once per second, the planes will collect images of approximately ninety percent of the city at a time. This surveillance system will record virtually all of the outdoor movements of all of Baltimore's 600,000 residents. (Can you say, "*Big Brother*?") Not surprisingly, plaintiffs (led by the ACLU) filed a lawsuit in federal court under **42 U.S.C. § 1983** and **28 U.S.C. § 2201**, seeking declaratory and injunctive relief, arguing that this AIR pilot program violates their constitutional rights under the **First** and **Fourth Amendments**. Specifically, they claim that the constant surveillance infringes upon their reasonable expectation of privacy, resulting in indiscriminate searches, and that the data analysis attendant to the program violates the **Fourth Amendment**. The plaintiffs also tossed in a **First Amendment** argument just for kicks, claiming that the program violates their right to freedom of association. The federal trial court judge ruled in favor of the defendant police department (456 F. Supp. 3rd 699) and plaintiffs appealed. The Fourth Circuit Court of Appeal, in a split 2-to-1 decision, upheld the trial court's ruling, holding that Baltimore's aerial surveillance plane program passes constitutional muster. The Court held that this aerial surveillance program does in fact help police combat crime and does not violate the residents' right to privacy. Per the Court: "In addition to not infringing (on) a reasonable expectation of privacy, the AIR program seeks to meet a serious law enforcement need without unduly burdening constitutional rights." (Leaders of a Beautiful Struggle v. Baltimore Police Department*** (4th Cir. Nov. 5, 2020) 979 F.3rd 219.) Interesting decision, and one we are likely to hear about again. But maybe the good citizens of crime-ridden Baltimore, in this anti-law enforcement—"*defund the police*"—era, are just getting tired of being victimized. Makes me wonder, as California's crime rates skyrocket with the election of more and more "progressive" state and local officials, whether California's citizens will ever reach a similar conclusion.

CASE LAW:

***Detentions for Investigation; Bulges in a Person's Clothing*:**

United States v. Bontemps **(9th Cir. 2020) 977 F.3rd 909**

Rule: A bulge in a person's clothing that may in a police officer's training and experience be a concealed firearm, is sufficient reasonable suspicion to believe that the person is in illegal possession of a firearm, justifying that person's detention for investigation.

Facts: Vallejo Police Department Detectives Jarrett Tonn and Kevin Barreto were patrolling in an unmarked police SUV (presumably while in uniform) on the afternoon of April 18, 2018, when they observed defendant Tamaran Bontemps and three others walking down the street on Robles Way in Vallejo; a mixed residential-commercial area. As they drove past the group, Detective Barreto noticed that one of the men (later identified as Quinton Mills) appeared to be carrying a concealed handgun in the pouch pocket of this sweatshirt. The detectives hung a U-turn, going by them again to get a closer look. As they did so, Detective Tonn—from the passenger seat—could "very clearly" see that defendant—walking in front of Mills—had what the detective described as a "very large and obvious bulge in Mr. Bontemps' sweatshirt on his left side above his waist" that the officer recognized from his "training and experience as a police officer" to be consistent with a firearm. "In particular, (defendant), who was wearing a light gray sweatshirt that was partially zipped up, 'had a very obvious bulge on his left side just above the waist area, kind of halfway maybe between his waist and his left armpit.' Due to this 'very large and obvious bulge in (defendant's) sweatshirt on his left side above his waist,' as well as Detective Tonn's training and his encounters with 'numerous people with firearms,' Tonn believed (defendant) was carrying a concealed gun." So, making another U-turn, the officers pulled up behind the four men, exited their vehicle, and, with their firearms unholstered but held at their sides, ordered the group to sit on the curb. All four complied. As Detective Barreto was dealing with Mills (who was in fact found to be in possession of a loaded 9mm Glock handgun), Detective Tonn turned his attention to defendant who, at that point, had become argumentative, yelling at the officers and at passing cars. The detectives called for backup. Detective Tonn "deployed his Taser" on defendant in order to subdue him while ordering everyone on their stomachs. Defendant was handcuffed and searched. The bulge was found to be a .40 caliber Glock 22 handgun concealed in a shoulder holster. Defendant was determined to be on felony probation for carrying a loaded firearm in pubic with an outstanding warrant for a probation violation. He was charged federally with being a felon in possession of a firearm (18 U.S.C. § 922(g)(1)). After the federal district court judge denied his motion to suppress the firearm, defendant pled guilty and was sentenced to 4 years and 9 months in prison. He appealed.

Held: The Ninth Circuit Court of Appeal, in a split (2-to-1) decision, affirmed. It was conceded that from the point the officers got out of their vehicle and ordered everyone to sit, defendant was in fact detained. The reason for the detention was Detective Tonn's observation of the bulge in defendant's sweatshirt that the officer believed—based upon his training and experience—was as an illegally possessed firearm. Defendant argued on appeal that Detective Tonn's observations were legally insufficient to justify his detention. The applicable rules are well settled. "(A)n officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot" (*Terry v. Ohio* (1968) 392 U.S. 1; *Illinois v. Wardlow* (2000) 528 U.S. 119, 123.); often referred to as a "*Terry stop*." In California (given the rarity of concealed weapons permits), evidence that a person is concealing a firearm provides an adequate basis for a reasonable suspicion for believing that the firearm is possessed illegally (a violation of Pen. Code § 25400). The only issue in this case, therefore, was whether Detective Tonn's observation of a visible bulge in defendant's clothing was sufficient, by itself, to justify his belief that it might be a firearm, thus providing the necessary reasonable suspicion upon which to base defendant's detention. A majority of the Court ruled here that "*yes*," *it can be*, depending upon an evaluation of the "totality of the circumstances." The Court did not dispute that some bulges might be indicative of something

other than a firearm, such as maybe a prosthetic device or a package of some sort. It might even be illegal drugs which would require something more than a mere "reasonable suspicion" (i.e., "probable cause") to recover from a suspect's person. (*Note*: A "patdown" of a person's outer clothing [a "limited search"] when it is a firearm or other offensive weapon that it is suspected the suspect may be concealing, as opposed to drugs or illegal paraphernalia, is lawful when based upon no more than a "*reasonable suspicion*," due to the inherent danger involved.) However in this case, the detective testified to seeing what he—with his prior training and experience—recognized to be a "very large and obvious bulge" in defendant's sweatshirt "that likely indicated a concealed firearm." The case law gives "significant weight" to an officer's expertize on this subject; i.e., his "observation of a visible bulge in an individual's clothing that could indicate the presence of a weapon." The Court, therefore, held here that "a bulge that appears to be a concealed firearm can form the basis for a *Terry* stop in a jurisdiction where carrying a concealed weapon is presumptively unlawful" (such as California), and when the observation is made by an officer with the necessary training and experience giving some weight to such an observation. In this case, all these elements were satisfied. Defendant's detention, therefore, was lawful.

Note: A couple of things: The search of Mills' person and the recovery of his firearm was not discussed here. This appeal dealt with Bontemps' issues only. Secondly, note that defendant was never patted down for weapons; the detective going straight to a full body search. Whether or not the necessary "probable cause" to do a full search (as opposed to a more limited patdown for weapons) existed under these facts was never discussed. But with a firearm already taken off of Mills, the distinctive bulge in defendant's clothing that, with Detective Tonn's training and experience, appeared to be a firearm, and defendant's sudden loud and combative attitude to the point where Detective Tonn felt the need to Tase him, the existence of probable cause justifying the full body search doesn't seem to have been an issue. That may be why defendant didn't raise it. Third; while you may not like having to use bodycams, the Court here commented on how Detective Tonn's bodycam video substantiated his testimony that the bulge did in fact appear to be a firearm. And lastly, the presumptive illegality of carrying a concealed firearm does not necessarily apply to other jurisdictions where CCW permits are easy to get, or maybe not required at all. The Court cited Washington State as an example. (Citing *United States v. Brown* (9th Cir. 2019) 925 F.3rd 1150, 1153-1154, holding that a tip that an individual "had a gun" in Washington did *not* support a reasonable suspicion of wrongdoing because carrying a concealed firearm is "presumptively lawful in Washington.") They could have also cited South Dakota (my current home state) where you don't even need a permit to carry concealed. But the bottom line in this new case is that whether or not an officer's observation of a bulge in a person's clothing supplies the necessary reasonable suspicion to stop and detain that person depends upon an evaluation of the totality of the circumstances, including (but certainly not limited to) the officer's training and experience, the distinctiveness of the bulge, the recovery of a firearm from a co-suspect, and the combativeness of the suspect himself. Going beyond the holding in this case, you might add to the list of relevant factors such things as the nature of the area (e.g., a "high crime" or an gang-controlled area), the time of the day or night, the suspect wearing warm, bulky clothing on a warm day, recent shootings in the area, an officer's prior knowledge of the detainee's criminal history, etc. It comes down to a matter of using your training, experience, and just plain old-fashioned common sense.

***Marijuana Vehicle Searches*:**
***Closed Container of a Lawful Amount of Marijuana in a Vehicle*:**
***H&S § 11362.1(c) and a Vehicle Driver's Protection from Detention, Search, or Arrest*:**
***California's Marijuana Laws vs. Federal Law*:**
***Good Faith and Marijuana Vehicle Searches*:**

United States v. Talley **(June 15, 2020) __ F. Supp.3rd __ [2020 U.S. Dist. LEXIS 106004]**

Rule: The lawful possession of marijuana in a vehicle, by itself, does *not* supply the necessary probable cause needed to allow for a search of that vehicle for more marijuana. A closed container of not more than 28.5 grams of marijuana in a vehicle, even though not sealed, is lawful for a person who is 21 years of age or older. The fact that possession of any amount of marijuana continues to be a violation of federal law does not allow for state officers, investigating a state offense, to search for more marijuana. An officer's alleged "good faith" does not provide an exception to the search restrictions under H&S § 11362.1(c).

Facts: On July 24, 2019, at around 11:10 p.m., San Francisco P.D. Officers Griffin and Ishida made a lawful traffic stop on defendant's vehicle for driving in a lane reserved for buses and taxis, a violation of (what the Court referred to as) the "California Traffic Code § 7.2.72." (Never heard of the "California Traffic Code." This looks more like a local municipal or county code. But the legality of the traffic stop was not in issue.) As defendant fished around looking for his driver's license and registration, Officer Griffin observed in plain sight a closed, clear plastic, capped off, tube, about the size of a prescription pill bottle, containing what appeared to be marijuana. Defendant freely showed it to Officer Griffin after the officer commented on it. Believing that the presence of a container of marijuana—with a removable cap—provided the necessary probable cause to conduct a search of the entire vehicle for more, the officers had defendant step out of his car so that they could search it. The search resulted in the recovery of a firearm wedged between the driver's seat and the center console, along with some ammunition. Arrested on the spot, defendant was first charged in state court where a preliminary hearing was held. However, a federal grand jury then indicted defendant on one count of being a felon in possession of a firearm and ammunition, per 18 U.S.C. § 922(g)(1) (the state case presumably being dismissed). Defendant filed a motion to suppress everything recovered from his vehicle, alleging that because he had not more than 28.5 grams of marijuana in a *closed* plastic container, he did not violate any California laws and that the search was therefore illegal.

Held: The federal district court, in a published decision, granted defendant's motion to suppress. The Government's primary argument was that transporting any amount of marijuana in an "*unsealed*" container is a crime, and although defendant's pill bottle had a lid on it, it was not "*sealed*." California (in its infinite wisdom) voted in favor of Proposition 64 in November, 2016, decriminalizing the possession of 28.5 grams (an ounce) or less of marijuana (i.e., "cannabis") by persons 21 years of age or over. (See H&S Code § 11357) Proposition 64 also provided that "[c]annibis and cannabis products . . . deemed lawful by this section are not contraband nor subject to seizure, *and no conduct deemed lawful by this section shall constitute the basis for detention, search, or arrest.*" (H&S § 11362.1(c)). This has been interpreted to mean that so long as the driver of a motor vehicle is not violating any of the laws relating to the transportation

or use of marijuana, and he is 21 years old or older and possesses a legal amount of the stuff, and so long as there is no other articulable legal cause to search his car for more contraband, conducting such a search is illegal. Some of the laws a driver can violate, taking it out from under the protective umbrella provided by H&S § 11362.1(c), are driving while under the influence of marijuana (V.C. § 23152(f)), or smoking it while driving (H&S § 11362.3(a)(7) and (8)). At issue here is a third statutory restriction, providing that you cannot possess an "open container or open package of cannabis or cannabis products while driving." (H&S § 11362.3(a)(4)) As noted by the Court: "The statute in question in this case is Vehicle Code § 23222, which states that, 'while driving a motor vehicle,' it is an infraction to possess 'any receptacle containing any cannabis . . . which has been opened or has a seal broken, or loose cannabis flower not in a container . . . .' Vehicle Code § 23222(b)(1)." The bone of contention here was whether this meant that the container had to be not only unopened, but in a "sealed" condition to be lawful. Citing prior California authority, the Court held that it does not. (See *People v. Shumake* (2019) 45 Cal.App.5th Supp. 1.) Per the Court; "the government's strained interpretation that any non-sealed container is illegal would render meaningless the final clause, which implies that transporting loose cannabis flower 'in a container"' is allowed." Per the ruling in *Shumake*, even though not sealed, a closed container is in compliance with V.C. § 23222(b)(1). The *Shumake* court ruled that the officer's "belief that any cannabis being transported in a vehicle must be in a heat-sealed container is not supported by the plain language of Section 23222(b)(1)." Therefore, an officer cannot rely on the presence of a closed (even though not sealed) container of less than an ounce of marijuana—it being lawful—as justification to search a vehicle for more marijuana in that, as provided by H&S § 11362.1(c), "*no conduct deemed lawful by this section shall constitute the basis for detention, search, or arrest.*" The Court further ruled that the fact that the possession of any marijuana at all is still a violation of federal law (marijuana still being classified federally as a Schedule I controlled substance, illegal to possess pursuant to 21 U.S.C. § 844(a)) does not provide an excuse to skirt the H&S § 11362.1(c) protections from being detained, arrested, or searched. The Ninth Circuit has already held that local police officers do not have probable cause to arrest when the alleged violation is of federal law in those circumstances where the officers are, at the time, investigating a violation of state law. (*United States v. Jones* (U.S. Dist. Ct. 2020) 438 F.Supp.3rd 1039. See also *United States v. $186,416.00 in U.S. Currency* (9th Cir. 2010) 590 F.3rd 942, 948. See also *Commonwealth v. Craan* (Mass. 2014) 469 Mass. 24: "Federal law does not supply an alternative basis for investigating possession of one ounce or less of marijuana.") Lastly, the Court rejected the Government's argument that the officers' "good faith" saves the search in this case. This argument doesn't fly because even though the officers did not have the benefit of the *Shumake* decision—it not being decided until after the search in this case—the relevant statutes were there when they conducted this search. Neither *Shumake* nor this decision here is a novel interpretation of the relevant statutes, which the officers are presumed to know and understand. The good faith exception, therefore, does not apply. The search of defendant's vehicle and the recovery of the gun, therefore, was illegal.

Note: Even though this is only a federal trial court decision, it is consistent with *People v. Shumake*. And even though *Shumake* is only a decision out of the Appellate Department of the Alameda Superior Court, there is no decision on this issue from a higher court, state or federal. So, until there is, this case and *Shumake* are controlling. Noting that V.C. § 23222(b)(1) talks about a container "which has been opened *or* has a seal broken" (Italics added), written in the

disjunctive, then it makes sense that there is no requirement that the container actually be sealed. The fact—or whether it is even important—that the pill bottle may have been opened earlier while in the vehicle, and then closed again, is not discussed. (See H&S § 11362.3(a)(4)), when it references the possession of "an *open* container or *open* package of cannabis or cannabis products while driving.") The bottom line is that the container apparently must actually be *open* when observed by the officer to be illegal.

***Warrantless Entries into a Residence*:**
***The Attenuation Doctrine and Attenuation of the Taint*:**
***Fruit of the Poisonous Tree and Attenuation of the Taint*:**

United States v. Garcia **(9th Cir. Sept. 10, 2020) 974 F.3rd 1071**

Rule: When the causal connection between unconstitutional police conduct and subsequently discovered evidence is remote or has been interrupted by some intervening circumstance, so that the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained, then the resulting evidence might still be admissible. The "attenuation of the taint doctrine" is an exception to the "fruit of the poisonous tree" rule.

Facts: After chasing a wanted suspect to the door of defendant's apartment, and arresting him as he tried to escape via a back window, officers entered defendant's apartment without a warrant and without consent for the stated purposes of checking the welfare of anyone inside (i.e., the "emergency aid exception") and/or as a "protective sweep" for other suspects. While inside, the officers contacted defendant (who appeared to have been sleeping), held him at gunpoint, handcuffed him, and took him outside. Once outside, it was discovered that defendant was subject to a probationary Fourth waiver, and subject to warrantless searches. Officers then reentered his apartment and conducted a full Fourth waiver search, finding methamphetamine "and other incriminating evidence." In a previous appeal and an unpublished decision, the Ninth Circuit rejected both excuses for entering defendant's apartment, holding that the officers violated of the Fourth Amendment. (See *United States v. Garcia* (9th Cir. 2018) 749 F. App'x 516.) Upon returning the case to the trial court for a determination of whether the "attenuation doctrine" applied—i.e., whether the discovery of the suspicionless search condition was an intervening circumstance that broke the causal chain between the initial unlawful entry and the discovery of the evidence supporting defendant's conviction—the trial court held that the attenuation doctrine *does* apply. Defendant appealed.

Held: The Ninth Circuit Court of Appeal again reversed, finding that the evidence recovered from defendant's apartment during the Fourth waiver search should have been suppressed. It had already been held in this case (in the prior appeal) that the officers illegally entered defendant's apartment and illegally arrested him; all before discovering that he was subject to a Fourth waiver search. As a general rule, all products of such an illegal entry into defendant's apartment and his illegal arrest are subject to suppression as "fruit of the poisonous tree." (*Wong Sun v. United States* (1963) 371 U.S. 471.) It was undisputed in this case that but for the initial unconstitutional entry, the officers would not have known that defendant even existed, let alone that he was subject to the suspicionless search condition that the officers relied upon to conduct the second search. Thus, the incriminating evidence would not have been discovered if not for

the unconstitutional entry**.** However, it is a rule that when the causal connection between some unconstitutional police conduct and subsequently discovered evidence is remote or has been interrupted by some intervening circumstance, so that "the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained" (See *Hudson v. Michigan* (2006) 547 U.S. 586, 593.), then the resulting evidence might still be admissible. The potential admissibility depends upon an evaluation of the surrounding circumstances. Referred to as the "*attenuation doctrine*," this rule provides an exception to the usual rule of exclusion or suppression of the evidence. It applies when "the connection between the illegality and the challenged evidence has become so attenuated as to dissipate the taint caused by the illegality." The United States Supreme Court has set out three factors to consider when determining whether the "attenuation doctrine" applies to a given case. (*Utah v. Strieff* (June 20, 2016) 579 U.S. __, __ [136 S.Ct. 2056].) Per *Strieff*, the circumstances to be considered are:

- The temporal proximity (i.e., the amount of time) between the Fourth Amendment violation and the procurement of the challenged evidence;
- The presence of intervening circumstances; and
- The purpose and the flagrancy of the official misconduct.

Factor 1: The Court found that "(t)he temporal proximity factor weigh(ed) in favor of suppression because only a few minutes passed between the officers' unconstitutional entry into (defendant's) home and those very same officers' reentry into his home to conduct the investigatory search." The Government did not argue otherwise. *Factor 2*: The presence of an intervening circumstance (i.e., the discovery of defendant's Fourth waiver) also weighed in favor of suppression. The Court reasoned that "a suspicionless search condition differs from an arrest warrant (as occurred in *Strieff*) in a significant respect," finding the former to be an optional "exercise of discretionary authority," while the latter is acting on a mandatory court order; i.e., an arrest warrant. This difference makes the discovery of an arrest warrant a stronger intervening factor than the discovery of a Fourth waiver. As such, the discovery of defendant's Fourth waiver was held not to be sufficient to break the causal chain between the officers' constitutional violations and the ultimate discovery of meth in his apartment. *Factor 3*: "The purpose and the flagrancy of the official misconduct" factor was also held to favor suppression in that it was the warrantless entry into a residence and handcuffing defendant—all done at gunpoint—before removing him from his own apartment, even if the officers acted in good faith, that was at issue. Because private residences are accorded the highest level of protection under the U.S. Constitution (i.e., the "*first among equals*" for purposes of the Fourth Amendment. [*Florida v. Jardines* (2013) 569 U.S. 1, 6.]), when combined with the manner in which the officers made their entry (e.g., illegally, and with guns drawn) and defendant's immediate handcuffing, was all held to be more egregious than other less intrusive constitutional violations. Based upon all of the above, the attenuation doctrine did not apply. The evidence discovered in defendant's apartment, therefore, should have been suppressed.

Note: There's really nothing too surprising in this case. I noted, however, that the Court did question the officers' honestly (not to mention their honesty and integrity), surmising that the Fourth waiver search was perhaps the result of them seeing something in defendant's apartment during the "protective sweep" that piqued their interest, thus motivating them to conjure up a fake excuse to do a full search (ignoring the fact that defendant's Fourth waiver was not shown to be "fake"). The Court had absolutely no evidence supporting such an accusation, but that little

inconvenient problem didn't prevent them from making it anyway. And then with nothing in the record to support such an accusation, the Court faulted the Government for failing to prove that the officers *weren't* so motivated. Go figure. Such a negative attitude, with the Court exhibiting their unsupported distrust of the officers, only suggests to me that the officers in this case could do no right no matter what the true facts were. But the Justice's unsubstantiated paranoid suspicions aside, it is worth mentioning that the belief held by many law enforcement officers that "protective sweeps" are presumed to be legal without any attempt to articulate some factual justification for doing so is not supported by the case law. The rule is that for a protective sweep to be lawful, you must have a "*reasonable belief*" that there is another person on the premises who poses a danger to those at the scene. (*Maryland v. Buie* (1990) 494 U.S. 325; see also *People v. Block* (1971) 6 Cal.3rd 239.) The only possible exception might be that upon making an arrest in a residence, officers may do a quick check of those areas immediately adjacent to the location of the arrest, such as closets and other spaces immediately adjoining the place of arrest from which an attack could be launched, for the sole purpose of eliminating the possibility that someone may be hiding there. (*Maryland v. Buie*, *supra*, at p. 334.) So what could the officers have done here that would have led to a more positive result? They could have taken it a little slower and knocked on defendant's door instead of just barging in. When he responded (which he no doubt would have), they could have asked a few simple questions concerning why their fleeing suspect would have chosen defendant's apartment in an attempt to escape from the officers. In the process, they could have sought defendant's identification. And while he would not have been obligated to identify himself under these circumstances, it he had, the Fourth waiver would have been lawfully discovered. End of issue.

***P.C. § 1538.5 Motions and Illegal Detentions*:**
***P.C. § 148(a)(1) When Perpetrated During an Unlawful Detention*:**

People v. Chavez **(Sept. 10, 2020) 54 Cal.App.5th 477**

Rule: The exclusionary rule does not apply to a new and distinct crime occurring during or immediately after a detention, whether the detention was lawful or not. Therefore, the lawfulness of a suspect's detention is not relevant at a motion to suppress pursuant to P.C. § 1538.5 when charged only with resisting arrest.

Facts: Defendant was arrested and charged with the misdemeanor offense of resisting, obstructing, or delaying a peace officer in the performance of his (or her) duties, pursuant to subdivision (a)(1) of Penal Code § 148. The underlying facts leading to this charge were not described in the Court's decision. Defendant moved pursuant to P.C. § 1538.5 to suppress, arguing that his initial detention was illegal. The People responded by arguing that defendant was not entitled to such a hearing, submitting that the lawfulness of his detention is irrelevant to the charge of P.C. § 148(a)(1). The trial court agreed, denying defendant's motion without a hearing. However, the Appellate Department of the Superior Court reversed the trial court's decision. The Court of Appeal ordered the matter transferred to them.

Held: The Second District Court of Appeal (Div. 6) affirmed the trial court's decision (thus reversing the Appellate Department of the Superior Court). Pen. Code § 1538.5(c)(1) provides that: "(w)henever a search or seizure motion is made in the superior court as provided in this

section, the judge or magistrate shall receive evidence *on any issue of fact necessary to determine the motion*." (Italics added) Citing *In re Richard G.* (2009) 173 Cal.App.4th 1252, the People argued that this is to be interpreted to mean that the exclusionary rule does not apply to a new and distinct crime occurring during or immediately after a detention, whether the detention was lawful or not. Pursuant to *Richard G,* even when a person is unlawfully detained, the circumstances of that detention do not excuse defendant's concurrent or later illegal resistance, as charged pursuant to P.C. § 148(a)(1). Therefore, whether or not a defendant—charged with physically resisting his detention—was unlawfully detained is irrelevant and therefore not "*necessary to determine the motion*" to suppress. And because only relevant evidence is admissible at a 1538.5 motion to suppress (see Evid. Code § 350), the circumstances of defendant's detention are inadmissible. Therefore, because the lawfulness of defendant's detention is irrelevant, no evidentiary hearing as to the lawfulness of defendant's detention is required.

Note: This rule, however, does not mean that officers don't have to be concerned with whether or not they unlawfully detain someone. The officer may still be subject to a federal civil suit pursuant to 42 U.S.C. § 1983, and/or California's "Bane Act;" Civil Code § 52.1. Also, as a trial (as opposed suppression motion) issue, illegally detaining someone may negate the necessary element of a P.C. § 148 charge; i.e., that the officer was acting in the "*performance of his* (*or her*) *duties*," there being no such duty to unlawfully detain someone. (See *Evans v. City of Bakersfield* (1994) 22 Cal.App.4th 321.) And, of course, any physical evidence discovered during or as a product of an illegal detention is still going to be subject to suppression. All this new case here says is that a subject's resistance to being detained is not excused merely because the detention might have been illegal and therefore is not to be litigated pursuant to a P.C. § 1538.5 motion to suppress when that resistance is the only issue.

***Prison Visitors' Strip Searches*:**

***Cates v. Stroud* (9th Cir. Sept. 25, 2020) 976 F.3rd 972**

Rule: Strip searches of visitors to a prison facility must be based upon a reasonable suspicion to believe the visitor is in possession of contraband. A visitor to a prison with a reasonable suspicion to believe that he or she possesses contraband may be subject to a strip search, but only after given the option of leaving the institution/facility grounds without being searched.

Facts: Plaintiff Tina Cates' boyfriend, who she would visit once a week, was incarcerated in Nevada's High Desert State Prison. On February 19, 2017, she attempted to visit him again. However, prior to this occasion, prison officials had received a tip from "two confidential credible sources" that plaintiff might try to bring drugs into the prison. Based upon this information, Arthur Emling, Jr., a criminal investigator with the Nevada Office of the Inspector General, obtained a search warrant authorizing him to search plaintiff's "person," as well as "any vehicles used and registered by Cates to transport herself to High Desert State Prison," and to seize "any and all illegal controlled substances/narcotics." However, the warrant *did not* specifically authorize a visual body cavity strip search of plaintiff's person, nor did it include authorization to search any cellphones she might have. When plaintiff arrived at the prison on February 19th, she signed a consent-to-search form as she did preparatory to every other visit,

agreeing to the "search of (her) person, vehicle and other property which I have brought onto prison grounds." The form did not mention "strip searches." Plaintiff believed, as was the normal procedure, that she was agreeing to being patted down only. After signing this form, however, Emling and a female criminal investigator for the Office of the Inspector General (Myra Laurian) approached plaintiff and, without explanation, had her follow them to the prison administration building. Once there, Laurian took plaintiff into a bathroom where she was "told" her to remove her clothing, including her bra and underwear. She was also instructed to remove a tampon she was using at the time. She was then "ordered" (as opposed to "asked") to "bend over and spread her cheeks." Believing that she did not have a choice, plaintiff complied with Laurian's instructions. No drugs were found. Allowed to dress again, plaintiff was not provided with a new Tampon, but given instead some "toilet paper to shove down there." Plaintiff was never told she might have a choice in submitting to the above procedure or that she was free to leave. Following this strip search, plaintiff was "detained" (or, at least, she felt like she was being detained) in the prison administration building while Emling took her car keys and searched her car. Finding only a cellphone, but no drugs, Emling took plaintiff's cellphone back to the admin building and asked her for permission to search it. Plaintiff declined. Based upon this refusal, plaintiff was not allowed to visit her boyfriend. Also, her visiting privileges at the prison were terminated. The search warrant Emling had obtained was never executed. Plaintiff subsequently sued Emling, Laurian, and others, in federal court, pursuant to 42 U.S.C. § 1983. The federal district (trial) court granted the civil defendants' motion for summary judgment. Plaintiff appealed.

Held: The Ninth Circuit Court of Appeal affirmed, finding that although plaintiff's rights had in fact been violated, the civil defendants were entitled to qualified immunity. Among the issues raised by plaintiff on appeal (and her only "viable" issue, per the Ninth Circuit) was her claim that the "unconsented strip search" of her person violated the Fourth Amendment. The Fourth Amendment does not prohibit all searches; only "*unreasonable*" searches. To determine whether a particular search is unreasonable, the intrusion on the individual's privacy interests must be balanced against "its promotion of legitimate governmental interests." Prisons, being "fraught with serious security dangers," present a unique situation requiring a court to balance the prison's "significant and legitimate security interests" against the privacy interests of those who enter, or seek to enter, the prison. While prison visitors don't shed all their rights, what rights they do have are diminished to the extent necessary so that they don't compromise the prison officials' need to prevent the smuggling of money, drugs, weapons, and other contraband into the prison. "Prison officials . . . have a strong interest in preventing visitors from smuggling drugs (and other contraband) into the prison." The issue here is to what extent, if at all, strip searches are allowed in order to accomplish this goal. In evaluating this issue, it has been recognized by the U.S. Supreme Court that "courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." (*Bell v. Wolfish* (1979) 441 U.S. 520, 559.) Patdown searches and metal detector screenings of visitors to airports, court houses, and prisons—given their relative minimal intrusiveness—are allowable without any suspicion to believe the visitor is carrying contraband. Strip searches, however, involving the visual exploration of body cavities and given the fact that they are "dehumanizing and humiliating," are at the other end of the spectrum. The Fourth Amendment has been held to permit strip searches, whether of prison inmates or mere visitors, only in limited circumstances. (*Bell v. Wolfish*, *supra*, at pp. 558-560.) The Ninth Circuit has

previously held that prison inmates (as opposed to mere visitors), with limited exceptions (see Note, below), may be subjected to strip searches only upon a determination that there is sufficient "reasonable suspicion" to believe that the prisoner searched might be in possession of "smuggled weapons, drugs or other contraband which pose a threat to the safety and security of penal institutions." (*Fuller v. M.G. Jewelry* (9th Cir. 1991) 950 F.2nd 1437, 1447; *Kennedy v. Los Angeles Police Dep't* (9th Cir 1990) 901 F.2nd 702, 715; *Edgerly v. City and County of San Francisco* (9th Cir 2010) 599 F.3rd 946, 957.) Other federal circuits have extended this rule to prison visitors. (E.g., see *Burgess v. Lowery* (7th Cir. 2000) 201 F.3d 942, 945; recognizing "a long and unbroken series of decisions by our sister circuits" finding "strip searches of prison visitors . . . unconstitutional in the absence of reasonable suspicion that the visitor was carrying contraband.") The Ninth Circuit adopted this rule by its decision in this case. *But that's not the end of the issue*. Because a strip search is permissible only if it can be justified by a legitimate security concern, the person to be searched (at least when based upon no more than a reasonable suspicion) must first be afforded the opportunity to leave the premises instead of being searched. If the visitor chooses the option of foregoing an intended visit, then the possibility that contraband or weapons can be brought into the prison no longer exists. Therefore, the only time a strip search is lawful is when (1) "*probable cause*" exists that the visitor has contraband on his person, *or* (2) with a "*reasonable suspicion*" to believe that the visitor possesses contraband *and*, having been offered the opportunity to leave, decides he or she would rather be searched. Per the Court: "If the visitor would prefer to leave the prison without such access, the prison's security needs can be satisfied by simply letting the visitor depart." In this case, Investigator Emling had obtained a search warrant for plaintiff's person, but never executed it. So the warrant's validity was not litigated. Either way, however, the warrant *did not* authorize a strip search. But having gotten a magistrate's approval in the warrant to search plaintiff's person (short of a full strip searh), it can be assumed (without deciding) that there was at least a reasonable suspicion to believe she would have contraband on her. However, plaintiff was never offered the opportunity to forego her visit and just leave. A strip search, therefore, under these circumstances was indeed in violation of the Fourth Amendment. However, given the lack of any prior case authority on this issue from the Ninth Circuit, the Court held that Investigators Emling and Laurian cannot be held to have known this rule, thus providing them with qualified immunity.

Note: The Court's discussions wandered into several related issues albeit irrelevant to this case. For instance, it was noted that strip searches of *prisoners* (as opposed to mere visitors) are allowed only when (1) the inmate searched has just had a contact visit (*Bell v. Wolfish* (1979) 441 U.S. 520, 558-560.), (2) upon being introduced into the general population (*Florence v. Board. of Chosen Freeholders of the County of Burlington* (2012) 566 U.S. 318; *Bull v. City and County of San Francisco* (9th Cir. 2010) 595 F.3rd 964.), or (3) any other time where there exists a reasonable suspicion that the inmate possesses contraband. A prisoner, obviously, isn't given the opportunity to avoid the search by choosing to leave. *Visitors*, on the other hand, can eliminate the problem by just deciding to forego their intended visit and leave, even when there is a reasonable suspicion that they are carrying contraband. But they must be given that opportunity. The Court also delved a bit into prison parking lot searches of vehicles. California has held that a prison visitor's vehicle is *not* subject to search absent a prior warning and then given the opportunity to just leave. (*Estes v. Rowland* (1993) 14 Cal.App.4th 508.) To the contrary, federal courts have allowed a warrantless search of a visitor's vehicle based upon no more than a reasonable suspicion and *without* offering the driver the opportunity to leave. (See

United States v. Prevo (11th Cir. 2006) 435 F.3rd 1343; *Neumeyer v. Beard* (3rd Cir. 2005) 421 F.3rd 210, 211, *McDonell v. Hunter* (8th Cir. 1987) 809 F.2nd 1302, 1309, and *Spear v. Sowders* (6th Cir. 1995) 71 F.3rd 626.). In the parking lot search cases, the federal courts have noted that there is a substantial difference between a strip search ("*humiliating and intrusive*") and a vehicle search, and that at least in some of the cases, prisoners had access to the parking lots at the facilities in issue. Without specifically so ruling, the Ninth Circuit didn't disagree with this reasoning.