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THIS EDITION'S WORDS OF WISDOM:

"*Being ignorant is not so much a shame, as is being unwilling to learn*."
(Benjamin Franklin)

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***Case Law*:**

CASE LAW:

***Sixth Amendment Right to Confrontation*:**

Michigan v. Bryant **(Feb. 28, 2011) __ U.S. __ [131 S.Ct. 1143; 179 L.Ed.2nd 93]**

Rule: Hearsay statements made by a victim and testified to by police are only admissible in evidence if they are "*non-testimonial*." To determine whether statements are non-testimonial, the primary purpose of the questioning must be determined.

Questioning during an ongoing emergency situation is generally going to result in non-testimonial responses.

Facts: Detroit, Michigan, police responded to a call at 3:25 a.m. about a man who had been shot and was lying on the ground at a gas station. At that location, they found Anthony Covington bleeding from a gunshot wound to his abdomen. He appeared to be in great pain and could talk only with difficulty. The police asked Covington what had happened, who had shot him and where it had occurred. Covington responded that "Rick" (defendant) had shot him some 25 minutes earlier. He indicated that he had had a conversation with defendant through the back door of defendant's house. Covington further said that as he started to leave, defendant shot him through the door. He then drove himself to the gas station where the police found him. This conversation lasted about 5 to 10 minutes before medical personnel took him to the hospital. He died from his wounds shortly thereafter. The police went from there to defendant's house where they found blood and a bullet on the back porch and an apparent bullet hole in the back door. They also found Covington's wallet with his identification outside the house. Defendant was not there, having fled (only to be arrested a year later in California). With defendant eventually charged in state court with murder and related offenses, the officers were allowed to testify before the jury about what Covington had told them. Defendant was convicted of second degree murder and other charges. His conviction was upheld on appeal in the Michigan Court of Appeal. However, the Michigan Supreme Court reversed, finding that defendant had been deprived of his Sixth Amendment right to confrontation when the trial court allowed the officers to testify about Covington's hearsay statements. The United States Supreme Court granted certiorari.

Held: The United States Supreme Court, in a split 6-to-2 decision, reversed, remanding the case back to the Michigan state courts for further proceedings. At some point after defendant's trial in this case, the United States Supreme Court decided *Crawford v. Washington* (2004) 541 U.S. 36. *Crawford* held that pursuant to the Sixth Amendment right of confrontation, evidence of a declarant's statements (Covington's statements concerning the circumstances of him being shot) to police (or others) are *inadmissible* at trial, despite an applicable exception to the hearsay rule, unless it is proved that the declarant is (1) now unavailable to testify himself, *and* (2) the defendant had a prior in-court opportunity to confront and cross-examine the declarant. This rule, however, only applies to what the court labeled as "*testimonial*" statements: "(W)here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands (of the Sixth Amendment) is confrontation." What constitutes a "testimonial statement" was only vaguely described in *Crawford*, leaving the issue for later decisions. Subsequent to *Crawford*, the Supreme Court decided the case of *Davis v. Washington* (2006) 547 U.S. 813. *Davis* discussed the difference between testimonial and non-testimonial statements in two distinct situations, both involving domestic violence victims (i.e., the "declarants") who for various reasons were no longer available to testify. But the defendants in both cases never had the opportunity to cross-examine them, which meant that in order for their statements to be admissible in court, those statements would have to be classified as "non-testimonial." *First scenario*; the recording of a domestic violence victim's 9-1-1 telephone call requesting help in an ongoing situation was found

to be *non-testimonial*, thus allowing for the admission into evidence of the recording itself. The *Davis* Court's reasoning was because the victim was speaking of events as they were happening right then, while facing an ongoing emergency. The statements elicited from the victim were necessary to enable the police to resolve the present emergency rather than simple to learn what had happened in the past. Also, the formality of the situation was less because the victim was questioned about an ongoing event. In such a situation, there was little if any opportunity for the declarant to fabricate what she was telling police, adding to its reliability. The recording was therefore held to contain "non-testimonial" hearsay and thus admissible into evidence. *Second scenario*; *Davis* analyzed statements in another situation (a companion case joined with *Davis* for purposes of appeal; *Hammon v. Indiana*) that were held to be testimonial, and thus inadmissible. These statements were those of a domestic violence victim given to police after the fact. The police interview in *Hammon* was concerning an occurrence that although recent, was over, with the suspect no longer present. The interview of the victim was part of an investigation into possible past criminal conduct with no emergency in progress. The primary, if not sole, purpose of the interview was to investigate a possible crime in order to gain information for later prosecution. These factors made the victim's responses "testimonial" and inadmissible in court. *In the present case*, it was undisputed that Covington was unavailable, having died from his wounds, and that defendant had not had an opportunity to confront and cross-examine him. The issue, therefore, was whether the statements obtained from Covington as he laid dying in the parking lot were non-testimonial, and thus admissible, or testimonial, and inadmissible, based upon the criteria established in *Davis*. In determining whether a declarant's statements are testimonial or non-testimonial, the primary purpose of the questioning must be ascertained. The test is an objective one, requiring an objective analysis of the circumstances surrounding the questioning and the making of the statements in issue. As such, the subjective intentions of the parties are irrelevant. If the information the parties knew at the time of the encounter would lead a reasonable person to believe that there was an ongoing emergency, even if that belief was later proved incorrect, then the resulting statements would be non-testimonial and admissible in court. Ongoing emergencies" are not limited to domestic violence situations. They can occur anytime there is a potential threat to not only the victim, but also to the responding police and/or to the public at large. The involvement of a firearm is an important factor to consider. Another factor is the medical condition of the victim, being relevant to the victim's purpose in responding to questions and a police officer's evaluation of the magnitude of a continuing threat to the victim, themselves, and the public. The formality of the questioning must also be considered. An unstable, confused initial confrontation is more likely to result in non-testimonial responses than is a controlled interview intended to collect evidence for prosecution. Lastly, the statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation**.** The nature of what was asked and answered, viewed objectively, where the elicited statements are necessary to the eventual resolution of the present emergency, rather than simply to learn what had happened in the past, are more likely to result in non-testimonial evidence. In the instant case, the police responded to a call concerning a man who had been shot, finding Covington, bleeding from an apparent gunshot would, lying in a gas station parking lot. They didn't know at that time who Covington was, whether the

shooting had occurred at the gas station or at a different location, who the assailant was, or whether the assailant posed a continuing threat to Covington or to others. They also didn't know what the assailant's motive might have been and whether he was still in the area. The entire situation was confused. The initial questions had the primary purpose of attempting to establish these facts in order to assess the situation in what reasonably appeared to be an ongoing emergency. The questioning under these circumstances lacked the formality normally attendant to testimonial-type questioning. "Because the circumstances of the encounter as well as the statements and actions of Covington and the police objectively indicated that the "primary purpose of the interrogation" was "to enable police assistance to meet an ongoing emergency, . . . Covington's identification and description of the shooter and the location of the shooting were (non-testimonial). The Confrontation Clause did not bar their admission at Bryant's trial."

Note: Whether or not an unavailable victim's hearsay statements to police are going to be admissible in court is more an issue for prosecutors than the police. A police officer is going to collect that evidence either way. But it is helpful for a police officer to know when there are going to be admissibility issues so that he or she will know when a more thorough investigation is going to be necessary in order to obtain a conviction. The Sixth Amendment confrontation problem highlighted in *Crawford v. Washington* greatly complicated the lives of prosecutors. But it also helped to emphasize the need for investigators and prosecutors to work harder and closer in order to obtain a conviction. Note also that the Supreme Court in this case further pointed out that questioning that begins as a non-testimonial evaluation of the circumstances of an ongoing emergency may, as the situation stabilizes, evolve into a testimonial collection of facts with future prosecution in mind. That was not an issue in this case, but may be in others. Just something else that needs to be considered as victims and witnesses to a crime are questioned.

***Use of Safety Belts per V.C. § 27315(d)(1)*:**

People v. Overland **(Feb. 18, 2011) 193 Cal.App.4th Supp. 9**

Rule: V.C. § 27315(d)(1), requiring the occupants of a motor vehicle to be "properly restrained," mandates the use of both the shoulder harness and the lap belt portion of a safety belt harness when the vehicle, if manufactured after 1996, is in operation.

Facts: Santa Monica Police Officer Ortiz observed defendant driving her 2002 Lexus 300RX with the shoulder harness portion of her seat belt tucked behind her back. The lap portion of the belt was properly affixed across her lap. Officer Ortiz effected a traffic stop and issued her a citation for a violation of V.C. § 27315(d)(1), for not being properly restrained by a seat belt. Defendant contested the ticket, but was found guilty. She appealed to the Appellate Division of the Superior Court.

Held: The Los Angeles Appellate Division of the Superior Court affirmed. Vehicle Code § 27315(d)(1) provides in relevant part: "A person shall not operate a motor vehicle on a highway unless that person and all passengers 16 years of age or over are

properly restrained by a safety belt." Defendant's argument was that by wearing only the lap belt portion of the seat belt (or "safety belt") she was in compliance with the section. The Court disagreed. The issue is what is meant by the phrase "*properly restrained*." Subdivision (f) of V.C. § 27315 says that safety belts must be maintained in good working order and must conform to the motor vehicle safety standards established by the United States Department of Transportation. The Federal Motor Vehicle Safety Standards, as codified in the Code of Federal Regulations (CFR), require that all passenger vehicles manufactured after 1996 be equipped with a combined lap belt and shoulder harness. (49 C.F.R. §§ 571.208, S4.1.5.1(2) (2010), 571.209, S3 (2010)) Section 571.208, S2 indicates that the purpose of this requirement is "to reduce the number of deaths of vehicle occupants, and the severity of injuries, . . . by specifying equipment requirements for active and passive restraint systems." (See also V.C. § 27315(a)) It is also mandated by V.C. § 27314.5(a) that dealers selling 1972 to 1990 model used cars with lap belts only must affix warning notices that "failure to install and use shoulder harnesses with lap belts can result in serious or fatal injuries in some crashes." Based upon this background, the Court determined that in order to be "properly restrained by a safety belt," a motorist or a passenger in any vehicle manufactured after 1996 must wear the entire shoulder harness and lap belt combination restraint system while the vehicle is being operated. Defendant's vehicle had the required restraint system. Her failure to properly wear it violated section 27315(d)(1).

Note: The Court further cited *Kodani v. Snyder* (1999) 75 Cal.App.4th 471, where a vehicle stop was upheld as legal where the driver did not appear to be wearing the shoulder harness portion of the safety belt assembly. The court, in *Kodani*, noted that the wearing of the shoulder harness is mandatory for vehicles manufactured after a certain date. The federal courts are in agreement. (See *Collier v. Montgomery* (5th Cir. 2009) 569 F.3rd 214, 218 [addressing a similar safety belt statute]; and *Hupp v. City of Walnut* (N.D. Cal. 2005) 389 F.Supp.2nd 1229, 1232.) So everyone seems to be in agreement. Everyone except *Ms. I-own-a-Lexus-so-I-can-do-whatever-I-want*. Now she knows too.

***The Internet and One's Expectation of Privacy*:**
***Search Warrant Exhibits and Incorporation*:**
***Search Warrants and Irrelevant Typographical Errors*:**
***P.C. § 1524.2 and Probable Cause for a Search Warrant*:**
***Search Warrants and Stale Information*:**
***Good Faith*:**

***People v. Stipo* (May 16, 2011) 195 Cal.App.4th 664**

Rule: (1) An Internet subscriber has no expectation of privacy in the subscriber information he supplies to his Internet provider. (2) Failing to "incorporate by reference" an exhibit attached to a search warrant won't be fatal to the warrant's validity so long as the warrant affidavit has made some reference to the attachment. (3) Minor typos in a warrant affidavit that don't affect the warrant's probable cause don't affect the warrant's validity. (4) Failing to comply with the requirements of P.C. § 1524.2(a)(1) and (b)(4), by failing to return the requested information with a sworn declaration verifying the

authenticity of the records, is irrelevant to the use of those records in a follow-up search warrant. (5) Information in a warrant affidavit is not stale when there is cause to believe that the offense is continuing and/or that evidence of the crime will still be found at the target of the search. (6) Good faith applies where an officer reasonably relies on the magistrate's determination that a warrant is supported by probable cause.

Facts: In January 2008, a computer hacker unlawfully entered the Hacienda La Puente High School District computer network. The hacker gained control of the school district's "routers," changed their "configuration," and installed "unauthorized tunnels" to route the data on the network to the hacker's computer. This gave him access to payroll and employee records, birth dates, Social Security numbers, and other confidential data. A computer expert working for the school district was able to identify the hacker's IP address within the Time Warner Road Runner network and passed this information on to the police. Police Officer Rene Mesta applied for a search warrant to require Time Warner to identify the subscriber who had the identified IP address at the time of the unauthorized access. Attached to the warrant were a summary of facts and the officer's investigative report, marked as exhibits 1 and 2, respectively. Although the search warrant was issued on January 28th, Officer Mesta didn't receive the results until May 2nd. The returned warrant identified defendant as the owner of the IP address, verified that he had a current account with Time Warner, and provided his home address. With this information, Officer Mesta obtained a search warrant for defendant's residence on August 1st. Recovered as a result of the execution of this warrant was a diagram that "mapped the intrusion" into the school district's network and digital evidence on his laptop that connected him to the crime. Charged in state court with wiretapping (P.C. § 631(a)) and unlawfully accessing computer information (P.C. § 502(c)(2)), defendant's motion to quash both search warrants and to suppress the resulting evidence was denied. Defendant pled no contest to the charges and appealed.

Held: The Second District Court of Appeal (Div. 6) affirmed. *(1)* Defendant first challenged the search warrant to Time Warner. Arguing that his Fourth Amendment rights had been violated, defendant alleged that he had an expectation of privacy in the personal information about him held by Time Warner. The Court disagreed. It is a rule of law that a defendant must first establish that he or she has a "legitimate expectation of privacy . . . in the . . . particular area searched or thing seized in order to bring a Fourth Amendment challenge;" i.e., he must show that he has "standing" to challenge such a search. But there is no legitimate expectation of privacy in information a person voluntarily turns over to third parties. (*Smith v. Maryland* (1979) 442 U.S. 735, 743–744.) Defendant voluntarily provided the contested subscriber information to Time Warner. In *Smith*, the United States Supreme Court concluded that such information falls outside the Fourth Amendment's privacy protections. Although *Smith* dealt with telephone records, it has been held that subscriber information provided to an Internet provider is no different. (See *U.S. v. Perrine* (10th Cir. 2008) 518 F.3rd 1196, 1204; and *U.S. v. Forrester* (9th Cir. 2007) 512 F.3rd 500.) As with telephones, Internet users "rely on third-party equipment in order to engage in communication." "(E)-mail and Internet users have no expectation of privacy in the to/from addresses of their messages or the IP addresses of the websites they visit because they should know that this information is

provided to and used by Internet service providers for the specific purpose of directing the routing of information." As such, defendant, having no expectation of privacy in the information held by Time Warner, lacked the necessary standing needed to challenge the search warrant served on Time Warner. *(2)* Defendant next argued that the Time Warner warrant was legally insufficient in that Officer Mesta neglected to "incorporate by reference" the second exhibit—the investigative report—into the warrant itself. The Court, however, noted that the officer's investigative report was mentioned in the officer's affidavit, where it is stated that Exhibit 2 is attached. "Incorporate by reference" is a technical phrase. Police officers are not expected to use a lawyer's terminology. The absence of an incorporation clause is not a substantial defect. Officer Mesta "implicitly" incorporated Exhibit 2 in the warrant by mentioning it in the affidavit. He merely failed to use the technical phrase "*incorporated by reference*." *(3)* Defendant further noted that Officer Mesta's affidavit incorrectly listed the time of his intrusion into the school district's computer system as 11:57 a.m. when in fact it was at 11:37 a.m. The trial court concluded that because the warrant was accurate in all other respects, such a minor typographical error is not enough to invalidate the warrant. "Where the affidavit establishes the facts of the crime, a mistake as to time does not automatically negate probable cause." A mistake as minor of this nature would not have made any difference to the magistrate in concluding that there was probable cause supporting the issuance of the warrant. *(4)* Next, defendant complained that Time Warner failed to file a declaration verifying the authenticity of its records it returned in response to the warrant. Instead, it provided a letter only. Defendant argued that because Time Warner failed to comply with the requirements of P.C. § 1524.2(a)(1) and (b)(4) (*Records of Foreign Corporations Providing Electronic Communications or Remote Computing Services*) by failing to return the requested information with a sworn declaration verifying the authenticity of the records, the information should not have been allowed to be used to establish probable cause for the second search warrant; i.e., for defendant's home. The procedural requirements of P.C. § 1524.2, however, are prerequisites for entering the records into evidence at trial, not for using them as probable cause in a search warrant affidavit. It is "beside the point" that Time Warner's letter accompanying the requested records may not be admissible at trial. There is no suppression remedy for failing to follow the procedural requirements of section 1524.2. *(5)* Lastly, defendant contended that the warrant application for his home was based upon stale information. Again, the Court disagreed. Noting that there is no bright-line rule when evaluating a staleness issue, the result depends upon the circumstances of each case. The Court found here that there was sufficient evidence that defendant's hacking activities were a continuing offense and that evidence of his illegal activities would still be in his home when the search warrant was executed. First, it was noted that defendant had created an "information dump" for all employee information, providing him with information that could be used for purposes of identity theft in the future. The intercepted school district information was a continual resource for identity theft. It is a reasonable inference that traces of the network intrusion would be present in defendant's computer because they are automatically entered and very difficult to remove. Also, there was nothing to indicate that defendant knew he was being investigated and thus he had no reason to dispose of his computer or the evidence contained in his computer. Further, Time Warner notified Officer Mesta that defendant had maintained his IP address and current

subscription. Defendant had been a long-term customer of Time Warner and his account was still active when Time Warner disclosed the subscriber information. Lastly, Officer Mesta acted on the information he received from Time Warner within a reasonable time after getting it. The Court therefore ruled that it was objectively reasonable for the police to believe that defendant's computer equipment and crime evidence would continue to be at his home. (6) Lastly, even if the warrant for defendant's home lacked in probable cause, there is no reason to believe that Officer Mesta acted in bad faith in relying upon the magistrate's determination that the warrant was lawful. "'(A) warrant issued by a magistrate normally suffices to establish' that a law enforcement officer has 'acted in good faith in conducting the search.'" "(E)vidence seized will not be excluded where officers rely on warrants that are later ruled to be invalid if their reliance was objectively reasonable." Mesta's reliance on the warrants was objectively reasonable.

Note: Search warrants are presumed to be lawful, which is why, when in doubt, it has always been my strong suggestion that an officer take the time to get a warrant. Two hours on your computer will save you a day or more waiting in some courthouse hallway to testify as to why you didn't think a warrant was necessary. And the likelihood we will lose a motion to quash or traverse a warrant is nil. Getting a warrant (or, in this case, two) won't guarantee that you still won't have to testify. But most of defendant's arguments in this case were pretty close to frivolous. We were never even close to losing this one. Also, whenever staleness may even possibly be an issue, it helps immensely if you describe in your warrant affidavit why it is believed that incriminating evidence is still likely to be found in the place to be searched.

***Arrests and Probable Cause*:**
***Search Warrants; Omission of Material Facts*:**

Garcia v. County of Merced **(9th Cir. May 5, 2011) 639 F.3rd 1206**

Rule: (1) Probable cause to arrest does not require that the suspect actually be guilty. So long there is at least a "*fair probability*" that the suspect is guilty, the arrest is lawful. (2) Even though an informant's criminal history is left out of a search warrant affidavit, the warrant is still valid so long as that information wasn't intentionally or recklessly left out, *or* when it wouldn't have made a difference to the magistrate even if he'd known.

Facts: Special Agent Alfredo Cardwood of the Bureau of Narcotics Enforcement and Merced Deputy Sheriff John Taylor (defendants in this civil suit) received information from one Robert Plunkett, an inmate of the Merced County Jail serving time on theft charges and a known jailhouse informant, that attorney John Garcia (plaintiff in this civil suit) "was prepared to accept drugs (methamphetamine) from the informant" and smuggle them into the jail to another inmate, Alfonso Robledo. The drugs were to be concealed in a Bugler tobacco pouch. Garcia was a local criminal defense attorney with 20 years of experience in the area. Robledo was Garcia's client and the source of Plunkett's information. Before acting on this information, Officers Cardwood and Taylor checked out Plunkett's information. In so doing, it was determined that Plunkett did indeed have an in-custody relationship with Robledo, that Robledo was in jail on drug

charges, that Garcia was Robledo's attorney, that Garcia's investigator (Augie Provencio) had in fact been in the jail on business during the time of the discussions under investigation, all as claimed by Plunkett. Also, Plunket was not in a computer database of unreliable informants. Plunkett said that Robledo had told him that a woman named "Sylvia Brown" was Garcia's usual source of methamphetamine. At Taylor's request, Plunkett called Sylvia Brown on the telephone with Taylor monitoring, and told her he had gotten some drugs for Robledo, half of which were for Garcia. Brown's response was to the effect that that arrangement was alright with her. Garcia's criminal history was checked and it was determined that at the very least, he had served two drug-related prison terms in the '60s and '70s. Because every fact and detail given by Plunkett checked out, and no misinformation or deception was discovered, and after consulting with, and getting the approval of two deputy district attorneys, a controlled "reversed sting" was set up. With the approval of a judge, Officers Cardwood and Taylor obtained some impounded methamphetamine and a Bugler tobacco pouch. The meth was clearly visible to anyone who looked into the pouch. Plunkett, who was out of jail on a pass, delivered it to Garcia while being surveilled. Garcia, after looking into the pouch, took it and its contents to his office. Officers Cardwood and Taylor then obtained a search warrant from the same judge who had approved the release of the methamphetamine and executed it on Garcia's office while supervised by a special master. The search produced a plastic bag containing a small amount of methamphetamine from the office's bathroom, a small amount of methamphetamine from the office, a one-pound scale, and six packages of Bugler tobacco. Garcia's explanation for the methamphetamine in the bathroom was that it was the result of "spillage" when his investigator, Augie Provencio, flushed the contraband from the prepared Bugler package down the toilet. Although arrested, Garcia was never charged in court with any criminal offenses based upon the above events. Instead, he sued Officers Cardwood and Taylor in federal court for violating his civil rights for false arrest. The federal district court judge denied Officers Cardwood's and Taylor's motion for summary judgment based upon their claim of qualified immunity. The officers appealed.

Held: The Ninth Circuit Court of Appeal reversed, remanding the case back to the district court for entry of judgment for the officers. *(1)* The federal district court judge had denied Officers Cardwood's and Taylor's motion for summary judgment based upon Garcia's denial that he knew what was in the pouch, thus creating an issue of fact for a jury to decide. The trial judge was wrong. The issue here is not whether Garcia was guilty or innocent, but whether Officers Cardwood and Taylor had probable cause to arrest him. "Probable cause to arrest exists when officers have knowledge or reasonably trustworthy information sufficient to lead a person of reasonable caution to believe that an offense has been or is being committed by the person being arrested. (Citation) For information to amount to probable cause, it does not have to be conclusive of guilt, and it does not have to exclude the possibility of innocence, a distinction which the district court overlooked. (Citation) . . . (P)olice are not required 'to believe to an absolute certainty, or by clear and convincing evidence, or even by a preponderance of the available evidence' that a suspect has committed a crime. (Citation) All that is required is a 'fair probability,' given the totality of the evidence, that such is the case. (Citation)" Based upon the information available to Officers Cardwood and Taylor, not the least of

which was the controlled reverse sting, Garica's arrest was supported by probable cause. The Court acknowledged that the incriminating information had initially come from a "jailhouse informant," and that such persons commonly provide such information only when motivated by their own selfish purposes. The credibility of jailhouse informants is commonly suspect and seldom acted upon without corroboration. Officers Cardwood and Taylor did not act on Plunkett's information alone. As acknowledged by the trial court, the officers conducted a thorough investigation in an effort to determine whether Plunkett was telling them the truth. An arrest and search did not take place until Garcia took physical possession of the controlled substance under circumstances indicating an intent to carry through with its delivery to his client. "(T)he relevant question regarding information from Plunkett—and from all jailhouse informants—is not whether it is legally cognizable, but whether it is corroborated and credible." In this case, it was. "Accordingly, the officers are plainly entitled to qualified immunity from Garcia's unlawful arrest claim. *(2)* As a side issue, Garica also argued that Officers Cardwood and Taylor purposely omitted Plunkett's extensive criminal history from the search warrant affidavit; i.e., that he was "a multiple felony offender—potential 'three striker.'" To prevail on this issue, Garcia was required to "establish (both) a substantial showing of a deliberate falsehood or reckless disregard, and establish that, without the dishonestly included or omitted information, the magistrate would not have issued the warrant." Here, it was never alleged that Officers Cardwood and Taylor were even aware of the rest of Plunkett's criminal history. But even if they were, the Court noted that the affidavit did include the fact that Plunkett was in jail for theft; "a quintessential crime of dishonesty and moral turpitude." With this information, and knowing that Plunkett was a "jailhouse informant," the magistrate likely knew enough to weigh his credibility. But either way, with all the corroboration for Plunkett's information, the magistrate wouldn't have rejected the warrant even had he known about the Plunkett's entire criminal history. And lastly, "a judge evaluating a request for a search warrant is not a potted plant." Had the magistrate been concerned, he could have asked. Based upon this, "Alfredo Cardwood and John Taylor did not violate Garcia's constitutional rights." "This is not a case of rogue officers disregarding the plaintiff's constitutional rights. The officers in this case did not 'knowingly violate the law,' and they were not "plainly incompetent."

Note: I've always told cops when deciding whether to arrest or search that "it's not whether you're right, but whether you're *probably* right." But that's probably an over statement. In actuality, there need only be a "*fair probability*" that you're right, which is something less than even a preponderance of the evidence. This is a great cases illustrating that you don't (or shouldn't) have any civil liability for false arrest should your arrestee later be determined to be innocent. The case also makes an important point about being careful not to omit important facts from your search warrant affidavits. I've also preached that it's better to put too much in there than not enough. Plunkett's entire criminal history, as with any informant or any other person whose credibility is going to be in issue, should have been included. Although it didn't' make a difference under the facts of this case, it can be under other circumstances. Avoid the issue. Put it all in there. Now, here's the question of the day: *Was John Garcia guilty of the knowing possession of methamphetamine or not*?