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Remember 9/11/01*: *Support Our Troops
Remember 12/7/41*: *Pearl Harbor
Remember 11/29/09*: *Murder of Lakewood, Washington, Police Officers Mark Renninger, Ronald Owens, Tina Griswold, and Greg Richards

Robert C. Phillips (858) 395-0302 (C)
Deputy District Attorney (Ret.) RCPhill808@AOL.com

THIS EDITION'S WORDS OF WISDOM:

"*All my life, I always wanted to be somebody. Now I see that I should have been more specific*." (Jane Wagner)

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ADMINISTRATIVE NOTES:

Interrogating Out-Of-Custody Suspects Who Invoke: I've been preaching for some time that "*anticipatory invocations*" are legally ineffective. In other words, attempts to invoke one's *Miranda* rights either [1] before an interrogation occurs or is even imminent, *or* [2] before being taken into custody, may be ignored, allowing the officer to again seek a *Miranda* waiver at some later time. But some officers are using this theory to justify continuing an interrogation of an out-of-custody suspect despite attempts by the suspect to invoke *during* the interrogation. The reasoning goes that if such an anticipatory invocation is legally ineffective, then attempts by an out-of-custody to invoke may be ignored altogether and the interrogation continued. As reasonable as this argument sounds, I strongly believe it is wrong. However, the only case I had that specifically held this tactic to be illegal (*People v. Garcia* (Mar. 11, 2009) 90 Cal.Rptr.3rd 440.) was depublished. So I took some time to research the issue further: Here's what I found: Although a *Miranda* invocation may not be effective when made during a non-custodial interrogation, the Fifth Amendment right against self-incrimination still applies. As a result, it is my position that statements obtained as the product of a continued interrogation in the face of an out-of-custody suspect's invocation of his self-incrimination rights will *not* be admissible in court. Further, failing to scrupulously honor a suspect's attempt to invoke, even though he's not in custody at the time, is unprofessional, unethical, and forbidden by the courts. If this topic interests (or confuses) you, I have the results of my research on this issue in the form of an article that I will be glad to forward to you upon request.

CASE LAW:

***Brady Violations*; *Failing to Disclose Potentially Exculpatory Evidence*:**

Tennison v. City and County of San Francisco **(9th Cir. June 23, 2009) 570 F.3rd 1078**

Rule: A police officer's failure to provide all potentially exculpatory evidence to the defense (via the prosecutor), material to either guilt or punishment of a defendant, is a "*due process*" violation and grounds for the officer's civil liability.

Facts: Plaintiffs John Tennison and Antoine Goff served nearly 13 years in prison for a murder of which both were subsequently declared factually innocent by the courts. They subsequently sued the principal investigators involved, San Francisco Police Department Inspectors Prentice Earl Sanders and Napoleon Hendrix, in federal court. The Plaintiffs' argument was that their conviction was the product of the Inspectors withholding exculpatory evidence and manufacturing and presenting perjured testimony. The victim in the murder case, Roderick Shannon, was beaten, shot, and killed, by a number of gang members. Fleeing from the suspects, Shannon attempted to escape on foot after crashing his car. However, his killers caught and murdered him in cold blood. The subsequent investigation led to a number of possible witnesses, most of whom gave conflicting accounts of what happened, much of the information about which was never provided to

the prosecution and/or the defense. For instance: (1) *The* "*Secret Witness Program*" ("*SWP*"): Early on, the inspectors sought information from the public through the "Secret Witness Program," where people can provide information anonymously, with a $2,500 reward being offered. The SWP request form was included in Inspector Sander's file, but the fact that the request was made was never communicated to the prosecutor in the case, ADA George Butterworth, even though he had access to Inspector Sander's file. Tennison's defense attorney, Jeff Adachi, was never told of the use of the SWP nor the offer of a reward. (2) *Masina Fauolo*: Plaintiffs Tennison and Goff were initially identified in a photographic lineup as two of the killers by eleven-year-old Masina Fauolo, who claimed to have witnessed the murder. She identified Goff as the shooter and Tennison as one of the men who had beaten Shannon. Throughout the investigation, Fauolo had contact with Inpector Hendrix almost every day, the conversations from which were recorded in Hendrix's notes documenting the names of people involved and other information. After Fauolo's friend, Pauline Maluina (as discussed below), changed her story about seeing the murders, claiming that Fauolo had pressured her, Inspector Hendrix called Fauolo in Samoa and talked to her again in a taped interview. This tape was not given to the defense. Fauolo testified at Tennison's preliminary hearing and at the Plaintiffs' consolidated joint trial. (3) *Pauline Maluina*: Fourteen-year old Pauline Maluina claimed to have been with Fauolo when the murder occurred. Hendrix interviewed Maluina. She corroborated Fauolo to some extent, but otherwise gave a significantly different account on how the two of them happened to be there and what they did afterwards. She did identify Tennison, however, from a photo lineup, and id'd him at Tennison's W&I § 707 hearing (at which the Juvenile Court determined that he was to be tried as an adult). Later, when ADA Butterworth expressed concerns about the discrepancies between her story and Fauolo's, she told Butterworth, with Hendrix present, that she hadn't really witnessed the murder, that she'd never seen Tennison before, and that she'd picked him out in the lineup only because Fauolo told her who to pick. Maluina later took a polygraph examination which came back as "inconclusive." A memo concerning the polygraph results was put into Inspector Hendrix's file but was never provided to defense counsel. Then, after talking to Fauolo again, Maluina reverted to her original claim that she had in fact seen the murder and reiterated her identification of Tennison. Maluina testified at Goff's preliminary examination and at the Plaintiffs' consolidated trial. (4) *Chanté Smith*: Another witness, Chanté Smith called Inspector Sanders. Although denying witnessing the murder, she provided information about who was there. Smith's account about how the murder had occurred differed from what Fauolo and Maluina had told the Inspectors. According to Smith, other gangsters, including Lovinsky Ricard, were there, but Tennison and Goff were not. Smith said that Ricard was the shooter. Inspector Sanders made notes of the interview with Smith. Sanders interviewed Smith again shortly before trial, as did three officers from the SFPD gang taskforce. Notes of these interviews, although included in Inspector Sander's file, were never provided to defense counsel. (5) *Lovinsky Ricard*: Inspector Hendrix interviewed Ricard shortly after Chanté Smith told him that he was the shooter. Ricard denied being involved in Shannon's murder, so he was discarded as a suspect. About a week after both Plaintiffs were convicted of first degree murder, Tennison himself telephoned Ricard, who admitted to being the shooter. A month later, after being arrested on other charges, Ricard confessed to other officers to killing Shannon, providing details

that were consistent with Chanté Smith's version of the facts. The tape of this confession and the interviewing officers' notes were given to Inspector Hendrix but were never given to the defense, nor, apparently, to the prosecutor. Meanwhile, Tennison's attorney, Jeff Adachi, interviewed Ricard on his own and made a videotape of his confession, but with Ricard's identity disguised. When Adachi was later removed as Tennison's attorney, this information was given to Tennison's new attorney but without identifying Ricard. Tennison filed a motion for new trial with evidence of Ricard's anonymous confession submitted. ADA Butterworth later testified that he didn't learn about Ricard's confession until the third and final day of Tennison's new trial motion. The trial court denied the new trial motion finding Ricard's anonymous confession to be unbelievable. The Court of Appeal affirmed both plaintiffs' convictions. Plaintiffs filed a federal writ of habeas corpus petition which resulted in both of them being released from custody and declared "factually innocent." Based upon the above facts, Plaintiffs filed this federal 42 U.S.C. § 1983 civil rights suit, alleging that the defendant Inspectors had withheld material exculpatory information in violation of *Brady v. Maryland* (1963) 373 U.S. 83. The Inspectors moved for summary judgment (i.e., dismissal without a trial), claiming immunity from liability, which the trial court denied. This appeal followed.

Held: The Ninth Circuit Court of Appeal affirmed. The Court first rejected the defendant Inspectors' argument that a "*Brady* violation" can only serve as a basis for a prosecutor's civil liability (claims against ADA Butterworth being settled out of court), and not that of a police officer. A defendant's right to all potentially exculpatory information, i.e., evidence that is material to either guilt or punishment, cannot be thwarted by a police officer hiding it from the prosecutor. A *Brady* violation, whether committed by a police officer or a prosecutor, is a constitutional "*due process*" (Fifth and Fourteenth Amendments) violation, and can therefore lead to civil liability. The Court further rejected the defendant Inspectors' argument that "*bad faith*" had to be proved before they could be held civilly liable. Although an officer's failure to *preserve* evidentiary material that had been in their possession which, upon further testing, might have exonerated a defendant is not subject to sanctions absent the officer's bad faith in destroying such evidence (*Arizona v. Youngblood* (1988) 488 U.S. 51.), the same is not true for a *Brady* violation. The Court ruled that a plaintiff in a federal section 1983 civil suit need only prove that the officers "acted with deliberate indifference to, or reckless disregard for, an accused's rights or for the truth in withholding evidence from prosecutors." Given the inconsistencies between what the Inspectors claimed, what ADA Butterworth said happened, and what Tennison's attorney claims he received, there are certainly facts sufficient for a civil jury to find that the Inspectors acted with a reckless indifference to the Plaintiffs' rights. It was also noted that placing memos and other documents in a police officer's file where the prosecutor has access to them does not discharge one's *Brady* responsibilities. Also, the fact that defense counsel might have been aware that another potential witness might have exculpatory evidence (i.e., Chanté Smith in this case) is not enough to excuse Inspector Sander's failure to insure that the information about Smith had been passed onto the prosecutor (who is then responsible for getting it to the defense). Where the police have a detailed interview from a witness that might have exculpatory information, they are obligated to pass that information along. As to Ricard's post-trial confession, the Court rejected the Inspectors' argument that they

were acting in an "advocacy role," and are thus entitled to the absolute immunity prosecutors generally have. A police officer is not an officer of the court. Inspectors Hendrix and Sanders were not "performing the traditional functions of an advocate." The Court further rejected the Inspectors' argument that just because defense counsel received the tape of Ricard's confession before the motion for new trial was over, there was no prejudice. To the contrary, the value of Ricard's confession in this case was prejudiced by the trial court not knowing that it was corroborated by Chanté Smith (information about whom which was also withheld). Failure to disclose the fact of Ricard's confession when it could have helped the defense was a *Brady* violation. The fact that Ricard's confession came after Plaintiffs' conviction, and that the Inspectors considered it unbelievable, is irrelevant to their duty to make it available to defense counsel. As for the SWP reward, the fact that a reward was offered is also something that needs to be disclosed. In this case, it was a disputed fact whether a reward was ever paid to any of the witnesses. Defense counsel is entitled to know of, and explore, this issue. Based upon all the above, the trial properly denied the defendant Inspectors' motion for summary judgment. A civil trial on these issues must be heard.

Note: The moral to this long and sad saga is that anything and everything you, as a police officer, uncover during your investigation needs to be provided to the prosecutor, with an accurate accounting of everything that includes. It is the prosecutor's duty, not the police officer's, to decide what must be given to the defense under the standards dictated by *Brady v. Maryland* and its progeny. The fact that gang cases tend to be difficult, with defendants, victims and witnesses alike, all prone to credibility issues, is not relevant to your duty to give everything to the prosecutor so that he or she can decide what needs to be disclosed. Your prosecutor is either conversant in the complicated rules under *Brady* or has an expert in his or her office who is. What constitutes "*exculpatory*" evidence is not always obvious. Do not try to apply your own sense of fair play to this issue because *Brady* is not a about fair play, but rather about letting a defendant have everything he might potentially need to defend himself even if *you* don't think its important. To be blunt, what the defense needs is not your decision to make. Also, just as importantly, the prosecutor needs to know everything, including the good, the bad, and the ugly, about your case to effectively prosecute it. Aside from the civil liability, *Brady* violations are almost always fatal to a prosecution, even when the defendant is guilty.

***Good Faith*: *Negligent Errors in Arrest Warrant Records Keeping*:**

***Herring v. United States* (2009) __ U.S. __ [129 S.Ct. 695; 172 L.Ed.2nd 496]**

Rule: Evidence recovered in a search incident to arrest, when the arrest is the product of erroneous arrest warrant information, will be suppressed only when the erroneous information is the result of deliberate, reckless, or grossly negligent conduct, or if there is recurring or systematic negligence.

Facts: Investigator Mark Anderson learned that defendant had come to the Coffee County Sheriff's Department, in Alabama, to retrieve something from his impounded truck. Being familiar with defendant's criminal history, Anderson checked to see if he

had any outstanding warrants for his arrest. Finding none, he asked the clerk to check with neighboring Dale County. The clerk there reported that her county's computer database, maintained by the Dale County Sheriff's Department, showed that defendant did indeed have an outstanding felony arrest warrant. With this information, Anderson stopped defendant after he left the impound yard and arrested him. A search of his person incident to arrest resulted in the recovery of some methamphetamine and a pistol. Within the ten to fifteen minutes it took to stop, search, and arrest defendant, the Dale County clerk discovered that the warrant for defendant had been recalled some five months earlier. As a rule, when a court recalls an arrest warrant, someone from the court is supposed to call the Sheriff's Department where the computer is updated and the warrant is pulled from the system. For unknown reasons, that did not happen in this case, leaving the voided warrant in the Sheriff's database. Defendant was indicted in federal court for possession of the meth and for being a felon in possession of a firearm. Defendant's motion to suppress the dope and the gun was denied, the district court finding that Investigator Anderson acted in a good faith belief that the warrant was still outstanding and that there was "no reason to believe that application of the exclusionary rule here would deter the occurrence of any future mistakes." Upon defendant's conviction, he appealed. The Eleventh Circuit Court of Appeal affirmed, noting that failing to properly update Dale County's warrant database involved a "negligent failure to act, not a deliberate or tactical choice to act." Defendant petitioned to the U.S. Supreme Court.

Held: The United States Supreme Court, in a 5-to-4 decision, affirmed. After noting that some jurisdictions exclude evidence under these circumstances (see "Note," below), the Court determined to resolve the conflict. Assuming for the sake of argument that a search conducted as a result of a reasonable mistake by officers is in fact a Fourth Amendment violation, the question is really whether the exclusionary rule requires the suppression of the resulting evidence. In this case, the Coffee County officers did nothing wrong. It was the Dale County Sheriff's Department that was in error. However, as noted by the 11th Circuit, the error was the result of negligence only in not properly updating their computer system, and not reckless or deliberate conduct. This fact alone was sufficient for the Court to find that the "extreme sanction of exclusion" of the resulting evidence was not required. The exclusion of evidence resulting from an officer's error is only necessary where to do so has some deterrent effect; i.e., it serves to motivate law enforcement not to violate the Fourth Amendment. The benefits of deterrence must out weight the costs of suppression. The "costs," of course, involve the letting of guilty, and possibly dangerous people go free. "Marginal deterrence" does not necessarily call for the suppression of the resulting evidence. The exclusionary rule should only be used when necessary to deter "deliberate, reckless, or grossly negligent conduct, or in some circumstances, recurring or systematic negligence." "Evidence should be suppressed 'only if it can be said that the law enforcement officer had knowledge, or may be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.'" Not all record keeping errors are immune from the exclusionary rule. Recklessness in the maintenance of a warrant system, or knowingly making false entries to lay the groundwork for future false arrests, will not be rescued by this good faith exception. The Dale County officials' conduct did not rise to that level in

this case. There being only simple negligence in this case, use of the exclusionary rule is not necessary.

Note: California has been one of the jurisdictions holding law enforcement to a higher standard, excluding the resulting evidence any time a records-keeping error such as occurred here could be traced back to a "law enforcement source." (E.g., *Miranda v. Superior Court* (1993) 13 Cal.App.4th 1628.) A similar error by a *non*-law enforcement source, such as a court clerk, would not require the suppression of the resulting evidence. (E.g., *People v. Downing* (1995) 33 Cal.App.4th 1641.) Under this new case, we no longer have to worry about the difference between a law enforcement and a non-law enforcement source. But we *do* have to worry about insuring that record keeping errors, when they do occur, don't become a habit. Failure to correct such problems will give the defense an argument that any particular arrest or search based upon mistaken information was the product of recklessness, gross negligence, or recurring or systematic negligence. We don't even want to go there.

***Detentions and Reasonable Suspicion*:**
***Patdowns for Weapons*:**
***Detentions and Handcuffing*:**
***Warrantless Searches of Vehicles Incident to Arrest*:**

People v. Osborne **(July 14, 2009) 175 Cal.App.4th 1052**

Rule: (1) Detention of a vehicle burglary suspect, based upon his nervousness and indications that a vehicle had been tampered with, is reasonable. (2) Patting a vehicle burglary suspect down for weapons is reasonable upon determining that he might be a parolee, when he is nervous, and tools that could be used as weapons are within reach. (3) Handcuffing a suspect who tenses up and is nervous during a patdown does not convert a detention into a de facto arrest. (4) Searching a vehicle and its contents after the suspect's arrest when it is "*reasonable to believe*" that the vehicle might contain evidence relevant to the cause of the arrest is lawful.

Facts: Officer Michael Malone of the Antioch Police Department and his partner, while on routine patrol, observed defendant standing next to a Lexus. The trunk to the Lexus was open and defendant appeared to be handling some exposed wires in the trunk. Upon seeing the officers, defendant, appearing "real nervous," immediately shut the vehicle's trunk and walked away. At the same time, the officers observed another man in a nearby driveway. This person ran when he saw the officers, so they pursued him. Upon apprehending this person (for what, we don't know), defendant walked up from behind them. Officer Malone, primarily concerned because of defendant's size—six feet and about 250 pounds—told defendant to step back. Defendant walked back to the Lexus, about 10 yards away, and sat in the driver's seat. Officer Malone's partner told Malone that he thought he recognized defendant as being a parolee. So Malone approached defendant, looked inside the Lexus, and saw that the front passenger door panel had been stripped off and the trim on the dashboard around the stereo system had been removed. Malone also observed that there were loose wires coming from both areas as well as

tools, such as screwdrivers and pliers, that were "strewn" about in the front passenger area. Officer Malone, with four years of experience as a cop and having been involved in "thousands" of vehicle burglary investigations, suspected from these observations that defendant had been burglarizing the Lexus. Being also concerned that defendant might be armed, Officer Malone had defendant step out of the car and prepared to pat him down for weapons, placing his hand toward the rear of his body. Noticing that defendant was "real nervous," and feeling him "tense up," Officer Malone handcuffed him and asked if he had a gun. Defendant admitted to having a gun in his left front pants pocket while also volunteering that he'd recently been released from parole. A loaded nine-millimeter semiautomatic handgun was found in defendant's right front pants pocket. Officer Malone then recovered a backpack from the right front floor of the Lexus and opened it. Inside, he found a number of controlled substances. It was later determined that defendant owned the Lexus and that he'd been released from parole a few month earlier. Charged in state court with various drug-related offenses, as well as being a felon in possession of a firearm, defendant's motion to suppress was denied. He appealed from his conviction and prison sentence.

Held: The First District Court of Appeal (Div. 4) affirmed. (1) Defendant's first argument on appeal was that he had been unlawfully detained. The Court disagreed. For a detention to be lawful, it need only be shown that the officer had a "reasonable suspicion that criminal activity was afoot and that the suspect is connected with it." The officer must be able to point to specific and articulable facts which, when taken together with rational inferences from those facts, and while considering the "totality of the circumstances," reasonably justify the detention. An officer's training and experience is a factor to consider. Based upon the facts as described above, the Court had no trouble finding that Officer Malone's detention of defendant "*was more than reasonable*." (2) Secondly, defendant complained that patting him down for weapons was not reasonable. Again, the Court disagreed. Although noting that a vehicle burglary is not normally the type of crime that justifies a belief that the suspect might be armed, this case involved more. For instance, tools were lying nearby, including screwdrivers that could be used as weapons, as well as the fact that the suspect might be on parole and that he was acting "real nervous." The test is an objective one. It is irrelevant that the officer himself was not in actual fear. Under these circumstances, a reasonable officer would have concluded that defendant might be armed, justifying the patdown. (3) Next, defendant argued that by handcuffing him, Officer Malone converted what was up until then a detention into a "*de facto*" arrest without probable cause. However, "a police officer may handcuff a detainee without converting the detention into an arrest if the handcuffing is brief and reasonably necessary under the circumstances." In this case, based upon defendant's size, the fact that he was "real nervous," and because he began to tense up as if he were about to resist, handcuffing him was reasonable. (4) Lastly, defendant argued that in light of the recent U.S. Supreme Court case of *Arizona v. Gant* (2009) 556 U.S. __ [173 L.Ed.2nd 485], searching the backpack found in his car was unlawful. In *Gant*, the Supreme Court overruled its longstanding rule that a warrantless, suspicionless search of a motor vehicle "*incident to arrest*," even after the suspect had been handcuffed and secured in a patrol car, was lawful. *Gant* found such a search to be unlawful. The *Gant* Court, however, also held that there is a second legal theory justifying the warrantless

search of a vehicle incident to arrest even though the suspect has been secured. Under this alternative theory, a warrantless search of the vehicle and its contents is lawful, despite the fact that the suspect has already been taken into custody, whenever it is "*reasonable to believe evidence relevant to the crime of arrest might be found in the car*." "*Reasonable to believe*" is to be interpreted as less than probable cause. The Court here held that it was reasonable for Officer Malone to believe that evidence of the illegal firearm possession (e.g., ammunition or a holster) might be found in the vehicle. Under this theory, looking into the vehicle and the backpack found therein was lawful.

Note: This case utilizes *Gant's* alternative theory for searching a vehicle incident to an occupant's arrest, even though the arrestee has already been handcuffed and secured. As noted above, even with the arrestee being handcuffed and no longer able to lunge for weapons or destroy evidence, the car and its contents may still be searched whenever it is "*reasonable to believe evidence relevant to the crime of arrest might be found in the car*." It is also helpful that this Court interprets "*reasonable to believe*" as something less than probable cause. Also, the Court spent some time citing and describing authority for the argument that certain types of dangerous crimes (although not including vehicle burglaries) "*automatically*" allow a police officer, without having to cite any specific reasons, to pat a suspect down for weapons. While I'm not sure I'd encourage officers to take this theory too literally, it should help to save otherwise questionable pat downs. At the very least, you should be ready to testify (assuming you honestly believe it to be true) that in the your training and experience, people committing the type of crime in which your suspect is involved are commonly armed, and then add anything specific to your case that might help to bolster this conclusion.

***Driving Under the Influence of Drugs*:**

People v. Torres **(May 5, 2009) 173 Cal.App.4th 977**

Rule: Being under the influence of a drug does not necessarily mean that the person is impaired for purposes of driving while under the influence of drugs.

Facts: San Diego Police Narcotics Detective Ray Morales was surveilling a house when he observed defendant drive up and go inside. Five minutes later, defendant left the house, reentered his truck, and drove away. Morales radioed for a marked patrol unit. Officer Ariel Savage responded and, after seeing defendant fail to stop his truck at the limit line at an intersection driving halfway over it, he pulled defendant over. No erratic driving or other violations were observed. Although defendant was cooperative, Officer Savage noticed that defendant seemed to be jittery, his face twitched, and he stuttered. Detective Morales contacted defendant and also found him to be nervous and a bit agitated. Defendant's demeanor fluctuated between being remorseful, indifferent, and paranoid. He was sweating profusely, his muscles were rigid, and he couldn't stand still. He seemed sleepy although his eyes were wide open and watery. He was unkempt, had bad breath, and had a chemical odor. Arrested for driving while under the influence of drugs, defendant later admitted to using methamphetamine several days earlier. Morales evaluated defendant an hour and 40 minutes later and found his pulse to be elevated and

his pupils dilated, slow to contract and to dilate again. The trial court found Morales to be a drug-influence expert and admitted into evidence his opinion that defendant was under the influence of methamphetamine. Morales was also allowed to testify to the signs and symptoms of methamphetamine use and how defendant exhibited mannerisms consistent with such use. However, he *did not* qualify as an expert on the effects of such use on one's driving, and was therefore not allowed to testify on this issue. Tests showed that defendant's urine had more than 50,000 nanograms per millimeter of methamphetamine, and amphetamine levels of 16,000 nanograms per millimeter. A toxicologist, however, having no personal experience with meth users, testified that these numbers don't show how much "*under the influence*" a person might be, or how methamphetamine might affect the body. At best, she could only say that methamphetamine at any concentration is likely to produce symptoms inconsistent with safe driving. But she could not say that a person who was under the influence of methamphetamine was *actually* an unsafe driver. At trial, defendant admitted his methamphetamine use, but claimed that his driving ability was not impaired at the time of his arrest. Convicted of driving while under the influence of a drug, defendant appealed.

Held: The Fourth District Court of Appeal (Div. 1) reversed. To be guilty of driving while under the influence of drugs, "the drug(s) . . . must have so far affected the nervous system, the brain, or muscles [of the individual] as to impair to an appreciable degree the ability to operate a vehicle in a manner like that of an ordinary prudent and cautious person in full possession of his faculties." As noted by the Court; "It is not enough that the drug *could* impair an individual's driving ability or that the person is under the influence to some detectable degree. Rather, the drug *must actually* impair the individual's driving ability." (Italics added.) In this case, it was undisputed that defendant was under the influence of methamphetamine. There was also evidence that methamphetamine *can* impair a person's judgment, focus, and psychomotor skills in ways that *might* make the person an unsafe driver. But there was *no* evidence that defendant's methamphetamine use here *actually* affected his driving ability. There was no erratic driving. Defendant's sole offense was crossing over the limit line before coming to a stop; not an uncommon act done by many, totally sober people. There was also no expert testimony to the effect that someone who exhibits the signs and symptoms exhibited by defendant upon his arrest is necessarily impaired in his ability to drive a motor vehicle. As such, the evidence was insufficient to support defendant's conviction.

Note: Well, that sucks. But there has always been a serious dearth of expert opinion to help prosecutors correlate a given level of drugs in one's system to some identifiable level of impairment for purposes of driving. An expert officer's observed signs and symptoms don't give prosecutors the necessary evidence that the person was "*actually*" impaired for purposes of driving. Without such experts being available to the prosecution, and with no observed erratic driving, these are always going to be difficult cases to win. Still, it seems that one's physical impairments, such as those observed by Detective Morales in this case, would "circumstantially" prove a person's inability to drive a motor vehicle "in a manner like that of an ordinary prudent and cautious person in full possession of his faculties." But the Court here didn't seem to think that this was enough.