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Remember 9/11/01: Support Our Troops

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THIS EDITION'S WORDS OF WISDOM:

“A government big enough to give you everything you want, is big enough to take away everything you have.” (Thomas Jefferson)

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ADMINISTRATIVE NOTES:

V.C. § 23154: Probationers Driving While Under the Influence: Here's a new (effective 1/1/09) statute I failed to include in the New and Amended Statutes Update, but should have. It provides that anyone who is on probation for a conviction of V.C. §§ 23152 or 23153 cannot drive with a .01% or higher blood/alcohol level. The blood/alcohol percentage may be determined by a PAS (“*Preliminary Alcohol Screening*”) device or any other chemical test. Refusal to take a PAS test (to which a probationer is deemed to have consented) or other

chemical test will result in a license suspension of 1 to 3 years. The section also provides that an officer may administer the PAS test when he has “reasonable (i.e., “probable”) cause” to believe the person is driving with .01% or higher.

House for Sale: I’m trying one more time, advertising my home for sale. I need to get it sold so we can complete our move to the Black Hills of South Dakota before California’s new taxes all kick in. The sale price has been lowered to \$599,000 in this deflated market. But we’re not going any lower because I know that when the market here bottoms out, if not before, and all the potential buyers out there realize it ain’t going to get any better, the place will sell in a hurry. The house is around 2,000 square feet, has three bedrooms and two baths, on 2/3’s of an acre (horse property), with a couple dozen decorative trees, in a very quiet, crime free corner of Poway. The house itself was built in 1961 but has had almost all of its interior remodeled in recent years, including all wood floors throughout (except for new tile floors in the bathrooms). The house includes a newly refinished swimming pool and a large family room with separate patios on each side. Upon request, I can refer you to our real estate agent’s website where all the specifics are listed and there is featured a virtual tour of the place. But I first need to verify who you are (believing that I may still have some former defendants out there who would love to know where I live). *Oh, yes, P.S.:* I will still be writing these Updates and answering questions from South Dakota. But it will be from the comfort of my porch overlooking my 16-acre piece of God’s country. ☺

CASE LAW:

An Officer’s Expertise and Probable Cause for a Search Warrant:

People v. Nicholls (Jan. 30, 2008) 159 Cal.App.4th 703

Rule: A properly qualified expert officer’s opinion, connecting common characteristics of a child molester with known facts related to a child molest and the molester’s act of hiding his computer, establishes probable cause supporting a search warrant for that computer.

Facts: Defendant was accused of molesting his 10-year-old daughter between 2004 and 2005, the molests involving inappropriate touching as well as other lewd acts. Defendant was arrested and went to jail. Several months later, while still in jail, defendant telephoned his mother. In a recorded telephone conversation, defendant told his mother that he had put his laptop computer into the attic of her garage and that he did not want anyone “messing” with it. Defendant had been staying with his mother at her home when he was arrested. As a result of this phone conversation, a police detective sought a search warrant for the garage asking to seize and search the computer. In the affidavit, the police detective described his 17 years of law enforcement experience including formal training and extensive experience in child abuse and sexual assault cases, specifically listing a number of relevant classes he’d taken. The affidavit also included a description of defendant’s daughter’s statement concerning the molests. The detective then indicated

that based upon his “training, knowledge, and experience, as well as the experience of other skilled investigators and criminalists with whom (he) had spoken,” that people who molest children tend to exhibit “in varying combinations” certain characteristics. He then listed some fourteen separate characteristics of child molesters, i.e., that . . . : “(1) they receive sexual gratification from fantasy involving pictures or writings about sexual activity with children; (2) they collect sexually explicit materials for sexual gratification and fantasy; (3) they use sexually explicit materials to lower children’s inhibitions (although none was shown to the victim in this case); (4) they rarely dispose of their sexually explicit materials, especially when used in seduction of their victims; (5) they often correspond with other molesters to share information and support; (6) they rarely destroy the correspondence; (7) they use photographs to relive fantasies or actual encounters with the depicted children, etc.; (8) they go to great lengths to conceal and protect from discovery their collection of illicit materials; (9) they often correspond with others who share their interests through computerized bulletin boards; (10) they maintain diaries of their sexual encounters with children; (11) they collect books, magazines, computer files and other writings on the subject of sex with children; (12) they collect and maintain books, magazines, and other writings on the subject of sexual activity, which they use to seduce children; (13) they often keep mementos such as victims’ underwear; (14) they obtain, collect, and maintain digital images and photographs of their victims; if they take a picture of a child in the nude, there is a high probability the child was molested before, during, or after the photo-taking session because the act of the posing is a strong sexual stimulus for the individual.” With this included in the affidavit, a search warrant was issued allowing the detective to search for, seize, and inspect the contents of, defendant’s laptop computer. When it was recovered, it was found to contain some 10,000 still images and 47 movie files of child pornography. Defendant was therefore also charged in state court (in addition to the molest counts) with possession of child pornography. Defendant later filed a motion to suppress the computer and its contents. After his motion was denied by the trial court, he pled no contest and was sentenced to prison. Defendant appealed.

Held: The Third District Court of Appeal affirmed. Defendant challenged the probable cause in the affidavit, arguing that it did not contain sufficient evidence to support the issuance of the search warrant. Specifically, defendant argued that the warrant lacked any information tending to prove that he used his laptop in the molestations of his daughter, that he used child pornography in the molestations, or that he had expressed any general interest in receiving or transmitting child pornography through his computer or otherwise. The Court, however, held that it is not necessary that the warrant affidavit allege any of these facts. Rather, seizure and search of the computer was justified by the affiant’s description in the affidavit of the victim’s account of the molestations and the defendant’s conversation with his mother about putting his laptop in her garage attic and his concerns that someone might “mess” with it. This, along with the affiant’s opinions based upon his training and experience that child molesters receive and collect sexually explicit material, that they correspond with other child molesters, that they tend to preserve such correspondence, that they use photographs to fantasize about encounters with children, that they maintain diaries of their sexual encounters with children, that they collect books, magazines and computer files on the subject, and that they go to great

lengths to conceal their collection of illicit materials, is enough to establish probable cause. The Court also specifically rejected defendant's argument that his conversation with his mother and the affiant's expert opinions about the habits of child molesters weren't relevant. The law is clear that a law enforcement officer may draw upon his expertise to interpret the facts and circumstances as listed in the search warrant affidavit. Making a connection between defendant molesting his daughter (as described by the daughter) and then hiding his computer in his mother's garage attic while expressing concern that people find out what is on his computer (as indicated in defendant's conversation with his mother), particularly in light of the listed known characteristics of a child molester, is something the expert officer may do. Also, the fact that the phone conversation occurred several months after he was arrested does not make it any less relevant. The warrant affidavit, therefore, supports a finding of probable cause.

Note: The officer/affiant's 14-point list of common characteristics of a child molester is becoming more and more common in affidavits such as this one, at least in San Diego, apparently being something someone is teaching in child-abuse investigation training. But that's okay, so long as you (when you are the affiant) are in agreement that it is also your experience that they all apply in your opinion. You can also add to it if you, in your training and experience, have noted other relevant characteristics. But the importance of this case is its illustration of the value of an officer's established training and experience in connecting together all the known facts, leading to a finding of probable cause.

Stopping at a Stop Sign, per V.C. § 22450:

People v. Binkowski (Nov. 2, 2007) 157 Cal.App.4th Supp. 1

Rule: A vehicle's failure to stop until after its front bumper has crossed a crosswalk's limit line at an intersection is a violation of V.C. § 22450, justifying a traffic stop.

Facts: San Bernardino Sheriff's Deputy Alexander Pangburn, while on routine patrol at around 10:25 p.m., observed defendant driving over what he believed to be the speed limit. When defendant came to an intersection with a stop sign, she didn't stop until her front wheels had crossed the limit line, leaving her car straddling the line. Deputy Pangburn stopped defendant for failing to stop at the stop sign (V.C. § 22450). Upon contacting defendant, it was noticed that she was under the influence of alcohol. She was subsequently arrested for driving while intoxicated, per V.C. § 23152. Defendant filed a motion to suppress, testifying that she was driving at a speed of 30 mph in a 40 mph zone, and that "*she did not think*" her front bumper was over the intersection's limit line when she stopped. The Court denied her motion to suppress, finding that defendant had in fact violated V.C. § 22450(a) for failing to stop at the stop sign. Defendant pled guilty to a plea bargained charge of reckless driving (with the DWI being dismissed), and appealed.

Held: The San Bernardo Superior Court, Appellate Division, affirmed, agreeing with the trial court that defendant had failed to stop at the stop sign. Defendant's argument on appeal was that she *did* stop "at" the limit line because, even if you believe the deputy's

testimony, only her front tires had crossed the line leaving the rest of her car behind it. The issue, therefore, is what section 22450 means when it requires a driver to stop “*at a limit line*.” Subdivision (a) of section 22450 says, in pertinent part, that: “The driver of any vehicle approaching a stop sign at the entrance to, or within, an intersection, . . . shall stop at a limit line, if marked, otherwise before entering the crosswalk on the near side of the intersection. [¶] If there is no limit line or crosswalk, the driver shall stop at the entrance to the intersecting roadway. . . .” In interpreting this, the Court considered the intent of the Legislature by evaluating both the objective the Legislature hoped to achieve and the harm it sought to prevent. Looking at the statute as a whole, it is apparent that the Legislature intended to require a vehicle to stop before it came to a position where it would interfere with pedestrians in a crosswalk or with cross traffic that might be in the intersection. The Vehicle Code defines “*limit line*” as “the point” at which traffic is required to stop. (V.C. § 377) Looking to the dictionary, a “*point*” is defined as “a particular or precisely specified position, location, place, or spot.” A limit line functions as a “precisely specified position” only if a vehicle would have to stop when its front bumper reaches that line. Otherwise, where the vehicle would have to stop would depend upon the length of the vehicle and might result in longer vehicles protruding into the intersection; something the Legislature could not have intended. V.C. § 22500(b) is consistent with this conclusion, making it illegal to stop a vehicle “on a crosswalk.” Therefore, the Court found that the intent of section 22450 is to require a full stop before any part of the vehicle crosses the limit line. In this case, defendant’s front wheels crossed the limit line before she stopped. This gave Deputy Pangburn the right to conduct a traffic stop. The Court also rejected defendant’s argument that stopping her under these circumstances was really nothing more than a pretext for some other unspecified reason. “*Pretext stops*” are lawful so long as some legal reason for the stop exists. (*Whren v. United States* (1996) 517 U.S. 806.)

Note: The Court didn’t say what “*pretext*” the deputy might have had for stopping her, or even what she claimed the pretext to be. But I would imagine that her argument might have been something similar to; “*everyone does it, so why is he stopping me?*” The natural tendency to cross over the limit line is similar to what we commonly call a “California” or “rolling stop” that we all do. But just because everyone does it doesn’t make it legal. Whether there was some undisclosed pretext for stopping her or not, *Whren* says (if you’re not already familiar with the rule) that an officer’s true motivations for detaining someone is irrelevant so long as there is also some valid legal reason for doing so. In other words, even if Deputy Pangburn’s real reason for stopping defendant was something as innocuous (and inappropriate) as that she was cute, doesn’t make her failure to stop at the limit line any less illegal.

Search Warrants and Computers:

***People v. Varghese* (May 8, 2008) 162 Cal.App.4th 1084**

Rule: Seizure of a computer under authority of a search warrant for a residence and car, even when the warrant fails to list a computer as something that may be seized, is proper when the computer is likely to contain evidence of dominion and control.

Facts: Defendant had marital difficulties with his wife, Vilia, to the point where she finally moved out and sought a divorce. Defendant was not happy about her divorcing him and was even unhappier that she struck up a relationship with Haval Ravin; a physician who ran a fertility clinic. Defendant's discontent led to him driving or walking by Ravin's house, confronting Vilia by intercepting her when she visited Ravin, and standing out in front of Ravin's house at times, just watching. Twelve days before the divorce was to become final, at about 11:30 p.m., a neighbor heard a man screaming loudly from the direction of Ravin's home. At about 12:15 a.m., Ravin's son, Rizgar, came home to find blood all over the place. Ravin was later found stabbed to death. Blood evidence later connected defendant to the murder scene. The day after the murder, the police went to defendant's home to talk to him. When they got there, they developed additional evidence of his guilt and arrested him. A telephonic search warrant was obtained for defendant's home and his car. Although not listed in the search warrant, a laptop computer was found in his car and seized. A second search warrant was later obtained allowing for the search of the computer. Prior to obtaining this second warrant, the police received an anonymous e-mail stating that prior to the murder, defendant had said that he was thinking of hiring someone in Mexico to kill Ravin. This information was included in the affidavit. Also, the affiant officer asked to search the device for e-mail addresses, e-mail communications, profile information, billing records, news articles regarding homicides that occurred before or after the murder under investigation, information regarding travel to Mexico, information regarding hiring a person to commit murder, any information concerning the victim's business, downloaded photographs and advertisements concerning knives, swords, guns or other items usable as weapons. Once the laptop was searched, evidence was found that it had been used to conduct numerous name searches for information related to Vilia, Ravin, Ravin's clinic, as well as for information on "Revenge," "Adultery" and "Law." Charged in state court with murder, defendant's pretrial motion to suppress the evidence found on his computer was denied by the trial court. Defendant was convicted after a jury trial of first degree murder with the use of a deadly weapon. He appealed.

Held: The Fourth District Court of Appeal (Div. 1) affirmed. Among the issues contested by defendant on appeal was the admissibility of the contents of his computer. As a basis for his argument, defendant argued that the seizure of his computer was illegal when it was not specifically listed in the first warrant as an item to be seized. The People argued that at the very least, a person's personal computer, commonly containing information tending to connect a suspect to the home being searched, was properly seized as "*dominion and control*" evidence. As is standard, a request to search for and seize documents showing defendant's dominion and control of his residence *was* included in the warrant and affidavit. The Court agreed with the People. In so doing, the Court also rejected defendant's argument that the standard "dominion and control" request is unconstitutionally overbroad; i.e., a "general warrant." A warrant that is too broad in listing the items it is seeking, thus allowing the police officers to go on a "fishing expedition," violates the "particularity requirement" of the Fourth Amendment. The Court found, however, that the list of dominion and control evidence, as described in a typical search warrant, is necessarily broad because any manner of such evidence is likely

to be found. The fact that a computer will also likely contain a lot of other personal information not related to dominion and control is irrelevant. “(A) computer is the functional equivalent of a filing cabinet and a reasonable place to seek information concerning the dominion and control of the place searched.” Also, because defendant’s computer was found outside the residence, in his car, it was reasonable for the officers to conclude that the computer was currently being used by appellant and might contain information relevant to his control of the residence. Defendant also complained that the second search warrant, for the contents of his computer, was not supported by probable cause. In this affidavit, the officer recounted the facts and circumstances of the relationship between defendant and the victim and Vilia, as well as the anonymous informant’s e-mail about defendant seeking to hire someone from Mexico to murder Ravin. The Court found this information, in combination, provided the magistrate with a “substantial basis” for issuing the warrant. The anonymous information about defendant wanting to hire someone to kill Ravin was a relatively small part of the warrant and not necessary for the magistrate’s probable cause finding. More importantly, the affidavit included statements from Vilia that she and defendant had exchanged e-mails, the contents of which might help to shed some light on defendant’s motives and his state of mind. Also, there was some indication that there might have been a second suspect involved in the murder. Defendant, in claiming his innocence, suggested that Vilia was the actual killer. Correspondence between defendant and Vilia might help to prove or disprove this allegation. It was also expected that defendant’s use of the Internet might have assisted him in researching his victim; a fact that proved to be true. This was more than enough information to support the magistrate’s finding of probable cause to search the computer. Defendant’s motion to suppress the contents of his laptop computer was properly denied.

Note: Nowadays, with personal ownership and use of computers being about as common as television, inclusion of a computer in the list of items to be seized, and authority to later search, should be standard in just about every search warrant. It is not too hard to justify the conclusion that most crooks use computers to either plan their intended crimes, document their past crimes, or brag about their crimes to others via the Internet. A court’s conclusion that someone’s computer might also contain evidence of dominion and control might not fly in every case, so you can’t just assume that all computers are subject to seizure despite not being listed in a warrant. So list computers and their attachments in your warrants and save some over-worked prosecutor countless hours of extra litigation that could have easily been avoided.

Abandonment of a Motel Room and Expectation of Privacy:

People v. Parson (July 10, 2008) 44 Cal.4th 332

Rule: Abandonment of a motel room, negating any expectation of privacy, is a question of the defendant’s intent as determined by objective factors such as the defendant’s words and actions.

Facts: Defendant was a longtime drug abuser. He knew a lady named Theresa Schmiedt; a 59-year-old convalescent hospital nurse who lived in an apartment in Sacramento. Defendant visited Schmiedt in her apartment at around 10:00 p.m. on New Year's day, 1994. A neighbor heard unusual noises from Schmiedt's apartment around that time but didn't think anything of it. The next day, Theresa Schmiedt was found dead with no less than 18 blows to her head from something like a hammer and evidence that she had been strangled. Several of defendant's friends used Schmiedt's ATM card the next day. Defendant himself attempted to cash a \$500 check on her account. On January 4th, defendant checked into a motel, in Gilroy. He paid for one night's lodging but told the manager he might stay longer. The next day, defendant's car was still in the parking lot but no one answered the door or the room phone when the maid and the manager attempted to get a hold of him after the 11:00 a.m. check out time. With the door chained from the inside, the Motel's co-manager finally entered through a rear window, the screen to which was found on the ground, at some time after 5:30 p.m. When defendant was not found in the room, the co-manager called the Gilroy police. After the police arrived, federal marshals came to the scene with a federal arrest warrant for defendant based upon a parole violation. Sacramento County investigators, who by then considered defendant to be the prime suspect in Schmiedt's murder, also came to the scene. The officers decided to enter the room to look for defendant in order to serve the arrest warrant. Although defendant was not found, they did note in plain view some personal items. The bed looked as if no one had used it. A hammer was observed in an open athletic bag on the floor. Although believing that defendant had abandoned the room altogether, thus eliminating the need for a search warrant, the officers decided to check with a deputy district attorney for advice before doing anything else in the room. Deputy District Attorney Steve Secrest determined that while the motel room could probably be considered abandoned, it was a better idea to play it safe and get a search warrant given the importance of the case. Upon executing the resulting search warrant, Schmiedt's purse and other personal property was recovered, along with some of defendant's property. The recovered hammer was found to have the victim's blood on it. Arrested some days later in Canada and charged with capital murder, defendant's motion to suppress the contents of the motel room was denied. Defendant was convicted of first degree murder with special circumstances and sentenced to death. His appeal to the California Supreme Court was automatic.

Held: The California Supreme Court affirmed in a unanimous decision. Among the issues on appeal was the legality of the officer's initial warrantless entry into the motel room to check for defendant, defendant arguing that the later search warrant was the product of the observations made during that initial entry. In evaluating this issue, the Court analyzed the law of "abandoned property," referring to the motel room itself and its contents. The issue is "whether the person so relinquished his interest in the property that he no longer retained a reasonable expectation of privacy in it at the time of the search." It is a rule that "when a day-to-day room guest of a hotel or motel departs without any intention of occupying the room any longer and without making any arrangement for payment of his bill, an inference arises that he has abandoned his tenancy," even though he has left personal property in the room. Abandonment of property, eliminating any reasonable expectation of privacy in that property, is an issue of the defendant's apparent

intent as determined by an objective evaluation of the circumstances. Abandonment is primarily a question of defendant's intent as inferred from his words, acts, and other objective factors. The defendant's actual, subjective intent is irrelevant. In this case, it appears from the evidence that defendant surreptitiously fled from his motel room during the night, perhaps thinking that the police were hot on his trail, without having made arrangements to pay for another day. "(T)his evidence amply demonstrated an intent on defendant's part to abandon the motel room and the items left behind." The Court also rejected the argument that abandonment may not be found where the motel manager did not retake physical possession of the motel room from the guest prior to the challenged search. The lack of a search warrant, therefore, when the officers made the initial entry of the motel room, is irrelevant. The resulting search warrant was lawful.

Note: If this leaves you confused, let me explain with a little less legal mumbo-jumbo: What the Court is saying is that while defendant's intent is the issue when determining whether he has abandoned property, we don't determine that intent by what he claims to have been thinking. Rather, we determine his intent by looking at the "*objective factors*" such as what he said and what he did at the time. It is also important to note that the Court rejected defendant's argument that whether or not the hotel manager had acted to repossess the motel room must be considered, a position advocated by the Ninth Circuit Court of Appeal in *United States v. Bautista* (9th Cir. 2004) 362 F.3rd 584, and Orange County's Fourth District Court of Appeal (Div. 3), in *People v. Munoz* (2008) 167 Cal.App.4th 126, 134-135. On that particular issue, *Bautista* and *Munoz* can be considered to be overruled. Also, I'm particularly pleased with the smart move on the officers' part to check with a DDA before making a full search. And kudos to Sacramento Deputy District Attorney Steve Secrest for deciding to err on the side of caution by recommending to the officers that they get a search warrant even though everyone pretty much concluded that defendant had abandoned the motel room. When in doubt, get a warrant. And in important cases, it's sometimes best to get a warrant even if there is little or no doubt that the property had been abandoned, taking two hours to get a search warrant and saving everyone a day or more litigating the issue in court while risking the possibility of getting a judge who doesn't understand the law.

Border Searches and Computers:

***People v. Endacott* (July 16, 2008) 164 Cal.App.4th 1346**

Rule: A border search of a computer may be done without any suspicion that it contains pornography. A second search two days later does not require a search warrant.

Facts: Defendant landed at Los Angeles International Airport on a flight from Thailand. A U.S. Customs and Border Protection employee notice defendant was wearing a leather jacket and weight-lifter-type gloves, and had among his luggage two laptop computers. When asked why he went to Thailand, defendant said that he'd been there for four months, and that he went there to rest, visit a friend, and seek employment. The Customs employee found this to be unusual (particularly the jacket and gloves when coming from a place as hot as Thailand) and referred him to the secondary inspection area. After

obtaining a “binding declaration” from defendant to the effect that all the items in his possession were his, a Customs Officer powered up defendant’s computers because Thailand is considered to be a high risk country for child pornography. This initial inspection revealed several pictures of nude females that appeared to be preadolescent. With defendant’s permission, his computers were taken and held for two days after which they were subjected to a more detailed inspection. This later warrantless search resulted in the recovery of over 17,000 images of pubescent and prepubescent girls in various states of undress. Defendant was charged in state court with possession or control of child pornography (P.C. § 311.11). His motion to suppress the contents of his computers was denied. Defendant pled no contest and appealed.

Held: The Second District Court of Appeal (Div. 6) affirmed. Defendant’s argument on appeal was that because his computers were searched without even a “*reasonable suspicion*,” the search violated the Fourth Amendment. While agreeing that his computers were searched under the theory of a “*border search*” (the L.A. Airport being the “functional equivalent” of a border), which generally requires no suspicion, defendant argued that a computer, as a container of “expressive material,” is entitled to greater protection than other types of containers. The Court disagreed. Suspicionless border searches are lawful pursuant to the “longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, . . .” Computers, which may contain terrorist communications, are deserving of no more protection than any other type of container even though it may also contain “expressive material” which generally would be protected under the First Amendment. The Court further held that the second, more detailed search of defendant’s computers, which occurred two days later, was also valid despite the lack of exigent circumstances or a search warrant. The lawfulness of warrantless, suspicionless border searches is not based upon a theory of exigent circumstances, but rather upon the theory applicable to all border searches. “Although exigent circumstances may dissipate, the border does not.” To be valid, a border search need not take place incident to defendant’s entry into the country. The second, more detailed search of defendant’s computers was also lawful.

Note: Also decided in 2008, and amended and republished just six days before *Endacott*, is the Ninth Circuit’s similar decision in *United States v. Arnold* (9th Cir. 2008) 533 F.3rd 1003. In *Arnold*, defendant arrived at LAX from the Philippines also toting a laptop computer. His computer was similarly subjected to a suspicionless search at the airport and some limited child pornography was found. The computer was seized and searched more thoroughly two weeks later under the authority of a search warrant (making the delayed search a non-issue, as it was in *Endacott*). Defendant in *Arnold* argued, as was debated in *Endacott*, that a computer, as a container of “expressive material,” was entitled to the enhanced protection of a “reasonable suspicion” requirement despite the search being a border search. In discussing the types of searches classified as non-routine border searches (e.g., strip, body cavity searches and involuntary x-ray searches) which *do* require a “reasonable suspicion,” the *Arnold* court agreed with *Endacott* that computer searches at a border (or the “*functional equivalent*” of a border) are not entitled to any more protection than any other “*routine*” suspicionless border search. So that seems to pretty much settle the issue in both state and federal court.