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THIS EDITION'S WORDS OF WISDOM:

"*It takes 8,460 bolts to assemble an automobile, and one nut to scatter it all over the road*." (Anonymous**)**

IN THIS ISSUE:

ADMINISTRATIVE NOTES:

Retroactivity and Rule-Changing Appellate Decisions: I was asked by a concerned police officer a short time ago whether his search of a vehicle incident to arrest, done in clear violation of *Arizona v. Gant* (2009) 556 U.S. 332, but before *Gant* was decided, was going to eat it due to the *Gant* decision. I told him that I didn't know; the rules on retroactivity not being my bag. Well, I *should* have known because there is a case right on point. *Davis v. United States* (2011)

131 S.Ct. 2419, decided in June of last year by the United States Supreme Court, has specifically answered that question. In *Davis* (which happened to involve a *Gant* situation), the High Court held that although a warrantless search of a vehicle incident to arrest violated the Fourth Amendment under the new rule as announced in *Gant*, the exclusionary rule did not require the suppression of the evidence since the police acted with an objectively reasonable and good-faith belief that their conduct was lawful under the rules in existence at the time of the search. Although the new precedent applies retroactively to Davis' case, the exclusionary rule did not automatically apply to the unconstitutional search since the purpose of the rule (i.e., to deter illegal police conduct) was not advanced by suppressing the evidence in that case. In other words, while *Gant* is retroactive, the exclusionary rule does not apply to such searches conducted prior to the effective date of *Gant*.

CASE LAW:

***Burglary; the Entry Element*:**

***Magness v. Superior Court* [*People*] (June 7, 2012) 54 Cal.4th 270**

Rule: Absent evidence of an actual entry, opening a garage door is no more than an attempted burglary.

Facts: Timothy Loop was at home on the evening of July 24, 2010, when he heard his garage door opening. Running into his garage, he observed defendant standing near the end of his driveway. Loop chased defendant on his bicycle to a nearby residence. A call to the Sheriff's Department resulted in defendant's arrest. Loop's remote garage door opener, which had been locked in his car parked in his driveway, was found lying on the driveway where defendant had been standing. Physical evidence showed that defendant had broken into Loop's car and retrieved the garage door opener before opening the garage. There was no evidence that defendant had ever physically entered the garage. Based upon the above facts, the prosecutor argued at defendant's preliminary examination that the act of opening the garage door constituted a completed burglary. The judge agreed and held defendant to answer for a charge of first degree burglary of a residence and the second degree burglary of a vehicle. Upon the Superior Court's denial of defendant's motion to reduce the residential burglary to an attempted burglary, defendant petitioned the Court of Appeal for a pretrial writ of prohibition. The appellate court granted defendant's petition, finding that defendant could not be tried on any more than an attempted residential burglary. The People appealed.

Held: The California Supreme Court affirmed the Court of Appeal's decision, finding that without evidence of at least some minimal physical entry into the garage, defendant committed no more than an attempted residential burglary. Burglary is defined as "enter(ing) any house . . . with intent to commit . . . larceny or any felony." It has been held, at least in California, that even the slightest entry by any part of the body or an instrument is sufficient. Despite this rule, the Attorney General argued that causing the

garage door to open constituted entering the house for purposes of burglary. While this may have been true at common law, where a "breaking" was sufficient by itself, this is no longer the rule. California law has eliminated the need to prove an actual physical breaking, but requires some sort of entry into the place being burglarized. "For an entry to occur, a part of the body or an instrument must penetrate the outer boundary of the building." Merely opening a door, even if the door swings inward, is insufficient to show an entry absent some proof that the defendant's body, or an instrument being used by the defendant, broke the plane of the building's boundary. There was no evidence of such an entry being made in this case. Defendant, therefore, cannot be convicted of any more than an attempted residential burglary.

Note: The Court expends some ink discussing the purposes behind the burglary statute: "A burglary remains an entry which invades a possessory right in a building. . . . Burglary laws are based primarily upon a recognition of the dangers to personal safety created by the usual burglary situation—the danger that the intruder will harm the occupants in attempting to perpetrate the intended crime or to escape and the danger that the occupants will in anger or panic react violently to the invasion." But then, in response to the AG's argument that defendant created just such a danger, the Supreme Court cop'd out and said: "But not all conduct that implicates the interests underlying the burglary statute constitutes a completed burglary." So much for using the justifications for a burglary statute as an indicator of when a burglary has in fact been committed. This decision, however, is consistent with the long-standing requirement that to be a completed burglary, some sort of entry into the building must be made, no matter how slight, whether by the defendant's body or by an instrument being used by the defendant.

***Residences, the Curtilage, and Knock and Talks*:**

United States v. Perea-Rey **(9th Cir. May 31, 2012) 680 F.3rd 1179**

Rule: An attached carport is within the curtilage of a residence. A "knock and talk" must be begun at that entrance to a residence where uninvited guests would reasonably believe it is appropriate to contact an occupant of a residence.

Facts: Border Patrol Agent Angel Trujillo was watching as undocumented alien Pedro Garcia illegally climbed over the United States-Mexico border fence near Calexico. Agent Trujillo followed Garcia as he caught a taxi which took him to defendant's home, about a mile north of the border. Garcia entered the front yard through a gate and knocked at the front door. Defendant opened the door and, as observed by Agent Trujillo, spoke to Garcia as he "gestured" towards an attached carport to the right, as facing the house. Garcia walked along the front of the house, around the corner of the house, and into an attached carport. Agent Trujillo followed Garcia, walking past the front door and into the carport where he found defendant and Garcia standing at a side entrance to the house. Agent Trujillo commanded both men to remain where they were until other agents arrived. It was five minutes before Agent Trujillo's cover officers arrived. Garcia was removed and the house was surrounded. When defendant denied the agents' request for permission to enter the house, Agent Trujillo instead knocked at the

side door and, identifying himself as a border patrol agent, commanded anyone inside to come out. Eventually, six illegal aliens emerged from the house and a seventh was found hiding inside. Defendant was charged in federal court with harboring undocumented aliens. His motion to suppress evidence related to the aliens in his house was denied. Defendant pled guilty and appealed.

Held: The Ninth Circuit Court of Appeal reversed. Citing the recent U.S. Supreme Court case of *United States v. Jones* (Jan. 23, 2012) 132 S.Ct. 945 (dealing with installing GPS devices on a suspect's car; see *Legal Update*, Vol. 17, No. 2, Feb. 27, 2012), the Court noted that "(w)here the government 'physically occupie[s] private property for the purpose of obtaining information,' that is a '"search" within the meaning of the Fourth Amendment." This rule holds true whether the government agents enter one's home or the "curtilage" of the home. In determining whether a particular area (the carport in this case) is within the curtilage of a home, a court must consider (1) the proximity of the area, (2) whether the area is included within an enclosure surrounding the home, (3) the nature of the use made of the area, and (4) the steps taken by the resident to protect the area from observation by people passing by. The carport in this case, under the circumstances (i.e., attached to the house, within an area surrounded by a wrought iron fence, where defendant stored his cars and his tools, and being set back from the front behind a closed gate), was within the curtilage of defendant's residence. Therefore, absent an exception to the rule, a search warrant was needed to enter defendant's carport. Other than consent, the two exceptions that might apply would be exigency or emergency. The trial court in this case ruled that no exigency existed under the facts of this case. (No one argued that there was an emergency.) The Ninth Circuit noted that the trial court "did not clearly err" in reaching this conclusion, and the Government did not appeal that ruling. Instead, the Government argued that the agents could lawfully conduct a "knock and talk" at the side door in an attempt to contact the occupants. The Court disagreed. Entering the curtilage of a person's home for the purpose of conducting a knock and talk is lawful, but only at those entrances "where uninvited visitors could be (reasonably) expected." Here, while Pedro Garcia was invited by defendant to go to the carport entrance, Agent Trujillo was not. To the contrary, Agent Trujillo purposely bypassed the only entrance (i.e., the front door) where uninvited guests would reasonably be expected in an attempt to contact the occupants of the house. There being no lawful excuse for entering the carport, defendant's Fourth Amendment rights were violated. The resulting evidence (i.e., observation of, and contact with, the illegal aliens) should have been suppressed.

Note: I get a lot of questions concerning the lawfulness of going around a suspect's house, into carports, backyards, or other private areas, under a variety of circumstances. The answer is; "*it depends*." This case helps establish some of the standards applicable while doing little to really give us any clear guidance. But what is clear from this case is that while "knock and talks" are legal, you have to at least start at the front door, or wherever random visitors would reasonably believe was appropriate. In this case, however, the U.S. Attorney chose not to argue on appeal that the Agent Trujillo had the right, under the "fresh pursuit" doctrine, to follow an apparent illegal alien into the carport. That's too bad because I think that would have been a stronger argument,

particularly since the Ninth Circuit mentioned a couple of times that whether or not there was an exigency was waived by not appealing that issue. It's called "*fresh pursuit*."

***Suspect's Admissions and Probable Cause to Search*:**

United States v. Pope **(9th Cir. July 17, 2012) 686 F.3rd 1078**

Rule: A refusal to comply with a police officer's demand to empty one's pockets fails to implicate the Fourth Amendment. A defendant's admission to possessing a controlled substance constitutes probable cause to search.

Facts: El Dorado National Forest Law Enforcement Officer Ken Marcus responded to a call concerning a loud party. Defendant approached Officer Marcus, apparently to inquire about a friend of defendant's who had already been taken into custody. Defendant appeared to be under the influence of marijuana and, when asked, admitted to smoking the stuff. Asked if he had any marijuana on him, defendant denied that he did. Not believing him, Officer Marcus ordered defendant to empty his pockets. Defendant just stood there, ignoring the order. When asked again whether he had any marijuana in his possession, defendant admitted that he did. Officer Marcus therefore told defendant to "place the marijuana on the hood of the patrol car." This time, defendant complied. Defendant was cited for possession of the marijuana and released. Charged in federal court with the misdemeanor possession of marijuana (21 U.S.C. § 844(a)), defendant's motion to suppress the marijuana was denied. He pled guilty and appealed.

Held: The Ninth Circuit Court of Appeal affirmed. On appeal, defendant argued that he was searched unlawfully. The Government argued that the officer's first command to empty his pockets, being ignored by the defendant, was not a search and that the Fourth Amendment was therefore not implicated. The Court agreed. Likening this situation to when an officer threatens to unlawfully detain a suspect, where the Supreme Court has held that it's not a Fourth Amendment violation unless, and until, the suspect is in fact detained (*California v. Hodari D.* (1991) 499 U.S. 621.), merely threatening an illegal search similarly fails to implicate the Fourth Amendment. Therefore, the first command to empty his pockets, being ignored by the defendant, is a non-issue. The second command to put his marijuana on the patrol car's hood, however, *was* a search in that defendant complied with the officer's command. However, this command was preceded by defendant's admission that he did in fact have marijuana in his possession. Having so admitted this supplied the necessary probable cause to search. There being no opportunity to seek a search warrant under these circumstances, exigent circumstances justified the immediate warrantless search. The marijuana was therefore lawfully seized.

Note: Had defendant complied with the first demand to empty his pockets by pulling out the marijuana at that time, we'd then be discussing whether the officer had probable cause to make that first demand. I can see a good argument being made that when you contact a person that you recognize in your training and experience to be under the influence of marijuana, and then he admits that he's been smoking it, that that is

sufficient to constitute probable cause. But the Court didn't have to decide that issue, defendant's refusal to comply negating any need to consider the Fourth Amendment.

***Hotel Guest Registers and Privacy Rights*:**

Patel v. City of Los Angeles **(9th Cir. July. 17, 2012) 686 F.3rd 1085**

Rule: A city ordinance requiring hotels and similar establishments to make their guest registers available to law enforcement for inspection, without a warrant, is constitutional.

Facts: The City of Los Angeles enacted a new ordinance (LAMC § 41.49) requiring hotel operators to record certain information concerning its guests. Such information includes the guest's name and address; total number of guests; make, type and license number of the guest's vehicle if parked on hotel premises; date and time of arrival; scheduled date of departure; room number; rate charged and collected; method of payment; and the name of the hotel employee who checked in the guest. As defined, a "hotel" includes hotels, motels, inns, rooming houses, and other establishments offering space for overnight accommodation for rent for a period of less than 30 days. The required records, whether kept in electronic, ink, or typewritten form, must be kept on the hotel premises in the guest reception area or an adjacent office for at least 90 days after the last entry. Plaintiffs in this federal lawsuit, owners and operators of some motels, complained that, per the ordinance, these records must be made available to any officers of the Los Angeles Police Department for warrantless inspection upon request. The trial court held the ordinance to be constitutional. Arguing that the ordinance constituted a violation of the Fourth Amendment, the plaintiffs appealed.

Held: The Ninth Circuit Court of Appeal, in a split 2-to-1 decision, affirmed. Plaintiffs argued that LA's ordinance violated a hotel operator's privacy rights, and constituted a Fourth Amendment violation. The Ninth Circuit has already held in an earlier criminal case that there is no reasonable expectation of privacy in guest registry information once that information has been provided by the guest to the hotel operator. (*United States v. Cormier* (9th Cir. 2000) 220 F.3rd 1103.) Per *Cormier*, once a hotel guest provides personal information about themselves to a hotel, they lose any expectation of privacy in that information. Plaintiffs in this case failed to establish how a hotel operator, as the recipient of the guest's personal information, can reasonably claim to have any expectation of privacy in information concerning their guests. The Court discussed the recent U.S. Supreme Court right to privacy case of *United States v. Jones* (2012) 132 S.Ct. 945 (the GPS case; see *Legal Update*, Vol. 17, No. 2, Feb. 27, 2012), noting here that although inspecting hotel guest registers involved "papers," as protected by the Fourth Amendment, there was no "trespass" in making such an inspection as there was in *Jones*. Lastly, the Court held that the law dealing with "closely regulated businesses" (e.g., pawn shops, liquor stores, etc.) did not apply here in that hotels don't qualify as such a business. There being no Fourth Amendment violation, nor any expectation of privacy issues, in the inspection of a hotel guest register, LA's ordinance is lawful.

Note: The Court did note that there may be instances when information about a guest collected by a hotel *is* entitled to Fourth Amendment protection. For instance, the Court notes that a "customer list" compiled by a hotel may be entitled to the same protections as other business records. (pp. 1088-1089.) But that is not the circumstance in this particular case, when discussing hotel guest registers.

***Miranda*; *Reinitiation after Invocation*:**
***Tape-Recording Suspect Interviews*:**

People v. Thomas **(July 23, 2012) 54 Cal.4th 908**

Rule: Just as an invocation of one's *Miranda* right to counsel applies to all pending cases, the suspect's reinitiation of questioning also applies to all cases, absent law enforcement coercion or badgering, or other evidence of the suspect's contrary intent. There is no constitutional requirement that a suspect's interview be tape-recorded.

Facts: Defendant and co-defendant Henry Glover, Jr., kidnapped 25-year-old Francia Young as she was attempting to get into her car in Oakland's MacArthur Bay Area Rapid Transit (BART) station. They forced her into the trunk of her own car and drove her to several ATMs where they used her credit card to take $300 from her account. Defendant was observed on camera at one of the ATMs holding the victim's umbrella as Glover attempted to extract cash. Francia Young's partially nude body was found near a hiking trail the next morning in nearby George Miller Regional Park. The forensic evidence showed that she'd been raped, sodomized, and shot through the head at pointblank range. Defendant's semen was found on her body. Twelve days later, defendant and Glover committed a residential robbery in Hayward, beating and terrorizing nine-month-pregnant Sebrena Flennaugh. Hayward police interrupted the robbery as they responded to Flennaugh's incomplete 9-1-1 call. Although Glover escaped out a balcony exit, defendant remained at the scene. However, he was able to convince the officers that he was Flennaugh's friend and a co-victim. Flennaugh, threatened into cooperating, didn't contradict defendant until after they'd cut him loose. Glover was arrested three days later. The ATM photo of defendant was released to the media. As a result, defendant turned himself into the Oakland police the day after Glover's arrest. Having already been identified as a co-suspect in the Flennaugh robbery case in Hayward, he was turned over to Hayward detectives for questioning. Although he initially waived his *Miranda* rights, defendant changed his mind after about 25 minutes of questioning and asked for an attorney. Questioning was ended. Later that same day, defendant decided that he wanted to talk to the detectives again. A different Hayward detective recontacted him in his cell. The detective very meticulously insured that defendant understood that he had already invoked his right to counsel and that he couldn't be questioned again without counsel's presence unless he himself wished to. Defendant indicated that he had talked to a lawyer and that he now wanted "to make this right." After a fresh *Miranda* advisal and waiver, defendant discussed with the detective the Flennaugh robbery. The Francia Young murder was not mentioned. The next day, being informed that defendant had previously invoked his right to counsel but had since changed his mind, the Oakland detectives drove to Hayward to interview defendant about the Young murder. Without mentioning

the intended subject matter to be discussed, defendant was again advised of his *Miranda* rights which he waived. His resulting incriminating statements about Young's murder were used against him at trial. Convicted of first degree murder (and other charges), with special circumstances, defendant was sentenced to death. (The jury hung on the penalty for Glover, and he was subsequently sentenced to life without parole.) Defendant's appeal to the California Supreme Court was automatic.

Held: The California Supreme Court unanimously affirmed. Among the issues on appeal was whether defendant's reinitiation of questioning, after having invoked his right to counsel, applied only to the Flennaugh robbery or to the murder as well. Defendant, of course, argued for the Court to accept the former. The Court declined to do so. Once an in-custody suspect invokes his Fifth Amendment/*Miranda* right to counsel (as opposed to merely his right to remain silent), the clear rule is that he is then off limits to all questioning on all cases for as long as he remains in custody, unless he himself reinitiates the questioning. (*Edwards v. Arizona* (1981) 451 U.S. 477.) The purpose of this rule is to "preserve the integrity of an accused's choice to communicate with police only through counsel by preventing police from badgering a defendant into waiving his previously asserted *Miranda* rights." In determining the propriety of police questioning upon the reinitiation of a suspect's questioning at the suspect's request, following a prior invocation to his right to counsel, a court must consider whether the purposes of the *Edwards* rule are satisfied. Under the circumstances of this case, it was evident that defendant's statements to the Oakland detectives about the Francia Young murder were not the product of coercion or badgering. Defendant clearly understood his rights, having invoked them when he chose to and then purposely seeking recontact with the detectives after having talked to an attorney. Defendant never indicated in any way that he only wanted to talk about the Flennaugh robbery case. When the subject of the Young murder was broached, defendant could have easily indicated his reluctance to talk about that case if that was what he had intended. Under these circumstances, defendant's reinitiation of questioning applied to all cases. Defendant further complained that the Oakland detectives did not record his initial statement, but rather used a tape recorder only for a summary of what he had already told the officers, recorded after the fact. The Oakland detectives testified that this practice is pursuant to standard operating procedures. Defendant argued that such a procedure is a violation of his "due process" rights as an intentional destruction of exculpatory evidence; a violation of the rule of *California v. Trombetta* (1984) 467 U.S. 479. In response, the Court noted that there's no constitutional requirement that suspect interviews be recorded. Also, to be a "*Trombetta violation*," it must be shown both that (1) evidence with an exculpatory value apparent on its face was destroyed and that (2) defendant could not obtain comparable evidence by any other available means. Here, defendant had not shown that anything in his initial unrecorded statements tended to be exculpatory in nature. Also, comparable evidence was available to defendant through cross-examining his interrogators and through his own testimony, should he choose to testify. No *Trombetta* violation, therefore, occurred.

Note: The Court also states, however, that "in some circumstances a suspect's reinitiation of contact with the police could be deemed to affirmatively limit questioning to only certain crimes, . . ." (pg. 927) Therefore, if a suspect's intent is not clear, or he

seems to be equivocal on the issue, it might behoove an interrogator to clarify with the suspect that he intends to reinitiate questioning on all pending charges. It's not a legal requirement that you do that, however, but such a precaution might save us all some time and effort in litigating the issue. As for Oakland PD's stated policy not to record the initial interview with a homicide suspect, if that is in fact a true statement, I question the wisdom of that practice. A tape-recorded (or better yet, videotaped) interview is always so much better evidence than a police officer's bare testimony about what was said during a suspect interview. It is an undeniable fact that juries just don't always believe law enforcement offices anymore. And if certain California legislators get there way, recording suspect interviews in serious cases is going to be a statutory requirement shortly anyway. (See SB 1300)

***Search Warrants*; *Property Description*:**

People v. Rangel **(June 14, 2012) 206 Cal.App.4th 1310**

Rule: Seeking "gang indicia" evidence via a search warrant inferably includes the contents of a suspect's "smartphone."

Facts: Defendant, a gang member, was the suspect in an attempted murder and related charges, having beaten and stabbed another person in an apparent gang-related altercation. San Mateo Police Detective Dutto was assigned as the lead investigator in the case. Detective Dutto obtained an arrest warrant for defendant and a search warrant for his home. Among the items he requested the court's permission to search for and seize were; "Any and all items which would constitute items commonly known as 'Gang Indicia,' such as items and paraphernalia that would tend to demonstrate the subject's ongoing gang affiliation including but not limited to graffiti, notebooks, photographs, sketches, poetry, and red clothing . . . . Gang related paraphernalia typically retained by gang members can also appear in other forms, including but not limited to, newspapers, artwork, compact disks, audio and videocassette, cameras, undeveloped file, address books, telephone lists, graffiti collections, and magazines." The search warrant was executed. Defendant was arrested in his bedroom and his home was searched. A cellphone was recovered from the top of his dresser. The cellphone was of the "smartphone" variety; i.e., having the ability to store data, photographs and video. When questioned about his cellphone, defendant said that it had been disconnected. He denied being involved in the stabbing, claiming to have been with his girlfriend, "Nessa" or "Vanessa," at the time. However, he was unable to remember her last name. When asked for permission to search his cellphone for any information related to Vanessa, defendant was equivocal in his response. Apparently believing that he had defendant's consent, Detective Dutto retrieved the cellphone and turned it on. On the phone, he found the word "Pesado," which he knew to be defendant's nickname. Detective Dutto then clicked on the file that showed a list of text messages and found a text conversation with "Nessa" that appeared to link defendant to the stabbing. Reading all the other text messages in the phone, Detective Dutto found other messages related to the stabbing. He also scanned the "contacts" list for other names related to the case. This information was

used against defendant at his trial over his objection. Convicted of aggravated assault and various gang enhancements, defendant appealed.

Held: The First District Court of Appeal (Div. 5) affirmed. The issue on appeal was the legality of the search of defendant's cellphone. As he did at trial, defendant argued on appeal that a search of his cellphone was beyond the scope of the search warrant, and therefore illegal. It was conceded that the search warrant in this case did not specifically include cellphones among the items to be seized or searched. It is a constitutional requirement that a "(search) warrant must particularly describe the place to be searched and the items to be seized, so as to prevent the seizure of one thing under a warrant describing another." The Court found, however, that even though the cellphone was not specifically listed among the items to be seized and searched, doing so was in fact authorized by this warrant. "In determining whether seizure of particular items exceeds the scope of the warrant, courts (are to) examine whether the items are similar to, or the 'functional equivalent' of, items enumerated in the warrant, as well as containers in which they are reasonably likely to be found." Here, Detective Dutto in his warrant asked to search for and seize "any and all items" constituting "Gang Indicia," noting in the affidavit that; "Gang related paraphernalia typically retained by gang members can also appear in other forms, including but not limited to . . . address books, telephone lists, (and) graffiti collections, . . ." A "smartphone," such as defendant's, is akin to a personal computer, having the capacity to store people's names, telephone numbers, and other contact information, as well as music, photographs, artwork, and communications in the form of e-mails and messages." All of this may constitute gang indicia, depending upon their content. Defendant's cellphone was a likely container of such information. It was therefore subject to seizure without having to be specifically mentioned in the search warrant. The Court further held that having been lawfully seized pursuant to the warrant, a second warrant authorizing the detective to search the cellphone was unnecessary. Citing other authority, the Court noted that "a second warrant to search a properly seized computer (or cellphone, in this case) is not necessary where the evidence obtained in the search did not exceed the probable cause articulated in the original warrant."

Note: These are good rules to know. However, I can't help but note that had the detective merely remembered to list "cellphones" (and also computers) in his warrant, the need to litigate this issue would have disappeared, saving everyone a lot of time, effort, and expense. I'm no gang detective, but I would think that it is by now common knowledge that gang members use their cellphones and home computers to communicate amongst themselves and to boastfully record their misdeeds in photographs, texts, and e-mails. An experienced affiant should be able to allege this fact based upon his or her "training and experience." Such information is extremely helpful in proving up any P.C. § 186.22 gang enhancements. I might also caution you to avoid using the ". . . *including, but not limited to* . . ." language as was used in this warrant affidavit. There is federal authority for the argument that such language converts an otherwise lawful search warrant into an unconstitutionally over-broad "*general warrant*," making the whole warrant subject to attack. (See *United States v. Reeves* (9th Cir. 2000) 210 F.3rd 1041, 1046-1047; *United States v. Bridges* (9th Cir. 2003) 344 F.3rd 1010, 1017-1018.) That issue was not raised in this case.