The California Legal Update

Remember 9/11/2001; Support Our Troops

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This edition of the *California Legal Update* is dedicated to the memory, and in honor of:

Sacramento County Deputy Sheriff Danny Oliver, and
Placer County Detective Michael David Davis.

Both murdered in the Line of Duty; October 24, 2014

THIS EDITION'S WORDS OF WISDOM:

"*A woman's mind is cleaner than a man's: She changes it more often.*" (Oliver Herford)

IN THIS ISSUE: Page:

***Cases*:**

CASES:

***Penal Code § 69*; *Resisting an Executive Officer*:**

People v. Bernal **(Dec. 20, 2013) 222 Cal.App.4th 512**

Rule: Penal Code § 69 is violated merely by a suspect's forceful or violent resistance to the officer's attempts to perform his duty. The force or violence need not be directed towards the officer.

Facts: Defendant, who belonged to Escondido's Westside street gang, committed a strong-arm robbery on September 21, 2011, and a residential burglary on November 30. Between these two offenses, on October 13, he and two companions were contacted by two Escondido P.D. police officers while on one of Escondido's bike paths at about 11:30 p.m. Officers Michael Duong and Russell Whitaker were on bicycle patrol on the bike path in an area claimed by the Diablos street gang; a rival to the Westside gang. The bike path was closed after dark and was subject to a gang injunction. As Officers Duong and Whitaker approached the subjects, one of them tried to dump a steak knife he had in his pocket. Officer Duong secured the knife and handcuffed that subject. Officer Whitaker contacted defendant and patted him down for weapons, recovering an axe from his front waistband. After removing the axe, Officer Whitaker attempted to handcuff defendant by standing behind him and holding onto his left hand as he retrieved his handcuffs from his belt. As the officer attempted to put the handcuffs on, defendant pushed the officer in the chest and started to run. Officer Whitaker dropped the handcuffs and grabbed defendant around his waist with both hands. Defendant dragged Officer Whittaker with him as he ran, jerking his hips a couple times back and forth, attempting to shake off the officer's hold. Defendant dragged Office Whittaker about eight or ten yards down the bike path until they both fell to the ground. Officer Duong caught up with them and helped handcuff defendant. Officer Whittaker, who was wearing shorts, suffered bruised and scraped knees in the altercation. After being arrested on November 30, for the subsequent residential burglary case, defendant was charged in state court with a pile of offenses including P.C. § 69 from the above described October 13th resisting arrest offense. A jury convicted him of five of those charges including the P.C. § 69. He appealed from his 11 year, 8 month prison sentence.

Held: The Fourth District Court of Appeal (Div. 1) affirmed. On appeal, defendant argued that his P.C. § 69 conviction should be reversed because there was no evidence that he'd used force or violence "*against or on*" Officer Whitaker when he attempted to escape from him. Penal Code § 69 provides, in pertinent part, that; "Every person who (1) attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer of the law, or (2) *who knowing resists, by the use of force or violence, such officer, in the performance of his duty*, is punishable . . . (as a felony)." (Parenthesis, numbers, and italics added) The statute thus provides two theories under which a person can be prosecuted. Defendant was prosecuted under the second provision, highlighted by italics above. Looking at the elements of this offense, the Court noted that there is no requirement that a person use force or violence "*against or on*" an executive officer. The statute requires only that the defendant "knowingly "*resists*" the officer by the use of force or violence. It is this forceful resistance of an officer by itself that gives rise to a violation of P.C. § 69, without the necessity that the prosecution prove that the force or violence was directed towards the officer. In this case, defendant forcefully attempted to flee from Officer Whittaker as the officer tried to handcuff him. Upon pushing away from the officer, defendant forcefully jerked his hips from side to side in an attempt to break Officer Whittaker's grip on him. This is all that is required to violate § 69. Defendant was therefore properly convicted of this offense.

Note: Penal Code § 69 is perhaps one of the most under-used statutes in the Penal Code, with P.C. § 148 (a misdemeanor resisting) being preferred, and for reasons I've never fully understood. The only reason I can see is that no one (or at least, very few people) understand the difference between the two offenses. And more importantly, there seems to be a popular

misconception that police officers (who qualify as "*executive officers*," by the way) are expected to put their bodies at risk merely because they are police officers. I still get questions whether it's true that police officers cannot be the victims of certain offenses, such as a challenge to fight or loud noise. (It's not true.) This particular case is a good step in the right direction towards changing this mindset to a more rational way of thinking; i.e., that police officers deserve more protection from violence on the streets; not less.

***Miranda; Invocation and Reinitiation*:**

People v. McCurdy **(Aug. 14, 2014) 59 Cal.4th 1063**

Rule: An invocation of one's *Miranda* rights must be unequivocal to be legally effective. After invoking, a defendant may himself reinitiate the questioning by showing a willingness to engage in a generalized discussion about the investigation.

Facts: Eight-year-old Maria Piceno was sent by her mother to the Food King grocery store in Lemoore, some two blocks away, to pick up some groceries. It was about 3:00 p.m. on March 27th, 1995. She never returned. A witness, Mychael Jackson, saw Maria holding hands with defendant outside the Food King. Jackson later saw defendant open up the passenger door of his truck and "someone short" getting into it. That evening, defendant's neighbor, with whom defendant's residence shared a common wall, could hear what sounded like a child's soft whimpering coming from defendant's apartment. After that day, defendant's acquaintances noted strange reactions from defendant whenever the topic of the missing girl would come up, with him either getting angry, being visibly uncomfortable, or becoming agitated, frustrated, and distant. Finally, on April 9th, Maria's fully clothed body was discovered in Poso Creek in the greater Bakersfield area. An autopsy revealed that although she'd suffered some non-life threatening blunt force injuries, the actual cause of death was suffocation. Being near defendant's parent's house, defendant was familiar with Poso Creek. A shower curtain, similar to one defendant had owned, was found partially buried some 500 yards upstream from where Maria's body was found. Meanwhile, it was discovered that defendant had rented numerous "adult," "X-rated," or "pornographic," videos from stores in the same shopping center as the Food King on the same day and around the same time that Maria disappeared. Later, Police searched defendant's storage unit in Lemoore and found approximately 30 adult-oriented magazines, most featuring young women made up to appear underage, and which defendant later admitted to purchasing. Also, defendant's younger sister told police that defendant had molested her numerous times when they were young. Defendant was in the Navy, and shipped out on a 6-month deployment on April 11th. On April 18th, a Navy criminal investigator interviewed him. When the investigator asked defendant if he knew why she wanted to speak with him, he immediately referred to Maria's disappearance. Although denying that he had anything to do with Maria or her disappearance, he admitted to being in the shopping center near the Food King on that same day and to renting adult-oriented videos. He also admitted to regularly visiting his parents in Bakersfield. On April 30, Lt. Mark Bingaman of the Kings County Sherriff's Department, Agent Mike Devine of the Naval Investigative Service, and Deputy Marshal Bruce Ackerman, all few to defendant's ship near Japan. Defendant was subjected to a series of interviews over the next three and a half days. Although he continually denied any involvement in Maria's kidnapping and death, defendant made a number of statements that the prosecution

sought to use at trial. As noted below, some of the statements were admitted against him and some were not. Defendant was later convicted of first degree murder with the special circumstance of a death during the commission of a kidnapping, and sentenced to death. His appeal to the California Supreme Court was automatic.

Held: The California Supreme Court unanimously affirmed. Among the issues raised on appeal was whether the trial court erroneously admitted into evidence statements that should have been suppressed as violations of defendant's self-incrimination rights under *Miranda v. Arizona* (1966) 384 U.S. 436. For ease of analysis, defendant's interrogations and statements were divided into five segments. (1) *Statements made before receiving a Miranda warning*: Upon their initial meeting, Lt. Bingaman and Deputy Ackerman questioned defendant about his background, such as his upbringing, his decision to join the Navy, and his hobbies. Defendant answered these questions without protest. The trial court ruled that these statements were voluntary and therefore admissible despite the lack of a *Miranda* admonishment. The Supreme Court agreed. Law enforcement officers may speak freely to a suspect in custody so long as the questions "would not reasonably be construed as calling for an incriminating response." Nothing defendant was asked at this point called for an incriminating response. Rather, they were only an attempt by the officers to establish a rapport with defendant which is not inappropriate. Nothing of an incriminating nature was obtained. (2) *Statements made after receiving a Miranda warning*: Defendant was then given a standard *Miranda* admonishment which he indicated he understood. Lt. Bingaman started off by asking defendant for help with the investigation, to which defendant responded; "*They always tell you get a lawyer. . . . I don't know why.*" Deputy Ackerman told defendant that they could not advise him on that, but stressed that it was important for him to help with Maria's disappearance. The lieutenant also added, "*You know what we're trying to do is we're trying to help you.*" When defendant showed physical signs of stressing out, Lt. Bingaman merely told him to take his time and take deep breaths. Agent Devine took over the questioning and asked defendant about the adult-oriented magazines found in his storage locker, which defendant admitted to. But when asked whether something had happened to him when he was younger, defendant responded with: "*I can't say. I want a lawyer*." Taking that as an invocation, Deputy Ackerman closed the file and began to leave the room. The trial court ruled, and the Supreme Court agreed, that defendant's comment about "*They always tell you get a lawyer*" was not an invocation. A suspect's invocation, to be legally effective, must be unambiguous. This unclear reference to an attorney would not have reasonably indicated to defendant's interrogators that he was asking for the assistance of counsel. And the officers had no duty to seek clarification. Moreover, when told that they could not advise him what to do, defendant showed his intent to talk unassisted by continuing the conversation. The Court also rejected defendant's argument that this comment indicated that he didn't really understand his rights under *Miranda*. Even if he did not fully appreciate the possible value of invoking his rights, this does not mean he was not aware of them or did not understand the consequences of his decision to waive them. But when defendant later said, "*I want a lawyer*," it was clear that he was unequivocally invoking his right to counsel. However, defendant further argued that even prior to this invocation, anything he might have said was rendered involuntary by the officers' deceptive and manipulative tactics, promises of leniency (". . . *we're trying to help you*."), and threats. The Court responded that even if so, defendant did not respond to such pressure and that his will was not overborne as evidenced by his continued denial that he was involved in Maria's abduction and murder and his subsequent clear and

unambiguous invocation of his right to counsel. (3) *Statements made after defendant reinitiated the questioning*: About 20 seconds after his invocation to the right to counsel, defendant volunteered: "*I don't know if you guys got any other suspects or what.*" After explaining to defendant that they were talking to several people, defendant said; "*I don't know what to do*." Deputy Ackerman told defendant, "*It's up to you*." To this, defendant responded, "*I* [*want to*] *help you guys*, *I want you guys to find him, but I don't want to incriminate myself*." The questioning resumed. When Deputy Ackerman began questioning defendant about his relationship to his sister, however, defendant responded: "*I can't talk no more*." Deputy Ackerman, after offering defendant a glass of water, continued with the questioning. The trial court ruled that although defendant had earlier invoked his right to counsel, when he volunteered the comment about not knowing if they had any other suspects, defendant had legally reinitiated the questioning, effectively waiving his rights once more and opening himself up for further questioning. The Supreme Court agreed. After a suspect invokes, he may nonetheless resume the interrogation by initiating further discussions with the police, and knowingly and intelligently waving the rights that he'd invoked. Whether such a wavier is "*knowing and intelligent*" is determined by evaluating the totality of the circumstances, including the fact that it was the accused himself who reopened the dialogue. A reinitiation occurs when the suspect's words or conduct indicate a willingness to engage in a generalized discussion about the investigation. In this case, the Court held that defendant's statement about other suspects could fairly be said to represent a desire to start a generalized discussion about the officers' investigation. Recognizing this as an "*implied waiver*," the Court found nothing in the record to rebut defendant's apparent desire to continue the conversation with the officers. Also, the Court found defendant's comment; "*I can't talk no more*," *not* to be an invocation of his right to silence, but rather an indication he was having "voice problems," as evidenced by his continuing to answer questions after being offered some water. (4) *Statements made after defendant stated he did not want to discuss his childhood*: Agent Devine then asked defendant about his childhood. To this, defendant responded that he'd "*rather not say*." When Agent Devine pressed the issue, defendant stated four more times that he did not want to talk about his childhood. The trial court found this to be an invocation of his right to silence, suppressing, except for impeachment purposes, all statements defendant made after this point. Finding defendant's statements after at least his first invocation to silence to be voluntary, even though in violation of *Miranda*, the trial court held that they were admissible for impeachment purposes should he choose to testify (which he later did). Defendant argued that such statements were involuntary and thus not admissible for any purpose. The Supreme Court declined to decide the issue, however, finding any error harmless. Only two of his statements made during this period were used to impeach his testimony, and they were merely duplicative of other, similar evidence that was properly admitted into evidence. So the jury heard nothing new that could have possibly prejudiced defendant. (5) *Statements made after defendant's repeated invocation to silence*: After repeatedly (four times) attempting to invoke his right to silence, each attempt being ignored by the officers, anything said by defendant after that point was held to be involuntary by the trial court, and inadmissible for any purpose. The Supreme Court, therefore, did not discuss this ruling. Lastly however, defendant also argued that witness Mychael Jackson's testimony was "tainted fruit" of statements he made that were involuntary. The trial court ruled that Jackson's testimony was admissible. The Supreme Court agreed. Defendant's theory was that the media published his image after he was formally arrested, which did not occur until after the officers illegally obtained his (defendant's) statements, as described above. Once arrested (illegally, per

the defendant), defendant's picture was published by the news media. With defendant's picture in the newspapers, Jackson came forward, volunteering information about having seen Maria in defendant's company outside the Giant Foods store. The trial court ruled that even before questioning defendant, the officers had probable cause to arrest him. And even if not, defendant's "face" was not suppressible. The Supreme Court declined to decide whether any improper questioning (or, rather, the subsequent arrest, making this a 4th Amendment issue) of defendant led to Jackson's testimony, holding instead that Jackson's identification of defendant was sufficiently attenuated so as to purge the taint (if any). The question, per the Court, was whether the government exploited a perceived illegality. "Where the testimony of live witnesses is at issue, the test focuses primarily on the effect of the illegality on the witness's willingness to testify, and less on whether illegal conduct led to discovery of the witness's identity." "The greater the willingness of the witness to freely testify, the greater the likelihood that he or she will be discovered by legal means and, concomitantly, the smaller the incentive to conduct an illegal search to discover the witness." In this case, nothing in the record suggested that any assumed illegality related to defendant's arrest influenced Jackson's willingness to identify defendant as the man he saw with Maria outside the Giant Foods store. Law enforcement did not generate the publicity over this case. And Jackson came forward on his own, testifying voluntarily. As such, this testimony was too attenuated from any perceived illegality in defendant's arrest and is not subject to suppression.

Note: This brief would have been half as long had the interrogation been a little more organized and with a little more concern about defendant's attempted invocations. In short, from the initial implied waiver (never asking for an express wavier) to the always dangerous; "(*W*)*e're here to help you*" comments, the investigators here created unnecessary issues almost every step of the way. This guy wanted to talk, but asking him about his past when he was apparently not very proud of it tended to shut him down and should have been a topic to avoid. Also, even if not legally required, sometimes asking for clarification of ambiguous comments can save a lot of straining by the trial court and the Supreme Court in attempting to find ways to save what little incrimination defendant actually provided. In short, the record here was very messy, and the prosecution was very lucky to have lost as little as it did in the way of incriminating statements.

***Due Process and the Pretrial Failure to Disclose Exculpatory Evidence*:**

***Tatum v. Moody* (9th Cir. Sep. 17, 2014) __F.3rd __ [2014 U.S. App. LEXIS 17942]**

Rule: A police officer has a continuing obligation to report highly exculpatory evidence to prosecutors, failing to do so while the suspect remains in lengthy pretrial confinement being a Fourteenth Amendment due process violation.

Facts: Between June 27 and August 15, 2005, Southwest Los Angeles experienced a series of thirteen robberies of small businesses. Dubbed the "*demand-note*" robberies, the suspect would enter the victim business, present a handwritten note demanding money from the cashier, sometimes threaten violence or display what looked like a firearm, take cash, and then flee on foot. The notes were always similar. The suspect description remained constant throughout. Detective Steven Moody of the Los Angeles Police Department's Southwest Division was assigned to investigate the robberies. He was supervised by Detective Robert Pulido. The twelfth robbery in this series, an EB Games store, occurred on August 13. The thirteenth

robbery was of a Blockbuster, on August 15. On August 16, an unsuspecting Michael Walker went into the EB Games store, only to find himself under arrest after employees identified him as the perpetrator of the robbery three days before. Walker denied committing any robberies and a search of his residence failed to turn up any evidence. Nevertheless, Detectives Moody and Pulido concluded that Walker was their man. However, on August 18, two days after Walker's arrest and with him in custody, two more robberies—the Golden Bird Restaurant (attempted robbery) and a Burger King (robbery)—occurred in the Southwest Division's area that matched the M.O. and the physical description of the demand-note robber. Meanwhile, other detectives from the LAPD's Robbery-Homicide division were also investigating similar demand-note robberies. On September 15, almost a month after Walker was arrested, another Burger King was robbed that matched the M.O. of the prior demand-note robberies. But in this one, a subject named Stanley Smith was arrested fleeing from the scene. Being investigated by detectives from the Robbery-Homicide team, Smith confessed to them that he had committed about two robberies a week, specifically admitting to five of the demand-note robberies, including the Burger King robbery in the Southwest Division that occurred two days after Walker's arrest. Both Moody and Pulido knew of, or had reason to know of, the robberies that occurred after Walker had been arrested, and of Smith's arrest. The spree of demand-note robberies in the Southwest Division ended with Smith's arrest. Meanwhile, neither Detectives Moody nor Pulido ever informed prosecutors responsible for Walker's case about Smith's arrest, or about the two robberies (Golden Bird and Burger King) that occurred two days after Walker's arrest. Instead, Moody continued to build a case against Walker, such as by conducting photo lineups in which he was identified (with varying degrees of certainty) by four witnesses. Also, in subsequent reports approved by Pulido, and in bold type, Moody falsely stated that: "Since the arrest of Walker the crime spree caused by the 'Demand Note Robber' has ceased." Separate preliminary hearings were held on the EB Games robbery and several of the other robberies in the series, with Walker being held to answer in each. At no time did Detectives Moody or Pulido tell prosecutors about Smith's arrest and confession, or the robberies that occurred subsequent to Walker's arrest. Discovery requests from Walker's defense attorneys finally unearthed these facts, as well the fact that Walker's prints did not match those left at the scene of the EB Games robbery. Through the defense attorneys' efforts in obtaining extensive formal discovery, it was eventually determined that the demand note-robbery series continued beyond Walker's arrest, not ending until Smith's arrest, and that it was Smith's prints left at the scene of the EB Games robbery. When all this (and more) came to light, the case against Walker was finally dismissed after 27 months of pretrial incarceration, with an eventual court-ordered finding of "factual innocence." Walker (who subsequent died; Tatum apparently being his successor in interest) filed a 42 U.S.C. §1983 civil lawsuit in federal court against Detectives Moody and Pulido, alleging a "due process of law" violation for failing to disclose material exculpatory evidence. A jury found for the plaintiff with a verdict to the effect that Detectives Moody and Pulido violated Michael Walker's constitutional rights by (1) acting with deliberate indifference to, or reckless disregard for, Walker's rights or for the truth, and (2) withholding or concealing evidence that strongly indicated Walker's innocence of the crimes for which he was held in custody and which was reasonably likely to have resulted in dismissal of the charges against him if revealed. Tatum (in Walker's stead) was awarded $106,000 in compensatory damages, plus costs and attorney's fees. Moody and Pulido appealed.

Held: The Ninth Circuit Court of Appeal affirmed. On appeal, Detectives Moody and Pulido did not deny their actions, but rather challenged the judgment against them on the procedural grounds that the Constitution does not confer on Walker the right that the jury found them to have violated. The Ninth Circuit rejected this argument, holding that the Constitution does indeed protect a person from prolonged pretrial detention when a government official (e.g., the police), with deliberate indifference to or in the face of a perceived risk that their actions will violate that person's right to be free from unjustified pretrial detention, withhold from prosecutors information strongly indicative of his innocence. As an unjustified deprivation of one's liberty without being accorded due process of law, liability comes within the Fourteenth Amendment's due process clause. Although a jailor, for instance, has no duty to investigate the repeated claims of innocence of a suspect held pursuant to a court order, the same cannot be said for investigators who are tasked with the responsibility of providing evidence of guilt *and* innocence to the prosecutor and the court. Detective Moody and Pulido's silence in the face of compelling exculpatory evidence breached their duty of disclosure to authorities tasked with acting on that information. It was also noted that the fact that Walker was accorded his right to a preliminary hearing and a judicial determination of probable cause did not shield the officers from liability in that the validity of such a hearing is dependent upon the evidence provided by the investigators. The Court did note, however, that there are limitations to such liability. Due process is violated only when the resulting incarceration is of "unusual length," and when "caused by the investigating officers' failure to disclose highly significant exculpatory evidence." Three days, for instance, is not an "unusual length" of time. But as little as 68, and in another case, 217 days, has been held to constitute a due process violation. It must further be shown that the officers understood the risks to the plaintiff's rights from withholding the exculpatory information or were completely indifferent to those risks. Also, in this case, the evidence withheld by Detectives Moody and Pulido was certainly "highly significant," as evidenced by the fact that charges were immediately dropped against Walker when the true facts were revealed. Walker also received a finding of "factual innocence," based upon the information that Moody and Pulido had withheld. Lastly, the jury justifiably found that Moody and Pulido either understood the risks to Walker's rights by withholding that information, or were at least totally indifferent to those risks. As such, the civil jury's findings were upheld.

Note: I always have to step back and consider what the Court is saying when reading a Ninth Circuit opinion describing a police officer's actions that were as seemingly outrageous as those described here. Sometimes reading dissenting opinions, if any, or when I get e-mails from the officers involved, either or both of which often describe a whole different way of looking at the cited facts, I sometimes have to wonder whether we are all talking about the same case. And I also know that investigators are often tasked with the responsibility of handling so many cases at one time that a lot of important information might well fall between the cracks. But if there's any truth at all to the allegations made in this case against Detectives Moody and Pulido (as the civil jury found that there was), then prosecutors and cops alike should take note, vowing that you will never let something like this occur on your watch. It goes without saying that we are not in the business of prosecuting innocent people. Cases like this only add fodder to the not-uncommon, yet most-often baseless, defense allegations that cops and prosecutors can't be trusted. As a prosecutor, I knew that it was important for a jury to believe everything I would tell them, and everything my officer-witnesses would tell them. That won't happen when they read about cases like this one.

***Search Warrants*; *Material Omissions in the Affidavit*:**

United States v. Ruiz **(9th Cir. July 11, 2014) 758 F.3rd 1144**

Rule: Reckless omissions in a search warrant affidavit won't affect the legality of the warrant if, after adding the omitted materials, the warrant still reflects probable cause.

Facts: At about 4:20 in the morning on March 21, 2011, a man who identified himself as "McDog" knocked on the door of a trailer in Payette, Idaho. The resident, Emmett Mills, opened the door. McDog asked for Jessica. Mills told McDog that Jessica wasn't there. Another man wearing a white clown mask was standing behind McDog and was carrying a gun that Mills thought looked like an AK-47. Mills' girlfriend, Charlene Scales, was in the trailer and also saw McDog although she viewed him from another room through a crack in the door. Also, a neighbor watched the altercation from his own window. Mills and McDog got into a scuffle when McDog tried to force his way into the trailer, resulting in two shots being fired and Mills being wounded in the knee. Police responded after McDog and the other man had fled. Two spent casings were found outside the front door although they were from a semiautomatic pistol and not an assault weapon. The railing at the door was bent over as if someone had been pushed into it. Detective Plaza of the Payette Police Department was assigned to investigate the shooting. In talking to Mills, Scales, and the neighbor, everyone provided a similar description of the two suspects. In interviewing Scales, however, Detective Plaza sensed that she was hiding something. So he asked for a consent to search the trailer, which was granted. A handgun, methamphetamine, and a meth pipe were found. Scales claimed that visitors had left those items in the trailer. However, it was soon discovered that the narcotics division of the Payette Police Department was investigating Scales for her suspected involvement in the sale of drugs. In fact, later on the day of the shooting an undercover officer bought some methamphetamine from her at the trailer. Caught in the act, Scales signed on as an informant in exchange for consideration on her pending criminal charges. The officers told her that she would not, however, receive extra consideration for providing information about the shooting. The police also noted that Scales believed the shooting had been related to drugs and money. Meanwhile, by consulting with other agencies, defendant was identified through the McDog alias he used. Detective Plaza obtained a copy of defendant's criminal history indicating that he'd been recently booked. A photo lineup was put together and shown to Mills and Scales two days after the shooting. Mills couldn't identify anyone from the lineup, but Scales narrowed it down to two people. She finally selected defendant's photo because of a mark on his face, but was still only 90% sure. Payette police officers sought a warrant for defendant's Nampa, Idaho, residence, south of Payette. At a "warrant hearing," Detective Plaza gave oral testimony to a state magistrate judge, providing most of the factual background described here. However, he omitted what police officers knew about Scales' drug-related activity, including: (1) her prior sales of methamphetamine from the trailer; (2) her apparent dishonesty about the presence of drug-related paraphernalia in the trailer; (3) her interest in serving as a confidential informant in the future in exchange for consideration on her drug charges; and (4) her statement to police that the trailer shooting was related to drugs and money. Detective Plaza also failed to explain that Scales had initially focused on two photographs in the lineup, and that she distinguished between them by a mark on defendant's face. Based upon the detective's oral affidavit, the warrant was issued. Execution of the warrant

resulted in the discovery of a shotgun with an obliterated serial number. Defendant was charged in federal court with possession of an unregistered firearm (26 U.S.C. § 5861(d)) and unlawful possession of a firearm (18 U.S.C. § 922(g)(1)). He filed a motion to suppress the firearm. The district court judge found that Detective Plaza recklessly omitted material information about Scales' involvement with drugs and her agreement to act as a confidential narcotics informant in the future, but denied defendant's suppression motion anyway. Defendant appealed.

Held: The Ninth Circuit Court of Appeal, in a split 2-to-1decision, affirmed. In order to prevail on a claim that the police procured a warrant through deception, the party challenging the warrant must show that the affiant *deliberately or recklessly* made false statements or omissions that were material to the finding of probable cause. The warrant will then be corrected, deleting the false statements or adding information that shouldn't have been omitted, and retest the warrant for probable cause. If probable cause is still found, then the warrant, and the resulting search, will be upheld. In addition to the omissions listed above, and considered by the trial court in defendant's motion to suppress, defendant argued that Detective Plaza omitted material information about Scale's ability to observe the intruder at the door to the trailer. The Court found that evidence concerning the layout of the trailer corroborated her claim that she saw defendant. The Court similarly found that Detective Plaza did not misrepresent the descriptions of the man in the clown mask, based upon evidence as presented in the trial court. Next, the Court agreed with the trial court that Detective Plaza was reckless in failing to tell the search warrant magistrate about the circumstances of Scales' identification of defendant in the photo lineup. However, the Court held that the affidavit was still not misleading on this issue in that the magistrate was aware that Scales could only ID defendant to a 90% certainty and could have asked for more information if he felt he needed to know. The Court found as "serious" the omission of the drug-related information as it related to Scale's credibility. The fact that Scales was involved in the sale of methamphetamine could be interpreted as a motive to lie about the identity of the intruder. But when you add back all that information to the affidavit, the Court found that the warrant still reflected probable cause. Both the neighbor's statement and the physical evidence from the crime scene were consistent with, and supported Mills' account of the incident. Scales' information further corroborated Mills and the Neighbor. And even without Scales identification of defendant from the lineup, the connection between defendant and the "McDog" alias was evidence enough to support the probable cause finding. Finally, there was no indication Mills or Scales exaggerated or fabricated evidence related to the shooting. Therefore, even as corrected, the warrant affidavit still reflected sufficient probable cause to support the issuance of the search warrant. Defendant's suppression motion, therefore, was properly denied.

Note: When a major component (e.g., information from an informant, victim, or witness) of your search warrant has serious credibility issues, including the individual's shaky background, that information must always be described in your affidavit. I've never seen us get into trouble by putting too much information into a warrant, so long as it is accurate. It's when we misstate what evidence we have, or (as illustrated here) we leave things out of the warrant that the magistrate should have known when determining the existence of probable cause, that we get into trouble. In other words, better too much than not enough. There's a dissenting opinion in this case that would have quashed the warrant. And even the majority opinion (and the trial judge) felt that Detective Plaza took a serious gamble by "recklessly" sanitizing Scales'

background. So this was really a close case, given everything the detective left out. Don't make the same mistake.