The California Legal Update

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

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THIS EDITION'S WORDS OF WISDOM:

"*Get your facts first, then you can distort them as you please*." (Mark Twain)

IN THIS ISSUE:

ADMINISTRATIVE NOTES:

> ***Legal Update Index*:** As a reminder, or just to let you know if you're new to the *California Legal Update*, I have available an *Index* of all the cases and Administrative Notes I've put out over the last four years (including this *Update*). Using a "*word search*," it's about as easy as it can possibly get for you to find prior cases I've briefed or important Notes I've added to the Updates. I've only included the last four years in that prior to that, the cases lose a lot of their importance and to include them only complicates the utility of the *Index*. This *Index* is available to you upon request, at no extra charge.

CASES:

***The California Public Records Act; Information Contained in Private Electronic Devices*:**

***City of San Jose v. Superior Court of Santa Clara County* [*Smith, Real Party in Interest*]**
(Mar. 2, 2017) 2 Cal.5th 608

Rule: When a public officer or employee uses a personal e-mail or cellphone account to communicate matters related to the conduct of public business, the writings contained in those accounts are subject to disclosure under the California Public Records Act.

Facts: Petitioner, Ted Smith, in a suit concerning redevelopment efforts in the downtown area of San Jose, requested the disclosure of some 32 categories of public records from the City of San Jose. The targeted documents included e-mails and text messages "sent or received on private electronic devices" used by certain listed city officials and their staffs. In response, The City disclosed communications made using City telephone numbers and e-mail accounts but declined to disclose communications made using the listed individuals' personal accounts.

Smith sued for declaratory relief, arguing that the California Public Records Act's (CPRA) definition of "*public records*" encompasses *all* communications about official business, regardless of how they are created, communicated, or stored. The City's argument in response was that messages communicated through personal accounts are not public records because they are not within the public entity's custody or control. The trial court granted summary judgment in Smith's favor and ordered disclosure. However, the Court of Appeal issued a writ of mandate reversing that order. Smith petitioned to the California Supreme Court.

Held: The California Supreme Court reversed the Court of Appeal, reinstating the trial court's discovery order. The Court found the issue here to be a "narrow one:" "*Are writings concerning the conduct of public business beyond CPRA's reach merely because they were sent or received using a nongovernmental account*?" The Court held that in considering the language of the CPRA and the important public policy interests it serves, while balancing (1) the public's interest in knowing what it's government is doing with (2) the privacy interest involved, the simple answer is "*no*," they are *not* beyond CPRA's reach. "Public employees' communications about official agency business may be subject to CPRA regardless of the type of account used in their

preparation or transmission." In so ruling, the Court noted that the CPRA establishes a basic rule requiring disclosure of public records upon request. (Gov't. Code § 6253.)

In encouraging transparency in government activities, there is a presumptive right of access to any record created or maintained by a public agency that relates in any way to the business of that public agency. This rule of disclosure is backed up by the California Constitution: "The people have the right of access to information concerning the conduct of the people's business, and, therefore, . . . the writings of public officials and agencies shall be open to public scrutiny." (Cal. Const., art. I, § 3, subd. (b)(1)) But this presumption of disclosure is rebuttable, subject to a number of statutory exceptions. (E.g., see Gov't. Code § 6254) The Act also includes a catchall provision exempting disclosure if "the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure." (Gov't. Code § 6255(a).) Engaging in some statutory interpretation, the Court first defined the phrase "*public record*" as "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." (Gov't. Code § 6252(e)) While such "writings" used to be made on paper or some other tangible medium, the advent of computers, iPads, and smartphones, with the capability of documenting events through e-mail, text messaging, and other electronic platforms, has changed all that.

The problem here is generated by the propensity of police officers and other public agency employees to use their own personal devices to communicate from person to person information related to their agency's business. The Court here rejected the City's argument that any such writings are beyond the reach of the City and not subject to disclosure in the face of a CPRA request. Noting that the City is responsible for disclosing information related to the City's affairs whether it actually, or even "*constructively*," possesses such information, and that it would be far too easy for public employees to shield such information from disclosure if they were allowed to just hide it in their own personal electronic accounts, the Court ruled that a public agency's officers and employees' personal accounts were not excluded from the disclosure requirements of the CPRA. "(A) city employee's communications related to the conduct of public business do not cease to be public records just because they were sent or received using a personal account." However, this does not mean that such individuals no longer have a personal right to privacy. Communications that are primarily personal, so long as they contain no more than incidental mentions of agency business, generally will not constitute public records.

On the other hand, if an agency employee prepares a writing that substantively relates to the conduct of public business, that writing would appear to satisfy the Act's definition of a public record and is therefore subject to disclosure. Such privacy concerns, however, are more properly addressed on a case by case basis. And even then, they can be minimized through specific procedural safeguards. Any personal information not related to the conduct of public business, or material falling under a statutory exemption, can be redacted from public records that are produced or presented for review. Also, noting that a public agency is only required to make "reasonable efforts" to obtain such information from its officers and employees (see *California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 166.), it is not up to the agency itself to search out requested information not actually in its own possession. In complying with a CPRA request, the Court tells us that "an agency's first step should be to communicate the request to the employees in question. The agency may then reasonably rely on

these employees to search *their own* personal files, accounts, and devices for responsive material" and make that information available to the requesting entity. Also, it is suggested that an agency may want to "adopt policies that will reduce the likelihood of public records being held in employees' private accounts." Eliminating, or at least reducing, the practice of using personal accounts to conduct public business would help to minimize this issue.

Note: Whether or not this is an issue for any particular individual depends upon whether he or she continues to use private computers and cellphones for the purpose of conducting public business. One solution is to carry two cellphones, for example, limiting the public business to one owned and provided by the agency for which you work. As cumbersome as that sounds, I actually did that for some time as a deputy district attorney working as a liaison deputy with local law enforcement, although at the time my motivation was to facilitate the monthly requirement that I determine who (me or the county) was to be cover the costs. But I found it to be doable. Not discussed here, unfortunately, is what sanctions might be involved should a public employee, tasked with responding to a CPRA request, fail to provide the requested information, either unintentionally, negligently, or even in bad faith. Is his agency legally responsible? I would have to assume the answer to that question is "*yes*." But my opinion and a dime won't even get you a cup of coffee anymore. So we'll have to wait for the case where that actually happens.

***DUI; Scope of a Consent for the Withdrawal of a Blood Sample*:**

People v. Pickard **(June 30, 2017) 15 Cal.App.5th Supp. 12**

Rule: When a DUI suspect is asked for and provides consent to submit to a blood test to determine the content of alcohol in his or her blood, it is beyond the scope of that consent and a Fourth Amendment violation to also test that blood for drugs.

Facts: Defendant was arrested for driving while under the influence (DUI) of alcohol. Giving the defendant the standard implied consent admonishment relative to the defendant's obligation to submit to a breath or a blood test, the officer also told her that the breath machine was unable to retain any kind of a sample for retesting. On the other hand, as explained by the officer, a blood test, with two samples being drawn, would result in one of the samples going to the crime lab and being "*tested for alcohol*. . . . The second vial is held at no cost to you." (Italics added) Consistent with his field admonishment, the officer testified that he told defendant "that two small vials of blood will be drawn. One goes to the San Diego Country Crime Lab. It gets tested for *alcohol* and . . . that report gets added to my report at a later date." (Italics added) Defendant chose to submit to a blood test where two vials of blood were in fact drawn.

As promised, defendant's blood was analyzed for alcohol on February 29, 2016. "Presumably" (there was no proof of this, but was assumed by the Court), because the blood/alcohol content came out too low as the circumstances would have otherwise indicated, the second vial of defendant's blood was later sent to Bio-Tox for a drug analysis. Bio-Tox received the second vial of defendant's blood on March 30th. A Bio-Tox report dated April 1, 2016, reflected

positive results of the drug screen. Defendant, therefore, was charged in state court with driving while under the combined influence of alcohol and drugs in violation of V.C. § 23152(f). Defendant filed a motion to suppress the test results. The trial court denied the motion to suppress the February 29th blood test for alcohol, but granted it for the Bio-Tox drug test results dated April 1, ruling that testing for drugs was beyond the scope of defendant's consent to give a blood sample. The People appealed.

Held: The Appellate Division of Superior Court of California, San Diego County, affirmed. The issue here concerned the scope of defendant's consent in agreeing to submit to a blood test. The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of "objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" A consensual search may not legally exceed the scope of the consent supporting it. It is the government's burden to prove that a warrantless search was *within* the scope of the consent given. In a DUI case, while there are certain legal consequences to refusing to submit to a blood or breath test, it must still be shown that an arrestee consented to submitting to one of these tests.

In this case, the arresting officer asked defendant whether she would submit to a breath or blood test, telling her that if she chose a blood test, two vials of blood would be drawn; one for the crime lab to test for alcohol, with the other retained at no cost to her. With this knowledge, defendant chose to allow a blood draw. But at no time was she asked for consent to withdraw blood for use in a test for the presence of drugs. Countering the People's argument that defendant did not limit the use of her blood, the Court noted that she was under no obligation to place restrictions on its use. "(D)efendant did not have an affirmative obligation to expressly place limits on the consent when it was the mutual understanding of defendant and the officer, and their reasonable expectations that the blood was to be tested *only* for alcohol." It is the People's burden to prove that the consent she gave included within its scope the testing for drugs. In this case, there was no such consent given. The drug test results, therefore, were properly suppressed. The Court also rejected the People's argument that "good faith" allowed for the admission into evidence the blood test results for drugs, specifically finding that "the secondary testing for drugs was a procedural recurring or systematic failure by the law enforcement agency's personnel to abide by the Fourth Amendment." In other words, this is done all the time.

Note: The decision in this case is really not a surprise, and makes sense in light of the recent rash of cases discussing the need for a free and voluntary consent over and above the "implied consent" as described in V.C. § 23612. But I have to question the Court's conclusion that "secondary testing" for drugs is "a procedural recurring or systematic" practice. I have to ask whether there was evidence to this effect presented in this case, or was the Court merely drawing from its own, unproven preconceived beliefs? If the former, the Court didn't say so. If the latter, then I'm not sure it was appropriate to include it in this case as a proven fact. Just saying.

***DUI; Warrantless Blood Draws and Consent*:**

People v. Ling **(May 5, 2017) 15 Cal.App.5th Supp. 1**

Rule: The results of a blood test in a DUI case are inadmissible absent evidence that the defendant did in fact consent to the taking of a blood sample. A mere submission to authority is not consent.

Facts: A California Highway Patrol (CHP) officer observed defendant's vehicle at about 4:00 a.m. on the morning of June 13, 2015, near the intersection of Highways 101 and 92. Stopping defendant's vehicle (the circumstances of the stop not being described in that its legality was not contested), the officer noticed the odor of alcohol emanating from defendant's car. Defendant was unable to provide the requested driver's license, registration or insurance. Getting defendant out of the car, the officer noticed indications of alcohol influence. Defendant did poorly on a field sobriety test. The officer then informed defendant that a "PAS" (preliminary alcohol screening) test was the last voluntary field sobriety test available to him, but that it was not the test that was required by the implied consent law.

The officer began to administer the PAS test without waiting for defendant to indicate whether or not he was willing to submit to it. The results of the PAS test were 0.144, 0.177, and 0.159. These results were admitted into evidence solely for purposes of the officer's subsequent conduct and not for the truth of the matter asserted. (In other words, it was of no evidentiary value in proving defendant's level of intoxication, but merely to show that he had probable cause to arrest defendant.) Defendant was arrested, handcuffed, and placed into the officer's patrol car. The officer then advised defendant of the implied consent law by telling him: "Because you're under arrest for DUI, you have to submit to a chemical test, which is a test of either your breath or your blood." The officer's communication with defendant regarding implied consent was limited to this instruction that defendant had to submit to a blood or breath test. The officer did *not* advise defendant of the consequences of failing to submit to a chemical test. After discussing with defendant the characteristics of a blood versus a breath test, the officer drove defendant to the Redwood City CHP station where there were no facilities for a breath test.

Calling for a phlebotomist to draw defendant's blood, blood was drawn using the normal protocol for such a procedure. Defendant never objected to, nor resisted, the taking of his blood. At no time, however, from defendant's arrest up until the blood draw, did he ever tell the officer that he would submit to a blood test. Although the officer initially testified that defendant chose a blood test, he agreed on cross-examination that a more accurate description would be that defendant merely "submit[ted] to a blood draw." Prior to trial, defendant filed a motion to suppress the results of his blood test. Although the court had some reservations concerning the procedures used, the motion was nonetheless denied. Defendant appealed.

Held: The Appellate Division of the Superior Court of California for San Mateo County reversed. The issue on appeal was the legality of the warrantless blood draw. The People

continued to argue that defendant consented to having his blood drawn, submitting that defendant chose a blood test without any indication that he did not want to provide a blood or breath sample. The People contended that because there was no evidence that defendant had refused or revoked his consent or that he resisted the blood draw procedure in any manner, the warrantless blood draw was consensual under the Fourth Amendment. However, the law on this issue is not nearly so lenient.

The People bear the burden of proving that a consent was, in fact, freely and voluntarily given. "This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." (*Bumper v. North Carolina* (1968) 391 U.S. 543, 548.) To be effective, consent must be voluntary. Voluntariness is to be determined by considering the "totality of the circumstances." It is also the rule that "assent" alone is not necessarily "consent." "Consent, in law, means a voluntary agreement by a person in the possession and exercise of sufficient mentality to make an intelligent choice, to do something proposed by another . . . . [Assent] means mere passivity or submission, which does not include consent." Neither is there consent when all we have is the mere submission to an express or implied assertion of authority. Defendant in this case was told that "(b)ecause you're under arrest for DUI, you have to submit to a chemical test, which is a test of either your breath or your blood." Never was he asked if he was willing to summit to such a test. Telling him that he "*has to submit*" to a chemical test of his blood communicates a reality where the chemical test will be conducted against defendant's will, if necessary. He was also never given the opportunity of choosing between providing a breath sample or a blood sample.

His lack of physical or verbal resistance to submitting to a blood test, by itself, does not mean that he had consented to the procedure. In sum, the Court noted that "(t)he People fail to point to any evidence in the record showing that defendant consented to the blood draw nor could they." The evidence instead shows that defendant submitted to a blood draw and that this submission was due to the officer's expression of lawful authority. As concluded by the Court; "absent evidence to the contrary, it cannot be presumed that individuals under arrest could reasonably construe a direction from an arresting officer that they must take some action as a mere query as to whether they will voluntarily consent to it. Consequently, the totality of the circumstances shows defendant did not consent to the blood draw." The blood results, therefore, should have been suppressed.

Note: It is clear that the officer in this case was either totally oblivious to, or chose to ignore, the plethora of recent (i.e., post *Missouri v. McNeely* (Apr. 17, 2013) 569 U.S.__ [133 S.Ct. 1552].) cases discussing the need for a full explanation of the V.C. § 23612 implied consent rules, along with evidence that a DUI arrestee do more than merely acquiesce, and actually consents, to a blood or breath test, in order for the results to be admissible in court. The Court in fact makes some reference to the need for law enforcement officers to stay up on the law if their arrests are going be of any benefit. This should be understood without having to repeat it.

***Cellphones and Fourth Waiver Searches*:**

People v. Sandee **(Sep. 13, 2017) 15 Cal.App.5th 294**

Rule: When determining whether a Fourth waiver search includes the text messages in a probationer's cellphone, the test is what a reasonable person would have understood from the language of the Fourth waiver condition itself. Where a Fourth waiver subject has agreed to suspicionless searches of her property and personal effects, this may be interpreted to include cellphones (at least as the law stood at the time of this case; see *Note*, below).

Facts: On September 23, 2015, San Diego County Sheriff's Department detectives were surveilling a house suspected of being a location where narcotics activity was occurring. Eventually, defendant and a male companion were observed riding up to the house on bicycles. The subjects entered the house "for a period of time" and then rode away. As they did so, a detective observed the subjects blow a red light and conducted a traffic stop. Defendant admitted to being on probation and subject to search and seizure conditions. Upon verifying that defendant had a "valid (F)ourth (Amendment) wavier, good in all four areas," meaning that the waiver covered property in defendant's residence, vehicle, person and place of work, the detective searched defendant's backpack. A hypodermic needle was recovered. The detective also conducted a search of defendant's cellphone and found several text messages which he believed were indications that she was involved in selling narcotics. The detective took photos of the text messages and noted them in his report. Also, the detective found a bag containing 6.9 grams of methamphetamine lying next to a bush near where defendant had stopped her bike. Charged in state court with several drug-related offenses, defendant filed a motion to suppress the information obtained from her cellphone. Concluding that the detective's search of defendant's cellphone for text messages was within the scope of her Fourth Amendment waiver, the trial court denied the motion. Defendant thereafter pled guilty, was sentenced to probation, and appealed.

Held: The Fourth District Court of Appeal affirmed. The only issue on appeal concerned the legality of a warrantless search of a cellphone belonging to a person who is subject to Fourth waiver conditions. Since the U.S. Supreme Court decided the case of *Riley v. California* (2014) 134 S.Ct. 2473, the rule has been that a law enforcement officer may not conduct a search of a person's cellphone without a warrant, even incident to arrest, unless an exception to the warrant requirement applies. This is based upon the conclusion that because of all the potentially personal information contained in today's cellphones, "[c]ell phones differ in both a quantitative and a qualitative sense from other objects that might be carried on an arrestee's person."

Cellphones are thus entitled to a higher expectation of privacy than other objects a person might have in his pocket. Defendant, however, waived her right to be free from warrantless and suspicionless searches as a condition of probation (*three* probations, as a matter of fact). Specifically, she agreed to "[s]ubmit person, vehicle, place of residence, *property*, *personal effects* to search at any time with or without a warrant, and with or without reasonable cause."

(Italics added) The detective in this case relied on this probation search condition in conducting the warrantless search of defendant's cellphone. The California Supreme Court held years ago (see *People v. Bravo* (1987) 43 Cal.3rd 600, 606.) that when interpreting the scope of a Fourth Amendment waiver agreed to by a probationer, the "waiver of [the defendant's] Fourth Amendment rights must be interpreted on the basis of an objective test." Under this approach, "[t]he search condition must . . . be interpreted on the basis of what a reasonable person would understand from the language of the condition itself, not on the basis of appellant's subjective understanding, or under a strict test in which a presumption against waiver is applied." Defendant's conditions included the warrantless search of her "*property*" and "*personal effects*."

The Court ruled here that at the time the search was conducted, a reasonable, objective person would have understood this to encompass a search of defendant's cellphone. Defendant, however, submitted that the recent federal Ninth Circuit Court of Appeal decision of *U.S. v. Lara* (9th Cir. 2016) 815 F.3rd 605, dictates that a Fourth waiver probationer's cellphone is *not* subject to warrantless searches unless the search conditions at issue are clear that a cellphone is specifically included in the "property" to be searched. The state Fourth District Court of Appeal, however, held here that because the federal Ninth Circuit uses a different standard (i.e., a "balancing approach" that consists of "assessing, on the one hand, the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.") for determining the legality of a Fourth Waiver search, and because the decision in *Lara* is not binding on California courts, that *Lara* is not persuasive authority. Unless and until the U.S. Supreme Court dictates that *People v. Bravo* is no longer good law, the Court rejected defendant's argument that *Lara* requires a reversal. Defendant further argued that California's recently enacted Electronic Communications Privacy Act ("ECPA;" P.C. § 1546 et seq.) requires the suppression of her text messages in this cases. The ECPA states that a government entity shall not "[a]ccess electronic device information by means of physical interaction or electronic communication with the electronic device" unless one of several statutory exceptions applies, including obtaining the specific consent of the authorized possessor of the device." (P.C. § 1546.1(a)(3), (c)(4).) However, the ECPA wasn't effective until January 1, 2016. Defendant's arrest was in 2013. The Court declined to apply the ECPA retroactively in that prior to such enactment, it would *not* have been reasonable to assume that defendant's probation conditions did *not* allow for the retrieval of text messages from her cellphone. Similarly, the Court rejected the applicability of the recent case of *In re. I.V.* (2017) 11 Cal.App.5th 249, to this case. In *I.V.*, it was held that requiring as a condition of probation that the minor submit his "property" and "any property under [his] immediate . . . control" to search at any time was unconstitutionally vague as to whether it encompassed electronic devices and data in light of the ECPA. Noting again that the ECPA wasn't effective until 2016, *I.V.* did not apply to defendant's case. Based upon the above, the Court held that the search of defendant's cellphone as a condition of her probation was lawful.

Note: The Court's reasoning for rejecting the applicability of California's ECPA (Electronic Communications Privacy Act) was simply because the Act was not the law at the time of defendant's arrest. That tells us that the ECPA might well affect all cellphone Fourth waiver

searches that occur after January 1, 2016. However, note that effective January 1, 2017, the Legislature amended the Act by adding P.C. § 1546.1(c)(10), specifically addressing the issue of Fourth waiver searches. Subdivision (c)(10) adds as an exception to the protections from searches of electronic devices: "Except where prohibited by state or federal law, if the device is seized from an authorized possessor of the device who is subject to an electronic device search as a clear and unambiguous condition of probation, mandatory supervision, or pretrial release." This still says that for a search condition to apply to any "electronic device," which presumably includes cellphones, that the condition must be spelled out "clear(ly) and unambiguous(ly)." That tells us that cellphones should be specifically included, by name, adding "cellphones" to any list of property subject to search under a Fourth waiver condition agreed to by a probationer. Also note that in a footnote (fn. 3), the Court here cautions that this decision is limited to checking a probationer's text messages, noting that going any deeper might involve privacy interests of unknown third persons. Therefore, if you wish to go beyond a suspect's text messages, you should probably get a warrant.

***Searches of Containers in Vehicles*:**
***Probation and Parole Searches of Vehicles*:**
***Inevitable Discovery Doctrine*:**

People v. Cervantes **(May 18, 2017) 11 Cal.App.5th 860**

Rule: The rules on the lawfulness of conducting warrantless searches of the passenger area of a vehicle, where an officer reasonably expects that a parolee/passenger could have stowed personal belongings or discarded illegal items, applies to probationers on a Fourth waiver as well. The inevitable discovery doctrine will save evidence illegally discovered if it is reasonable to believe that the officer would have inevitably and legally found other evidence that would have provided the necessary probable cause to look for illegally seized evidence.

Facts: Defendant was stopped by San Diego Police Officers Peter Larson and Thomas Cooper for an expired registration tab on his 2001 Toyota Corolla. A female, who verbally identified herself as Sarah Craft, was sitting in the front passenger seat. It was quickly determined that her real name was Tiffany Craft, that she had an outstanding felony warrant, and that she was subject to a probation Fourth waiver. Officer Larson decided to search the vehicle based upon Craft's waiver of her search and seizure rights. The officer began by searching two bags (i.e., "a closed toiletries bag and an opaque plastic drawstring bag") on the backseat behind the driver's seat.

Despite first observing "numerous men's toiletries," he continued searching and found a large amount of methamphetamine, heroin, and some drug paraphernalia. In the second bag, which contained men's clothes, he found another large amount of methamphetamine (185.65 gram). Officer Larson then searched the center console where he found more methamphetamine. A search of defendant's person resulted in the recovery of a glass pipe and $300 in cash. Not surprisingly, defendant went to jail. After his arrest and upon being interrogated, defendant admitted to transporting the drugs from Los Angeles to San Diego. (Two days later, after having

bailed out, defendant was arrested again with another 17.1 grams of methamphetamine recovered. Can you say; "*drug problem*?" How about; "*slow learner*.") That incident, however, was not the subject of this appeal.) Charged with a pile of drug-related offenses, defendant filed a motion to suppress before his preliminary hearing. The motion was denied. Then again, defendant filed another motion to suppress in the trial court, challenging the legality of the search of his car. With his motion denied again, defendant pled guilty and was sentenced to three years of probation with one year in county jail. Defendant appealed.

Held: The Fourth District Court of Appeal (Div. 1) affirmed. On appeal, defendant argued that his car was searched unlawfully. The controlling authority argued by both sides is the California Supreme Court case of *People v. Schmitz* (2012) 55 Cal.4th 909. *Schmitz* held that a warrantless search of those areas of the passenger compartment of a vehicle where an officer reasonably expects that a parolee/passenger on a Fourth waiver could have stowed personal belongings or discarded items when aware of police activity, as well as a search of personal property located in those areas if the officer reasonably believes that the parolee owns those items or has the ability to exert control over them, is lawful. Defendant argued on appeal that because Craft was a "probationer," as opposed to a parolee, with the courts having held that probationers have a somewhat higher expectation of privacy than parolees, *Schmitz* does not apply. The Court, analyzing *Schmitz* in detail, disagreed.

In the context of a vehicle search, the Court noted that **(**1) parolees *and* probationers both have demonstrated histories of criminal activity and share a motivation to conceal further criminal activity and (2) a drivers' already-diminished expectation of privacy in his or her vehicle is even further diminished when transporting a passenger, particularly one subject to warrantless and suspicionless parole or probation searches. In a vehicle, both drivers and passengers have a reduced expectation of privacy in the interior of their automobile, as well as its contents, because cars travel public thoroughfares, seldom serve as the repository of personal effects, are subjected to police stop and examination to enforce pervasive governmental controls as an everyday occurrence, and, finally, are exposed to traffic accidents that may render all their contents open to public scrutiny. A driver's already-diminished expectation of privacy is even further diminished when he allows others to ride in his car. The Court found these basic rules hold true whether we're talking about a parolee/passenger, or a probationer/passenger. The Court, therefore, found that the rule of *Schmidt* applies to probationers on a Fourth waiver to the same extent as parolees. Defendant, however, also argued that when Officer Larson first looked into the toiletries bag and found items associated with a male, he should have realized that there would be nothing in there belonging to Craft (a female).

The same rationale, as argued by defendant, applied to the second bag that held men's clothing. The Court declined to decide this issue, however, ruling that the "inevitable discovery" doctrine applies in this case. Pursuant to the inevitable discovery doctrine, if the government can prove that the evidence in issue would have inevitably and lawfully been discovered regardless of any overreaching by the police, then whether or not a particular search was lawful is no longer relevant. In this case, the Court held that Officer Larson had cause, per *Schmidt*, to search the

center console of defendant's vehicle. Clearly, with the center console being within inches of where Craft was sitting, that was an area Officer Larson could have reasonably expected her to hide contraband, and would have inevitably searched anyway. The Court found that had Officer Larson chosen to search the center console first, finding the methamphetamine that was in there would have provided him with the necessary probable cause to search the rest of the vehicle and any containers found in the vehicle, including the two bags in the back seat. Inevitably, the two bags would therefore have been searched, and done so lawfully. The Court ruled that "that although Officer Larson happened to have begun his search of defendant's car by searching the toiletries bag and plastic drawstring bag in the backseat, he inevitably would have also searched the center console, and been legally justified in doing so." Defendant's motion to suppress, therefore, was properly denied.

Note: It's too bad the Court didn't get to the issue of whether first finding men's toiletries and clothes in the two bags would have required Officer Larson to stop his searches of those bags. It would have been a good thing to know whether a continued search of those bags was lawful under these circumstances. If it was lawful to get into the bags in the first place, as the Court held that *Schmidt* allowed, then there's a good argument that an officer is not required to break off that search just because he doesn't immediately see anything illegal or because the first-viewed contents tend to indicate that they belong to a non-probationer. If there's cause to believe that the probationer hid items in there, there's no reason to believe that she would not have co-mingled contraband with the non-probationer's property. But for a definitive answer on this issue, we'll have to wait for another day.