The California Legal Update

Remember 9/11/2001; Support Our Troops

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This edition is dedicated to, and in memory of, ***Judge William Draper***; a retired veteran, former San Diego Deputy District Attorney, retired judge of the Superior Court, and most of all, a good friend.

This edition is also dedicated to, and in memory of, retired ***San Diego Deputy District Attorney Ed Mantyla***; an Appellate Division fixture, and also a long-time friend.

THIS EDITION'S WORDS OF WISDOM:

"*Your value doesn't decrease based upon someone's inability to see your worth.*" (Anonymous)

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ADMINISTRATIVE NOTES:

DNA Sample Collection from Felony Arrestees: On December 3rd of 2014, the First District Court of Appeal (Div. 2) ruled in *People v. Buza* (2014) 231 Cal.App.4th 1446, that enforcement of P.C. § 296(a)(2)(C)—providing for the collection of a DNA buccal swap sample from post-arrest, pre-conviction felony arrestees (even before the subject's preliminary examination) for law enforcement analysis and inclusion in state and federal DNA databases—violates California's Constitution; Art I, § 13. Penal Code § 298.1(a) makes it a misdemeanor for an arrestee to refuse to provide such a sample. The *Buza* court, while suggesting strongly that § 296(a)(2)(c) might also violate the Fourth Amendment, reversed a defendant's conviction under §298.1. holding that enforcement of this section is illegal. However, the California Supreme Court granted review in *Buza* on February 18, 2015, making this case unavailable for citing. Therefore, there is currently nothing to prevent the renewal of DNA buccal swab sample collection under authority of § 296(a)(2)(C), nor charging an arrestee who refuses to provide such a sample with a misdemeanor violation of § 298.1, pending a decision from the California Supreme Court.

"*The Recipient's Mailbox is Full*:" If you're not getting your periodic (3 to 4 weeks) e-mailed link to the "*California Legal Update*" as often as the guy sitting at the desk next to you, you might think about checking your e-mail mailbox. I get between 5 to 10 returned messages upon distribution of each edition of the *Update* telling me that the intended recipient's mailbox is full. *Clean it out once in a while, why don't ya*? The other problem I continually see is that your employer is blocking the *Update*, probably because it's being sent out en mass (I have close to 5,000 individuals and groups listed on my e-mail list) and your system is reading it as spam. So you might check with your IT section and ask them to clear e-mails coming from rcphillips@legalupdate.com.

Cases:

***Delay in the Search of a Computer*:**

United States v. Sullivan **(9th Cir. May 28, 2014) 753 F.3rd 845, 854-857**

Rule: A 21-day delay in the obtaining of a search warrant for the defendant's computer was justified by the fact that the defendant was in custody, he was subject to search and seizure conditions under the terms of a Fourth Waiver, and he consented to the belated search. Balancing this with the importance of the governmental interests involved, and the fact that computer had to be transferred to a different governmental agency for analysis, and the delay was not unreasonable.

Facts: Defendant was convicted of various sex-related offenses involving an under-aged female in Nevada in 2001, and then again in California in 2002. His victims were typically 13 to 14 years old. He went to prison on his California conviction; eventually being paroled in 2007. Among his parole conditions was a "Fourth waiver" (i.e., that his "residence and any property under (his) control may be searched without a warrant by an agent of the Department of

Corrections or any law enforcement officer"), and that "(a)ny computer or mobile telecommunication device under (his) control, or (to) which (he might have) access" was "subject to search and seizure by (his) Parole Agent." It was also required that he not have any contact with females between the ages of 14 and 18 years of age. Upon his release from prison, defendant took up residence at the Bay Breeze Inn, in Oakland. In March, 2008, four months after being released from prison, defendant approached 14-year-old Erika Doe who was standing on a street in Berkeley with her friends after school. Defendant, who was a "large man" in his 40's, six feet five inches tall, weighing 250 pounds, somehow convinced Erika to come with him. Erika stayed with defendant over the next two weeks at the Bay Breeze Inn, submitting to various sex acts. During this time, defendant became the dominating force in Erika's life; controlling her daily activities, replacing her clothing with more adult and sophisticated outfits, and having her hair straightened and amplified with extensions. He would punish Erika if she tried to leave him. Defendant also took numerous video and still photographs of Erika in various states of undress, some while performing sex acts. At least one such video was uploaded to defendant's laptop computer. Finally, on March 17, an Oakland police officer saw Ericka standing on a street in an area frequented by prostitutes. Detaining Erika for questioning, defendant was observed standing nearby. He was also questioned but later released. Upon finding that Erika was the subject of a missing person report, she was taken into custody and returned to her mother. Removed from defendant's presence, Erika told police, and later defendant's parole officer, everything that had been going on for the last two weeks at the Bay Breeze Inn. Parole officers thereafter arrested defendant on March 25, seizing several items including his laptop computer, a digital camera, a book about pimping, and a cellular phone. On April 2, while defendant was being held on eight parole violations, the parole officers transferred custody of the evidence, including defendant's laptop, to the Berkeley Police Department because the California Department of Corrections did not have the technical ability to conduct a forensic search of the laptop. On April 10, defendant was interviewed at the jail by Berkeley PD detectives. He told the detectives that Erika claimed to be 19 years old, and that this was documented in one of the videos on his laptop. He signed a written consent form allowing the detectives to go into his computer to find this video. Perhaps erring on the side of caution, on April 15, the detectives also obtained a search warrant to search the laptop. A forensic search of the laptop resulted in the discovery of the sex videos at issue in this case. Defendant was charged in federal court with the production of child pornography (18 U.S.C. § 2251(a)) and possession of child pornography (18 U.S.C. § 2252(a)(4)(B)). Arguing that the 21-day lapse between the seizure of his laptop and its eventual search (March 25 to April 15) was unreasonably excessive, and thus a violation of the Fourth Amendment, defendant filed a motion to suppress the contents of his computer. The trial court denied his motion. After a 13-day court trial, defendant was found guilty. Sentenced to 25 years in prison, he appealed.

Held: The Ninth Circuit Court of Appeal affirmed. At issue on appeal was the reasonableness of the 21-day delay between the seizure of defendant's laptop and the eventual obtaining of a search warrant to do a forensic search, during which time the laptop remained in law enforcement's possession. Defendant cited *United States v. Dass* (9th Cir. 1988) 849 F.2nd 414, where the Ninth Circuit had held that seizing and holding onto mailed packages for up to 23 days was such a lengthy retention of the packages that it constituted a substantial intrusion into the possessory interests of their owners. Also cited was an Eleventh Circuit federal case, *United States v. Mitchell* (11th Cir. 2009) 565 F.3rd 1347, where holding onto the hard drive from a

suspect's computer for 21 days was found to be an unreasonable retention of the defendant's property, violating the Fourth Amendment. The standard to be applied when evaluating the legality of the length of time a suspect is deprived of his property pending a search is one of "*reasonableness*," taking into account the "*totality of the circumstances*," but while recognizing that it's not necessary that the Government pursue the least intrusive course of action available to it. Determining reasonableness requires a "*balancing test*;" i.e., balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." In this case, the intrusion into defendant's possessory interests was minimal in that he was in custody during the entire 21 days in question and couldn't have used his computer anyway. The fact that he was subject to a Fourth waiver, and had also given a written consent, all served to minimize his possessory interests in his computer. None of these factors were involved in either the *Dass* nor *Mitchell* cases. Balanced with this, the Court found the seizure and retention of defendant's laptop was necessary for the promotion of legitimate governmental interests. The state "has an overwhelming interest in supervising parolees because parolees . . . are more likely to commit future criminal acts." (*Samson v. California* (2006) 547 U.S. 843, 853.) The state also has a strong interest in detecting and prosecuting child pornography cases. The fact that the government might not have pursued the "least intrusive course of action" was held to be irrelevant. The 21-day delay was also partially justified by the fact that the Department of Corrections, not having the means to conduct a forensic search of the laptop, had to take the time to transfer it to another law enforcement agency. Balancing all these factors and defendant's arguments come up short. His motion to suppress the contents of his laptop computer, therefore, was properly denied.

Note: The importance of this case, if it's not already obvious to you, is to highlight the rule that you can't take a suspect's property (including, but not limited to computers and cellphones) away from him and hold onto it indefinitely while you take your time in getting the necessary search warrant. Dragging your feet, while the suspect's possessory interests are being intruded upon, will eventually morph into a Fourth Amendment violation. You have to move the investigation along, diligently, and be prepared to testify to why it took you as long as it did to get a search warrant. It didn't help the defendant's arguments in this case that he was in custody and wasn't going to be allowed access to his computer anyway. Take away that factor, however, and this is a close case; one we probably would have lost. It doesn't take three weeks to get a search warrant.

***Residential Entries*; *Express vs. Implied Refusals*:**

United States v. Moore **(9th Cir. Oct. 23, 2014) 770 F.3rd 809**

Rule: To be legally effective, a present occupant's refusal to allow law enforcement's entry into his or her residence must be express (as opposed to "implicit").

Facts: Defendant lived with his fiancée Kristen Jones and their children in Laveen, Arizona. The Department of Homeland Security (DHS) had been monitoring defendant for some months, suspecting him of being involved in the distribution of marijuana. On January 18, 2012, DHS Special Agent Scott Wagoner started surveilling defendant's residence based upon a tip from a

confidential informant that a large quantity of marijuana had just been delivered there. on the morning of the 19th, Jones was observed leaving the house. At around noon, defendant came outside and pulled a vehicle into his garage, and then reentered the house. So it was known that he was home. At about 2:00 p.m., some of the officers participating in the surveillance went to the door, knocked and rang the doorbell, presumably to seek a consensual entry. Although people could be heard "shuffling around" inside, no one came to the door. At this point, Agent Wagoner decided to go back to his office to start working on a search warrant. But before the warrant was completed, Agent Wagoner (at the suggestion of a supervisor) called a phone number they believed was for defendant's house. However, Jones, who was at work, answered. Agent Wagoner identified himself and explained to her that the house was under surveillance for possible drug trafficking and that he was in the process of writing up a search warrant. Telling Agent Wagoner that her children, her sister, and "possibly" defendant, were all at the house, she expressed some concern for them being there during the execution of a search warrant. So she told Agent Wagoner that she would leave work and meet him at the house. But before doing so, Jones called her sister. One minute later, a person was observed coming out of the house, going into the backyard, and dumping something over the back fence into an adjacent yard. Officers checked what was dumped and found two large boxes, each of which contained a 20-pound bundle of marijuana, packed for shipping. Wagoner and Jones met at the house shortly thereafter at which time Jones signed a "Consent to Search" form. Jones and some officers then went to the front door of the residence where she tried telephoning her sister, and then defendant, on their respective cellphones. Neither person answered. Nor did anyone answer their knocks at the front door. It was also discovered that Jones' key wouldn't unlock the deadbolt lock on the front door. So when asked, Jones gave the officers permission to break through the front door with a battering ram. Upon the officers' forced entry, defendant, Jones' sister, and the children all exited the house. A search of the house based upon Jones' consent resulted in the recovery of three more boxes of marijuana along with digital scales, packing material, and shrink-wrap. Upon waiving his *Miranda* rights, defendant admitted that the marijuana was his, giving the officers details as to his sources and his shipping methods. Charged in federal court with one count of being in possession of marijuana with the intent to distribute (21 U.S.C. § 841(a)(1) and (b)(1)(D)), defendant's motion to suppress was denied. He was thereafter convicted by a jury and sentenced to 3 years and 10 months in prison. Defendant appealed.

Held: The Ninth Circuit Court of Appeal affirmed. On appeal, defendant argued that pursuant to the Supreme Court's landmark case decision of *Georgia v. Randolph* (2006) 547 U.S. 103, because he was present at the scene and did not consent to the officer's warrantless entry, the evidence found in the house should have been suppressed as a violation of the Fourth Amendment. The Court disagreed. *Randolph* provides a narrow exception to the general rule that a warrantless entry into a home is lawful whenever an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant, consents to that entry. The "narrow exception" under *Randolph*, making such an entry *unlawful*, applies when a physically present co-occupant *expressly* refuses to allow police to enter his home, despite another inhabitant's (Jones, in this case) consent. Defendant in this case was physically present. But he did not "*expressly*" object. Refusing to answer the door or telephone is, at best, an "*implicit*" objection. The Court here declined to extend the rule of *Randolph* to implicit objections. The Court further upheld the use of the battering ram, at least where the consenting cotenant expressly approved of its use.

Note: Defendant also cited a case out of the federal Eight Circuit (*United States v. Williams* (8th Cir. 2008) 521 F.3rd 902.), where it was held that the defendant slamming the door shut on the officers and closing the deadbolt door lock was sufficient "affirmative conduct" to qualify as an express refusal to consent to the officers' entry. But merely refusing to come to the door or answer the telephone, as occurred in this case, does not qualify as such "affirmative conduct." It is also interesting to note, by the way, that had the DHS agents merely completed the search warrant they'd started (assuming they had enough probable cause to obtain one), rather than seek a consent (which provided the added problem of giving defendant the opportunity to secret his marijuana, which he apparently tried to do albeit unsuccessfully), none of the above would have ever been an issue. A couple hours on the computer typing up a warrant and talking to a judge would have saved them, and numerous other people, days and days of litigation. While I appreciate the neat new case law, sometimes we make more work for ourselves by trying to cut corners.

***Knock and Talk*:**

Carroll v. Carman **(Nov. 10, 2014) __ U.S. __ [135 S.Ct. 348; 190 L.Ed.2nd 311]**

Rule: The constitutionality of conducting a knock and talk at an entrance to a residence other than the front door is an open question, although most case law supports doing so at any entrance where visitors could reasonably be expected to go.

Facts: Pennsylvania State Police received a report that a man named Michael Zita had stolen a car and two loaded handguns and that he might be at a particular residence belonging to Andrew and Karen Carman. Officers Jeremy Carroll and Brian Roberts proceeded to the Carman's residence to investigate. They arrived at the residence in separate vehicles at about 2:30 in the afternoon. The Carman's home was situated on a corner with a gravel parking area on the left side of the property, as you faced the house. Neither officer had ever been there before. There being no parking available in front of the house, the officers drove around the corner onto the side street, past the gravel parking area, eventually parking their police vehicles at "the far rear of the property." As they approached the house from its left side, the officers saw a small structure ("carport or shed") with its door open and a light on. Officer Carroll "poked" his head inside and announced that he was the "Pennsylvania State Police." No one was there. So they continued towards the side of the house when they next saw a sliding glass door that opened onto a ground-level deck. (It's apparent that this was in their backyard, in an area accessible from the side.) Officer Carroll later testified that it "looked like a customary entryway," so he and Officer Roberts decided to knock on it. As they stepped onto the deck, Andrew Carman came out of the house and "belligerently and aggressively" approached them. The officers identified themselves and explained that they were looking for Michael Zita. When asked for his name, Carman refused to identify himself. Instead, he turned away from the officers and appeared to reach for his waist. Officer Carroll grabbed Carman's right arm to make sure he was not reaching for a weapon. Carman twisted away from Officer Carroll, lost his balance, and fell into the yard. At that point, Karen Carman came out of the house. She identified herself and her husband. Denying that Zita was in the house, she gave the officers permission to search for him. Finding no one, the officers left. No charges were brought on anyone. But that didn't prevent the

Carmans from suing Officer Carroll in federal court under 42 U.S.C. § 1983, alleging a Fourth Amendment violation for having gone into their backyard and onto their deck without a warrant. Officer Carroll argued at trial that his entry into the Carman's backyard was lawful under the so-called "knock and talk" exception to the warrant requirement, allowing police officers to knock on someone's door so long as they are "on those portions of the property that the general public is allowed to go on." Carmen contended that that rule only applies to the front door. The District Court trial judge instructed the jury that the "knock and talk" exception "allows officers without a warrant to knock on a resident's door or otherwise approach the residence seeking to speak to the inhabitants, just as any private citizen might." The jury was also instructed that "officers should restrict their movements to walkways, driveways, porches and places where visitors could be expected to go." The civil jury found for Officer Carroll. However, the federal Third Circuit Court of Appeal reversed, ruling that Officer Carroll had violated the Fourth Amendment "as a matter of law" in that the "'knock and talk' exception 'requires that police officers begin their encounter at the front door, where they have an implied invitation to go.'" The Third Circuit also held that Officer Carroll was not entitled to qualified immunity from civil liability in that "his actions violated clearly established law." Officer Carroll appealed to the United States Supreme Court.

Held: The United States Supreme Court unanimously reversed the Third Circuit. Unfortunately, however, the Court did not decide whether Officer Carroll was in violation of the Fourth Amendment when he chose to enter the patio area of the plaintiffs' home at the rear sliding glass door. Rather, the Court merely reversed the Third Circuit's conclusion that Officer Carroll violated the Fourth Amendment as a matter of law, holding only that whether or not an officer is restricted to conducting a knock and talk at the front door of a residence is an unresolved issue. "A government official (who is) sued under (42 U.S.C.) § 1983 is entitled to qualified immunity unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct. (Citation) A right is clearly established only if its contours are sufficiently clear that 'a reasonable official would understand that what he is doing violates that right.' (Citation) In other words, 'existing precedent must have placed the statutory or constitutional question beyond debate.' (Citation). This doctrine 'gives government officials breathing room to make reasonable but mistaken judgments,' and 'protects "all but the plainly incompetent or those who knowingly violate the law."' (Citation)" The Third Circuit relied completely on one case in support of its conclusion that an officer must necessarily begin a "knock and talk" at the front door. (See *Estate of Smith v. Marasco* (3rd Cir. 2003) 318 F.3rd 497.) The Court found here that not only did the Third Circuit misinterpret *Marasco*, but it also ignored other federal and state court cases to the contrary which have consistently held that a police officer, in making contact with a resident, is constitutionally bound to do no more than restrict his "movements to walkways, driveways, porches and places where visitors could be expected to go." (E.g., see *United States v. Titemore* (2nd Cir. 2006) 437 F.3rd 251; *United States v. James* (7th Cir 1994) 40 F.3rd 850, vacated on other grounds at 516 U.S. 1022; *United States v. Garcia* (9th Cir. 1993) 997 F.2nd 1273, 1279-1280; and *State v. Domicz* (2006) 188 N.J. 285, 302.) However, despite this lower appellate court authority supporting Officer Carroll's actions, the Supreme Court declined to say whether they were correctly decided, noting only that the issue is certainly not "beyond debate." As such, Officer Carroll is entitled to qualified immunity.

Note: The problem with these important search and seizure issues being taken up before the U.S. Supreme Court as a civil case is that the High Court will never decide an issue they don't have to. Deciding whether or not an officer is constitutionally required to restrict "knock and talks" to the front door was not necessary where the Court could determine Officer Carroll's potential civil liability by resolving the qualified immunity issue only. But this case is still important from a criminal search and seizure standpoint when you consider the fact that lower courts, including the Ninth Circuit case mentioned here (*U.S. v. Garcia*), have upheld going to *any door* where "*visitors could be expected to go*." Until the Supreme Court decides otherwise (which I don't expect them to do), this is the rule you can use in the field. The California Supreme Court is in apparent agreement with the majority rule. (See ***People v. Camacho*** (2000) 23 Cal.4th 824.) In *Camacho*, the Court held certain police observations from the side of the house to be illegal, but only because there was nothing to indicate, based upon the lack of walkways or other physical attributes of the property, that the public in general was inferably invited to the side of the house. (*Id*., at p. 833.) So my suggestion to you is that unless there is some legitimate reason not to, start at the front door as long as it is accessible, eliminating this issue altogether. But if there are other entrances where, due to the physical attributes of the property (e.g., a walkway, pathway, signs, its location in relation to the front of the house, etc.), it is reasonable to assume that the public would be expected to approach and knock, then don't be hesitant to try them as well.

***Warrantless Searches of Cellphones Incident to Arrest*:**
***Warrantless Searches of Cellphones and Exigent Circumstances*:**
***Warrantless Searches of Cellphones under the Vehicle Exception*:**
***Warrantless Searches of Cellphones and Inevitable Discovery*:**
***Warrantless Searches of Cellphones and Good Faith*:**

United States v. Camou **(9th Cir. Dec. 11, 2014) 773 F.3d 932**

Rule: A suspect's cellphone seized from his vehicle incident to his arrest may not be searched in the absence of a search warrant or exigent circumstances. The fact that there is probable cause to believe the cellphone contains evidence of a crime, under the so-called "vehicle exception," does not justify the lack of a warrant. Also, neither the doctrine of inevitable discovery nor good faith allows for a warrantless search.

Facts: Defendant drove his truck into a U.S. Border Patrol primary inspection checkpoint at 10:40 p.m., on Highway 86 in Westmorland, California. His girlfriend, Ashley Lundy, sat in the passenger seat. Agents at the checkpoint grew suspicious when Lundy failed to make eye contact. Upon opening the door to the truck, an illegal alien was found lying on the floor between the truck's front seats. Everyone was handcuffed and moved to the checkpoint's security offices for booking. A cellphone was found in the cab of the truck and was inventoried as "seized property and evidence." Defendant admitted that the cellphone was his, but then invoked his *Miranda* rights. Lundy, however, waived her rights and couldn't talk enough. She admitted that she and defendant were smuggling aliens into the United States and had been doing so for some nine months. She also stated that they would be contacted on defendant's cellphone by a subject known to them as "Jessie," a.k.a. "Mother Teresa," to receive instructions for where to pick up, and later to drop off, the smuggled aliens. In fact, as they talked, defendant's cell

rang several times, displaying a phone number Lundy identified as belonging to Mother Teresa. Finally, at about midnight, an hour and twenty minutes after defendant's arrest, Border Patrol agents searched defendant's cellphone looking for evidence of "known smuggling organizations and information related to the case." There was no claim that the warrantless search of the cellphone was necessary to prevent the destruction of evidence or to ensure anyone's safety. Checking the call logs revealed several recent calls form Mother Teresa. Some videos on the phone were also found showing what appeared to be the area around Calexico. The agent then checked the still photographs stored on the phone's internal memory and found some child pornography. The cellphone was later turned over to the FBI which obtained a search warrant, resulting in the discovery of several hundred images of child pornography. While the smuggling charges were not pursued (not meeting the U.S. Attorney's "prosecution guidelines"), defendant was indicted by a federal grand jury for possession of child pornography, per 18 U.S.C. § 2252(a)(4)(B). Following the denial of defendant's motion to suppress the contents of his cell phone, he pled guilty to the pornography charge and appealed.

Held: The Ninth Circuit Court of Appeal reversed, ruling that defendant's motion to suppress should have been granted. At issue, of course, was the legality of the warrantless search of defendant's cellphone by the Border Patrol. Several legal theories were offered by the government in its fruitless attempt to justify the search: 1. *Incident to Arrest*: A search incident to arrest allows for a warrantless search of the area within an arrestee's immediate control; i.e., "the area from within which (an arrestee) might gain possession of a weapon or destructible evidence," along with any containers found within that area. Such a search, however, must be "*spatially*" (i.e., at the place of the arrest) and "*temporally*" (i.e., "roughly contemporaneous," time-wise, with the arrest) incident to the arrest. It was undisputed both that defendant was lawfully arrested and that his cellphone was lawfully seized from his vehicle incident to that arrest. However, the cellphone itself was not searched until an hour and twenty minutes after the arrest. It was also not searched until after a number of intervening acts took place; i.e., the subjects were handcuffed and removed to the security offices, processed, and interviewed, and the phone itself was set aside and inventoried as a seized item. Being neither "*spatially*" nor "*temporally*" incident to the defendant's arrest, the eventual search of defendant's cellphone cannot be said to have been searched incident to his arrest. That illegal search, being the basis for the FBI's later search warrant, poisoned the eventual recovery of all the child pornography in defendant's cellphone. 2. *The Exigency Exception*: Under the exigency exception, officers may make a warrantless search if: (1) they have probable cause to believe that the item or place to be searched contains evidence of a crime, and (2) they are facing exigent circumstances that require immediate police action. The United States Supreme Court has recently held that while search warrants are generally required to search an arrestee's cellphone, an exception may be found where it is shown that there is a "need to prevent the imminent destruction of evidence . . . , to pursue a fleeing suspect, (or) to assist persons who are seriously injured or are threatened with imminent injury." (***Riley v. California*** (2014) 573 U.S. __ [134 S.Ct. 2473, at p. 2493.) Assuming for the sake of argument that the agents had probable cause to search defendant's cellphone, the Court failed to find any exigencies justifying the lack of a search warrant. Once defendant's cellphone had been seized, the possibility that he might delete incriminating data had been eliminated. Also, there was nothing to indicate that his phone was vulnerable to "remote wiping." If remote wiping was suspected, that possibility can be eliminated by merely disconnecting the phone from the network. Lastly, the agent's search went beyond the scope of

any probable cause that might have existed, searching not only the phone's call logs, but videos and photographs as well. 3. *The Vehicle Exception*: Under the so-called vehicle exception to the search warrant requirement, officers may search a vehicle and any containers found therein without a warrant so long as they have probable cause to believe seizable items (e.g., evidence or contraband) are located therein. (*United States v. Ross* (1982) 456 US. 798.) The vehicle exception is justified by the lower expectation of privacy individuals have in their vehicles as well as the mobility of vehicles, allowing evidence contained within a vehicle to be easily concealed from the police. Such a search differs from searches incident to arrest in that it need not be contemporaneous in time or place, nor does the purpose of the search have to be related to the cause of the arrest. Also, it is broader in that it is not limited to the lunging area and is not dependent upon an arrestee remaining unsecured. Again, assuming that the agents in this case had probable cause to search the vehicle, the Court found nevertheless that the search of defendant's cellphone cannot be justified by this theory. That's because a cellphone, per the Court, is not a "*container*." In *New York v. Belton* (1981) 395 U.S. 752, the Supreme Court defined "container" as "any object capable of holding another object," and explained that in the vehicle context, containers "include closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like." Following the U.S. Supreme Court's lead in ***Riley v. California, supra***, the Court here agreed that cellphones contain far more personal information than the types of containers contemplated by the Supreme Court when it decided *U.S. v. Ross*, giving the owner of a cellphone a higher expectation of privacy in its contents than in what *Belton* defined as a container. While *Riley* was a "search incident to arrest case," there is no reason not to extend its reasoning to searches based upon probable cause. 4. *Inevitable Discovery*: Evidence that would have inevitably been found by law enforcement by other lawful means will be admissible in evidence despite the exclusionary rule. However, the doctrine of inevitable discovery has never been applied in those circumstances where officers had probable cause to obtain a warrant, but simply didn't attempt to do so. Also, in this case, the government failed in its burden to prove by a preponderance of the evidence that they would have gotten a warrant for evidence of defendant's smuggling activity in that the U.S. Attorney (allegedly) told the Border Patrol agents that day that they weren't going to file smuggling charges on defendant. 5. *Good Faith*: "When the officer executing an unconstitutional search acted in 'good faith,' or on 'objectively reasonable reliance (upon erroneous information),' the exclusionary rule does not apply." The test for good faith is an objective one: i.e., "whether a reasonably well trained officer would have known that the search was illegal in light of all the circumstances." In this case, however, the government did no more than allege that the agent did not act recklessly or deliberately. Even is true, this does not excuse the failure to obtain a warrant. The need for a search warrant under these circumstances is something a well-trained officer should have known. So good faith does not apply.

Note: About as understated as a Mack Truck hitting you head-on at 65 miles an hour, this case pretty well slams the door on warrantless cellphone searches. You're going to need a search warrant to get into a cellphone absent consent, an articulable exigency, or when it's been abandoned. This case also makes it abundantly clear that you can't treat a cellphone as just some common "container," such as those defined in *Belton* (above). It's not only the Ninth Circuit that is telling us this, but the U.S. Supreme Court as well. (See ***Riley v. California, supra***, 134 S.Ct. at pp. 2484-2485.) Container-search theories just do not apply to cellphones. The next

step in this progression; . . . *computers*. It's coming. (See *People v. Michael E.* (2014) 230 Cal.App.4th 261, 276-279, where the Court included a whole segment criticizing the current trend of referring to computers and cellphones as "*containers of information*," predicting the coming of a whole new body of law dealing with electronic devices.) The only holding in this case with which I might disagree is the Court's conclusion that "good faith" does not apply. An officer's good faith reliance on prior case law typically excuses an illegal search. (*Davis v. United States* (June 16, 2011) 131 S.Ct. 2419, 2423-2424.) Until now, no case has held that a warrantless search of a cellphone found in a vehicle with probable cause to believe it contains evidence of a crime is illegal. This case is the first to extend the rule of *Riley* (searching cellphones incident to arrest) to searches with probable cause. The Court should have cut the Border Patrol agents some slack on this issue.