

LEGAL UPDATE

(COPY -- DISTRIBUTE -- POST)

Vol. 16

March 30, 2011

No. 3

www.legalupdate.com

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Remember 9/11/01: Support Our Troops

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THIS EDITION'S WORDS OF WISDOM:

"If you find yourself in a fair fight, you didn't plan your mission properly." (Col. David Hackworth, U.S Army)

IN THIS ISSUE:

Page:

Administrative Notes:

First Amendment Freedom of Expression 1

Case Law:

Extended Border Searches 2
Collective Knowledge Doctrine 2
Observations from Beyond the Curtilage 3
Use of Night Vision Goggles 3
School Searches 6
Detaining Mailed Packages 7
Probable Cause to Arrest 9

ADMINISTRATIVE NOTES:

First Amendment Freedom of Expression: Two new civil cases have come down in the last month dealing with a demonstrator's right to *freedom of expression* under the First Amendment, both upholding the rights of the demonstrators over the rights of others. The first, *Best Friends Animal Society v. Macerich Westside Pavilion Property, LLC* (Mar. 2, 2011) __ Cal.App.4th __; [2011 DJDAR 3324], found a shopping mall's "time, place and manner" rules, limiting where and when demonstrators could set up their table and pass out leaflets, to be in violation of the California Constitution. The second, *Snyder v. Phelps* (Mar. 2, 2011) __ U.S. __ [2011 DJDAR 3307], from of the United States Supreme Court, upheld the

right of members of a Baptist Church to protest America's alleged tolerance of homosexuality by picketing at the funeral for a U.S. soldier killed in Iraq. The demonstrators in *Snyder* used disturbing signs such as "Thank God for Dead Soldiers." The soldier's father's \$5 million judgment in a civil suit for the intentional infliction of emotional distress was reversed by both the lower federal circuit court and the U.S. Supreme Court which found the demonstrator's activities, as offensive as they were, to be protected by the First Amendment. Both of these cases merely highlight my continuing advice to police officers not to make arrests when you get called to these situations, except when necessary to thwart an on-going physical confrontation (i.e., an assault or batter). The issues are just too complicated for any lone officer to resolve in the field and are always more appropriately handled by a civil court. An updated review of this issue in an article I wrote on the subject is available to you upon request. No extra charge.

CASE LAW:

Extended Border Searches:

Collective Knowledge Doctrine:

***United States v. Villasenor* (9th Cir. June 10, 2010) 608 F.3rd 467**

Rule: An extended border search by federal officers is lawful where there is a reasonable certainty that a vehicle contained contraband upon crossing the border, and there's a reasonable suspicion to believe that the vehicle still contains contraband or other evidence of criminal activity when later stopped.

Facts: A drug-smuggler who was arrested at the Calexico Port of Entry told Immigration and Customs Enforcement (ICE) agents that he was a part of a larger smuggling operation, giving the agents details including a description of some of the vehicles being used as well as a picture of a white PT Cruiser with a visible license plate. The plate number was put into the Treasury Enforcement Communications System (TECS), a computerized system designed to identify federal law violators who might be crossing the border. The next morning, the 82-year-old defendant, driving that same PT Cruiser across the border into the United States, triggered an automatic referral to the secondary inspection area. When a drug-sniffing dog failed to alert on defendant's car, he was allowed to pass on into the country. Shortly thereafter, ICE agent Enrique Torregrosa, who had been present at the drug smuggler's interview the day before, happened to be stopped at a red light in Calexico when he suddenly noticed that he was right behind the white PT Cruiser described by the smuggler the day before. Given its direction of travel and proximity to the border, Agent Torregrosa deduced that it had just come from Mexico. However, he was unaware that defendant's car had already been subjected to a drug-dog sniff with negative results. After verifying that the car's license number had indeed been entered into TECS, he decided to follow it. Defendant first stopped at a FillCo gas station. While talking on his cell phone, defendant got out of his car and walked to the corner, looking south towards the Port of Entry. After several minutes, he went into the bathroom and then left the station without buying any gas. He drove about two miles to an AM/PM gas station where he again walked around the property, still on

his cell phone. After about five minutes, he got back into his car and drove away, again without buying any gas. From there, he drove to a DMV office about 30 minutes away. He went into the DMV and then returned to his car after about 2 or 3 minutes. When he drove off, Agent Torregrosa decided it was time to stop him. He radioed for a Calexico patrol unit to make a traffic stop. After defendant was stopped, a drug-sniffing dog was called for. But it took about 45 minutes before the dog arrived. When it did, the dog alerted on the rear rocker panel of the car. Thirty-seven and a third pounds of cocaine in 15 packages was recovered. Arrested and charged in federal court with importing and possessing an illegal substance, defendant's motion to suppress the cocaine as the product of an illegal detention was granted by the trial court. The Government appealed.

Held: The Ninth Circuit Court of Appeal reversed. The issue was whether, under these circumstances, the search of defendant's vehicle was a valid "extended border" search. An extended border search may be based upon less than probable cause so long as (1) the totality of the circumstances, including the time and distance elapsed as well as the manner and extent of surveillance, convince the fact finder with *reasonable certainty* that contraband was aboard the vehicle at the time of entry into the United States, *and* (2) the government agents conducting the search had a *reasonable suspicion* that the search may uncover contraband or evidence of criminal activity. At issue in this case was the reasonableness of Agent Torregrosa's suspicion that there was contraband or other evidence of criminal activity in defendant's vehicle despite there already having been an earlier negative result with the use of a drug-sniffing dog at the Border Check Point. Here, Agent Torregrosa testified that he was unaware of the dog-sniff that had already occurred at the secondary area of the Border Check. Defendant's vehicle was searched at the border check by Customs and Border Protection (CBP) inspectors. Torregrosa worked for ICE. The "*collective knowledge doctrine*" does not apply unless (1) the separate law enforcement agents are working together in an investigation even though they may not have explicitly communicated to the other the facts that each has independently learned, *or* (2) unless one officer, with direct personal knowledge of all the facts necessary to give rise to a reasonable suspicion or probable cause, directs or requests another officer to conduct a stop, search, or arrest. Some cases suggest that for the first rule to apply, there also must have been some communication between the two agents. However, neither of these circumstances apply to this case. But even if Torregrosa knew of the prior negative dog-sniff indicating that there were no drugs in defendant's car, he still had sufficient other information that defendant might have some involvement in drug smuggling, and that an actual physical search of defendant's car would possibly turn up other evidence of that illegal activity other than the drugs. This reasonable suspicion is established by proof of an arrested drug-smuggler's self-incriminating (thus reliable) statements indicating that defendant's PT Cruiser was involved in smuggling activity, defendant's unusual actions at two gas stations, and his meaningless visit to DMV. An extended border search of defendant's car being lawful, it was not improper to stop and detain him even for some 45 minutes while awaiting the arrival of a drug-sniffing dog. Defendant's motion to suppress should have been denied.

Note: The Calexico officer had actually made a pretextual stop of defendant's vehicle for a violation of V.C. § 26708(a)(2), for having his vision through the front windshield

obstructed by a 10-inch rosary hanging from the rear view mirror. The Court declined to discuss the legality of this reasoning for stopping defendant in that the detention was found to be legal as an extended border search. So whether or not section 26708 applied is irrelevant. The use of a drug-sniffing dog was also unnecessary, in that the extended border search doctrine allowed for the thorough physical search of his car with or without the prior use of the dog. But we should not fault the officer here for taking it slow and making sure that the prosecution would have several legal grounds to justify the search. That way if one legal theory falls short, we always have the other to rely upon. When we get into trouble, it's usually because some hard-charging cop barged his way into a situation without giving it some thought as to what he is doing. That didn't happen here.

***Observations from Beyond the Curtilage:
Use of Night Vision Goggles:***

People v. Lieng (Dec. 14, 2010) 190 Cal.App.4th 1213

Rule: Warrantless observations into the curtilage of a home from outside the curtilage are lawful, and may be used in an affidavit for a search warrant. The use of night vision goggles does not implicate the Fourth Amendment.

Facts: Based upon informant information, Mendocino County Sheriff's Sergeant Bruce Smith and other narcotics officers went to the area of defendants' (Richard and Tony Lieng) rural residence at about 4:30 a.m. Using night vision goggles (so they wouldn't alert defendants of their presence with flashlights), the officers walked up a long driveway used by defendants and at least three other families. Defendants' residence was at the end of the driveway; a walk of 10 to 15 minutes. There was no gate to the driveway. Coming closer to defendants' residence, the officers came upon a metal gate that was open and possibly non-functional. A wire fence extended from the gatepost but no evidence was presented as to where the fence led. There may have been a "no trespassing sign," but the sergeant could not remember seeing it, or if he did, where it was located. Beyond the gate, about 20 feet off the driveway was a metal building from which the officers could hear electric devices, such as fans, running, with "high intensity discharge lights" on inside. The smell of marijuana coming from the building was also evident. Continuing on past the metal building, the officers approached the defendants' residence; a distance of about 150 feet from the metal building. Continuing along the driveway and approaching the garage (how close is unknown), it being attached to the residence on the driveway side, they could hear electric devices (e.g., fans) running and noted, again, the use of "high intensity discharge lights" in the garage. Again, the odor of marijuana was evident. About a week later, the officers revisited the area again at night (12:30 a.m.) and again noted all of the above, including an even stronger odor of marijuana. At no time during these two visits did the officers leave the driveway. A third visit by other officers was made six days later with similar results. Sergeant Smith sought and obtained a search warrant for defendants' residence and the metal building, alleging the above facts and including Sgt. Smith's expert opinion that defendants were engaged in the cultivation of marijuana. Execution of the warrant resulted in recovery of enough evidence to justify both defendants being charged in state court with cultivation

of marijuana and possession for sale. Defendants' motion to suppress was denied. Following a negotiated plea by both defendants, they appealed.

Held: The First District Court of Appeal affirmed. As with the trial court, defendants challenged the legality of the search warrant, arguing that Sgt. Smith used illegal observations (i.e., in violation of the Fourth Amendment) in the affidavit. The issue was whether Smith and the other officers were within the curtilage of defendants' home when they made those observations. The rule is that observations made from *within* the curtilage of a person's home are lawful only if made while at the location with a warrant, consent, or an exigency. But observations made from *outside* the curtilage (i.e., from "open fields"), with or without a warrant, consent or an exigency, do not implicate the Fourth Amendment. Whether or not any particular location is in or outside the curtilage of a person's home depends upon the circumstances. To determine whether one is within the curtilage of a home, four factors must be considered: (1) The proximity of the area to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by people passing by. Here, the record was unclear as to how close Sgt. Smith got to defendant's garage, but the bulk of the observations were made from the common driveway, open to the public. Although there was some testimony about a gate and a fence, it appeared that the gate was open and maybe not even operable. The evidence did not describe whether the wire fence surrounded the house or otherwise separated it from the driveway. But there was no evidence to support the argument that the driveway, from where the observations were made, was an area "intimately tied to the home itself." It appeared that it was not. And there were no apparent attempts by defendants to protect the observed locations from being seen by anyone passing by. Based upon this, Sgt. Smith's observations were not made from within the curtilage of the defendants' home. Defendants also complained that the officers were using night vision goggles. But the Court found that using such a device to assist in seeing things that were otherwise in plain sight anyway did not implicate the Fourth Amendment. The Court therefore, after finding sufficient information in the affidavit to support a finding of probable cause, agreed with the trial court that Sgt. Smith's observations were lawful and that the search warrant was therefore valid.

Note: Probably the biggest problem the appellate court had here was dealing with the lack of detail concerning the physical makeup of defendants' property as it related to where the officers were when they made their observations. Fortunately, with the trial court finding in the prosecution's favor (even though noting that the case was a "close one"), the appellate court needed only to find that the evidence was insufficient to overrule the trial judge. Had the prosecution lost at the trial court level on these issues, the appellate court would have been ruling instead that the evidence was insufficient to warrant a reversal. Whether this lack of specificity in the testimony was the prosecutor's or the sergeant's fault is academic at this point. The bottom line is that when litigating fact-dependent issues such as whether or not a police officer is making observations from within or outside the curtilage of a house, a lot more detail, such as diagrams, photos and measurements, needs to be pumped into the evidence. The sergeant should have been required to testify to how close he was to the house when seeing and smelling

defendants' garage, and where in relation to that spot was the wire fence, if at all. Whether or not there was a "no trespassing" sign, and where it was, should not have triggered an "*I don't know*" response, as it did. More detail relating to the gate and the attached wire fence should have been provided. All of these deficiencies could have lost it at the trial court level, and did in fact make it more difficult for the appellate court than it had to be. We dodged a bullet in this case, not because the officers did anything wrong in their investigation, but only because of the poor record made at the motion to suppress.

School Searches:

***In re Sean A.* (Dec. 22, 2010) 191 Cal.App.4th 182**

Rule: A school policy of searching all students who leave and return to school during the school day may allow for a suspicionless search of a student by school administrators as a "*special needs*" administrative search.

Facts: Defendant, a student at a particular high school, was observed coming onto the school campus in the middle of the school day. A quick check of the day's attendance records showed that the defendant had been present for his 3rd period class, but absent for 4th period. The school has a written policy, as a part of their "behavior code," that all students who return to class after being "out of bounds" (i.e., away from the classroom area of the school campus) "are subject to a search of their person, their possessions, and vehicle when appropriate." Defendant was called into the assistant principal's office and asked where he'd been. He claimed to have gone home to retrieve a notebook. Defendant was instructed to empty his pockets, which he did. A plastic bag containing 44 pills of methylenedioxy-methamphetamine (i.e., "MDMA, or "ecstasy") was recovered. The police were called and defendant arrested. Defendant admitted to going home to pick up the pills and to having already sold some of them on the way back to class. A petition alleging the possession and possession for sale of a controlled substance was filed in juvenile court. When his motion to suppress was denied, defendant admitted the possession for sale charge and was placed on probation. Defendant appealed.

Held: The Fourth District Court of Appeal (Div.1), in a split 2-to-1 decision, affirmed. After first noting the need to maintain discipline and provide a safe environment for learning, and to prevent the harmful impact on the students and staff of drugs and weapons when brought onto a school campus, the Court cited U.S. Supreme Court authority for the general rule that searches of students by school officials typically require at least a "*reasonable suspicion*" (as opposed to "probable cause"). (*New Jersey v. T.L.O.* (1985) 469 U.S. 325.) The California Constitution (Art I, § 28(c)) further provides that students and staff of public schools have "the inalienable right to attend campuses which are safe, secure, and peaceful," stressing the governmental importance of keeping schools safe. This same authority, however, recognized the possible applicability of the so-called "*special needs*" exception to the general principles of the Fourth Amendment in the public school setting, perhaps eliminating the need for even a reasonable suspicion. (*Id.*, at p. 333.) When a school official conducts a search of a student, the general rule (per *T.L.O.*) is that there must be a "*particularized*" or

“*individualized*” suspicion that the student being searched possesses contraband or a weapon. However, a “*special needs*” administrative search, where applicable, eliminates the need for an “individualized suspicion” so long as it is based upon “a government need (that) is great, (and where) the intrusion on the individual is limited.” The California Supreme Court has found such a special needs search to apply in the school setting in some circumstances. (See *In re Latasha W.* (1998) 60 Cal.App.4th 1524; random handheld metal detector searches.) In this case, the assistant principal testified only that he “search(es) every student who leaves campus and comes back” in order to “keep students that are on campus safe ”and to ensure that “nobody’s bringing anything on campus they shouldn’t.” The Court summarized this practice as follows: “Plainly the purpose of the policy is to prevent students who have left and returned in violation of the school rules from bringing in harmful objects such as weapons or drugs like those discovered in the current case.” The Court found this policy to reflect a strong enough governmental interest to warrant a limited, relatively non-intrusive search of defendant’s pockets despite the lack of any reasonable individualized suspicion that defendant himself might have brought back a weapon or other contraband. The court further noted that by not touching defendant, and because this school policy, which all parents and students were required to read and acknowledge at the beginning of the school year, applied equally to all students, the intrusion into defendant’s privacy rights were thereby minimized. As an administrative (i.e., not involving any particular suspected criminal activity) special needs search, done to protect students and staff on the campus, it is irrelevant that there was no particularized reasonable suspicion that defendant himself was armed or in possession of drugs. As such, the search of defendant’s pockets and the recovery of his ecstasy was lawful.

Note: If the line between a general criminal investigative search and a special needs administrative search is a bit blurry to you, note that this is the same reasoning by which the courts justify DUI checkpoints. While a DUI checkpoint is meant to remove drinking drivers from the road, it is done *not* for the purpose of making arrests as much as to protect everyone else on the road. That’s the administrative, special needs purpose behind such checkpoints that allow for non-particularized suspicionless detentions of drivers as they pass through the checkpoint. The administrative special needs purpose of the school policy in this case is to protect students and staff from the dangers of allowing weapons and drugs onto a high school campus. But note a very compelling dissent in this case, citing authority from other jurisdictions to the effect that the governmental interest in providing safe school campuses is not strong enough to deviate from the general rule that a reasonable suspicion is needed to conduct searches of a student’s pockets. It’s a close case that could have gone either way.

Detaining Mailed Packages:

***United States v. Lozano* (9th Cir. Oct. 18, 2010) 623 F.3rd 1055**

Rule: Detaining a mailed package for 22 hours with a reasonable suspicion that it might contain drugs is reasonable under the circumstances of this case.

Facts: Defendant lived with his adult son in Barrow, Alaska; population 4,000. The son was on probation with search and seizure conditions. In the Spring of 2007, officers conducted a probation search and recovered some drugs and firearms. Defendant came home during the search and gave his consent for the officers to also search his room. \$12,500 was found which a drug-sniffing dog, named “Hershey,” alerted on as having been in contact with drugs. Also found was a photograph of defendant posing in a California marijuana field. Several baggies of marijuana, and an automatic handgun, were found in a storage area next to the house. Defendant was not charged with anything from this search. The following winter, pressing his luck, defendant visited Barrow’s Post Office and asked the manager whether postal workers screened mail, used drug detection dogs, and ever opened packages to look for drugs. The manager notified Postal Inspector Kaminski of this weird conversation causing Kaminski to authorize a “mail watch” on defendant’s P.O. box. Shortly thereafter, a package addressed to a “Bill Corner,” but using defendant’s Post Office box number, arrived at the Barrow Post Office. The box was a large U-Haul packing box with delivery confirmation requested, was heavily taped, had an incomplete return address, and originated in California. None of the concerned parties knew anyone named Bill Corner living near Barrow. Postal Inspector Kaminski was notified. He had the package shipped to him in Anchorage where he was in training with Hershey, the drug dog. It arrived the next day. Hershey did in fact alert on the package. A search warrant was obtained and eleven pounds of marijuana were recovered. The dope was replaced with a tracking device and returned to Barrow. Defendant retrieved it three days later from his P.O. box. He was arrested later that day and charged in federal court with the attempted possession of marijuana with the intent to distribute. He filed a motion to suppress the contents of the box, arguing that the marijuana’s discovery was the product of the box’s illegal detention. The trial court denied defendant’s motion. After being convicted by a jury, defendant appealed.

Held: The Ninth Circuit Court of Appeal affirmed. The rule is that postal workers may detain a package for the purpose of investigating its contents so long as they have an articulable suspicion that it contains contraband or evidence of illegal activity. Whether one’s suspicions are reasonable depends upon an evaluation of the totality of the circumstances. In this case, Postal Inspector Kaminski had a reasonable suspicion to believe that defendant’s package contained contraband. Between the prior incident with marijuana and excessive money being found in defendant’s home, his suspicious actions in inquiring about whether the Postal Service checks for drugs, and the receipt of a box addressed to defendant’s P.O. box shortly thereafter with an unknown recipient, an incomplete California return address, delivery confirmation requested, and the way the box was packaged (e.g., heavily taped), there was certainly a reasonable suspicion to believe the box contained contraband. But even with a reasonable suspicion, detaining a package can become unreasonable if it is held too long. The relevant time period is that between the initial detention and when probable cause is developed. If probable cause develops, the package and its contents may be lawfully seized and held indefinitely. In determining how long a package may be detained, the difficulty of travel for canines in Alaska may be considered. Here, the length of the detention was a total of 22 hours. And most of that was because the only canine available was in Anchorage, in training. Also the Court held that there is no requirement that the government give the recipient

notice of the delay. Lastly, it was not improper to divert the package via Anchorage. Defendant's motion was properly denied.

Note: Note that the fact that a package originates in California is now officially a factor to consider when determining whether there is cause to believe that there might be drugs in it. We should all be *so proud!* (Or *you* should be. I fled the state two years ago.) But the real issue here is how long you can hold onto a package before sending it onto the recipient, albeit without its original contents (i.e., for a controlled delivery). I wouldn't try stretching it out any longer than necessary absent some real strong reason why you took so long. Law enforcement must move expeditiously, with no unexplained delays. As long as you do so, we should be okay. I won't give you an outside number because then one of your peers (certainly not you) might think that that limit lets you delay until then. Every case will depend upon its own unique circumstances.

Probable Cause to Arrest:

***In re J.G.* (Oct. 6, 2010) 188 Cal.App.4th 1501**

Rule: Gangsters running with items usable as weapons in their hands, apparently in pursuit of another person, is probable cause to arrest them for a violation of P.C. § 12024; possession of a deadly weapon for the purpose of assault.

Facts: Two Anaheim Police Department detectives, investigating an earlier gang-related crime, were standing in front of a residence. The area was known to the detectives to be an area claimed by a gang known as the "Anaheim Travelers City" (or "ATC"). Standing there, they observed four young males running from one street, past the detectives (apparently not seeing them), to another street, as one of the males yelled; "*He's over there.*" One of the detectives recognized defendant with whom he had had prior contacts. He also knew defendant to be an ATC member. As the males ran by, it was observed that defendant was carrying a brick. Another one of the males was carrying the plastic top of a lamp. One of the males pointed up the next street as they reached it. All four of them then ran in that direction, out of the detectives' sight. The detectives immediately got into their unmarked vehicle and followed the males. They found them walking up the street and, stopping their car, confronted them. Identifying themselves as police officers, they pointed their firearms at the males and ordered them to drop the objects they were carrying and to get on the ground. It was noticed at that point that the third male was carrying a rock. Everyone dropped their respective objects and went to the ground as ordered. They were all handcuffed and arrested. Taken to the police station, defendant admitted that the four of them were chasing another individual who had threatened them. Defendant was charged in Juvenile Court with possessing a deadly weapon with the intent to assault, per P.C. § 12024 (a misdemeanor). He brought a motion to suppress his statements arguing that they were the product of an illegal arrest, made without probable cause. The Court denied his motion and defendant admitted his guilt. He appealed.

Held: The Second District Court of Appeal (Div. 3) affirmed. The issue on appeal, as at trial, was whether the detectives had sufficient probable cause to arrest him. Citing

California and U.S. Supreme Court landmark cases, the Court defined “*probable cause*” as, “less than evidence which would justify condemnation” (i.e., conviction). (*Illinois v. Gates* (1983) 462 U.S. 213, 235.) also: “(W)hen the facts known to the arresting officer would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that the person arrested is guilty of a crime.” (*People v. Price* (1991) 1 Cal.4th 324, 410.) Probable cause is determined by evaluating the totality of the circumstances, and not based upon any isolated event. An arrest made without probable cause, “in the hope that something might turn up” later, is unlawful. Under the exclusionary rule, any evidence discovered as a direct product of an illegal arrest is subject to suppression. The Court further discussed the difference between a mere detention and an arrest: “The principal distinction between a *Terry* detention (referring to *Terry v Ohio* (1968) 392 U.S. 1) and an arrest is the distinction between the ‘suspicion that [a person] may be connected with criminal activity [citation]’ and probable cause to believe that the suspect has committed a crime.” In this case, the arresting officers had probable cause to arrest the defendant and his companions for possessing a deadly weapon with the intent to assault, per P.C. § 12024, when they saw them apparently chasing someone with a brick, a rock and part to a lamb, in their hands. While so armed, with one of the suspects yelling, “*He’s over there,*” and another pointing up the street, it was reasonable for the officers to conclude that they were in fact chasing another person who they intended to assault. The fact that defendant was known by one of the officers to be a member of a street gang that claimed that particular area added to the weight of the officers’ suspicions. Although concluding that “(i)t would be unreasonable to expect a police officer to do otherwise (than arrest the subjects),” the Court noted that this was a close case. “We accept the possibility J.C. and his cohorts were chasing a rabbit or playing a game.” But the issue is not one of having sufficient evidence to convict, rather only to establish probable cause. Lastly, the fact that the suspects were merely walking by the time the detectives stopped them did not undo the probable that had already been established. The arrest, therefore, was lawful.

Note: Generally, flight alone is insufficient to justify a detention, let alone an arrest. (*People v. Souza* (1994) 9 Cal.4th 224.) But in this case, there were other facts known to the officers in addition to the observed running. The Court defines probable cause a number of ways, but fails mention the phrase most often bandied about since *Illinois v. Gates* was published in 1983; i.e., a “*fair probability*.” (at pp. 231-232.) This omission was despite citing *Gates* as a landmark “probable cause” case. The Court also tossed in an outdated definition of “reasonable suspicion” sufficient to detain, telling us that “(n)ot only must (an officer) *subjectively* entertain such a suspicion, but it must be objectively reasonable for him to do so.” (*J.G.*, at p. 1506, italics added.) The need to prove an officer’s own subjective belief for either a reasonable suspicion to detain or probable cause to arrest fell by the wayside some fifteen years ago when the U.S. Supreme Court decided *Whren v. United States* (1996) 517 U.S. 806. I’m also not sure I agree with the Court’s comment about this being a close case. I’ve often preached that when establishing probable cause to arrest (or to search), it is not necessary that you be right; only that you be “*probably right*.” Under *Gates*, it appears to be even less than that. There need only be a “*fair probability*” that you are right.