The California Legal Update

Remember 9/11/2001; Support Our Troops

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THIS EDITION'S WORDS OF WISDOM:

"*My luck is so bad that if I bought a cemetery, people would stop dying.*" (Rodney Dangerfield.)

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ADMINISTRATIVE NOTES:

Arresting for Violations of V.C. § 12500: I was recently asked about V.C. § 12801.5(e), where it provides in part: "(*A*) *peace officer may not detain or arrest a person solely on the belief that the person is an unlicensed driver*, unless the officer has reasonable cause to believe the person is under the age of 16 years." I've been asked if this detention/arrest restriction conflicts with V.C. § 40302(a) which mandates the arrest of a subject who "*fails to present his driver's license or other satisfactory evidence of his identity for examination*." Section 12500(a) provides that: "A person may not drive a motor vehicle upon a highway, unless the person then holds a valid driver's license issued under this code, . . ." The general consensus is that section 40302(a) dictates that

you *will* arrest for a violation of this section. But does section 12801.5(e) prevent you from doing so? The Ninth Circuit Court of Appeal, in *Bingham v. City of Manhattan Beach* (9th Cir. 2003) 341 F.3rd 939, says that arresting a person for a section 12500(a) violation is illegal pursuant to section 12801.5(e). However, since 2003, *Bingham* has been criticized in a number of subsequent cases, even though never specifically overruled. Also, the Ninth Circuit subsequently decided *Harvey v. Coronado* (9th Cir. 2012) 2012 U.S. Dist. LEXIS 187471, upholding an arrest for V.C. § 12500 without mentioning section 12801.5(e). Further, the U.S. and California Supreme Courts have decided any number of times that violating a state statute by making a custodial arrest for a misdemeanor, or even an infraction, which, by state law is subject to a citation only, doesn't itself violate the Fourth Amendment. So nothing gets suppressed. (E.g.; see *Virginia v. Moore* (2008) 553 U.S. 164 [170 L.Ed.2nd 559].); *People v. McKay* (2002) 27 Cal.4th 601.) And lastly, the way I read V.C. § 40302(a), an arrest is lawful (or rather mandatory) where the driver is unable to produce any "satisfactory evidence of his identity." So it would only be when he's driving without a valid license, but has other "satisfactory evidence of identity," that the arrest restriction of section 12801.5(e) applies. If he has neither a license *nor* any other "satisfactory evidence of his identity," which is what usually happens, taking him into custody under authority of section 40302(a) for not having that evidence of his identity does not violate section 12801.5(e). At least that's my opinion, for what its worth.

CASES:

***Post-Arrest Silence as an Invocation of Rights*:**

People v. Tom **(Aug. 14, 2014) __ Cal.4th __ [2014 Cal. LEXIS 5469]**

Facts: Defendant and a friend (a retired San Francisco Police Department officer), Peter Gamino, were drinking Vodka tonics while enjoying a steak dinner. After dinner, Gamino agreed to assist defendant in picking up a car at defendant's nearby son's home. Per Gamino, defendant did not appear to be intoxicated although he admitted that they had some difficulty finding defendant's son's house. On the return trip home, with defendant driving his Mercedes E320 and Gamino following him in his son's car, Gamino had some difficulty keeping up. At the same time, shortly before 8:20 p.m., Loraine Wong was stopped at a stop sign at the intersection of Santa Clara Avenue and Woodside in Redwood City with her two daughters, Sydney, age 8, and Kendall, age10, in her Nissan Maxima. Not seeing any cross traffic, she proceeded into the intersection intending to make a left turn onto Woodside as defendant's speeding car approached the intersection. With no indication that he attempted to brake at all, defendant broadsided the left-rear corner panel and rear passenger door of Wong's Nissan, hitting it hard enough to put her into a 360 degree spin. With Woodside being a posted 35 mile-per-hour speed zone at that location, it was later estimated that defendant was traveling between 49 to 67 miles per hour, depending upon whose expert you believe. Young Sydney died shortly thereafter at a nearby hospital. Kendall and Loraine Wong sustained serious injuries. Defendant complained of a sore ankle, but refused medical treatment, asking only that he be allowed to walk to his nearby home. With that request being denied, he grudgingly agreed to accompany officers to the police station, and then to a hospital, for the purpose of voluntarily providing a

blood sample, collection of such a sample being the policy of the Redwood City P.D. in any serious injury accident. While at the hospital, however, officers noticed for the first time that defendant had an odor of alcohol on his breath and that his eyes were bloodshot and glassy. A short field sobriety test (i.e.; the horizontal gaze nystagmus test, the Romberg test, and the finger-to-nose test) was administered after which it was determined that he was under the influence of alcohol. At no point did he ever ask about the welfare of the occupants of the car he'd hit. His only comment had been that he never saw the victims' car. Defendant's blood was drawn at 11:13 p.m., around three hours after the crash, revealing a blood-alcohol level of 0.04%. Using a burn-off rate of 0.02% of alcohol per hour (the rate widely accepted as accurate in the scientific community), a criminalist opined that defendant had consumed six drinks and that his blood-alcohol level at the time of the crash was 0.098%. (The defense expert testified that it could have been as low as 0.01 to 0.02%.) In the criminalist's opinion, defendant would have been too impaired to drive safely. Defendant was charged in state court with vehicular manslaughter with gross negligence (P.C. § 192(c)(1)) and various other alcohol, DUI-related charges. At trial, the prosecutor elicited testimony from two of the officers that defendant never inquired as to the welfare of the occupants of the vehicle he'd hit, arguing to the jury that this indicated a consciousness of guilt. A jury acquitted defendant of the alcohol-related charges but convicted him of vehicular manslaughter with gross negligence, and found true an allegation that he personally inflicted great bodily injury on Kendall Ng. (Former P.C. § 12022.7(a).) The court sentenced defendant to seven years in prison. However, the Court of Appeal reversed his conviction, ruling that defendant was in effect under arrest when he was transported from the scene of the accident (i.e., a "de facto" arrest), and that using his post-arrest silence concerning the welfare of the victims was a Fifth Amendment, self-incrimination violation. The People petitioned to the California Supreme Court.

Held: The California Supreme Court, in a split (4-to-3) decision, reversed the Court of Appeal, and remanded for further proceedings. The issue on appeal was the propriety of the prosecutor's use as substantive evidence of guilt defendant's failure to ask (i.e., his "silence") about the welfare of the occupants of the vehicle he hit. The question is: Does a criminal suspect effectively invoke his right to silence under the Fifth Amendment, thus precluding the use of such silence in evidence against him, merely by failing to ask about or otherwise discuss a potentially incriminating topic? After the trial in this case was complete, the U.S. Supreme Court decided that case of *Salinas v. Texas* (June 17, 2013) 570 U.S. ___ [133 S. Ct. 2174]. In *Salinas*, the issue was whether an out-of-custody suspect who had been freely answering a police officer's questions during a non-custodial interrogation (thus, no *Miranda* admonishment or waiver) effectively invoke his right to remain silent merely because he suddenly becomes quite when asked about some potentially incriminating circumstances. The Supreme Court in *Salinas* ruled that such silence was not a legally effective invocation. The High Court noted in *Salinas* that "(t)he privilege against self-incrimination is an exception to the general principle that the Government has the right to everyone's testimony." *Salinas* stands for the general proposition that the prosecution may use a defendant's pre-arrest silence in response to an officer's questions as substantive evidence of his guilt (and not just as impeachment evidence), at least where the defendant had not yet expressly invoked the self-incrimination privilege. "(T)he privilege 'is not self-executing' and 'may not be relied upon unless it is invoked in a timely fashion.' . . . (A) witness must assert the privilege to subsequently benefit from it." The California Supreme Court, in this case, extended this rule to the *post-arrest*, *pre-admonishment* stage where there has not

yet been an express, unequivocal invocation of the suspect's right to silence. "(D)efendant, after his arrest but before he had received his *Miranda* warnings, needed to make a timely and unambiguous assertion of the privilege in order to benefit from it." Here, defendant merely failed to express any concern for, or make any inquires about, the victims; a fact the prosecutor introduced into evidence through the testimony of several witnesses and brought up in closing arguments as something relevant to the defendant's "*consciousness of guilt*." In effect, his silence on this issue was used against him as substantive proof that he knew he did wrong. While the Court of Appeal found that this was a Fifth Amendment, self-incrimination violation, by using his silence against him, the California Supreme Court ruled that under the theory of *Salinas*, it was not. But because the Appellate Court had not yet determined whether defendant had in fact expressly invoked his rights at some other point in his contact with the police, the case was remanded for a determination of this issue.

Note: Well, now I'm confused. The Court likened a suspect's lack of concern as to the condition of his victims to an "*equivocal attempt to invoke*," which as we know is legally insufficient to halt an interrogation. But this, to me, is like comparing apples and oranges. Recent cases (including the Supreme Court's own *People v. Suff* (2014) 58 Cal.4th 1013, 1068, briefed below) have found that equivocal attempts to invoke are legally insufficient *only* after a prior waiver and when an in-custody defendant is then attempting to halt the questioning mid-interrogation. An equivocal invocation *is* legally effective when made at the initiation of an interrogation where there has been no prior waiver. (E.g.; see *Sessoms v. Runnels* (9th Cir. 2012) 691 F.3rd1054.) But in this case, we're not even talking about an actual, overt attempt to invoke, whether equivocal or not. So I'm not sure why the Court even discussed equivocal invocations. Also note that the Ninth Circuit Court of Appeal disagrees with this Court's analysis, having held several times that one's silence might very well be the equivalent of an invocation. (See *United States v. Velarde-Gomez* (9th Cir. 2001) 269 F.3rd 1023; *United States v. Whitehead* (9th Cir. 2000) 200 F.3rd 634.) The Court here recognized the split of opinion on this issue, but disagreed with the Ninth Circuit. So we may see more on this subject in the very near future, particularly since the political makeup of the California Supreme Court is changing drastically in the very near future. Also, the Court hinted that on remand, the Appellate Court might consider whether the probative value of defendant's failure to ask about the welfare of his victims, when compared with its potential prejudicial effect, would make such evidence inadmissible pursuant to E.C. § 352 (prejudicial effect being outweighed by its probative value). I tend to agree. Throughout reading this case, I kept asking myself; "*How does the defendant's* (*admittedly deplorable*) *lack of concern for anyone other than himself relate to a 'consciousness of guilt*?'" The Supreme Court never directly addresses this question.

***Failure to Signal, per V.C. §§ 22107 & 22108*:**
***Miranda*; *Ambiguous Attempts to Invoke*:**

People v. Suff **(Apr. 28, 2014) 58 Cal.4th 1013**

Rule: (1) Failure to signal while making a right turn at an intersection is a violation of V.C. § 22107. (2) In order to invoke one's right to counsel under the Fifth Amendment after a previous waiver, a suspect must unambiguously assert his rights.

Facts: In January, 1989, defendant picked up a prostitute by the name of Rhonda Jetmore on Main Street in the City of Lake Elsinore. While negotiating the cost of her services, defendant suddenly attacked her; choking her into near unconsciousness. While face to face with her assailant, Jettmore was able to get a good look at him. She also noted that he wore a belt buckle with the name "Bill" on it (defendant's first name is William). Jetmore was able to break free from defendant's grasp by hitting him in the head with a flashlight she had with her, knocking off his wire-rimmed glasses. She then made good her escape as defendant sought to retrieve his glasses. Her description of his physical appearance later became instrumental in his later capture and prosecution. This event was followed by a gruesome series of murders reminiscent of the television series "Criminal Minds." Twelve prostitutes disappeared off the streets of the cities of Lake Elsinore and Riverside between June, 1989, and December, 1991. Their bodies were eventually found, one by one, abandoned in fields and other rural areas. Commonalities indicating that they had all been murdered by the same person included, in addition to being prostitutes, that each victim met her end by asphyxiation due to strangulation. Four of the victims also suffered stab wounds to the chest, and the right breast of three of the victims were excised and left near the bodies. Fibers, hair samples, DNA, unique mismatched tire tracks, and shoeprints, all eventually tied to defendant, were recovered from most of the victims and the areas where they were dumped. Finally, on the evening of January 9, 1992, Riverside Motor Officer Frank Orta was on patrol in an area of Riverside known for its prostitution activity when a van attracted his attention. As Officer Orta watched, an apparent prostitute approached and conversed with the driver of the van, only to walk away. Being aware of information from a police bulletin concerning the serial killings of prostitutes, and noting that the van matched the general description of the killer's van as provided by Rhonda Jetmore, Officer Orta decided to follow it. Upon observing the van make an illegal right turn from the center lane without signaling, Officer Orta effected a traffic stop and contacted defendant; the van's driver. It was quickly determined that defendant's license was suspended and his vehicle registration expired. Also, defendant resembled a composite sketch of the murder suspect obtained from Rhonda Jetmore's description of the man who attacked her. After some investigation at the scene, defendant was arrested for a parole violation, having served prison time in Texas for murdering his daughter some years back, and transported to the police station for questioning. At the police station, Detective Christine Keers advised defendant of his *Miranda* rights and obtained a waiver in writing. But then defendant asked; "*Do I need a lawyer*?" To this, Detective Keers responded; "*Well, I don't know. Do you need a lawyer*?" Defendant then said; "*I don't know. For what I've done, I don't see why I need a lawyer*." Keers then said; "*And all I'm doing is asking you to talk to me. Do you want to do that*?" He said, "*Okay*." From this point, Keers began questioning defendant about the prostitute murders. Defendant, not surprisingly, denied any involvement. Not too far into the interrogation Detective Keers asked defendant for consent to search his apartment. Perhaps growing wary of the possibility that he was actually suspected of having murdered a number of prostitutes, defendant responded to the consent-to-search request with; "*I need to know, am I being charged with this, because if I'm being charged with this I think I need a lawyer*." Keers responded; "*Well at this point, no you're not being charged with this*." Immediately following this exchange, defendant consented to a search of his apartment and the interrogation continued. Over the next three and a half hours defendant made a number of incriminating admissions connecting him directly to the murders. Charged with twelve murders and a premeditated attempted murder, with special circumstances, defendant contended in pretrial motions that (1) he was stopped and detained illegally, and (2) he had invoked his right

to counsel when he stated; "*I need to know, am I being charged with this, because if I'm being charged with this I think I need a lawyer*." The trial court denied his motions. Convicted on all counts with special circumstances, and sentenced to death, defendant's appeal to the California Supreme Court was automatic.

Held: The California Supreme Court unanimously affirmed. Chief among the issues raised by defendant on appeal were (1) the legality of the traffic stop that led to his arrest and (2) whether or not he'd invoked his right to counsel during his interrogation. (1) *Traffic Stop*: Officer Orta decided to conduct a traffic stop when defendant made a right turn from the center lane without signaling. Defendant argued that under the California Vehicle Code, looking specifically at V.C. § 21453, there is no legal requirement that he signal when turning right at an intersection. Sections 22107 and 22108 requires a driver to signal, but only when possible to do so for 100 feet before making the turn which, when stopped at a traffic light, is impossible to do. In a somewhat twisted recitation of the legislative history of the relevant Vehicle Code sections, defendant argued that there just isn't any section requiring a signal when turning right at an intersection. The Court disagreed, finding that the signaling requirements of sections 22107 and 22108 apply whether turning "from a direct course" or "mov(ing) right or left upon a roadway," reflecting a legislative intent "that the signaling requirements apply to lane changes as well as changes of course." The Court also rejected defendant's argument that section 22107's requirement that a driver must signal only "in the event any other vehicle may be affected by the movement" eliminated the need to signal in this case in that there were no vehicles that could have been affected by his turn. Officer Orta was in fact directly behind defendant when he made his right turn, and therefore could have been affected by defendant's illegal right turn. (2) *Miranda*: Defendant contended in pretrial motions that he had invoked his right to counsel when he stated; "*I need to know, am I being charged with this, because if I'm being charged with this I think I need a lawyer*." If found to be an invocation, his post-invocation admissions should have been suppressed. The Court, however, found such an attempt at an invocation of his *Miranda* rights to be equivocal and legally ineffective. The rule is simple, even if not always so easily applied: "*In order to invoke the Fifth Amendment privilege after it has been waived, and in order to halt police questioning after it has begun, the suspect 'must unambiguously' assert his right to silence or counsel*." Defendant's argument centered on the theory that because Detective Keers had to have known in her own mind that he was *going* to be formally charged with the murders, then his invocation was clear and unequivocal to her. Further, if not sure herself, with the prosecutor sitting nearby monitoring the interrogation, she had an obligation to ask. The Court, however, held that the detective was not required to inform defendant of the likelihood that he would be formally charged. "There is no requirement that, before a person may validly waive his privilege against self-incrimination, he must be apprised of the evidence against him, the 'severity of his predicament,' or the chances he will be charged." The majority of the Court (with Justice Liu vehemently disagreeing) rejected defendant's argument that Detective Keers' alleged "deceit and trickery," where "it is obvious that she was deliberately buying time in an effort to keep him talking," should not be allowed to purposely thwart his attempt to invoke his *Miranda* rights. Per the Court; "The focus of the test . . . is the clarity of the defendant's request, not the particular officer's belief, and there is no requirement that an officer ask clarifying questions." Whether or not Detective Keers was in fact attempting to be "tricky," therefore, is irrelevant in the face of a suspect's equivocal attempt to invoke. Lastly, defendant attempted to characterize his initial waiver of his rights as "conditional," contending that it was "limited"

because he "placed a condition on his waiver" when he stated that he thought he needed a lawyer if he was being charged. The Court, however, noted that defendant never stated that he would speak to the detectives without the assistance of counsel only if not charged with the crimes. And there is no legal obligation for the detective to seek out such a clarification. While selective waivers are in fact recognized by the courts, the Court declined to let defendant "avoid (the requirement that an invocation be clear and unequivocal) by characterizing an ambiguous reference to counsel as a (selective) limitation on his waiver of his *Miranda* rights."

Note: No one made an issue of it, so perhaps I'm being hyper-sensitive, but when Detective Keers first advised defendant of his rights and he responded with; "*Do I need a lawyer*?", Keers' response *should* have been something like; "*Well, that's completely up to you*." Instead, she said; "*Well, I don't know. Do you need a lawyer*?" The issue is not whether he "*needs*" a lawyer, but rather that he's entitled to the assistance of a lawyer, whether he needs one or not and whether he's guilty or not. Asking him "*Do you need a lawyer*?" is too close to inferring that if he's claiming to be innocent, then he doesn't need one. It's legally improper to "*downplay*" the importance of the *Miranda* admonishment and waiver. (See *Juan H. v. Allen* (9th Cir. 2005) 408 F.3rd 1262, 1271-1272.) Inferring that a suspect needs a lawyer only if he's guilty is improper and could cost you the results of your interrogation. Otherwise, this is a pretty clear-cut case. Officers should recognize that that lack of a clear and unequivocal invocation is legally ineffective, at least after you already have a waiver and you are mid-interrogation. In contrast, note that an equivocal invocation at the beginning of the interrogation, without a prior waiver, is likely to be presumed to be valid unless you take steps to clarify whether he's trying to invoke. (E.g., see *Sessoms v. Runnels* (9th Cir. 2012) 691 F.3rd1054.) *People v. Tom*, briefed above, seems to ignore this distinction. But many other recent cases highlight this as the rule. So until the U.S. Supreme Court specifically rules otherwise, that's what I'm going by.

***Provocative Act First Degree Murder*:**

People v. Johnson **(Nov. 19, 2013) 221 Cal. App. 4th 623**

Rule: One who maliciously commits an act that is likely to result in death, prompting an intended victim to kill in reasonable response to that act, is himself responsible for the resulting death and is guilty of murder. One who instigates the crime as an aider and abettor, even though not present, is equally guilty of murder. When the underlying crime is one of the dangerous felonies listed in P.C. § 189, then the murder is automatically of the first degree.

Facts: Defendant was upset because he knew that Peter Davis grew marijuana in his backyard, and figured he was selling it to others. Although Davis had a physicians' recommendation authorizing him to use medical marijuana, an expert later testified that Davis did in fact have a sufficient quantity of marijuana to be a supplier to other people seeking to purchase it. Defendant told a friend that he and his "homies" were going to "take care" of someone that was selling pot in "our town," meaning Los Osos. Defendant said that they were going to take care of the problem by doing a "home invasion" robbery, and that they had a gun with which to do it. Boasting "that he was running things," and that he was "the shot caller," defendant arranged for two of his "homies," Kelsey Alvarez and Jesse Baker-Riley, to do the actual robbery. The day of the robbery, Dylan Baumann was visiting Davis. Alvarez and Baker-Riley went to Davis' home

and knocked on the door. When Davis opened the door, he was confronted by the two robbers, with Baker-Riley brandishing a firearm, pointing it at Davis' face. Threatening to shoot either Baumann or Davis, Baker-Riley demanded cash and marijuana. Baumann gave him his cellphone. Baker-Riley and Alvarez continued to terrorize Davis and Baumann, threatening to kill them if they "did anything." Eventually, Baker-Riley saw some drying marijuana in a back bedroom. He pointed his gun at Davis and ordered him to walk into the bedroom and sit on the bed while he retrieved the marijuana. Davis thought that Baker-Riley was separating him from the group in order to kill him and that he was about to die, prompting him to plead for his life. Noticing his own firearm next to the bed, Davis took the opportunity to pick it up and start shooting. One of his shots got Alvarez in the chest, killing him. Baker-Riley apparently fled from the scene. Defendant, who was not even at the scene, was charged with first degree murder as a result of Alvarez's death under the so-called "*provocative act murder doctrine*," along with other related offenses and allegations stemming from the robbery. Convicted and sentenced to prison for 26 years to life, defendant appealed. (Tried separately, Jesse Baker-Riley was also convicted of first degree murder; *People v. Baker-Riley* (2012) 207 Cal.App.4th 631.)

Held: The Second District Court of Appeal (Div. 6) affirmed. Simply stated, under the provocative act murder doctrine, when the perpetrator of a crime (who we will call the "provocateur") maliciously commits an act that is likely to result in death, prompting an intended victim (or other third party) to kill in reasonable response to that act, then the provocateur himself is responsible for the resulting death, and guilty of murder. The one killed may even be an accomplice in the intended crime. Provocative act murder has both a physical and a mental element. The physical element may be proved by evidence that a surviving accomplice in the underlying crime (robbery, in this case) commits an act, the "natural and probable consequence" of which is the use of deadly force by a third party; that third party typically being the intended victim of the underlying crime. This case perfectly illustrates this concept. When Baker-Riley pointed a firearm at Davis, accompanied by threats to kill him, a "natural and probable consequence" of that act was for Davis to react with deadly force, killing another person; i.e., Alvarez. That makes Baker-Riley, the "provocateur," responsible for Alvarez's death. Also, a participant in the underlying crime who does not actually commit a provocative act himself, such as defendant in this case, may nevertheless also be vicariously liable for the killing caused by his provocateur accomplice based upon having aided and abetted the commission of the underlying crime. Defendant aided and abetted in this crime when he planned and instigated it, even though he was not present at the scene. The mental element of provocative act murder requires proof that the defendant personally harbored malice. This "malice" requirement, however, may be implied. The issue then is whether defendant's conduct, or that of his accomplices, was sufficiently provocative of a lethal resistance to support a finding of implied malice. The Court ruled here that such implied malice, as personally displayed by the actual provocateur (i.e., Baker-Riley), may also be imputed to the "mastermind" of an armed home-invasion robbery even if he is not personally present at the scene. Here, defendant was the "mastermind" of an armed home-invasion robbery. He planned, directed, and supervised this crime. As such, the implied malice may legally be imputed to him. Also, however, in order for a defendant to be found guilty based upon the provocative acts of an accomplice, the acts must have been committed "in furtherance of the common design." In this case, the Court held that substantial evidence supports the inference that Baker-Riley's provocative acts were committed in furtherance of the common design of facilitating the robbery by making it clear, to use

defendant's words, that Davis "had no business" selling marijuana in Los Osos. Lastly, the Court upheld defendant's conviction for murder of the first degree despite the lack of evidence of premeditation and deliberation, ruling that provocative act implied malice murders are automatically of the first degree when they occur during the commission of one of the dangerous felonies enumerated in P.C. § 189; i.e., a "felony murder." Robbery is one of the felonies listed in section 189. Thus, as a "felony murder," there is no requirement that the People prove "a deliberate and premeditated intent to kill." Defendant, therefore, was properly convicted of first degree murder under the provocative act murder doctrine.

Note: We don't get a lot of provocative act murder cases, given the limited circumstances in which this theory applies. It's even rarer to see it applied where the defendant isn't even at the scene of the homicide. I see this particular case to be a classic example of the application of the provocative act murder doctrine, and one that will be used as a teaching aid in law school and police academy criminal law classes for many years. Good case, and one worth reviewing whenever you, as an investigator or a prosecutor, come across similar circumstances.

***Odor of Marijuana and Vehicle Searches*:**
***Medical Marijuana and Vehicle Searches*:**

People v. Waxler **(Mar. 11, 2014) 224 Cal. App. 4th 712**

Rule: (1) The odor or burnt marijuana, combined with a plain sight observation of a small amount of marijuana in a vehicle, establishes probable cause to believe that there is more marijuana in the car. (2) The suspect having a medical marijuana card authorizing the use of marijuana for medical purposes does not prevent the lawful search of his vehicle for more marijuana.

Facts: Del Norte County Sheriff's Deputy Richard Griffin received a report of a person illegally dumping trash in a parking lot in Crescent City. Upon checking the area, Deputy Griffin found defendant sitting in his pickup truck. As he approached defendant, the deputy could smell the odor of burnt marijuana. A marijuana pipe with what appeared to be burnt marijuana in the bowl was observed in plain sight on the bench seat next to defendant. The truck was searched, resulting in the recovery of a methamphetamine pipe and a small bindle containing about $50's worth of meth. At some point during the search, defendant told Deputy Griffin that he had a medical marijuana card, showing him a valid card from Washington State. Charged with transportation of methamphetamine (H&S § 11379) and with possession of methamphetamine (H&S § 11377) in state court, defendant's motion to suppress was denied. He pled guilty to the simple possession of methamphetamine, and appealed.

Held: The Fist District Court of Appeal (Div. 5) affirmed. Noting that the Fourth Amendment allows for the warrantless search of a vehicle as long as the search is supported by sufficient probable cause, the Court found here that Deputy Griffin did in fact have the necessary probable cause to believe that defendant's vehicle contained seizable contraband. In so finding, it was noted that given the "historical distinctions between the search of an automobile or other conveyance and the search of a dwelling," such as a lesser expectation of privacy and the mobility of a motor vehicle, no search warrant is necessary. Where such a search is authorized,

"every part of the vehicle and its contents that may conceal the object of the search" may be searched. The first issue was whether the odor of burnt marijuana, when combined with the deputy's plain sight observation of the marijuana pipe, provided the necessary probable cause to search the entire vehicle. The Court held that it does. The Court further held that it is irrelevant that possession of less than an ounce of marijuana is only a non-bookable infraction. Smelling the odor of burnt marijuana, plus the plain sight observation of what appeared to be a marijuana pipe, provided the necessary probable cause to believe that the vehicle may contain more marijuana than already observed. "(E)ven if defendant makes only personal use of the marijuana found in [the passenger area], he might stash additional quantities for future use in other parts of the vehicle." It was also irrelevant that the deputy had only observed a non-bookable amount of marijuana before deciding to search the car for more. "Here, Deputy Griffin had probable cause to believe (defendant's) truck contained contraband after smelling burnt marijuana near the truck and seeing burnt marijuana in the truck, irrespective of whether possession of up to an ounce of marijuana is an infraction and not an arrestable offense." Case law to the contrary, finding that an officer is not legally entitled to assume that illegal amounts of marijuana may be present based upon no more than a plain sight observation of less than an ounce (*People v. Hua* (2008) 158 Cal.App.4th 1027; *People v. Torres et al*. (2012) 205 Cal.App.4th 989.), applies only to when it is a residence that is to be searched. Residences have a higher expectation of privacy than does one's vehicle. "The automobile exception is not limited to situations where the officer smells or sees more than 28.5 grams of marijuana in the vehicle." The Court further held that defendant producing a medical marijuana card does not prevent an officer from searching his car. "(T)he officer is entitled to continue to search and investigate, and determine whether the subject of the investigation is in fact possessing the marijuana for personal medical needs, and is adhering to the eight-ounce limit on possession." The possession of marijuana is still illegal in California, even if subject to some limited exceptions. The Compassionate Use Act merely provides defendant with an affirmative defense that he may use at trial. It does not prevent an arresting officer from developing the probable cause necessary to justify a search of his vehicle. Defendant's truck, therefore, was lawfully searched.

Note: This case is consistent with prior case law in California (See *People v. Strasburg* (2007) 148 Cal.App.4th 1052.). However, despite this being a well-settled issue, I still get this question a lot; i.e.: "*Am I allowed to search a suspect's car for more marijuana when I've seen only a limited amount in plain sight and/or despite him having a physician's authorization and/or a medical marijuana card*?" Deputy Griffin knew the rules on this, and is quoted in the decision telling the court what authority he had to search the vehicle despite the minor amount observed and the defendant claiming to have a medical marijuana card. So if you didn't know all this, you do now. The real issue, not answered here, is whether the deputy could have searched defendant's car based upon the odor alone, or was the observation of the marijuana pipe a necessary factor in order to establish probable cause? I believe "*yes*," an "*odor alone*" search is lawful, and there's some pretty good authority, even if a little bit antiquated, supporting this conclusion. (See *United States v. Johns* (1985) 469 U.S. 478; *People v. Lovejoy* (1970) 12 Cal.App.3rd 883, 887; *People v. Gale* (1973) 9 Cal.3rd 788, 793, fn. 4.) But there is also contrary case law from other jurisdictions. Also, you'll find some local judges who still have a hard time with this concept. So when confronted with this situation, I suggest you look for any other facts or circumstances other than just the odor supporting your conclusion that there's marijuana in a car. And then, once you've collected as much evidence as is feasibly possible under the

circumstances, do your search and make me some more up-to-date case law. And by the way, I have a complete, up-to-date training outline on Proposition 215 and the medical marijuana issue that I can send you upon request. No extra charge.