The California Legal Update

Remember 9/11/2001: Support Our Troops; Support our Cops

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THIS EDITION'S WORDS OF WISDOM:

"*Notice*: *Due to the current work load, the light at the end of the tunnel will be turned off until further notice*." (Unknown)

IN THIS ISSUE:

ADMINISTRATIVE NOTES:

SB 192: Repeal of P.C. §§ 150 & 1550; **"*Posse Comitatus*:"** P.C. § 150 provides that a uniformed peace officer, or any peace officer described in P.C. §§ 830.1, 830.2(a), (b), (c), (d), (e), or (f), or 830.33(a), has authority to command any "*able-bodied*" individual over the age of 18 to assist in an arrest. Similarly, P.C. § 1550 says that "(e)very peace officer or other person empowered to make the arrest hereunder shall have the same authority, in arresting the accused, to command assistance therefor as the persons designated in Section 150. Failure or refusal to render that assistance is a violation of Section 150." Refusing such a command is an infraction, punishable by a fine of from $50 to $1,000. Effective January 1, 2020, however, in another example of Governor Newsom and the California Legislature's lack of support for law enforcement, both sections (on the books since 1872) have been repealed (SB 192).

CASE LAW:

***Brady v. Maryland*:**
***Pitchess v. Superior Court*:**
***Evid. Code §§ 1043-1047*:**
***Discovery of Confidential Impeachment Evidence*:**

Association for Los Angeles Deputy Sheriffs v. Superior Court **(Aug. 26, 2019) __ Cal.5th __ [2019 Cal. LEXIS 6237]**

Rule: A police department's *Brady* list is confidential to the extent it is derived from confidential personnel records. However, a law enforcement agency does not violate that confidentiality by sharing with prosecutors the identity of law enforcement officers on its *Brady* list who are potential witnesses in a specific pending case. Therefore, when a peace officer on a department's *Brady* list is a potential witness in a specific pending criminal prosecution, that department may disclose to the prosecution the name and identifying number of the officer and the fact that the officer may have relevant exonerating or impeaching material in his or her confidential personnel file without the prosecution first having had to comply with the statutory procedures (Evid. Code §§ 1043-1047) for the release of such information.

Facts: The U.S. Supreme Court held in the landmark case decision of *Brady v. Maryland* (1963) 373 U.S. 83, that the prosecution has an affirmative duty to disclose to the defendant in a specific pending criminal case any and all evidence that has the potential to impeach a law enforcement officer's testimony. Such disclosure may be required even if the prosecutor is not personally aware that the evidence exists. Thus, this duty carries with it an obligation for a prosecutor to "learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Failure to comply with the prosecution's so-called "*Brady* obligation" commonly results in a reversal of a defendant's conviction. In order to avoid this result, many law enforcement agencies have developed what is commonly known as a "*Brady list*," listing officers who have information in their confidential personnel files that is discoverable under the *Brady* decision. An officer will commonly find him or herself on his or her department's *Brady* list if the officer has a sustained determination (usually as the result of a

citizen's complaint and a resulting administrative investigation) of any of (but not limited to) the following accusations; (1) immoral conduct, (2) bribes, rewards, loans, gifts, favors, (3) misappropriation of property, (4) tampering with evidence, (5) false statements, (6) failure to make statements and/or making false statements during departmental internal investigations, (7) obstructing an investigation/influencing a witness, (8) false information in records, (9) policy of equality—discriminatory harassment, (10) unreasonable force, and/or (11) family violence. (This specific list is from the Los Angeles Sheriff's Department's Manual of Policy and Procedures.) Sustained allegations of any of the above are commonly documented in an officer's confidential personnel file, per P.C. § 832.7. Eleven years after the *Brady* decision, the California Supreme Court decided the case of *Pitchess v. Superior Court* (1974) 11 Cal.3rd 531. In *Pitchess*, the Court recognized that a criminal defendant may, in some circumstances, compel the discovery of evidence in the arresting law enforcement officer's confidential personnel file when that evidence is relevant to the defendant's ability to defend against a criminal charge. As a result of the *Pitchess* decision, California's Legislature enacted a statutory procedure whereby a defendant may allege the existence of certain impeaching evidence (such as the eleven circumstances described above) and thereby trigger an in camera (i.e., without the defendant being present) review by the trial judge of an officer's personnel file. Should the trial court judge determine during that in camera review that such evidence exists, that judge is to release the information to the defense for use at trial. (See Evid. Code §§ 1043-1047.) It is likely, however, that compliance with the *Pitchess* statutes will not always insure that a prosecutor's non-statutory *Brady* obligations are satisfied. (E.g., where a defendant is unable to establish the necessary "*good cause*" (E.C. § 1043(a)(3)) to trigger the in camera hearing process, his "*Pitchess* motion" would inevitably be denied; an occurrence that does not necessarily mean that there is no discoverable *Brady* material in the officer's personnel file.) In 2016, the Los Angeles Sheriff's Department decided that in order to facilitate *Brady* compliance, it was going to provide to the Los Angeles District Attorneys' Office and other prosecutorial agencies within the county a complete list of the names and ID numbers of some 300 deputy sheriffs (out of some 7,800 deputies on the department) who had one or more sustained *Brady* allegations in their confidential personnel files. In this manner, it made it easier for a prosecutor to meet his or her *Brady* obligations when a Sheriff's deputy with potential *Brady* material in his or her personnel file was on the witness list for a pending case. The prosecutor would then notify the defense for that pending prosecution that a *Pitchess* motion was in order. The Los Angeles Sheriff's Association objected to this apparent end run around the necessary Evidence Code/*Pitchess* requirements for the release of such information and filed a petition in the Superior Court asking for injunctive relief. The trial court granted the Association's petition, finding that *Brady* did not authorize disclosure of the list at the Department's discretion when unconnected to any specific pending criminal case. However, the trial court ruled that in the case of a specific pending prosecution, *Brady* did not preclude the Sheriff's Department from volunteering to the prosecution the names and ID numbers of deputies with *Brady* material in their personnel files who might be witnesses in that particular case. The Second District Court of Appeal in a split 2-to-1 decision reversed, ruling that the trial court's proposed exception was impermissible; i.e., that absent the filing of a *Pitchess* motion, a deputy's name and ID number was not to be released even in a pending prosecution. ((2017) 13 Cal.App.5th 413.) The Sheriff's Association appealed.

Held: The California Supreme Court unanimously reversed the Appellate Court's decision. Noting first that a law enforcement agency's *Brady* list is confidential to the extent it was derived from confidential personnel records, it was also noted that the *Pitchess* statutes "must be viewed against the larger background of the prosecution's" *Brady* obligations and a defendant's right to a fair trial. In other words, a prosecutor's constitutional duty to insure that a criminal defendant in a pending prosecution has at his or her disposal all potentially exonerating evidence takes precedence over the more restrictive *Pitchess* procedures for the release of that information as described in Evidence Code sections 1043 through 1047. "There can be no serious doubt that confidential personnel records may contain *Brady* material. An officer may provide important testimony in a criminal prosecution. Confidential personnel records may cast doubt on that officer's veracity. Such records can constitute material impeachment evidence. . . . These are not close questions." The Court, in debating whether or not *Brady* material in an officer's personnel file is confidential, noted that subdivision (b) of P.C. § 832.7 was amended during the time this case was pending in the appellate court, removing the confidentiality protections of certain personnel records. Subdivision (a) of section 832.7, on the other hand, continues to provide that the information listed in that subdivision (as opposed to subd. (b)) is "confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code." The Court thus assumed that an officer's presence on a department's *Brady* list was likely the result of information derived from some confidential (§ 832.7(a)), and some non-confidential (§ 832.7(b)), personnel records. However, whether any or all of an officer's *Brady* information in his or her personnel file is confidential is, in the end, irrelevant. Noting that a prosecutor's constitutional *Brady* obligations take precedence over the *Pitchess* procedural restrictions on the release of confidential personnel record information, the Court "conclude(d) that the (Sheriff's) Department may provide prosecutors with the *Brady* alerts at issue here without violating confidentiality." The Sheriff's Department volunteering the fact that a particular law enforcement witness has potentially impeaching information in his personnel file helps to alleviate the prosecutor's constitutional dilemma of being required to provide the defense with relevant evidence even when he or she was unaware of it, thus "mitigat(ing) the risk of a constitutional violation." "(C)onstruing the *Pitchess* statutes to cut off the flow of information from law enforcement personnel to prosecutors would be anathema to *Brady* compliance. ("*Anathema*," means "*abhorrence*," "*curse*," or "*denunciation*." I had to look it up.) Therefore, despite the statutory restrictions contained in Evidence Code §§ 1043 to 1047, it is lawful for the Sheriff's Department to share with the prosecution the name and identification number of any deputy listed in the Department's *Brady* list, i.e., that a named deputy may have relevant exonerating or impeaching material in his or her confidential personnel file, when that deputy is a potential witness in a pending criminal prosecution.

Note: "*Brady*," of course, is a bad word for any law enforcement officer who has had one or more sustained citizen complaints (or other internal disciplinary internal investigation) filed against him or her, typically involving the unnecessary use of force or evidence of untruthfulness (although see the eleven grounds for a *Brady* list inclusion listed above). Under *Pitchess*, such a sustained allegation can be used to impeach the testimony of an officer for only five years (see P.C. § 832.5(b)). *Brady*, on the other hand, is *forever* (although the older the complaint, the weaker the relevance in a pending prosecution). Being on a department's *Brady* list can be a death knell for an officer's career, seriously compromising his or her value as a witness in any future criminal prosecution. But by the same token, the threat of being included on a *Brady* list

is (or should be) a strong motivational factor for any law enforcement officer to remain honest in all respects, and/or to keep in check any temptation to apply a little "street justice" on an uncooperative suspect. My strong advice to all cops when faced with such temptations: *Don't do it*! It's not worth compromising your entire career. On the other hand, as noted in the brief above, this decision allowing the police and prosecutors to skip the Pitchess/Evid. Code §§ 1043-1047 discovery requirements greatly assists a prosecutor in his or her dilemma of having to turn over (or at least alert the defense to) existing *Brady* information in an officer/witness's history, whether or not the prosecutor even knows about it. (If the prosecutor *does* know about it, note that it is a felony for him or her to "*intentionally and in bad faith*" fail to so inform the defense. See P.C. § 141(c).) While this decision does not *require* a law enforcement agency to inform a prosecutor that a potential officer/witness has negative information in his or her personnel file, it is certainly a good idea that the agency do so in order to avoid *Brady* error and a possible reversal of any resulting conviction. The Court also noted that it was *not* deciding whether the prosecution was necessarily allowed to "directly access (the) underlying records, or perhaps a subset of those records." *Brady* does not require this, although if the defense is provided with the details of negative information via the in camera hearing, it is certainly helpful to a prosecutor that he or she also know about it. Lastly note that this decision does *not* address the original issue raised when the L.A. Sheriff's Department Association filed for injunctive relief; i.e., as to whether an agency can simply give a prosecutorial office its entire *Brady* list up front. The trial court granted the Association's original petition to enjoin doing that, and the trial court's decision was not contested on appeal. So at this stage, only the L.A. Sheriff is precluded from caughing up its entire *Brady* list to a prosecutorial agency. As for other law enforcement agencies, until the issue is raised again in another case, it's probably not a good idea to do what the L.A. Sheriff was told by the trial court judge that they could not do. You'll probably lose when your right to do so is challenged.

***Enforcement of DUI Probationary Conditions*:**
***Warrantless Seizure of a Blood Sample from a Fourth Waiver Probationary*:**

People v. Cruz **(Apr. 25, 2019) 34 Cal.App.5th 764**

Rule: A search warrant is unnecessary to take a blood sample from a DUI arrestee when the arrestee is subject to Fourth waiver search and seizure probationary terms that expressly include a prior consent to submit to a blood test.

Facts: At about 10:50 p.m. on May 2, 2016, Officer Opinski of the Merced Police Department observed defendant driving at a high rate of speed through the City of Merced. As he did so, Officer Opinski observed defendant cross partially into the opposing lane at a curve in the roadway, drive through a stop sign, and nearly hit a pedestrian. Defendant stopped his car when Officer Opinski activated his emergency lights, "collid(ing)" with the curb. Abandoning his car, defendant fled on foot, falling several times as he attempted to do so. Officer Opinski caught defendant and arrested him. Officer Opinski could smell the strong odor of an alcoholic beverage on defendant's breath and person. Defendant refused to submit to a field sobriety test. His repeated response to Officer Opinski's questions was; "*I want my lawyer*." Upon reading him the "Admin Per Se Form" regarding the consequences of failing to submit to a breath or blood test, defendant declined; responding again that he wanted his lawyer. Upon taking

defendant to the police station in preparation for obtaining a search warrant for a blood test, it was discovered that not only was his license suspended, but he was also on probation for a prior felony DUI conviction with a probation condition that he submit to a blood, breath, or urine test if arrested for DUI. Therefore, without getting a warrant, Officer Opinski transported him to a hospital where, over defendant's express objection, a phlebotomist extracted a sample of his blood. The blood test result showed defendant's blood-alcohol level to be .157%. Charged in state court with driving while under the influence of alcohol within 10 years of a prior felony DUI conviction (Veh. Code, § 23550.5(a)) and related charges, defendant filed a motion to suppress the blood-alcohol result, arguing that the warrantless extraction of his blood violated the Fourth Amendment. Upon denial of his motion, defendant pled no contest and was sentenced to 2 years prison. He appealed.

Held: The Fifth District Court of Appeal affirmed. In doing so, the Court first noted that "(i)nvasions of the body, including nonconsensual extractions of blood, are searches entitled to the protections of the Fourth Amendment." Thus, the extraction of a blood sample, conducted without a search warrant, is presumed to be "unreasonable" absent one of "the few specifically established and well-delineated exceptions." "Consent" is one of those exceptions, eliminating the need for the People to prove either probable cause or exigent circumstances. And this includes a "*prior consent*," given by a defendant as a condition of his probation in a prior case. It is the People's burden to prove that a defendant's consent was in fact freely and voluntarily given and that the resulting warrantless search was within the scope of the consent given. When a defendant is convicted of a criminal offense, he may be given the option of serving the prescribed jail or prison sentence or of accepting probation under certain terms and conditions. In any particular case where the so-called "*search and seizure conditions*" are appropriate (not every probationary sentence necessitates search and seizure conditions), the defendant will have to make a choice of either accepting such conditions, or going to prison (in the case of a felony). Typically, such search and seizure conditions provide that if he accepts probation (which is a privilege, not a right), he will first have to consent to having "his person, vehicle, place or residence, or any other belongings, to search and seizure, without a warrant, any time day or night, by any probation officer and/or peace officer, with or without probable cause" (i.e., referred to as a "*Fourth waiver*"). A defendant is free to reject such a condition should he so choose. But the alternative is having to serve his prison time instead. Accepting search and seizure conditions in such a circumstance has been held to be a free and voluntary consent in that it is the probationer's choice. Defendant in this case, as a result of a 2013 felony DUI conviction, had accepted such a search and seizure condition, and was still on probation at the time of this new offense. And his prior conviction being for a felony DUI case itself, defendant had also expressly agreed to submit to a warrantless chemical test of his blood, breath, or urine should he be arrested for drunk driving again. Because of this search and seizure condition of defendant's probation, the Court determined that defendant had no right to refuse a blood draw in the present case. When he did refuse, Officer Opinski was legally justified in having blood drawn anyway, even over his objection, so long as the procedure was performed in a reasonable manner. In affirming the trial court's denial of defendant's suppression motion, the Court rejected defendant's argument that he should have been allowed to revoke his prior consent at any time. The Court determined that to allow a person on probation to later unilaterally revoke his consent to being searched or seized without a warrant would make the Fourth wavier a nullity. The Court also noted that while it is an undecided issue whether a "general Fourth

waiver" (i.e., for "his person, vehicle, place or residence, or any other belongings," without specifically mentioning a blood draw) is to be interpreted to include providing a blood sample in a DUI case, that issue did not need to be decided here. Defendant in this case specifically consented to providing a blood, breath, or urine sample should he be arrested again for DUI (as, indeed, he was). Lastly, the Court rejected defendant's argument that Officer Opinski should have merely reported defendant's probation violation (by refusing to provide a blood sample) to his probation officer and then let the authorities revoke his probation. Per the court, to limit Officer Opinski's options in such a manner would only serve to frustrate the dual purposes of the probation condition, "namely, deterrence and discovery of subsequent offenses." Based upon all of the above, defendant's conviction was upheld.

Note: I'm often asked whether being subject to seizure conditions excuses the lack of a search warrant in a DUI refusal case, or in other contexts such as upon seizing an arrestee's cellphone or computers. The answer is, *it depends*. The "general Fourth waiver," referred to above, is similar to the standardized language used in many probationary Fourth waivers, i.e., that a defendant agree to a warrantless search of his "*person, home, vehicle, and other property*" (or similar language). While it can be argued that a blood draw comes within the category of a search of a probationer's "*person*," neither the U.S. nor the California Supreme Courts has decided the issue as to whether such generalized language in a probationary Fourth waiver is to be interpreted to include a blood draw. (See *People v. Simon* (2016) 1 Cal.5th 98, 120.) In another context (and another question I am often asked about), note that some courts have applied a narrow definition to the word "*property*," ruling that one's property does not include his cellphone (See *United States v. Lara* (9th Cir. 2016) 815 F.3rd 605, 609-612.) nor other "electronic data" device. (*In re I.V.* (2017) 11 Cal.App.5th 249, 259-263.) (Note also that *People v. Sandee* (2017) 15 Cal.App.5th 294, at pages 302-304, disagrees with *Lara*.) Also, the rules may be different for parolees. (See *United States v. Johnson* (9th Cir. 2017) 875 F.3rd 1265, 1273-1276.) You also have to consider the language in the Electronic Communications Privacy Act, when dealing with electronic devices, to the effect that a warrantless search of an electronic device of any sort may be lawful "if the device is seized from an authorized possessor of the device who is subject to an electronic device search as a clear and unambiguous condition of probation, mandatory supervision, or pretrial release." (P.C. § 1546.1(c)(10))) The bottom line is that all this probationary condition confusion can be eliminated if a sentencing court, when including search and seizure conditions in one's probationary sentence, thinks to add to the generalized language something that is specific to that particular case, such as (as in this case) that the defendant submit to a blood, breath, or urine test should he be arrested again for DUI, or in an electronic device case, that his cellphone, computers, etc., be subject to a warrantless search. It's up to a prosecutor to remind the court to do this.

***Motions to Suppress, per P.C. §§ 995, 999a, and 1538.5*:**
***Consensual Encounters and Detentions*:**
***Spotlighting*:**
***Good Faith and the Applicability of the Exclusionary Rule*:**

People v. Kidd **(May 16, 2019) 36 Cal.App.5th 12**

Rule: Litigating the constitutionality of a search and/or seizure is statutorily provided for under more than just at a preliminary hearing (per P.C. § 1538.5(f)) and/or as a part of a P.C. § 995 motion to dismiss. Spotlighting a person's vehicle, plus other "overt actions," constitutes a detention. An officer's intentional illegal detention of a suspect, even when done in good faith, does not prevent the suppression of the resulting evidence.

Facts: At approximately 1:30 a.m., on the morning of April 21, 2017, defendant and another were observed by a law enforcement officer in the City of San Jacinto sitting in their vehicle with only the front amber fog lights on. The officer, in uniform and a marked patrol vehicle, decided to stop and talk to the individuals. The officers' statement purpose for making this contact was to see if they were stranded, or what they were doing, or if they lived there. Making a U-turn and parking his patrol car about 10 feet behind defendant's car (with another car parked about 10 feet in front of it), the officer pointed two spotlights—one by the driver's side mirror and the other on the overhead light bar—at it, illuminating it's interior. Contacting the occupants, defendant was found to be the driver. The officer immediately noticed the strong odor of marijuana emanating from the vehicle. Shining his flashlight into the car, the officer observed the passenger as he attempted to conceal some bags of what the officer suspected to be marijuana. Asking the two occupants whether either was on probation or parole, defendant said that he was on probation. The officer directed defendant and the passenger to exit the car and to sit in his patrol vehicle while he verified defendant's probationary terms. As he did this, defendant spontaneously told the officer that there was a firearm inside the car's center console. After confirming that defendant was on probation and that he was subject to a Fourth waiver, the officer searched the car. Recovered from the car was 26 ounces of marijuana in several different packages, a digital scale, a pistol with the serial number scratched off, a loaded magazine for the pistol, and 142 alprazolam pills (an anti-anxiety medication in the benzodiazepine family, also known as Xanax). Defendant was arrested. Charged in state court with a number of felony offenses, defendant filed a motion to suppress which was first litigated at the preliminary hearing as authorized by P.C. § 1538.5(f). The motion was denied and defendant was bound over on two felony and one misdemeanor counts. No express findings of fact were made by the preliminary hearing magistrate. Arraigned on an information filed after the preliminary hearing, defendant filed another motion to suppress as authorized by P.C. § 1538.5(i). At the special hearing on the motion, neither party presented any additional evidence, submitting the issue on the basis of the preliminary hearing transcript. The trial court judge denied the motion. Subsequently, defendant took a third "bite of the apple," filing a motion to dismiss pursuant to P.C. § 995, again arguing that the evidence against him should be suppressed. The judge hearing this motion, reviewing the preliminary hearing transcript as well as the parties' briefings, granted the motion, suppressing the evidence and dismissing the case. The People appealed.

Held: The Fourth District Court of Appeal (Div. 2) affirmed. Three primary issues were litigated on appeal: (1) The propriety of the defense getting three attempts to suppress the evidence, (2) the legality of defendant's detention and arrest, and (3) the officer's good faith.

Statutory Procedures for Testing the Legality of a Search or Seizure: The People first argued that defendant had already availed himself of a motion to suppress during the preliminary examination and then a reconsideration of that motion upon the filing of the information in the superior court, as provided for under P.C. § 1538.5(i). Having had his "two bites of the apple"

(my words, not the Court's), he should not have been entitled to a third. The Court disagreed. In fact, it was noted that under the statutory scheme provided for under Penal Code sections 995, 999a, and 1538.5, an accused may have up to *seven* opportunities to challenge the validity of a temporary detention, arrest, or search and seizure. Specifically:

> (1) The accused can move to suppress the evidence obtained at the preliminary hearing (Pen. Code, § 1538.5(f));
> (2) If the motion is denied and the accused is held to answer, a motion may be made in the superior court to set aside the information for lack of probable cause on the ground that the evidence is the product of an illegal search (Pen. Code, § 995);
> (3) Upon the denial of a motion under Penal Code section 995, a defendant may file a petition for a writ of prohibition to stay the trial on the ground that the evidence is the product of an illegal search (Pen. Code, § 999a);
> (4) A special hearing de novo in the superior court on the validity of the search is proper (Pen. Code, § 1538.5(i));
> (5) An adverse determination may be reviewed by means of a petition for a writ of prohibition or mandate in the appellate court (Pen. Code, § 1538.5(i));
> (6) If prior to trial the opportunity for a section 1538.5 motion did not exist or the accused was not aware of the grounds for the motion, the issue may be raised at trial. (Pen. Code, §§ 1538.5(h) and (m); *and*
> (7) Finally, the matter may be considered on appeal after the denial of the motion under Penal Code section 1538.5, even though the accused enters a plea of guilty after the denial (Pen. Code, § 1538.5(m)).
> (See *People v. Gephart* (93 Cal.App.3rd 989, 995-996.)

This inclusion by the state Legislature of various statutory methods of challenging—via a formal motion—the constitutionality of a Fourth Amendment search and seizure issue constitutes an exception to the general rule that one trial judge cannot reconsider and overrule an order of another trial judge. (*People v. Riva* (2003) 112 Cal.App.4th 981, 991.) The Court therefore concluded that there was no procedural bar to a second trial court judge accepting the arguments, and deciding the legality of a defendant's detention and arrest, even though the same issue had previously been heard and decided by both another trial court judge and the preliminary hearing magistrate.

Legality of Defendant's Detention: The People argued that defendant was not detained until that point in time when the officer approached the car and learned that defendant was on probation. (I might make the argument that he was not detained until told to sit in the officer's patrol car.) Up until that point, per the People, the contact constituted nothing more than a consensual encounter. Again, the Court disagreed. The law is well established that a law enforcement officer may approach someone on the street or in any other public place and converse with that person if the person is willing to do so. Labeled a "*consensual encounter*" by the courts, it is not necessary that there be any articulable suspicion of criminal activity in such a circumstance. The test for evaluating the legality of such a police-citizen contact is whether a reasonable person under the circumstances would have felt free to disregard the officer's attempts at beginning a conversation, and simply go about his or her business. (In re Manuel G. (1997) 16 Cal.4th 805.) If such a hypothetical reasonable person would not feel free to just walk away under the

circumstances, then the contact is elevated into a "*detention*." (The courts employ an objective test, ignoring the common sense fact that most people are intimidated enough by the approach of a police officer that they seldom feel free to ignore the officer and just walk away.) Where a reasonable under the circumstances would not feel free to leave, the contact is illegal unless there is an articulable reasonable suspicion to believe the person was, is, or is about to be, engaged in criminal activity. (*Terry v. Ohio* (1968) 392 U.S. 1.) Prior case law tells us that when a law enforcement officer simply parks his car behind another person's car, no reasonable person would believe that he or she is not free to simply drive (or walk) away. (See *People v. Franklin* (1987) 192 Cal.App.3rd 935, 940.) However, should the officer, in doing so, turn on his patrol car's colored emergency lights, the contact is instantly converted into a detention; i.e., no reasonable occupant of the car would believe that he or she is free to leave. (See *People v. Bailey* (1985) 176 Cal.App.3d 402, 406.) In this case, the officer, after making a U-turn, turned on his patrol car's spotlights only. While simply spotlighting a person is generally not enough to convert a consensual encounter into a detention (see *People v. Franklin*, *supra*, and *People v. Rico* (1979) 97 Cal.App.3rd 124, 130.), doing so plus very little else might be. (See *People v. Garry* (2007) 156 Cal.App.4th 1100, where it was held that when an officer spotlighted the defendant and then walked "briskly" towards him, asking him questions as he did so, the contact became a detention.) Here, in this case, the officer made a sudden U-turn and then parked within 10 feet behind the defendant's vehicle, directing two spotlights into defendant's vehicle as he did so. Although defendant's car was not blocked in, the Court ruled that the officer's actions converted what otherwise would have been a consensual encounter into a detention in that under the circumstances, any reasonable person in defendant's position would have believed that the officer wanted to talk to him and would not have allowed him to leave until he did so. And if that alone was not enough, the officer's act of getting out of his car and approaching defendant would have eliminated any ambiguity. Here, defendant was lawfully parked with his fog lights illuminated. It is not illegal to have one's fog lights turned on while parked. (See Veh. Code §§ 24400(b) and 24403(a) for the relevant vehicle's lighting requirements.) The People's argument that defendant may have been about to drive off with his fog lamps only, in violation of V.C. § 24403, was merely speculative. Also, the officers were unable to articulate any lawful grounds for believing that defendant or his passenger were engaged in any other unlawful activity by simply sitting in their parked car. At that point in time when defendant was detained, therefore, there was no legal justification for doing so. The officer's observation of the smell of marijuana and the passenger's apparent possession of marijuana, and the subsequent search of the car, were the direct products of defendant's unlawful detention, warranting the suppression of all the resulting evidence.

Good Faith: Perhaps grasping at straws, the People further argued that the officer did not act in bad faith or commit deliberate, reckless, or grossly negligent misconduct, and that the use of the exclusionary rule was therefore not called for. There is actually U.S. Supreme Court authority to back up this argument. Specifically, the High Court has held: "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." (*Herring v. United States* (2009) 555 U.S. 135, 144.) In this case, however, the Court held that while they are not suggesting that the officer acted in bad faith, it is clear that he purposely spotlighted defendant's car in preparation to making contact with its occupants without any reason to believe defendant was doing anything illegal, but rather just to see what the car's occupants were doing

and to check to see if they lived in the neighborhood. As such, defendant's detention in the absence of any reasonable suspicion of criminal wrongdoing was found to be deliberate in the sense that it was not accidental or negligent conduct. Under these circumstances, suppression of the resulting evidence serves the policy objectives of the exclusionary rule as articulated by the U.S. Supreme Court.

Defendant's Probationary Status: After defendant was unlawfully detained, it was discovered he was subject to a "*Fourth waiver*" (i.e., subject to search and seizure without a warrant or probable cause, under the terms of his probation). It has been held that the connection between an unlawful traffic stop and the discovery of incriminating evidence may be attenuated by the subsequent discovery that the defendant is subject to a search condition. (See *People v. Durant* (2012) 205 Cal.App.4th 57, 64–66.) Despite the fact that the People failed to make this argument, the Court (citing a case that disagreed with *Durant*; i.e., *People v. Bates* (2013) 222 Cal.App.4th 60.) held (without discussing why) that it would not have done them any good to do so; i.e., that the Court "would not have found (defendant's) parole (sic) search condition served to attenuate the taint of the illegal detention."

Conclusion: The evidence discovered in defendant's vehicle following his illegal detention was properly suppressed.

Note: The rumor is that the Riverside District Attorney's Office is thinking about seeking Supreme Court review of this case, challenging the holding here that spotlighting a person's vehicle is enough, by itself, to constitute a detention. I strongly recommend they do so. The Court's conclusion in this case seems to fly in the face of *People v. Franklin, supra,* which held that spotlighting a person, who was on foot, and then the officer "pulling to the curb behind (him)," is not a detention. The question answered in *Franklin* was whether the "immediate act" of pulling up behind defendant constituted an "'additional overt action' sufficient to convince a reasonable man he was not free to leave." The Fifth Circuit, in *Franklin*, held that it *was not*. (pg. 40) In this new case, the Fourth Circuit held that the officer making a sudden U-turn, and then pulling up behind defendant's parked vehicle, was in fact such an "*additional overt action*" sufficient to elevate a consensual encounter into a detention. The problem is that the evidence suggests that neither defendant nor his passenger even saw the officer make a U-turn in that they still had the baggies of marijuana out in the open as the officer walked up on them; not attempting to hide them until contacted by the officer. The other "*over action*" of parking their patrol car behind defendant's car, and spotlighting them in the process, is no more than happened in *Franklin*, where (again) such acts were held not to be enough to constitute a detention. Lastly, cementing the issue for this Court was the officer's act of walking up on the defendant's vehicle. The only other case similar to this scenario is *People v. Garry, supra,* where there were the additional factors that upon spotlighting the defendant, the officer walked "briskly" towards him, asking him questions as he did so. Neither of those factors are present in this case, the Court here even noting that this officer's approach to the defendant's car was "not made in a particularly aggressive or intimidating manner." (pg. 22.) So the only way the Court here could have found that defendant was seized (i.e., detained) upon the officer spotlighting him, or even walking up to his car, is to ignore both *Franklin* and *Garry*. As for a defendant having up to seven "bites of the apple," so to speak, allowing so many different attempts to suppress the evidence, the fact that there are more than two methods for doing so comes as a complete

surprise to me. I used to think that it was unfair just allowing a defendant to have two such attempts. How this current state of the law came about is because as the Legislature kept adding various statutory methods for testing the legality of a search or seizure while failing to eliminate those that were already on the books. The Court describes the history behind this phenomenon in some detail at pages 17 to 20 of the decision.