The California Legal Update

Remember 9/11/2001; Support Our Troops

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THIS EDITION'S WORDS OF WISDOM:

"*The wise man doesn't give the right answers; he poses the right questions*."
(Claude Levi-Strauss)

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ADMINISTRATIVE NOTES:

Affluenza: Getting my Fox News fix one day, I couldn't help but note a story out of Texas where a young man, driving with three times the legal limit of alcohol in his system, killed four people in a traffic collision. Pleading guilty to four counts of alcohol-induced vehicular manslaughter, the defendant argued at sentencing as a mitigating factor that he suffered from "*alfluenza*." What is "*alfluenza*," you might ask? It's a term made up by the defendant's imaginative attorney that he defined as "*the inability to tell the difference between right and wrong due to being too rich.*" Before you laugh, you should know that the Texas judge was impressed enough to grant the defendant probation. I mention this as a warning to police officers of the necessity of noting and reporting any and all comments an

arrestee makes that are indicative of his attitude and consciousness of guilt, no matter how "slam dunk" a case might appear on its face. For prosecutors: Never discount out of hand such an outrageous argument by defense counsel.

***CASE LAW*:**

***Assault Weapons; Manufacturing and Possession*:**

***People v. Nguyen* (Jan. 8, 2013) 212 Cal.App.4th 1311**

Rule: Possession of the parts to an unassembled assault weapon, with evidence of the perpetrator's intent to assemble and possess the weapon, is chargeable as an attempt to manufacture and to possess the assault weapon.

Facts: Officer Brian Chapman, assigned to the Orange County Auto Theft Task Force, intended to do a statutory premises inspection of defendant's auto repair shop. As a matter of standard procedure, Officer Chapman asked defendant if he had any weapons on site. Defendant admitted that he did, showing him a fully assembled .50-caliber DTC rifle which he claimed to use for pig hunting. Defendant further admitted that he'd purchased the weapon's receiver over the Internet and that he had to "machine it," or drill holes in it, in order to put it together. Although without a serial number or a manufacturer's name, the rifle appeared to be operable. Defendant also had ammunition for this rifle. Asked if he had any other weapons, defendant told Officer Chapman that he was in the process of building an AK-47. He showed Chapman a box of AK-47 parts. Defendant explained that he'd purchased the parts over the Internet at "AK-builder.com," and that when he'd received it, the rifle's flat receiver had yet to be bent into shape; a task that defendant himself performed at some point. Defendant admitted to Officer Chapman that he knew it was wrong for him to have and make his own AK-47. It was determined that although one more hole needed to be drilled into the receiver, all the parts for building a working AK-47 were in the box. It was later determined that defendant had a prior felony conviction. Charged in state court, defendant pled guilty to Counts One and Two for being a felon in possession of a firearm; the 50-caliber DTC rifle (former P.C. § 12021(a)(1)) and possession of ammunition by a prohibited person (former P.C. § 12316(b)(1)). Following a jury trial, defendant was also convicted on Counts Three and Four, for attempting to manufacture an assault weapon (P.C. § 664(a) & former P.C. § 12280(a)(1)), and attempting to possess an assault weapon (P.C. § 664(a) & former P.C. § 12280(b)) Defendant appealed from his six year prison sentence.

Held: The Fourth District Court of Appeal (Div. 3) affirmed. The 50-caliber DTC rifle and its ammunition (Counts One and Two) were not at issue in this appeal. Defendant's argument on appeal was that it was not a crime to attempt to manufacture, or attempt to possess, an AK-47 rifle, as charged in the Third and Fourth counts. More specifically, defendant contended that possession of the unassembled parts of an AK-47 is not illegal. After noting that the completed offenses were made illegal by the so-called "*Roberti-Roos Assault Weapons Control Act of 1989*" ("*AWCA*;" former P.C. §§ 12275 et seq.), the Court ruled that a person *may* in fact be charged with the attempted perpetration of

the listed offenses. P.C. § 12280(a)(1) makes it illegal when "(a)ny person who, within this state, manufactures or causes to be manufactured … any assault weapon." Subd. (b) of P.C. § 12280 further criminalizes the possession of an assault weapon. An AK-47 is clearly listed in the AWCA as an illegal assault weapon (see former P.C. § 12276(a)(1)). Also, section 12276.1(a)(1), defining assault weapons by their general characteristics, includes the type of firearm the parts for which were possessed by defendant; e.g., a semiautomatic, centerfire rifle, with the capacity to accept a detachable magazine, with a pistol grip protruding conspicuously beneath the action of the weapon, a folding stock, and a "forward pistol grip." Defendant argued, however, that nowhere in the assault weapons statutes does it indicate that merely having the parts to an AK-47 (or any other assault weapon), which has yet to be assembled, is illegal. To this, the Court noted that (1) the AWCA does not require that the weapon be yet assembled, and (2) that defendant was not convicted of manufacturing or the possession of an assembled assault weapon. Rather, he was convicted of the *attempt* to manufacture and possess an assault weapon. Attempts to commit a crime are illegal under P.C. § 664, with P.C. § 21a noting that an attempt has been committed upon proof of a direct but ineffectual act, going beyond mere preparation, done towards the commission of the crime, when done with the specific intent to complete the crime. Here, defendant had all the necessary parts to construct an illegal assault weapon, going so far as to bend the receiver into a position where the weapon was ready to assemble. With the evidence clearly showing that defendant specifically intended to assemble these parts into a functioning AK-47, his convictions for both the attempted manufacturing of the weapon, and its attempted possession, were supported by the evidence.

Note: The Court never actually says that the possession of the unassembled parts to an assault weapon constitutes the completed crime of possession of an assault weapon. But the Court was heading in the direction of such a finding, shooting (no pun intended) down defendant's various arguments on this issue before ultimately noting that this was not the issue. The only issue was whether defendant was properly convicted of *attempting* to manufacture and possess an assault weapon. Note also that for there to be an attempt, we must prove a direct, yet ineffectual act, going beyond mere preparation, done towards the commission of the completed crime. Here, they used the bending of the receiver into position as that act. Mere possession of a box of parts might not be enough by itself to constitute an attempt, particularly if there is no evidence that the defendant ever really intended to do anything with the parts. And lastly, note that all these Penal Code sections (with the exception of the attempt section; P.C. § 664) have been updated as of January 1, 2012, to new sections, but without any substantive changes. (See P.C. §§ 30500 et seq., and §§ 3600-30675, for the substantive offenses at issue here.)

***Driving Under the Influence of Alcohol; Blood-Draws*:**

***People v. Cuevas* (July 31, 2013) 218 Cal.App.4th 1278**

Rule: DUI blood-draws, witnessed and testified to by law enforcement officers, need not be performed by a physician in a hospital environment to satisfy the reasonableness requirements of the Fourth Amendment.

Facts: The defendants in seven cases, combined for purposes of this appeal, were each arrested for driving while under the influence of alcohol, per V.C. § 23152(a) and (b). Upon arrest, each was advised by the arresting officer that under California's implied consent law. he or she was required to take a blood or breath test. All defendants opted for a blood test. Six of the defendants were transported to a jail facility for the test, with one going to a hospitall. Blood was drawn from the accused in each case with the an officer witnessing the blood-draws. In later hearings to suppress the blood test results, the officers each testified that the blood-draws were performed by individuals whom they identified as either phlebotomists, blood technicians, or individuals who routinely draw blood. In general, the officers observed that the individual drawing blood cleaned the area before drawing blood and used a needle from a sealed package. In no case was there any evidence that any of the defendants claimed to be in pain or discomfort during the procedure. In five of the seven cases, the officers actually testified to the lack of any such complaint. Finally, in five of the cases, the officers observed the injection area being bandaged following the blood-draw. After criminal charges were filed in state court, all the defendants moved to suppress the results of the blood tests. In six of the seven cases, the trial courts denied the motion with suppression being ordered in one case. All seven cases were combined for appeal to the Appellate Department of the Superior Court of Alameda County. In a split 2-to-1 decision, the trial courts which upheld the blood-draw procedures were all reversed, with the trial court's suppression of the evidence affirmed in the seventh case. The suppression of the blood-draw results by the Appellate Department of the Superior Court was justified on the basis that (1) the respective police officers who observed, and later testified to the taking of blood in each case, lacked the medical training necessary to testify whether the blood-draw was performed in a medically approved manner, and (2) because in all but one case the blood-draws were performed in a jail facility rather than in a hospital setting. Therefore, because it was not proved that the respective blood-draws were performed in a reasonable matter under the Fourth Amendment, the results of the blood tests were suppressed. All seven cases were transferred to the First District Court of Appeal (Div. 1)

Held: The First District Court of Appeal (Div. 1) ruled that the blood-draw procedures in each of the seven cases met the Fourth Amendment constitutional standard of reasonableness, thus making the blood test results admissible in evidence. The "touchstone" of the Fourth Amendment is reasonableness. Reasonableness is determined, ultimately, by examining the "totality of the circumstances." In *Schmerber v. California* (1966) 384 U.S. 757, a DUI case, the U.S. Supreme Court discussed this constitutional standard of reasonableness. There, after first concluding that a blood-draw did not violate the Fifth Amendment privilege against self-incrimination, the Supreme Court also ruled that not all intrusions into a person's body are unconstitutional. Citing *Schmerber*, the Court in this new case ruled that the issues in a blood-draw case are (1) whether the police were justified in requiring a DUI arrestee to submit to a blood-draw, and (2) whether the means and procedures used in taking blood meet the Fourth Amendment standards of reasonableness. The Supreme Court in *Schmerber* found blood tests to be commonplace and a "highly effective means" of determining one's blood-alcohol level. Such tests are simple and effective, virtually without risk, trauma, or pain.

But the blood in *Schmerber* was drawn by a physician in a hospital environment. So the issue here is whether it is constitutionally unreasonable, through creating an undue risk of harm to an arrestee, to have a blood-draw performed by someone other than a physician, and in places other than a hospital. California cases since *Schmerber* have ruled that deviating from the *Schmerber* set of circumstances do not necessarily make a blood-draw unreasonable. Drawing blood at a jail rather than a medical facility has already been upheld. (*People v. Ford* (1992) 4 Cal.4th 32.) It has also been held to be lawful for blood to be drawn by a phlebotomist who was not fully qualified to draw blood under state law. (*People v. Esayian* (2003) 112 Cal.App.4th 1031; *People v. McHugh* (2004) 119 Cal.App.4th 202; *People v. Mateljan* (2005) 129 Cal.App.4th 367.) The issue debated in these cases was whether the manner in which the blood sample was obtained deviated so far from the medical practices found to be reasonable in *Schmerber* as to render the seizure constitutionally impermissible. It has also been held that the testimony of an observing police officer, relating his observations of the blood-draw in question, was sufficient evidence to prove that the blood-draw was conducted in a reasonable manner, rejecting a need, under the Constitution for expert testimony on this issue. (*People v. Sugarman* (2002) 96 Cal.App.4th 210.) The Court here agreed with the above decisions. While the Court accepted defendant's argument that an arrestee's consent under California's implied consent law is not by itself sufficient to demonstrate the reasonableness of the search, it is nevertheless one factor to consider. Combine this with the officer's observations of the procedures used, the lack of any visible discomfort experienced by the defendant, and the officer's familiarity with the person he or she believed to be a trained phlebotomist or blood technician, and there is no reason, under the totality of the circumstances, why the officer's testimony cannot be used to establish the reasonableness of the procedures used. This, in sum, is sufficient to meet the constitutional standard of reasonableness.

Note: Every once in a while, typically at the urging of inventive defense attorneys, a few judges get a bee in their bonnet about some issue or circumstance that for years was never considered to be a problem. This is apparently one of those circumstances. But there's nothing wrong with that. "Inventive defense attorneys" help keep the criminal justice system honest and fair. So rather than take offense at all the time and effort it takes to get the system back on track when phantom issues like this are raised, recognize it as an example of how well the adversary system of justice we employ actually works. In the end, justice was done here. But this doesn't mean that law enforcement can afford to be lax on issues like this. An arresting or transporting officer needs to pay careful attention to the facts and circumstances of a blood-draw as noted in this decision, and be ready to testify to all the details of the procedures used, where it was done, and who did it.

***Privileged Official Information, per E.C. § 1040(b)*:**

In re Marcos B. **(Mar. 7, 2013) 214 Cal.App.4th 299**

Rule: It is the prosecution's burden to prove that official information, such as the surveillance point in a narcotics case, is privileged pursuant to E.C. § 1040(b). Even if privileged, such information must be revealed when it is material and uncorroborated.

Facts: Santa Ana Police Officer Corey Slayton was patrolling on foot and in full uniform in the area of 1700 South Evergreen Street in Santa Ana, a "high-narcotics area," at approximately 6:15 p.m. Upon walking down an alley parallel to Evergreen, Officer Slayton noticed three males standing on the west side of the street; 15-year-old Marcos B., another minor and an adult. As Officer Slayton watched, a Hispanic male approached the three and removed some currency from his pocket. He handed it to the minor who handed it to the adult who handed it to defendant. Defendant then walked to the east side of the street to a white PVC drainage pipe and removed a large plastic baggie that appeared to contain numerous smaller baggies. He removed one of the baggies and replaced the larger baggie back into the pipe. Returning across the street, defendant handed the baggie to the adult suspect who handed it to the other minor who handed it to the purchaser. From Officer Slayton's perspective, the baggie appeared to contain a white crystalline powder. After the Hispanic male left, a White male approached the subjects and the whole procedure was repeated. Following this second transaction, Officer Slayton approached the subjects as a second officer, who had been in radio contact with Officer Slayton, approached them from another direction. The three subjects were detained. Officer Slayton walked over to the pipe and retrieved the large baggie he'd seen defendant put there. Forty-seven small baggies, later determined to contain crack cocaine, heroin, and methamphetamine, were recovered. Defendant was found to have $120 in $20 bills on him. Charged in Juvenile Court with a number of drug-related offenses, defense counsel cross-examined Officer Slayton about his observations of the drug transactions. When asked what direction he'd come from as he approached the three suspects, Officer Slaton demurred, explaining that he "would rather not say where I was coming from." The prosecutor then objected to this line of questioning on the basis that the information was privileged "official information" under Evidence Code § 1040, and requested an in camera hearing. Over defense counsel's continuing objections, the court held an in camera hearing from which defendant and his attorney were excluded. After the hearing, the magistrate upheld the claim of privilege, ruling that Officer Slayton's "surveillance point or post is not material for purposes of section 1042." Counsel was specifically precluded from asking the officer about the exact location where he was standing at the time he made his observations. Upon the close of testimony, the magistrate adjudged defendant to be a ward of the court, per W&I § 602, for having violated the alleged drug-related offenses. Defendant appealed, asking the appellate court to review the transcript of the in camera hearing and to ascertain whether the Juvenile Court magistrate abused his discretion in determining that Officer Slayton's surveillance point qualified as privileged information under E.C. § 1040.

Held: The Fourth District Court of Appeal (Div. 3) reversed. Evidence Code § 1040 allows a claim of privilege for "official information" whenever (among other reasons) the "disclosure of the information is against the public interest," at least so long as "there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice." (E.C. § 1040(b)(2)) The party claiming the privilege (typically, the People) has the burden of showing that the sought-after information is in fact privileged. But it is the court's duty to insure that the defendant's "due process" (i.e., "fair trial") rights aren't violated in the process. The

Juvenile Court magistrate failed to follow the correct procedures in this case. What should have happened was for the magistrate, when the privilege was first asserted by the People, to ask defendant to make a prima facie showing supporting the necessity of disclosure. If the defendant does so, then the court should have ordered an in camera hearing, attended only by the party claiming the privilege; i.e., the People and the officer. The defendant should have been given the opportunity to propose questions to be asked at this hearing, which was not done. At the hearing, the People should have revealed to the magistrate the location from where Officer Slayton's observations had been made with an offer of proof as to why it was necessary to prevent disclosure of this location (e.g., a continuing investigation, potential danger to someone allowing officers to use the location, etc.). This also was not done. Had the People succeeded in meeting its in camera burden, which it did not, then the defense should have been allowed to present evidence as to the materiality of information and how it might deprive defendant of a fair trial by suppressing it. Based upon the insufficient showing on the part of the People in this case, the Appellate Court concluded that "as a matter of law," the need to preserve the confidentiality of the surveillance location was not proved. As such, the magistrate abused his discretion by upholding the claim of privilege. Also, the Appellate Court ruled that Officer Slayton's location when he observed defendant's illegal acts is in fact "material," overruling the magistrate on this issue as well. A percipient witness's credibility is typically material unless it is unquestioned or at least sufficiently corroborated. In this case, Officer Slayton's eyewitness testimony was the only direct evidence of defendant's guilt. There was no evidence presented to the effect that the second officer involved saw any of defendant's illegal acts himself. No contraband was found on defendant. While the $120 retrieved from defendant's person was some corroboration, there are any number of other innocent explanations as to why he might have had such money on him. The entire case against defendant, therefore, hinged on Officer Slayton's credibility. Knowing exactly where Officer Slayton was when he watched defendant's illegal acts would have provided defense counsel with the opportunity to test the officer's credibility. By not revealing to defense counsel the information the People claimed to be privileged deprived defendant of a fair trial. The Court, therefore, reversed the magistrate's true finding.

Note: Unless you do a lot of narcotics cases, where the "official information" privilege most often rears its ugly head, this may be a whole new issue to you. In my 30 years of prosecuting (and 6½ years as a cop), I've had to deal with it only a couple of times. But when it does become an issue, whether you're a prosecutor, a cop, a defense attorney, or a judge, it is really important you know how to handle it. The Court here noted that it was only through the tenacity of Marco's defense attorney that the issue was properly preserved for appeal. So what, as a prosecutor or the investigating officer, do you do when the court finds the information privileged yet material, and thus discoverable? The solution, such as it is, that we've always used in my experience is to put it to the officer; *reveal the information or allow the court to dismiss the case*. It's the officer's (presumably after consulting with his or her supervisors) choice.

***Aider and Abettor Liability*: *Continuous Child Abuse, per P.C. § 288.5*:**

People v. Ogg **(Aug. 28, 2013) 219 Cal.App.4th 173**

Rule: A mother's knowing failure to protect her child from continuous sexual abuse supports her conviction as an aider and abettor of the crime.

Facts: A.R. was born in 1993 to defendant. Defendant began dating Daniel Ogg six years later. He soon moved in with defendant and A.R. Over the next 10 years, Daniel sexually abused A.R. numerous times although never in defendant's presence. Per A.R.'s trial testimony, the abuse started when she was six years old, with Daniel playing a "food game" with her, putting food into her mouth with her eyes shut, challenging her to guess what it was. This led to Daniel putting his penis into her mouth. A.R. reported this practice to defendant. Defendant, however, denied ever hearing about it. Later, when A.R. was about eight years old, Daniel started forcing A.R. to orally copulating him about once a month. When A.R. was ten, Daniel performed oral sex on her. About this time A.R. again told defendant what Daniel was doing. Defendant told her that if they called the police, she (defendant) would go to jail and A.R. and her younger brother would be put into Foster care where children, according to defendant, are often raped. A.R. decided not to call the police. Rather than throwing Daniel out of the house, defendant soon after married him. When A.R. was twelve, Daniel began kissing her on her mouth and digitally penetrating her. Before she was fourteen, he unsuccessfully tried to have sexual intercourse with her. When A.R. was sixteen, she told a friend what was going on. The friend reported it and Daniel was arrested. When interviewed, defendant at first denied knowing anything about the abuse. But she eventually admitted that Daniel told her what he was doing way back when A.R. was ten and that she suspected that "(i)t kind of seemed like" it had happened several times. She also admitted that she had no "good reason" for not reporting it herself. Defendant further admitted that she though Daniel's actions were "inappropriate," but continued to believe he wouldn't do it again. She also said that she was afraid that she'd lose her children if she turned him in. Defendant told her mother that she didn't do more to protect A.R. because "the kids would come and go, but Daniel would be in her life forever." Charged in state court with aiding and abetting the continuous sexual abuse of A.R. (P.C. §§ 31, 288.5.), defendant was convicted and sentenced to 16 years in prison. She appealed.

Held: The Second District Court of Appeal (Div. 6) affirmed. On appeal, defendant argued that although she failed to protect A.R., there was insufficient evidence to establish that she acted with the intent or purpose of committing, encouraging, or facilitating the commission of the crime of continuous sexual abuse of a child. Penal Code § 31 makes liable as principals "(a)ll persons involved in the commission of a crime, whether acting directly or aiding and abetting, . . ." Per P.C. § 288.5, a principal commits continuous sexual abuse of a child under the age of 14 years if the person has recurring access to the child over a period of at least three months and "engages in three or more acts of substantial sexual conduct" or "three or more acts of lewd or lascivious conduct" with the child. "Lewd and lascivious conduct" requires proof of a specific intent to arouse, appeal to, or gratify the sexual desires of either party. (P.C § 288(a)) An

aider and abettor must share the specific intent of the perpetrator. He or she shares the specific intent of the perpetrator if he or she "knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime." It is not necessary that the aider and abettor be prepared to commit the offense by his or her own act should the perpetrator fail to do so, nor that the aider and abettor seek to share the fruits of the crime. Generally, failure to prevent a crime is insufficient to establish aiding and abetting liability. But "[a]iding and abetting liability can be premised on a parent's failure to fulfill his or her common law duty to protect his or her child from attack." "[A] parent who knowingly fails to take reasonable steps to stop an attack on his or her child may be criminally liable for the attack if the purpose of nonintervention is to aid and abet the attack." In this case, defendant was told about Daniel's sexual contacts with A.R. by A.R. herself on at least two occasions, and admitted that Daniel also told her once. With this information, and by failing to either report it or kick Daniel out of the home, defendant facilitated the continuing sexual abuse. Defendant was aware of the continuing abuse, but did nothing about it because she did not want to lose Daniel. She also prevented A.R. from reporting the abuse herself by telling her that she (defendant) would go to jail and that A.R. would be placed in Foster care where she could be raped. It matters not that defendant did not intend to gratify her own sexual desires, or that she wasn't even present at the time of any of the illegal acts. Her conviction only required proof that she failed to protect her daughter when she knew of Daniel's criminal purpose. She both acted and failed to act with the intent to facilitate his abuse of A.R. Based upon the above, defendant was properly convicted of aiding and abetting the continuous sexual abuse of her daughter.

Note: The law has historically held persons to a higher standard whenever there is shown to be a "common law duty" to protect another. This applies to both protecting our children and our elders. Merely failing to do anything to stop child abuse or adult abuse perpetrated by others is not an excuse when there is a legal duty to protect the victim. So while ignoring known child abuse going on at your neighbor's house does not constitute a crime, the same cannot be said when the victim is someone you have a duty to protect.

***Search Warrants*; *Stale Information*:**

***People v. Jones* (June 28, 2013) 217 Cal.App.4th 735**

Rule: The continuing nature of on-going related criminal activity helps support a finding of probable cause for a search warrant despite the passage of time between the last criminal act and the execution of the warrant.

Facts: Karen Flann's purse was stolen in March, 2002. In July, 2004, she discovered that someone had used her date of birth and Social Security number to open cell phone accounts with AT&T and Liberty Wireless. Both accounts had overages, resulting in collection agencies contacting Flann for payment. A third company, Sprint Wireless, also notified Flann that her application for phone service, made in in July, 2004, but for which she never applied, had been denied. An investigation led to information that someone began illegally using Flann's identity in November 2003, The name and

address on the AT&T account were defendant's. On September 20, 2004, Detective Ilya Bezuglov of the Davis Police Department sought and obtained a warrant to search defendant's residence, recounting the information as indicated above. Executing the warrant, officers found two sawed-off shotguns along with 20 shotgun shells in a bag under a bed in the master bedroom. They also found the cell phone associated with the AT&T account obtained using Flann's identifying information. It was determined during the investigation that the AT&T account was open from November 18, 2003, to April 17, 2004. The Liberty Wireless account was opened May 9, 2004, and closed on an unknown date. Defendant was arrested and charged in state court with using another's personal identifying information to obtain credit, goods, or services, per P.C. § 530(a).5, a number of weapons-related charges, and other offenses. Defendant's motion to suppress the evidence recovered from his residence was denied. He pled "no contest" and appealed.

Held: The Third District Court of Appeal affirmed. Defendant's argument on appeal was that the information contained in the affidavit to the search warrant used to search his home was stale, and therefore without probable cause. The Court noted that information concerning criminal activity, when it becomes so remote in time that it is deemed stale, will no longer be worthy of consideration when attempting to determine whether the evidence sought will still be at the place to be searched. When remoteness causes the information to become stale, it may no longer be considered in determining whether probable cause exists. Whether or not staleness is an issue must be determined on a case by case basis. For instance, it has been held that while there is no "bright line rule" telling us when information becomes stale, a delay of over four weeks between a drug transaction and the obtaining of a search warrant has been held to be insufficient to establish probable cause. However, in this case, the circumstances show an ongoing identity theft enterprise that continued from March, 2002 (theft of the victim's purse), to November, 2003 (when the victim's identity was first used illegally by defendant), to July, 2004 (when the Sprint application was used in the victim's name). This set of circumstances shows an "ongoing operation," unlike a solitary drug transaction, that was likely continuing through September, 2004, when the warrant was obtained. The Court also rejected defendant's argument that because the last direct connection between him and Flann's identity was November, 2003, when he opened the AT&T account in his name but with the victim's address and Social Security number, nothing after that was relevant. While the affidavit did not expressly connect defendant to the Liberty Wireless account or the Sprint Wireless application, the magistrate could reasonably infer that since defendant had used the victim's identification information illegally in November, 2003, the later illegal uses for similar purposes were also connected to him. This inference supported the probable cause determination. The warrant, therefore, was valid.

Note: This type of warrant is sometimes referred to as a "historical warrant," reflecting a continuous on-going criminal enterprise. The natural inference from a series of similar criminal acts over an extended period of time is that they are all connected, involving the same players, similar evidence, and with continuing criminal intent, which all leads to probable cause to believe that the sought-after evidence will still be at the place to be searched despite the passage of some time since the last criminal act. It all comes under the heading of "reasonableness," and using one's common sense.