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THIS EDITION'S WORDS OF WISDOM:

"*You can observe a lot by just watching.*" (Yogi Berra)

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CASE LAW:

***Curtilage to a Residence*:**
***Warrantless Residential Entries*:**

Sims v. Stanton **(9th Cir. Dec. 3, 2012) __ F.3rd __ [2012 U.S. App. LEXIS 24803]**

Rule: (1) A small, enclosed yard adjacent to a home in a residential neighborhood with a clearly marked area to which the activity of home life extends is curtilage. (2) Neither the "exigency" nor "emergency" exceptions to the search warrant requirement allow for the warrantless entry into the curtilage of a home when the underlying offense is no more than a misdemeanor.

Facts: Plaintiff Drendolyn Sims lived in a small house in the City of La Mesa. Her front yard was completely enclosed by a "sturdy, solid wood" six-foot fence, with a closed (also apparently of solid wood) gate. At about one o'clock in the morning on May 27, 2008, La Mesa Police Department Officer Mike Stanton and his partner responded to a radio call concerning an "unknown disturbance" involving a baseball bat in the street in front of Sims's home. Arriving at the scene in a marked patrol car and wearing police uniforms, the officers observed three men walking in the street. Upon seeing the officers, two of the subjects turned into an apartment complex. The third, later determined to be Nicholas Patrick, walked quickly across the street in front of the patrol car towards Sims's house. None of the subjects were carrying a baseball bat nor any other visible weapons, nor was there anything else tending to indicate that the subjects had been involved in the reported disturbance. Officer Stanton knew the area, however, to be associated with gang violence and that gang members often carried guns and knives. Officer Stanton called to Patrick, identifying himself as a police officer and ordering him to stop. Patrick looked directly at the officers and, despite several repeated commands, kept walking. He entered the gate to Sims's front yard and shut it behind him. Believing Patrick to be in violation of P.C. § 148 (disobeying a peace officer), and fearing for his own safety, Officer Stanton made a "split-second decision" to kick open the gate. Drendolyn Sims, who was standing immediately behind the gate, was struck by the gate as it flung open, knocking her into the front stairs. She was temporarily knocked unconscious, or at least became incoherent, sustaining a laceration on her forehead and an injury to her shoulder. She was later transported to the hospital. Sims filed a civil action in federal district court under 42 U.S.C. § 1983, alleging that her Fourth Amendment rights had been violated by Officer Stanton's warrantless entry into her front yard. Officer Stanton filed a motion for summary judgment (i.e., pre-trial dismissal), arguing that he had qualified immunity. During these pre-trial motions, Sims testified that she "enjoy[s] a high level of privacy in [her] front yard." Her fence, which was built for "privacy and protection," ensured that her outdoor space was "completely secluded" and cannot be seen by someone standing outside the gate. Additionally, the front yard was used for talking with friends, as Sims was doing on this evening (at 1:00 o'clock in the morning?), and for storing her wheelchair. The federal trial court judge dismissed her lawsuit, finding that (1) Stanton had not used excessive force; (2) exigency and a lesser expectation of privacy in the curtilage surrounding Sims's home justified the warrantless entry; and (3) no clearly established law put Stanton on notice that his conduct was unconstitutional, entitling him to qualified immunity. Sims appealed.

Held: The Ninth Circuit Court of Appeal reversed. The Court first noted that Sims's small, enclosed, residential yard was within the curtilage of her home. "[A] small, enclosed yard adjacent to a home in a residential neighborhood is unquestionably such a 'clearly marked' area 'to which the activity of home life extends,' and so is 'curtilage' subject to the Fourth Amendment protection." As such, it is constitutionally protected to the same degree as is the home itself. The trial court judge, for unexplained reasons, held that Sims's front yard had a lesser expectation of privacy than her house. This was error. Therefore, whether or not kicking in the closed gate to Sims's front yard was lawful is to be analyzed by the same standards as would have applied to her front door. As for whether the warrantless entry into Sims's front yard was lawful, two possible legal

theories might apply; i.e., the "*exigency*" and the "*emergency*" exceptions to the search warrant requirement. (1) The "*exigency exception*" assists officers in the performance of their law enforcement function by permitting police to commit a warrantless entry when "necessary to prevent . . . the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts." Officer Stanton argued that the *exigency* of attempting to stop a fleeing suspect allowed for the immediate, warrantless entry. The Court disagreed, noting that when balancing law enforcement's interest in stopping a fleeing suspect with the homeowner's right to privacy within his or her home, the latter wins out when the underlying offense is but a misdemeanor "except in rare circumstances." No such rare circumstances were shown to apply here. This is true even when "hot pursuit" is involved. At best, Patrick was in violation of no more than interfering with an officer in the performance of his duties, per P.C. § 148; a misdemeanor. (2) The "*emergency exception*" seeks to ensure that officers can carry out their duties safely while at the same time ensuring the safety of members of the public. It applies when officers "have an objectively reasonable basis for concluding that there is an immediate need to protect others or themselves from serious harm." Under the *emergency exception*, Stanton alleged that he feared for his safety. In order to substantiate this claim, Stanton must show that there was an "objectively reasonable basis for fearing that violence was imminent." Again, the seriousness of the underlying offense must also be considered under this theory. This is because it is recognized that a person caught committing a relatively minor offense is less likely to use violence to avoid arrest and prosecution. In this case, there was nothing to indicate that Patrick was in any way involved in the original 9-1-1 call, that he was armed, or that he otherwise constituted a danger. Officer Stanton's fears to the contrary were merely unarticulable speculation. Given the circumstances of this case, including the fact that at worst, only a misdemeanor was being committed, there is no evidence to support Officer Stanton's alleged fear for his own safety. The Court found the above rules were well-settled, and therefore something a reasonable officer should have known. Therefore, Officer Stanton is not entitled to qualified immunity.

Note: So is this a "*well-settled*" rule of which Officer Stanton should have known? *Absolutely not*! In fact, the Ninth Circuit's theory on these issues is a minority opinion with California following a whole different rule. In California, the cutoff for making warrantless residential entries under the exigency or emergency exceptions is (at least generally) whether the underlying crime is a "*bookable*" offense, and *not* whether it is a felony or a misdemeanor. The Ninth Circuit bases its ruling here (and in prior cases) on the U.S. Supreme Court decision of *Welsh v. Wisconsin* (1984) 466 U.S. 740, where it was held that a warrantless residential entry for the purpose of arresting a DUI suspect was illegal. However, Wisconsin at the time treated a first time DUI arrest as a civil, fine-only offense. The California Supreme Court has specifically found that as a general rule, *Welsh* applies to non-bookable offenses only, and that a warrantless residential entry to arrest a DUI suspect, at least where there is a possibility that he might again leave the house and continue his unlawful driving, was lawful. (*People v. Thompson* (2006) 38 Cal.4th 811.) While not an absolute rule (*Thompson*, at p. 827), the California Supreme Court found that the U.S. Supreme Court intended the cutoff to be whether or not the underlying offense was bookable. (See also *People v. Hua* (2008) 158 Cal.App.4th 1027;

and *People v. Torres et al*. (2012) 205 Cal.App.4th 989; both H&S § 11357 possession of marijuana cases, reiterating the same rule.) In fact, in *Welsh*, the U.S. Supreme Court specifically noted that they were *not* deciding whether warrantless arrests in a home for "*certain minor offenses*" were necessarily illegal (*Welsh*, at p. 750, fn. 11.), but rather that the *Welsh* rule applies only when the underlying crime is a non-bookable offense and in circumstances where the suspect isn't likely to continue his violation (e.g., Welsh's car was already in police custody). *Thompson* noted (at pp. 822-823) that the Ninth Circuit's interpretation of *Welsh* is a "minority opinion," citing some 21 contrary decisions, state and federal, from all over the country, and only three that agree with the Ninth Circuit. As a result, not only is the Ninth Circuit's opinion here not a "well-settled rule," but one that is probably wrong. The Ninth Circuit's opinion that "hot pursuit" doesn't change the rule is also contrary to California authority. (See *People v. Lloyd* (1989) 216 Cal.App.3rd 1425; upholding the hot pursuit into a residence of a fleeing suspect for a traffic infraction, elevated to a misdemeanor P.C. § 148 offense by refusing to stop.) *So what do you do*? California case law takes precedence over federal circuit court of appeal decisions. So you can do what Officer Stanton did and probably (remembering that *Thompson* only establishes a general rule that is dependent upon the specific circumstances) win it in state court. But you must also recognize that you are subject to potential civil liability in federal court. So the decision is yours (and your bosses). I'm told, however, that the City of La Mesa intends to pursue its appeal options in this case.

***Invocation of the Right to Silence, and Reinitiation of the Interrogation*:**

In re Z.A. **(July 26, 2012) 207 Cal.App.4th 1401**

Rule: A suspect's clear and unequivocal invocation to his or her right to silence during an interrogation must be scrupulously honored. Subsequent statements by the suspect may be considered a reinitiation of the questioning only if it reflects the suspect's desire to open up a more generalized discussion concerning the investigation.

Facts: The 17-year-old female defendant in this case was the passenger in a vehicle driven by her boyfriend, John Adkisson, as he attempted to cross the Mexico/U.S. border at the San Ysidro port of entry with a load of dope hidden in the car. As Customs and Border Protection Officer Hector Ibarra asked Adkisson the usual questions, a drug detection dog "showed an interest" in their car. At the same time, Officer Ibarra noted that defendant, seated in the front passenger seat, appeared to be abnormally "stiff and nervous, . . . intensely looking" at a handheld video game and not looking at him. Adkisson was directed to the secondary screening area. In "Secondary," Officer Ibarra searched the car and found 36 pounds of marijuana hidden in a compartment behind the glove box. Both Adkisson and defendant were handcuffed and searched, and then taken to a security office for questioning. Immigration and Customs Enforcement Agent Ethan Cramer interviewed Z.A. Agent Cramer read Z.A. her *Miranda* rights, which she waived. Agent Cramer's interrogation technique involved confronting defendant with incriminatory statements he claimed had been made by Adkisson, while attempting to get her to admit to knowingly being involved in the smuggling of the marijuana. Initially, defendant claimed that she was unaware of the marijuana hidden in the car. However, as

the interrogation progressed, she changed her story several times. Eventually, defendant suddenly said; "*I don't want to answer any more questions*." Immediately after this, she also said; " . . . *no, well I want to know if [Adkisson] is going to stay here how much time*." Rather than answering her question, or even attempting to clarify whether she was intending to reverse her apparent decision "(*not*) *to answer any more questions*," Agent Cramer proceeded on with the interrogation. Defendant eventually made incriminating statements tending to show she knew their car contained drugs. A petition was filed in Juvenile Court alleging various drug-smuggling offenses. Defendant's motion to suppress the statements she made after her alleged invocation of her right to remain silent was denied. The petition was found to be true. Defendant appealed.

Held: The Fourth District Court of Appeal (Div. 1) reversed, finding that the Juvenile Court had erred in admitting defendant's incriminatory statements into evidence, and that the error was prejudicial. On appeal, the Attorney General conceded that defendant had effectively invoked. "*I don't want to answer any more questions*" was indisputably a clear and unequivocal invocation to her right to silence. The rule in such a circumstance is that, "(o)nce [*Miranda*] warnings have been given, '[i]f the individual indicates in any manner, at any time prior to or during questioning, that he (or she) wishes to remain silent, the interrogation must cease." Or, in other words, the suspect's stated preference to remain silent must be "*scrupulously honored*." However, after such an invocation, the suspect may change her mind and reinitiate questioning if she so chooses. The Attorney General argued in this case that when defendant, immediately after her invocation, said, ". . . *no, well I want to know if [Adkisson] is going to stay here how much time*," that she was in fact attempting to reinitiate questioning. It was therefore lawful, according to the Attorney General's argument, for Agent Cramer to continue on with the questioning. The Court disagreed. In this case, defendant's inquiry about Adkisson was not an attempt to reinitiate questioning, but rather nothing more than her checking into her boyfriend's custody status. In order for a defendant's comments, after an invocation, to qualify as an attempt to reinitiate an interrogation, it must be shown that she "initiate[d] further communication … with the police . . . in a manner that can be 'fairly said to represent a desire … to open up a more generalized discussion relating directly or indirectly to the investigation.'" Here, no such desire was shown. Also, in addition to proving an intent to reinitiate a discussion about the investigation, the People must further prove that the interrogating officer obtained a new waiver of the previously invoked right. The defendant's previous wavier, given at the initiation of the interrogation, is insufficient to satisfy this requirement. At the very least, Agent Cramer should have stopped and sought clarification as to whether defendant was attempting to reinitiate the questioning. This also was not done. Therefore, having validly invoked her right to silence, and with no evidence that she was desirous of reinitiating the questioning, Agent Cramer had an obligation to scrupulously honor her request to remain silent. Having failed to do this, any statements obtained after her invocation should have been suppressed.

Note: The danger here is that some police interrogators, clever as they are, will sometimes seek to keep a suspect talking despite a mid-interrogation clear and unequivocal invocation. Any such attempt to keep a suspect talking after an unequivocal invocation, if successful, is a *Miranda* violation. In this case, Agent Cramer merely

ignored Z.A.'s invocation and continued the questioning. You can't do that. It is similarly illegal to use seemingly innocent casual conversation as a ruse to encourage the suspect to start talking again about his or her crimes after an invocation. This doesn't mean that truly innocent casual conversation between a law enforcement officer and an in-custody criminal suspect, whether or not he has previously invoked, is improper. Any incriminating statements made during such a conversation are admissible into evidence. Where you draw the line between mere causal conversation and an improper attempt to circumvent an invocation is often an issue. In this case, it was not even close. It appears as if Agent Cramer didn't even hear Z.A.'s invocation, or didn't understand what she'd said. More care in listening to a suspect's responses is necessary in order to know whether an attempted invocation can be ignored, clarification should be sought, or the interrogation must be terminated.

***Residential Burglary; Apartment Balconies*:**

***People v. Yarborough* (July 19, 2012) 54 Cal.4th 889**

Rule: Whenever a private residential apartment and its balcony are on the second or higher floor of a building, and the balcony is designed to be entered only from inside the apartment, the balcony is part of the apartment.

Facts: Salvador Deanda and his family lived in a one-bedroom apartment on the second floor of his apartment building. The apartment included a five-foot wide, three-foot deep balcony which was enclosed by a metal railing with a height that came up to an adult's stomach. The balcony was about eight or nine feet off the ground. The only entrance to the balcony was through a sliding glass door from Deanda's bedroom. Deanda had two bicycles on the balcony that were visible from the street. Other than by the metal railing, the balcony was otherwise unenclosed. Around midnight on August 8, 2009, Deanda was awakened by the barking of his dog. Looking out onto his balcony, he saw defendant standing on the balcony's edge, outside the railing. The toes of defendant's shoes were protruding under the railing, and his fingers were clutching the top of the railing as he held on. Deanda grabbed a stick and came after defendant, who jumped off the balcony and fled. He was arrested, however, by responding police. Defendant was charged with a completed residential burglary for having entered the victim's apartment with the intent to commit a theft or a felony. At the conclusion of the trial, the court instructed the jury that,"(a) building's outer boundary includes the area inside a balcony that is attached to an inhabited dwelling." Defendant was convicted of first degree residential burglary, and appealed. The Second District Court of Appeal reversed, holding that the jury had been misinstructed, and that the victim's unenclosed balcony was not a part of the building's outer boundary. Therefore, by entering the balcony only, defendant could not have committed any more than an attempted residential burglary. The People petitioned to the California Supreme Court.

Held: The California Supreme Court reversed the appellate court, holding that defendant had in fact committed a completed residential burglary. Penal Code section 459 provides that a "person who enters any . . . building . . . with intent to commit . . . larceny or any

felony is guilty of burglary." Section 460(a) further notes that the burglary of an inhabited dwelling is a burglary of the first degree. As under Common Law, the essence of burglary is an entry which invades a possessory interest in a building. In *People v. Valencia* (2002) 28 Cal.4th 1, the California Supreme Court held that a burglary is complete when the building's "*outer boundary*" is crossed. A building's outer boundary encompasses "any element that encloses an area into which a reasonable person would believe that a member of the general public could not pass without authorization." This is a legal question for the court to decide, rather than a factual one for the jury. Defendant's fingers and toes penetrated the outer boundary of the victim's balcony in this case. So the question here is whether the outer boundary of the balcony was also the outer boundary of the apartment building. In a footnote to *Valencia* (pg. 12, fn. 5), the Supreme Court stated that an "unenclosed balcony" would not satisfy this test because such a balcony cannot be "reasonably" viewed as being "part of the building's outer boundary." The appellate court in this case relied upon this footnote as its basis for reversing defendant's conviction, noting that the victim's balcony was unenclosed. However, *Valencia* was not a balcony case, but rather dealt with the defendant penetrating past the window screens of a residence. Therefore, *Valencia's* footnote 5, per the Supreme Court, is actually "*ill-considered dictum*," and not controlling. Reversing its thinking on this issue, the Court found in this case that "(a) balcony generally is surrounded by a railing (as it was in this case), and to that extent is enclosed." The Court went even further and noted that the "reasonable belief" test (i.e., whether a reasonable person would believe that a member of the general public could not pass without authorization) need not even be considered here. Instead, the Court held as a matter of law that: "Whenever a private residential apartment and its balcony are on the second or higher floor of a building, and the balcony is designed to be entered only from inside the apartment (thus extending the apartment's living space), the balcony is part of the apartment. The railing of such a balcony marks the apartment's 'outer boundary' (citation), any slight crossing of which is an entry for purposes of the burglary statute." Defendant in this case, therefore, with his fingers and toes extending beyond victim's balcony's metal railing, committed a complete burglary.

Note: No wishy-washy rulings in this case. We now know exactly what the rule is as it pertains to second story and above apartment balconies. I would think the same argument could be made as to a first floor apartment as well, if the baloney is blocked off in some way making outside access at least impractical even if not impossible. The Court did note that the jury instruction given by the trial judge was too broad, but the error was harmless in that the balcony in this case met the Court's stated rule as noted above.

***Consensual Residential Entries*:**

People v. Fernandez **(Aug. 1, 2012) 208 Cal.App.4th 100**

Rule: A defendant's objection to a consensual search of his residence may be ignored if he is lawfully arrested and removed from the scene when consent is later obtained from a cotenant, so long as the defendant's removal from the scene was not done for the purpose of negating his objection.

Facts: Defendant, a gang member, and some of his "homies," robbed Abel Lopez at knife point, beating Lopez in the process. Everyone fled into adjoining apartment complexes in the area. Among the responding Los Angeles police officers were Detective Kelly Clark and Officer Joseph Cirrito. Clark and Cirrito drove to an alley near Magnolia and 14th Street where they knew gang members gathered. As they stood in the alley, several passers-by directed them to an apartment building that was a known gang location, indicating that that was where the suspects had fled. A minute or so later, the officers heard screaming from that same apartment building. After calling for backup, Detectives Clark and Cirrito knocked on the door of the unit from where they had heard screaming. Roxanne Rojas, who was holding a baby and appeared to be crying, opened the door. She appeared to have been battered. She told the detectives that she had been in a fight, but denied that anyone else was in the apartment. When Cirrito asked her to step outside so he could conduct a sweep of the apartment, defendant stepped forward. He seemed very agitated, telling the detectives, "*You don't have any right to come in here. I know my rights*." Defendant was promptly arrested. Lopez, the robbery victim, identified him in a curbstone lineup as the man who had robbed and assaulted him. After defendant was removed from the scene, Detective Clark went back to Rojas, told her that defendant had been identified as a robbery suspect, and asked for her consent to search the apartment. Rojas gave consent, orally and in writing. During the ensuing search, officers found gang paraphernalia, a butterfly knife, and clothing matching what was worn by Lopez's robber. A sawed-off shotgun with its ammunition was recovered from a heating unit in the apartment where it was hidden. Criminal charges were filed in state court, including robbery, spousal abuse, and possession of the sawed-off shotgun, along with various gang-related and weapons-use allegations. Defendant's motion to suppress the items found in his apartment was denied. He pled no contest to the weapons-related charges. A jury convicted him of the robbery of Lopez with the use of a knife, and the abuse of Rojas, and found the gang allegations to be true. Defendant appealed.

Held: The Second District Court of Appeal (Div. 4) affirmed. Defendant's argument on appeal was that the search was executed without a search warrant and over his objection. When first taken into custody at his front door, defendant clearly expressed his lack of consent to the officers coming into his apartment. (i.e.; "*You don't have any right to come in here. I know my rights*.") Citing *Georgia v. Randolph* (2006) 547 U.S. 103, and *United States v. Murphy* (9th Cir. 2008) 516 F.3rd 1117, defendant argued that because he had objected to the officers entering his residence, Rojas's subsequent consent to the search of the apartment was invalid. Any evidence obtained as a result of that search, therefore, should have been suppressed. The general rule, of course, is that a search warrant is needed for law enforcement to lawfully search a person's residence. Consent by one in a position of authority over the residence is a recognized exception to this rule. But where two cotenants are present, one consenting while the other objects, *Randolph* held that officers are bound by the objection from the cotenant. Using what can be described as "*social expectations*" (i.e., what a reasonable person would understand is socially acceptable under the circumstances), the U.S. Supreme Court in *Randolph* ruled that police officers may not constitutionally conduct a warrantless search of a home over the express refusal of consent by a physically present resident, even if another cotenant

consents to a search, at least where the two cotenants are of equal authority (e.g., husband and wife). However, there are exceptions to this rule. Relevant in this case is where the objecting party is not present at the scene. In such a circumstance, officers may go with a present cotenant's consent and conduct a search. But the Court imposed a major caveat to this rule, holding that it applies only "(s)o long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection." In *United States v. Murphy*, the Ninth Circuit extended this caveat in *Randolph* by holding that if one present cotenant has expressly objected, any warrantless search conducted after the objecting cotenant has left or been removed from the residence is invalid no matter what the reason might be that he is no longer there. That objection stands despite his later absence and even if a second cotenant subsequently grants consent. In *Murphy*, under circumstances very similar to the present case, the defendant objected to the search of a storage unit when he was arrested. Two hours after he was carted off to jail, a cotenant was located and, without knowing that the defendant had denied consent, gave his consent. The Ninth Circuit found that the search under these circumstances violated *Randolph*. Once a present cotenant objects, that objection stands whether or not he remains at the scene, or, if he leaves, irrespective of why he left. However, four federal circuit courts and two state supreme courts have rejected the Ninth Circuit's analysis in *Murphy*. These courts have all uniformly held that even after a cotenant expressly refuses to allow officers to search his residence, a cohabitant's consent given after the objecting party leaves or is lawfully removed justifies a warrantless search. The contemporaneous presence of both the objecting and consenting cotenants was held to be an indispensable element to the rule of *Randolph* short of the police *purposely* removing the objecting party to avoid the legal effect of his objection. To allow the one tenant's objection to perpetually disable another cotenant from ever providing consent to the police to enter is an unworkable rule, not to mention it ignores the "*social expectation*" basis for the rule in *Randolph*. The Court in this new case agreed with the majority rule, finding that *Murphy* went too far by "read(ing) the presence requirement out of *Randolph*, expanding its holding beyond its express terms and giving rise to many questions with no readily identifiable principles to turn to for answers." The defendant's presence is a necessary element to the applicability of the rule of *Randolph*. Because defendant in this case was no longer present, having been lawfully arrested and removed beforehand, Rojas' subsequent consent to search was sufficient justification for the officers' warrantless entry and search of defendant's residence.

Note: But remember, defendant was lawfully arrested and taken to jail before Rojas was ever asked for permission to search. Although it was never discussed, there was apparently never any argument that defendant was taken from the scene "*for the purpose of*" negating his objection. In fact, I doubt if the officers in this case were even thinking about *Randolph* when they took him to jail, or understood that defendant's bitching about the detectives being in his home would later be considered an objection. But being lawfully arrested and taken to jail, his prior objection, such as it was, went away with the consent obtained from Rojas. So here's another rule of law that differs from the Ninth Circuit's minority opinion. While the California Supreme Court has denied review, a petition for certiorari was filed with the U.S. Supreme Court on December 17, 2012. So hopefully we will get some sort of resolution of the conflict out of this case.

***Parole Searches of Vehicles*:**

People v. Schmitz **(Dec. 3, 2012) 55 Cal.4th 909**

Rule: A warrantless search of those areas of the passenger compartment of a vehicle where an officer reasonably expects that the parolee could have stowed personal belongings or discarded items when aware of police activity, as well as a search of personal property located in those areas if the officer reasonably believes that the parolee owns those items or has the ability to exert control over them, is lawful.

Facts: Orange County Deputy Sheriff Mihaela Mihai observed defendant's vehicle wandering in the area of a condominium complex. Thinking the driver might be lost, she followed him. Defendant made a u-turn causing the two cars to approach each other. When Deputy Mihai stopped, defendant did as well, resulting in the two of them being parallel to each other. Two other adults and a child were in the car with defendant driving. In response to Deputy Mihai's question, defendant said he was not lost, that he merely pulled onto that street to make a u-turn, and that he didn't need directions. Deputy Mihai asked defendant for his driver's license. As he retrieved his license, Deputy Mihai noticed abscesses on his arms, indicative of possible drug use. Defendant denied that he was on probation or parole, but acknowledged that his front seat passenger was a parolee. Deputy Mihai then asked defendant if she could search his car. He did not respond. So based upon the parole status of the front seat passenger, Deputy Mihai searched the entire car. Two syringes were found in an otherwise empty chip bag on the floor of the back seat, and some methamphetamine was in a shoe, also on the floor of the back seat. Defendant (and presumably everyone else) was arrested. Charged in state court, defendant's motion to suppress the evidence was denied. He pled guilty to a number of misdemeanors, and appealed. The Fourth District Court of Appeal reversed, finding that the fact that a parolee is a passenger in a car, without any evidence giving a police officer a reasonable belief that the parolee had authority over the interior of the car, does *not* justify a search of the interior of the car pursuant to the parolee's Fourth wavier. (187 Cal.App.4th 722, and *Legal Update*, Vol. 15, No. 8, Oct. 8, 2010.) The People appealed.

Held: The California Supreme Court, in a 5-to-2 decision, reversed the appellate court, reinstating defendant's conviction. The sole issue here is whether a vehicle passenger's parole status, with the accompanying wavier of his Fourth Amendment search and seizure rights, allows for the search of a non-parolee's vehicle. The general rule, of course, is that warrantless searches of a parolee and his property are reasonable, so long as the parolee's status is known to the officer and the search is not arbitrary, capricious, or harassing. But the issue gets a bit more complicated when a parole search affects the privacy interests of third parties who are not subject to search and seizure conditions. In this case, the issue was the permissible scope of a parole search that infringes on the privacy rights of a third party driving a car with a parolee passenger. Specifically, how much of the car can be searched under such circumstances, and what property found in the car is subject to search? In analyzing these issues, the Court differentiated a Fourth waiver search of a residence from that of a vehicle. In a residence, given the high

expectation of privacy involved, it has been held that officers generally may only search those portions of the residence they reasonably believe the Fourth waiver suspect has complete or joint control over. Areas common to both a Fourth waiver suspect and other residents are subject to being searched. But those areas that are exclusively possessed or controlled by others are off limits. The rationale employed in the case of a residence, requiring the Fourth wavier suspect's "common or superior authority over the area to be searched," is unworkable when applied to a third person's vehicle with a parolee passenger. In the case of a vehicle, it is not necessary to show that the Fourth waiver suspect had complete or joint control over the place or item being searched. Because of a vehicle's lower expectation of privacy, it is lawful to conduct a warrantless search of those areas of the passenger compartment where an officer reasonably expects that the parolee could have stowed personal belongings or discarded items when aware of police activity. It is also lawful to search any personal property located in those areas if the officer reasonably believes that the parolee owns those items or has the ability to exert control over them. Where the appellate court made its mistake was in applying the rule for residences to the search of a vehicle. That was error. The factors to consider in determining what areas and items in a vehicle are subject to search include the nature of that area or item, how close and accessible the area or item is to the parolee, the privacy interests at stake, and the government's interest in conducting the search. The searchable areas are specifically not limited to the area immediately around the parolee himself. The non-parolee defendant's lack of knowledge that his passenger was subject to search and seizure conditions is irrelevant. In this case, the shoes and chip bag were on the floor immediately behind the parolee, and clearly accessible to him. Under the circumstances of this case, both would be logical places for the parolee to have attempted to hide items from the officer. Searching them, therefore, was reasonable.

Note: The Court further noted that a probationer being subject to a Fourth waiver is a matter of choice, such a person agreeing to give up his or her Fourth Amendment search and seizure protections in exchange for avoiding a jail sentence. Parolees, on the other hand, at least since the applicable statute (i.e., P.C. § 3067) was amended, aren't given a choice. Fourth wavier conditions are involuntarily imposed upon them. As a result, "parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment." Therefore, the fact that defendant's passenger here was a parolee, as opposed to a probationer, is a "salient circumstance" in setting out the rule of this case. But the Court never indicates that the general rule, as described above, is any different between cases involving probationers and parolees. Also, interestingly enough, the Court ruled that because "cause" is not required to justify such a search, an officer does not have to articulate facts demonstrating that the parolee actually placed personal items or discarded contraband in the open areas of the passenger compartment. The issue in court is going to be whether, when viewed objectively, it was reasonable for the officer to assume that any particular area or item might contain the parolee's personal property or be somewhere that he might be expected to secret items he didn't want the police to find.