The California Legal Update

Remember 9/11/2001: Support Our Troops; Support our Cops; Stand Up For Our Country

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Robert C. Phillips (858) 395-0302
Deputy District Attorney (Retired) RCPhill101@goldenwest.net

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THIS EDITION'S WORDS OF WISDOM:

"*The next time a stranger talks to you when you're alone, just look at him as if shocked and whisper*: '*You can see me*?'" (Anonymous)

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ADMINISTRATIVE NOTES:

***United States v. Cano*; *Border Searches*:** In *California Legal Update*, Vol. 25, #5 (Apr. 16, 2020), I briefed the Ninth Circuit case of *United States v. Cano* (9th Cir. Aug. 16, 2019) 934 F.3rd 1002, where the Court reversed the defendant's conviction, holding that his cellphone had been illegally searched at the U.S.-Mexico border by Customs and Border Protection (CBP) agents. It seems that at the very least I missed the point of this case, if not its ultimate conclusions altogether. Subsequently, the Ninth Circuit has denied a petition for rehearing en banc ((Sept. 2, 2020) 973 F.3rd 966) where a six-judge dissent argued that the original *Cano* decision is just dead wrong. In the *Cano* decision, it was held that a "*forensic border search*" of a cellphone is limited to those instances where there is a reasonable suspicion to believe that the suspect's phone contained "digital contraband." The term "*forensic*" is never defined, but is defined in the dictionary as "relating to or denoting the application of scientific methods and techniques to the investigation of crime." "*Digital contraband*," however, *is* defined by the *Cano* Court as being limited to stuff like child pornography. A search of defendant's cellphone for evidence of his particular offense (i.e., smuggling cocaine) requires probable cause and a search warrant, says the *Cano* Court, despite piles of contrary case law to the effect that non-forensic border searches *do not* require any level of suspicion, and certainly not a search warrant. (E.g., see *United States v. Montoya de Hernandez* (1985) 473 U.S. 531; and *United States v. Flores-Montano* (2004) 541 U.S. 149.) As pointed out in the en banc denial dissent, a more intrusive forensic search of one's electronic equipment (e.g., computers [see *United States v. Cotterman* (9th Cir. 2013) 709 F.3rd at 970.] and cellphones) do in fact require a reasonable suspicion. However, a warrant, let alone probable cause, has never been held to be necessary. And neither suspicionless nor warrantless forensic border searches have ever been held to be limited to child pornography. The dissent here also points out that at least two other federal circuits disagree with *Cano* on these issues: *United States v. Kolsuz* (4th Cir. 2018) 890 F.3rd 133, and *United States v. Williams* (10th Cir. 2019) 942 F.3rd 1187. This makes the *Cano* decision ripe for review by the U.S. Supreme Court. So stay tuned.

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CASE LAW:

***Writ of Habeas Corpus Procedure per 28 U.S.C. § 2254(d)*:**
***Miranda Waivers*; *Incomplete Admonishments*:**
***Confessions and Involuntariness*:**

Balbuena v. Sullivan **(9th Cir. Aug. 17, 2020) 970 F.3rd 1176**

Rule: Federal habeas corpus relief is available only when the federal court finds that a state court's rulings were either (1) contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, *or* (2) they were based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. A *Miranda* admonishment may be upheld despite an interrogator's failure to include the fact that the suspect is entitled to the assistance of an attorney during the interrogation, depending upon the circumstances. An involuntary or coerced confession violates a defendant's right to due process under the Fourteenth Amendment and is inadmissible at trial. A confession is involuntary whenever the defendant's will was overborne. Voluntariness is determined by considering the totality of all the surrounding circumstances; both the characteristics of the accused and the details of the interrogation.

Facts: Defendant Alexander Balbuena, age 16, was a member of the Richmond Sur Trece ("RST") criminal street gang. RST was having problems with the notorious MS 13 street gang. On January 16, 2006, MS 13 gang members shot and killed an RST gangster by the name of Luis Ochoa, also known as "Gizmo." Defendant and other RST gang members were out for revenge. The next day—January 17th—Jose Segura was sitting in his car with his girlfriend, Oralia Giron, and their two children (ages three years and three months), only two blocks away from the previous day's murder. Neither was a gang member although Giron's two brothers belonged to MS 13. Several men surrounded Segura's car; one of them telling Segura that they wanted revenge for Gizmo's murder. That man then shot into the car, killing Segura and seriously wounding Giron. (Miraculously, neither child was hit.) Witnesses told police that defendant and another RST gang member, Julius Stinson (a.k.a; Jujakas), were seen running from the scene into a nearby residence carrying pistols. Following up on this information eventually led officers to defendant's apartment where, armed with a search warrant, they found defendant asleep with his pregnant girlfriend. The murder weapon was also found and impounded. Defendant was taken to the police station for questioning. In a 90-minute videotaped interview, defendant eventually (after initial denials) confessed to having been the shooter (see below). Charged in state court as an adult, and with his videotaped confession being used in evidence against him, defendant was convicted by a jury of the first degree murder of Segura, the attempted murder of Giron, and street terrorism, plus related allegations. He was sentenced to 82-years-to-life. Defendant's

conviction was upheld on appeal in an unpublished decision (*People v. Balbuena* (May 5, 2010) First Appellate District, Division Two, No. A122043), although his sentence was reduced to 72-years-to-life. The California Supreme Court denied review. Defendant thereafter filed a petition for writ of habeas corpus in the federal district court, arguing, among other things, that the admission of his confession violated the Fourteenth Amendment's Due Process Clause in that his statements were obtained in violation of *Miranda* and by coercion, and were thus involuntary. The district court denied defendant's habeas petition (*Balbuena v. Biter* (N.D. Cal., May 25, 2012) 2012 U.S. Dist. LEXIS 73302.) He appealed to the Ninth Circuit Court of Appeal.

Held: The Ninth Circuit Court of Appeals affirmed. The primary issue on appeal from the denial of defendant's habeas corpus petition was whether his waiver of rights was valid and whether his confession was otherwise the product of coercion by the detectives when they questioned him, and thus involuntary.

(1) *Appellate Procedure*: On such as appeal (sometimes referred to as an "*indirect appeal*," as opposed to a "*direct appeal*" of one's conviction), it is not a question whether or not the appellate court agrees with the defendant (or, more correctly, the "petitioner"). Rather, a federal court may only grant habeas corpus relief when it finds that the state court's ruling was either (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," *or* (2) it was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." (See 28 U.S.C. § 2254(d)(1), (2).) So the issue on this appeal was whether the federal district court, in denying defendant's habeas corpus petition, correctly decided that neither of the above two grounds for granting his petition applies.

(2) *The Interrogation*: Prior to being to being questioned, one of the two detectives who questioned defendant read him his *Miranda* rights, reciting them as follows: "*So, you know you have the right to remain silent anything you say can be used against you in a court, you have the right to an attorney, you have the right to an attorney prior to your questioning if you desire, if you can't afford to hire one, one will be represented to you free of charge. You understand all those rights? You're nodding your head like you do, right? Okay, you're probably curious as to why we're wanting to talk [to] you tonight, is that true? With that in mind, are you willing to talk to us about why we were at your house tonight? Okay*?" Defendant responded; "*Yup. Yup.*" In a 90-minute, videotaped interview, defendant initially denied even being at the scene of the shooting. Attempting to break the ice, the detectives falsely told defendant that they knew he was there because his co-suspect, Stinson (aka, Jujakas), had already been interviewed and he told them that defendant was in fact there. They further encouraged defendant to speak honestly, telling him that, "it's important for you to be honest with us so if there is some way to help yourself out, this is the time to do it." In the process, the detectives also referred to defendant's impending fatherhood (with his girlfriend being pregnant), describing defendant as "*the sixteen year old that's going to be a father soon*." Another interrogation tactic used was to present defendant with often face-saving alternative scenarios. For example, the detectives suggested that he might have simply been angry because his best friend had been killed the day before, or that maybe someone like Jujakas forced him to do it, or, perhaps, he simply wasn't "thinking straight," or was "upset," or "that guy aimed the gun at you," or that "maybe he (was) a gang member" or he was "the guy that killed Gizmo," or that "it was a spur of the moment type thing,' etc., etc. Finally, defendant admitted that he was at the scene of the murder but continued to deny being the shooter. Needing more, the detectives pressed on with more alternatives such as

the possibility that it might be a "justifiable homicide, . . . something you did out of rage and you just weren't thinking straight . . . ." When defendant continued to deny being the gunman, the detectives again played on the pending birth of his child: "[*R*]*emember, we are giving you the opportunity to try to work through this so maybe you can be there for your kid in a few years*." Still not getting the response they wanted, the detectives falsely told defendant that witnesses saw him shooting a gun; asking him what type of gun he had in that "*only one of them hit somebody . . . .*[*s*]*o it's important which one you had*." In response, defendant finally admitted to having a .32-caliber handgun. More importantly, defendant admitted to seeing two people in the car and that he himself shot at the car's front window. At this point in the interrogation, the detectives referred to the possible sentences defendant faced, stating that although he would be tried as an adult, he might receive more lenient treatment if he spoke honestly and showed "remorse." After these statements, defendant provided the details of the shooting, admitting to being the shooter and that it was in fact in retaliation for Gizmo's murder the day before.

(3) *Appellate Issues*: The California Court of Appeal upheld the admissibility of defendant's confession. First, it found the *Miranda* admonishment to be sufficient, and not fatally flawed (see below). Secondly, the California Appellate Court found defendant's confession to be voluntary and not the product of coercion. The federal district court, in denying defendant's habeas corpus petition, held that these rulings were neither (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," *nor* (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." The issue for the Ninth Circuit was whether the federal district court was correct in its conclusions.

(4) *The Ninth Circuit's Ruling*: Defendant argued that his statements were involuntary based on three factors: (a) his youth, inexperience, and immaturity; (b) the *Miranda* warnings, which he characterizes as incomplete; and (c) the interrogation tactics that were used.

(4a) *Voluntariness*: The rule is simple: "An involuntary or coerced confession violates a defendant's right to due process under the Fourteenth Amendment and is inadmissible at trial." In determining whether a confession is involuntary, a court must ask "whether a defendant's will was overborne by the circumstances surrounding the giving of a confession" while considering "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." (*Dickerson v. United States* (2000) 530 U.S. 428, 433-434.) Under "*characteristics of the accused*," courts include the suspect's age, education, and intelligence as well as his prior experience with law enforcement. The "details of the interrogation" include its length and location, and whether the suspect was advised of his *Miranda* rights. With these standards in mind, the Court first noted that merely telling a suspect to speak truthfully does not generally amount to police coercion. But it's also important that defendant was only 16 years of age (as noted above), and had no prior criminal history. And while confessions coming from teenagers are to be viewed with "special caution" (*Doody v. Ryan* (9th Cir. 2011) 649 F.3d 986, 1011.), "(e)ven in the case of a juvenile, . . . indicating that a cooperative attitude would benefit the accused does not render a confession involuntary unless such remarks rise to the level of being 'threatening or coercive.'" Given special emphasis in this case is the fact that the appellate courts all had access to a videotape of the interrogation—so that the courts were not limited to "a cold record, or limited to reliance on the detectives' testimony"—finding the video to be "dispositive in this case." Viewing the video, California's Appellate Court ruled that, "(w)hile [defendant] was a minor without criminal history, he was hardly a 'child' as characterized in his briefs: He was 16 years old, arrested in bed with his pregnant girlfriend, and well versed in the

gang activities in his neighborhood. The atmosphere of the hour and a half long interview (which included periods when he was left in the interview room by himself) was not overly harsh or threatening, and [his] demeanor throughout was relaxed and displayed no intimidation or fear." Under these circumstances, the Ninth Circuit found that the state's conclusion that defendant's confession was voluntary "was not an unreasonable application of the law."

(4b) *The Adequacy of the Miranda warning*: When read his *Miranda* rights, defendant was told that, "*you have the right to an attorney prior to your questioning if you desire, . . .*" At no time was he told that he also had the right to the assistance of counsel "*during*" the interrogation. Defendant referenced the Court to two older Ninth Circuit cases to the effect that this is an incomplete admonishment and makes for an invalid *Miranda* waiver. (*United States v. Noti* (9th Cir. 1984) 731 F.2nd 610, 615, and *United States v. Bland* (1990) 908 F.2nd 471, 473-474.) However, the Court here noted that the U.S. Supreme Court has never specifically ruled on this issue. Instead, hinting at a rule to the contrary, the Supreme Court has held several times that that *Miranda* warnings "need not be given in the exact form described in that decision." (See *Duckworth v. Eagan* (1989) 492 U.S. 195, 202; and *Florida v. Powell* (2010) 559 U.S. 50, 60.) As such, *Noti* and *Bland's* rulings that it is necessary to advice a suspect that his right to counsel includes both before and during an interrogation does not represent "clearly established Federal law." California, therefore, cannot be faulted for not following those two cases.

(4c) *The Interrogation Tactics Used*: Defendant argued that the interrogation tactics used by the detectives caused an involuntary confession. On appeal, defendant did not raise the issue of the detectives' telling him facts that were not true (i.e., that his co-suspect said he was present at the scene of the shooting and that others said they observed him shooting a gun at the car). So the Court did not directly address this issue. However, the rule is that the use of deceptions (i.e., a "ruse" or a "subterfuge") in an interrogation are generally lawful so long as they were not the kind of deception that would be reasonably likely to procure an untrue statement. So that was a non-issue. Defendant did object, however, to the use of alternate scenarios, implied offers of leniency, and references to his unborn child. Depending upon the circumstances, any one of these tactics might contribute to a finding that a resulting confession was coerced. However, in this case, other than the fact that defendant was still very young at the time, there was no evidence that defendant had a limited IQ or that he was "easily confused" or "highly suggestible and easy to manipulate." Per the Court, contrary to defendant's arguments that the detectives "overbore his will," the video recording showed that the tone of the interview was non-threatening. Defendant was calm throughout, spoke easily with the detectives, and showed no indication of fear or intimidation. When his unborn child was mentioned, defendant showed no reaction. The interview lasted only ninety minutes, including breaks and an approximately thirty-minute period when defendant was left alone in the room. The same two detectives (as opposed to multiple officers) conducted the interview without defendant being subjected to "tag team" ("good cop-bad cop") questioning. Throughout the questioning, defendant appeared to be relaxed, yawning at times while leaning on the table. In all, the record (including the videotape) supports the state court's conclusion that defendant voluntarily confessed.

(5) *Conclusion*: The state court's voluntariness determination was not contrary to, nor an unreasonable application of, federal law. As such, the Court held that the district court's denial of defendant's writ of habeas corpus petition was proper.

Note: On the issue of failing to advise a suspect of his right to the assistance of an attorney "*during*" questioning, there is California authority discussing this issue; i.e., *People v. Lujan*

(2001) 92 Cal.App.4th 1389. Per the *Lujan* Court, we can probably get away with failing to tell the suspect of his right to the assistance of an attorney *during* questioning (referencing *People v. Wash* (1993) 6 Cal.4th 215, 236-237.), *or* that he can have an attorney *before* questioning (see *People v. Kelly* (1990) 51 Cal.3rd 931, 947-949.), but telling him only that he has a right to the assistance of an attorney without specifying at least one of the two—"*before*" or "*during*"—is legally insufficient. But this should *never* be an issue. I can only guess that the detective in this case was winging it, reciting to defendant his *Miranda* rights from memory. I don't care how good a memory you might have; it's always better to *read* the rights to the suspect from a form or a card. Winging it from memory may be impressive to those who are watching you and your supervisors, but this practice unnecessarily creates issues that can result in the suppression of your suspect's confession or a reversal on appeal. The safest route is to eliminate the issue altogether by remembering to tell the suspect that he has the right to the assistance of an attorney both before *and* during an interrogation, and to read him these rights so you don't forget. As for discussing with a suspect the likelihood that he won't ever be seeing his children (born or unborn) again, inferring that confessing will somehow eliminate that possibility, this is always dangerous. Playing on an in-custody suspect's love for his or her children, under the right (or wrong) circumstances, can easily result in a finding that a later confession was involuntary. Per the Ninth Circuit: "'The relationship between parent and child embodies a primordial and fundamental value of our society.' *United States v. Tingle*, 658 F.2nd 1332, 1336 (9th Cir. 1981). When interrogators 'deliberately prey upon the maternal [or paternal] instinct and inculcate fear in a [parent] that [he or] she will not see [his or] her child in order to elicit "cooperation," they exert the "improper influence;" proscribed by *Malloy [v. Hogan*, 378 U.S. 1, 7, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)]'" (*Brown v. Horell* (9th Cir. 2011) 644 F.3rd 969, at p. 980.) In this case, the videotape tellingly showed that this particular defendant couldn't have cared less about his unborn child, precluding as disingenuous his later argument that playing on his emotions relative to his baby was the cause of his confession. And speaking of the videotape, note the importance of videotaping a suspect's interrogation. It made all the difference in this case. Not mentioned by the Court, note that Penal Code § 859.5 requires that any interrogation of a murder (adult or juvenile) suspect who is interrogated while held in a place of detention must be at least audiotaped. If at all possible, videotaping the interrogation is even better because then the viewer can see a suspect's physical reactions (or lack thereof) in addition to hearing his verbal responses; a factor that proved to be very important in this case.

***Kelly Test Requirements and Dog Scent Trailing Evidence*:**
***Foundational Requirements for Dog Scent Trailing Evidence*:**

People v. Peterson **(Aug. 24, 2020) 10 Cal.5th 409**

Rule: (1) Dog scent trail evidence is admissible without the need to meet the foundational and reliability requirements as described in *People v. Kelly* (i.e., the "*Kelly/Frye* test"). (2) Dog scent trailing evidence is admissible so long as a proper foundation is laid concerning the dog handler's expertise, the present ability of the dog in issue to trail a human, and some corroboration that the person being trailed had in fact been at the location in issue.

Facts: Defendant Scott Lee Peterson lived with his wife, Laci, in Modesto, California. Laci worked as a substitute teacher while defendant ran a startup fertilizer company out of a leased

warehouse. After a few years in Modesto, Laci became pregnant with their first child who they named "Conner," with a due-date in February, 2003. On the day before Christmas, 2002, neighbors found the Petersons' dog with his leash attached wandering around the neighborhood. With neither defendant nor Laci home, the neighbors merely put the dog in the Petersons' backyard. Defendant came home at about 4:30 p.m. that afternoon, washed his clothes, and ate some pizza. He then called Laci's mother to see if she had seen Laci that day, referring to his wife as "missing." With the police eventually being called, it was determined that there were no signs of forced entry at the Peterson house and Laci's purse was still there. Defendant suggested that maybe she had been accosted while walking the dog. He also claimed that he had gone fishing that day in San Francisco Bay despite the cool, drizzly weather. Defendant, however, was immediately a suspect, giving non-committal and inconsistent answers to questions. He also showed little concern that Laci was missing. When asked, defendant claimed that there were no current problems in his marriage and denied that he was involved in any love affairs with anyone. Skipping a whole bunch of othere little pieces of evidence here and there, all indicating that defendant might have had something to do with his wife's disappearance, the kicker came when on December 30th (six days after Laci's disappearance), a woman named Amber Frey reported to the Modesto Police that she was in the midst of an affair with defendant, and had been since November (Can we spell, "*motive*?"), and that they had in fact been sexually intimate. Frey soon figured out that defendant had been telling her a whole pack of lies since they met, including that he had never been married, soon changing that story to having been married, but that he lost his wife and was facing the prospect of spending the holidays without her for the first time. Meanwhile, the Modesto Police collected articles from the Peterson home what Laci would have touched (a slipper and a pair of her sunglasses), intending to eventually use them with "trailing dogs" so that they could search for Laci's scent. Under authority of a warrant, police placed a surveillance camera outside the Peterson home and GPS tracking devices on his vehicles, including a series of vehicles defendant rented for a few days at a time. The surveillance camera didn't help much, but the tracking devices showed that defendant drove the approximately 90 miles from his home to the Berkeley Marina in San Francisco Bay at least five times in January, each time using a different vehicle. Defendant also started making a lot of big changes, such as terminating the lease he had for the warehouse where his business had been, making preparations to sell his house, trading in Laci's car for a pickup truck, stopping mail delivery and opening a post office box, converting Conner's room into a storage space, and cancelling the satellite television service to his home, explaining to them that he was moving overseas. Finally, in April, both Laci's and Conner's badly decomposed bodies washed ashore after a storm hit the San Francisco Bay area. Although the cause of their respective deaths could not be determined, an autopsy indicated that Laci was still pregnant with Conner when she died. Around that same time, defendant did things indicating that he was about to flee (e.g., bought a car with cash in his mother's name while using a fake driver's license number, growing a goatee and mustache, dying his hair, and not returning phone calls). He was therefore arrested on April 18th and booked on two counts of murder. When arrested, defendant was in possession of nearly $15,000 in cash, foreign currency, two drivers' licenses (his own and his brother's), a family member's credit card, camping gear, considerable extra clothing, and multiple cell phones. At trial, the prosecution's theory was that defendant had killed Laci sometime on the night of December 23-24. Then, on the morning of the 24th, he let their dog out with his leash on to make it appear something had happened while Laci was walking him. He took her body to the Berkeley Marina in his boat which he stored at his leased warehouse, motored out to an area near

Brooks Island, and slipped her body—attached to homemade concrete weights he had fashioned as an anchor—into the bay. He then returned to Modesto, dropped the boat off at the warehouse, put gas on a tarp he kept in the boat to cover any odors left from Laci's body, washed his clothes, and proceeded with the ruse that Laci was missing, all the while hoping her body would never be found. The jury convicted defendant of murder in the first degree for killing Laci and murder in the second degree for killing Conner. (P.C. § 189.) It also found true a multiple murder special circumstance. (P.C. § 190.2(a)(3).) Sentenced to death, his appeal to the California Supreme Court was automatic.

Held: The California Supreme Court reversed the death penalty finding, citing errors in the selection of a death qualified jury, but unanimously confirmed his conviction (*but see* Note, below). Among the issues on appeal (other than the defective jury selection process) was the admissibility of dog scent trailing evidence. Using Laci's slippers and dark glasses seized earlier from the Peterson home, various dog handlers used their dogs to trail Laci's scent from her home in Modesto, in and around Peterson's Modesto warehouse, on highways leaving Modesto, and at the Berkeley Marina in San Francisco Bay. After listening to extensive testimony from, and cross-examination of, the various dog handlers concerning their training, as well as their dogs' training and past performance, the trial court excluded all the dog scent evidence *except* for what occurred at the Berkeley Marina. The reason for excluding all the other dog scent evidence was the lack of sufficient corroboration that Laci had actually been where the dogs purported to trail her scent. The Berkeley Marina evidence differed because there was corroborating evidence that Laci had been present in the area; i.e., with Laci's remains washing ashore very near the Marina. The evidence that was admitted consisted of testimony from a dog handler (Eloise Anderson) who was a member of the Contra Costa County Sheriff's Department search and rescue team. Anderson testified at trial about scent trailing she conducted at the Berkeley Marina with her dog "Trimble" on December 28th, 2002 (four days after Laci's disappearance). Using Laci's sunglasses obtained from the Petersons' home, and while wearing rubber gloves to conceal her own scent, Anderson presented the sunglasses to Trimble while giving a trailing command. At one of the two Berkeley Marina access points, Trimble responded with a "*no scent trail*" signal. In the second location, however, Trimble "*lined out*," i.e., pulled her harness line taut with a level head. Trimble led Anderson from an area near the parking lot entrance down to one of the marina piers and to a pylon on the pier where a boat could have been tied, giving Anderson an "end of trail" signal at that point. Evidence of Trimble's hit on Laci's scent at this location was of course important to show that Laci (or her body) had in fact been at the Berkeley Marina and not at home walking her dog as defendant had claimed. Defendant argued that admission of this evidence was error because the trial court had failed to require a hearing pursuant to *People v. Kelly* (1976) 17 Cal.3rd 24. Defendant also argued that the prosecution had failed to establish the legally required evidentiary foundation necessary before such evidence can be admitted. The Court of Appeal disagreed as to both arguments.

(1) *Kelly Test*: Pursuant to *People v. Kelly*, when the admission into evidence of an expert's testimony is the issue, and that testimony relates to the use of novel scientific methods or techniques, the proponent of that evidence must first demonstrate the technique's reliability through testimony from an expert qualified to offer an opinion on the subject. The technique's reliability, in turn, depends upon a showing that it has achieved general acceptance among practitioners in the relevant field. Finally, the proponent of the evidence must show any procedures necessary to ensure the technique's validity were properly followed in the case at

issue. The purpose of these threshold requirements—commonly referred to as the "*Kelly test*"—is to protect against the risk of credulous juries attributing to evidence cloaked in scientific terminology an aura of infallibility. (The Feds follow a similar requirement pursuant to *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013, thus establishing what is more popularly known as the "*Kelly/Frye test*.") However, not every issue requiring expert testimony needs to satisfy the *Kelly* test. *People v. Kelly* does not apply unless the technique at issue is "novel;" i.e., "which is *new* to science and, even more so, the law." Also, *Kelly* only applies when the technique at issue is one whose reliability would be difficult for laypersons (i.e., the jurors) to evaluate. "(N)o *Kelly* hearing is needed when '[j]urors are capable of understanding and evaluating' the reliability of expert testimony based in whole or in part on the novel technique." (*People v. Jackson* (2016) 1 Cal.5th 269, 317.) Prior case law has already held that the *Kelly* test does not apply to dog scent evidence. (See *People v. Craig* (1978) 86 Cal.App.3rd 905.) So long as the proper evidentiary foundation—i.e., "the present ability of a particular well-trained dog to trail a human"—is established, then the evidence is admissible without the need for a *Kelly* hearing. Juries are perfectly capable of understanding such evidence.

(2) *Evidentiary Foundational Requirements*: As for the evidentiary foundation necessary before dog scene evidence is admissible at trial, the California Supreme Court has required that the proponent of the evidence establish as background qualifications the adequacy of the handler's *and* the dog's training, and supply evidence of the dog's reliability in trailing humans. (*People v. Jackson*, *supra,* at pp. 321–322.) The proponent of such evidence must also show the adequacy of the manner in which the dog was given a scent to trail—whether by being allowed to sniff the beginning of a known trail or by being "presented with a scent article"— and then asked to smell for a corresponding trail of the same scent. Also, there must be some independent evidence tending to confirm that the person found at the end of the trail was indeed the person who left the scent trail and supplied the initial scent. The Court ruled that the People had met it evidentiary foundational requirements as described above. Anderson's testimony was sufficient to show that Trimble had the necessary qualifications as a scent tracking dog. Anderson's testimony also established her own training and experience in this field. Most importantly, the necessary foundational requirement that there be corroborating evidence that Laci had in fact been in the Berkeley Marina area (i.e., her body washing up on shore nearby and in the direction the local tides, per expert testimony, would have taken her) had been established. Also, contrary to defendant's assertions, there was evidence that Trimble had the training and ability to pick up the scent of someone enclosed in, for instance, a tarp and carried in a boat; referred to as an "enclosed target." Based upon the above (and a few other more frivolous arguments similarly rejected by the Court), it was held that the dog scent evidence was properly admitted.

Note: I briefed this case primarily because there's not a lot out there on dog scent evidence. I found this case very instructional (even if, as written, a bit disjointed and hard to follow) on the issue. Prosecutors really need to read the whole decision if you have a case involving dog scent evidence because there's more to this issue that limited time and space prevents me from covering here in any detail. For instance, a modified version of CALJIC No. 2.16, which provides guidance concerning how to evaluate the dog-trailing evidence, was approved. And other cases are discussed involving different types of dog-sniffing evidence with different foundational requirements, such as where the dog is exposed to a scent and then watched to see if it shows an interest in various locales frequented by the defendant. (*People v. Willis* (2004) 115 Cal.App.4th 379.) Also, another variation is discussed where a dog is given pads with scent from

shell casings and the victim's shirt, after which a lineup of pads with scents from various people, including the defendant, is presented to the dog. (*People v. Mitchell* (2003) 110 Cal.App.4th 772.) So why was the penalty verdict reversed, you might ask? That's because the trial court erroneously dismissed a bunch of prospective jurors based solely on the jurors' responses in written questionnaires expressing opposition to the death penalty, even though the jurors gave no indication that their views would prevent them from following the law in the appropriate case. It's a hard and fast rule (that the prosecutors here should have known) that merely expressing some opposition to the death penalty as a general matter is not legal grounds by itself to dismiss a juror. (See *Witherspoon v. Illinois* (1968) 391 U.S. 510.) So the case is being returned to allow for a new penalty phase trial should the prosecution so decide to go forward with it. Also, since this decision was reported, I've learned via news reports that the Supreme Court has also determined that the *whole case* (not just the penalty phase) has to be returned to the trial court in that it has belatedly come to light that one juror failed to disclose in voir dire that she had at one time feared for her own unborn child when she was being harassed by the ex-girlfriend of her boyfriend, necessitating her getting a restraining order; sometime surely the trial attorneys should have been made aware of while selecting the jury. So the Court is now sending the entire case back to the San Mateo County Superior Court to hold an evidentiary hearing for the purpose of deciding whether Peterson should be granted a new trial on the grounds that "Juror No. 7 committed prejudicial misconduct by not disclosing her prior involvement with other legal proceedings, including but not limited to being the victim of a crime." So stand by on that issue.

***Brady v. Maryland and Undisclosed Impeachment Evidence*:**
***Statutorily Protected Confidential Records and Potential Brady Material*:**

People v. Stewart **(Oct. 9, 2020) 55 Cal.App.5th 755**

Rule: A prosecutor has a duty under *Brady v. Maryland* to specifically inform defense counsel of the existence of records and/or reports which contain potentially impeaching information. The fact that such records and/or reports are made confidential by statute does not take precedence over the fact that they contain potentially impeaching information and are thus discoverable.

Facts: Nineteen-year-old defendant Brandon Stewart was alleged to have forcibly raped and digitally penetrated 15-year-old Doe 1; his cousin. Originally, it was also alleged that he sexually assaulted 11-year old Doe 2. However, Doe 2's allegations were dropped from the complaint although she still testified against defendant as Evidence Code § 1108 character evidence (see below). Doe 1 testified that on the November 25th, 2016, she, defendant, and her sister (Aaliyah), were all sitting together watching television in Doe 1's home, in Oakland, California. Surreptitiously, defendant started rubbing Doe 1's thigh, prompting her to move away from him. Aaliyah got up to go to the bathroom at some point at which time defendant started rubbing Doe 1's thigh again. The rubbing eventually led to him digitally penetrating her. Despite her resistance, defendant was able to move her on to his lap, penetrating both her vagina and then her anus with his penis. Doe 1 was finally able to get away from him and go to her bedroom. Defendant followed her while urging her to submit, not stopping until Aaliyah finally came out of the bathroom. Doe 1 testified that she did not initially tell her mother or sister about the incident because she was afraid of how they might react and whether they would believe her. But it was noticed by everyone that her personality changed as she began to "act out," getting

into trouble at school. Finally, five days later, after being sent home early from school, Doe 1 told her mother what had happened. Her mother took her to the hospital and the police were called. Although the initial interview was relatively unproductive, a subsequent SART exam revealed "significant traumatic injuries" to Doe 1's genital area that were consistent with "some type of penetration that stretched the hymen and tore it." It appeared that the injuries had occurred recently. This was all followed up with an interview at the "Child Abuse, Listening, Interviewing, and Coordination" ("CALICO") center where staff trained in forensic interviews of sexual assault and child abuse victims conducted a detailed interview. Everyone involved in these various contacts with Doe 1 eventually testified at defendant's trial. Doe 2 also testified, but only under the provisions of Evidence Code § 1108 which allows for evidence of a defendant's character. (E.C. § 1108 provides an exception to the general rule of E.C. § 1101 that evidence of a person's character, including in the form of specific instances of conduct, is inadmissible to show the person has a propensity to engage in certain behavior. Under § 1108, in a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by § 1101.) Doe 2 was also a cousin of the defendant's, but from the opposite side of the family, and did not personally know Doe 1. Doe 2 testified that defendant sodomized her and forced her to orally copulate him when she was 11 years old. Three years later, when Doe 2 was 14, defendant molested her again by reaching under her shirt, inside her bra, grabbing her breast and sucking on it, stopping only when she started to cry. Doe 2 didn't tell her mother what had happened until some months later, at which time it was reported to the police. But because of certain inconsistencies in her account as to what defendant had done (see below), the prosecutor chose to use Doe 2's testimony as character evidence only, not alleging these acts as separate counts on the complaint. Defendant, tried as an adult, testified at his trial. He denied molesting either Doe 1 or Doe 2. He was found guilty and sentenced to prison for 13 years, precipitating this appeal.

Held: The First District Court of Appeal (Div. 2) reversed. On appeal, defendant argued that he was deprived of his right to a fair trial because he had been denied access to certain information relative to Doe 2's credibility; a violation of *Brady v. Maryland* (1963) 373 U.S. 83. The specific issue was whether the prosecutor had illegally withheld impeachment information pertaining to Doe 2's credibility. The Appellate Court held that defendant was correct in these assertions, necessitating this reversal. In the initial discovery provided to the defense was an investigator's notes indicating that in 2012, Doe 2—when she was 11 years old—had been the victim of a child molest by someone other than defendant. Per the notes, the matter had been thoroughly investigated (including a CALICO center interview) and turned over to "Juvenile Authority," but that the case was then "(c)losed 11/27/12." The notes also indicated that there was an Oakland Police Department (OPD) report regarding the same matter. A copy of that OPD was in the prosecutor's possession but not given to the defense. Some of the details of Doe 2's allegations were described in the notes given to the defense. However, the prosecutor did not inform defense counsel that the OPD report contained potential *Brady* (impeachment) material. Separate from Doe 2's 2012 case, the original complaint in this new case alleged Doe 2's allegations that defendant had also molested her. However, these charges were excised from the complaint prior to defendant's preliminary examination (inferring, perhaps, the prosecutor's concerns over Doe 2's credibility), leaving only the counts as they related to Doe 1. Only Doe 1 testified at the prelim; her testimony resulting in an information being filed that contained only

the three charges on which he was ultimately tried. Pretrial in limine motions and jury selection occurred from May into early June, 2018. Among the motions litigated pretrial were the People's motion to allow Doe 2 to testify as a propensity witness under Evidence Code section 1108 (which was granted), and the defendant's motion to order the prosecutor to produce all information required by *Maryland v. Brady*, including exculpatory evidence and impeachment evidence for any prosecution witnesses. With the prospect that Doe 2 would be testifying against his client, the defense attorney specifically asked the prosecutor for a copy of OPD's police report. The prosecutor responded that the confidentiality of the suspect in that case, who was not the defendant, and Doe 2—both of whom were minors—were protected under Welfare and Institutions Code section 827, and for that reason the OPD report was not discoverable. The trial judge agreed, telling defense counsel that to get that information he must file a petition with the Juvenile Court under W&I § 827. Defense counsel filed such a petition on May 11, 2018. Trial started on June 4th without any response to defendant's petition from the Juvenile Court. Four days after defendant's conviction and six weeks after his petition to the Juvenile Court, defendant finally got the requested information, and more. Received were some redacted Child Protective Services (CPS) reports regarding Doe 2, describing the incident of alleged abuse of Doe 2 which had been reported in 2012. (Defendant never did get the related OPD report.) The CPS reports reflected a thorough investigation including interviews of Doe 2, her 10-year-old brother, and a 12-year-old male cousin (the suspect), all of which resulted in an investigator's conclusion that the allegations were unfounded because "[t]he children made conflicting reports regarding the alleged sexual abuse." Arguably, this was all potential evidence defense counsel could have used to impeach Doe 2 (i.e., "*Brady* material") at defendant's trial. Based on the CPS reports, defense counsel moved for a new trial on the grounds of discovery of new evidence and the prosecution's failure to disclose the evidence in violation of *Brady*. The trial court denied defendant's motion for a new trial, indicating that it would "not likely have admitted the evidence (in trial) for several reasons—E.C. § 352, undue consumption of time, and the investigator's conclusion being an inadmissible opinion—and thus it would not have "rendered a different result probable on retrial." The Appellate Court disagreed, finding the trial court's denial of a new trial to be error, and that the prosecutor had in fact violated *Brady*, thus requiring a reversal. The rules under *Brady* are simple (even though not always easy to apply): "The prosecution has a duty under the Fourteenth Amendment's due process clause to disclose evidence to a criminal defendant when the evidence is both favorable to the defendant and material on either guilt or punishment." (*In re Miranda* (2008) 43 Cal.4th 541, 575.) "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." (*People v. Superior Court* (*Johnson*) (2015) 61 Cal.4th 696, 710.) "Evidence is 'favorable' if it … helps the defense or hurts the prosecution, as by impeaching one of the prosecution's witnesses. [Citation.] Evidence is 'material' only if there is a reasonable probability that, had [it] been disclosed to the defense, the result . . . would have been different." (*In re Miranda*, *supra*, at p. 575.) Nor does the evidence necessarily have to be in the actual possession of the prosecution. "[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police" (or anyone else who would be considered to be a part of the "prosecution team"). There was no issue here that the information in the CPS report was relevant to Doe 2's credibility and was information of which the prosecution is presumed to have been aware. The only issue is whether

the character of such information as being "confidential," such as that contained in Juvenile Court records (pursuant to W&I Code § 827), takes precedence over the rules under *Brady*. The People argued that because the prosecutor notified defense counsel of the existence of the CPS report in its initial discovery, thus affording defendant the opportunity to petition the Juvenile Court under W&I § 827 for access to any potentially exculpatory or impeachment evidence concerning Doe 2's credibility, the requirements of *Brady* were satisfied. The People further argued that the trial court lacked the authority to conduct an in camera review of the juvenile records because section 827 confers exclusive authority on the juvenile court to decide whether to grant access to such records. The Appellate Court agreed with the prosecution that they were not required to provide defendant with the OPD report, or that the trial court was required to review the report (or other juvenile records) in camera. However, it disagreed with the argument that by merely disclosing to defendant the existence of notes reflecting the existence of a police report documenting Doe 2's allegation of sexual abuse by a party other than defendant, the prosecution had satisfied its *Brady* obligations. Rather, the Court held that while the prosecutor could have satisfied its obligation by specifically informing the defense that the police report and the Juvenile Court CPS records contained *Brady* material, merely disclosing the existence of such records, without noting its potential value as *Brady* material, was legally insufficient. The United States Supreme Court has already held that a state's interest in the confidentiality of certain reports "must yield to a criminal defendant's Sixth and Fourteenth Amendment right to discover favorable evidence." (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39.) Taking it a step further, the California Supreme Court has held that a prosecutor satisfies his or her *Brady* obligations by informing a defendant that there is potential *Brady* material in a police department's confidential personnel files regarding officers who were witnesses in the case. Then, despite the confidentiality of such records, defendant can then seek access to such information pursuant to a "*Pitchess* motion" (pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3rd 531, and Evid. Code §§ 1043 et seq.). (*People v. Superior Court* (*Johnson*) (2015) 61 Cal.4th 696, 710; see *California Legal Update*, Vol. 20, #9, Sept. 7, 2015.) While a prosecutor is not obligated to do a defendant's research for him, he or she is at the very least required to inform the defendant of the existence of potentially impeaching evidence (i.e. "*Brady* material") in certain records, whether those records are statutorily confidential or not. As for the OPD report, the People could have satisfied their *Brady* obligation by informing the defense of the existence of potential impeachment material in the police report, making a copy of the OPD available for the Juvenile Court's review, and then referring defendant to the section 827 procedure to obtain it. However, that is not what they did in this case. In sum, because the prosecutor here failed to advise defense counsel of the existence of *Brady* material in either the Juvenile Court's CPS records or the OPD report, *Brady* was violated. The suppression of substantial material evidence bearing on the credibility of a key prosecution witness is a denial of due process within the meaning of the Fourteenth Amendment. Defendant therefore, is entitled to a new trail.

Note: The Court further notes that while defense counsel could have been more diligent in seeking the Juvenile Court records, his foot-dragging did not excuse the prosecution's failure to specifically inform him that the CPS records and OPD report contained potential *Brady* material. Had the prosecutor so informed defense counsel, and the relevant information was not requested in time for trial (perhaps necessitating a continuance of the trial itself), then we would have had an incompetence of counsel issue. But that's an issue for another day. The important point here

is that it is not sufficient for a prosecutor to merely tell defense counsel that there are records or reports that involve a prosecution witness. He or she must specifically warn defense counsel that such records contain potential impeaching *Brady* material, putting him on notice that the ball is now in his court to actively seek out those records. Seems like over-kill, perhaps, but that's the rule.