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Remember 9/11/01: Support Our Troops
Remember 4/1-2/11: A Great Day for America

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THIS EDITION'S WORDS OF WISDOM:

"*Geronimo*: *E-KIA.*" (Unknown Hero, Navy Seal Team 6)

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ADMINISTRATIVE NOTES:

***Firearms and W&I § 5150 Subjects*:** When a police officer takes into custody a person with mental problems and transports him for the purpose of having him evaluated per W&I § 5150 (i.e., is a danger to himself or to others, or is otherwise gravely disabled), W&I § 8102(a) commands the officer to confiscate any firearms or other deadly weapon owned, possessed, or under the control of that person. That authority, however, does not give the officer the right to conduct a warrantless search of the premises for those weapons. To lawfully confiscate such a weapon, the officer must have consent from the patient or someone else with authority over the area to be searched, exigent circumstances, or a search warrant. (*People v. Sweig* (2008) 167 Cal.App.4th 1145 (petition granted).) In response to the *Sweig* decision, the Penal Code now provides for such a search

warrant. (P.C. § 1524(a)(10)) The mere knowledge that a detained mental patient possesses dangerous weapons in his home does not likely provide, by itself, an exigent circumstance excusing the need for a search warrant. I'm telling you this because someone e-mailed me with a question on this topic, the question presupposing an officer's authority to conduct a warrantless search of a mental patient's home for weapons. Somehow (certainly not my error), before I could respond, I lost this and all other e-mails sent to me on the weekend of May 7th. So if you sent me an e-mail around then and didn't get a response (including requests to be added to the *Legal Update* e-mail list), please try me again.

CASE LAW:

***DUI*; *Driving the Motor Vehicle*:**

In re F.H. **(Feb. 25, 2011) 192 Cal.App.4th 1465**

Rule: Being a "driver" of a motor vehicle for purposes of the DUI statutes requires no more than that the defendant have momentary control of the steering of the vehicle.

Facts: Richardo Mendoza flagged down a Santa Rosa police officer at about 3:00 a.m., telling the officer that he'd been in a vehicle accident. Indeed, Mendoza's hair was standing straight up and dust covered his face. He appeared to be in shock. Mendoza directed the officer to another location where they found a vehicle upside down, having apparently rolled over several times. Defendant, a minor, was found lying in a ditch some 20 yards from the car. She had urinated on herself, had scratches, was covered in dirt, and complained of pain in her legs and back. According to Mendoza, the couple had been arguing as he drove his vehicle at about 30 to 40 miles per hour. Defendant, who had been sitting in the front passenger seat and who had been drinking, grabbed the steering wheel and yanked it, causing the car to swerve and leave the road. As defendant was being placed into an ambulance, she said; "*I did* [*it*]. *It was my fault*." Interviewed at the hospital, it was noted that defendant's eyes were red and watery, her speech was slurred, and she smelled of alcohol. She admitted that she had angrily grabbed the steering wheel, turning it, causing the car to go out of control and crash. She further admitted to having drunk five shots of a hard alcohol and some beer. She exhibited horizontal gaze nystagmus. Her blood alcohol level some three hours after the crash was 0.10 percent. As a result of the accident, Mendoza felt pain in his shoulder and left side. He received medical treatment for these injuries. Defendant suffered a broken leg and spinal injuries. Charged in Juvenile Court, a petition was sustained finding that defendant had committed two misdemeanors; driving while under the influence causing bodily injury (V.C. § 23153(a)), and driving with a blood-alcohol level of 0.08 percent or more causing bodily injury (V.C. § 23153(b)). The court made defendant a ward of the juvenile court and placed her on probation. She appealed.

Held: The First District Court of Appeal (Div. 1) affirmed. Defendant's argument on appeal was that she wasn't driving. The primary issue, therefore, was whether a passenger who grabs the steering wheel and thereby takes sufficient control of the vehicle to cause a crash is "driving" the car within the meaning of the Vehicle Code. V.C. §

23153(a) makes it illegal to drive while under the influence (or with a B/A level of 0.08% or more, under subd. (b)), committing an act forbidden by law or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver. Whether talking about subdivisions (a) or (b), there are essentially four elements to this offense: (1) Excessive alcohol intake, as differently defined by each subdivision; (2) driving a vehicle; (3) committing an act which violates the law or neglecting a duty imposed by law; and (4) causing bodily injury to another person. Conceding that she'd had too much to drink, defendant argued that the evidence was insufficient to establish the second, third, and fourth elements of the offenses, with the primary issue being whether she can be said to have been "driving" the vehicle. As to that element, V.C. § 305 defines a "driver" as "a person who drives or is in actual physical control of a vehicle." California jury instructions at CALCRIM No. 2241 further defines this element: "A person drives a vehicle when he or she intentionally causes it to move by exercising actual physical control over it. The person must cause the vehicle to move, but the movement may be slight." Whether or not a passenger who seizes the steering wheel and causes a crash is a "driver" has never been decided by a California court before. But there is authority to the effect that it doesn't take any more than steering the vehicle to be considered in "actual physical control," and thus a driver. The Court found that grabbing the steering wheel and having control of the vehicle, even if only momentarily, is sufficient to meet the Vehicle Code definition of a "driver." The fact that defendant did not have access to the accelerator or brakes did not affect her "influence, dominion, or regulation" (quoting language from other state authority) of the vehicle. The Court further found sufficient evidence of the third element; i.e., commission of an unlawful act, by her interfering with Mendoza's control of the car and turning the car in an "unsafe turning maneuver." As for the final element, the Court found that Mendoza's state of shock, left side and shoulder pain, and need for medical treatment, shows sufficient "bodily injury" within the meaning of the statutes. The petition alleging violations of V.C. § 23153(a) and (b), therefore, was properly sustained.

Note: This is not an earth shattering case, but one I felt needed briefing in that I've occasionally gotten questions concerning what it takes to be considered the "driver" of a motor vehicle for purposes of the DUI statutes. Note that there needs to be some movement of the car, no matter how slight, while the driver is in physical control. And also keep in mind that that movement, if not observed by the arresting officer, may be proven circumstantially. If there's no accident involved (e.g., a misdemeanor DUI, per § 23152, only), finding the under-the-influence defendant passed out in the middle of an intersection, engine running, gearshift in drive, and foot on the brake, is generally enough to prove he or she drove there. A physical arrest for this misdemeanor would be lawful even though the circumstantially proved movement did not occur in the officer's presence. (V.C. § 40300.5; *Troppman v. Gourley* (2005) 126 Cal.App.4th 755, at pp. 760-761.) But by the same token, finding a drunk passed out in his car in the parking lot of bar, where there's no direct evidence that he drove it to that location in such a condition (as opposed to having passed out in his car after merely taking refuge in it), is not enough. We need evidence to help disprove his later testimony that he was sober when he last drove his car.

***Search of a Vehicle's SDM*:**

People v. Xinos **(Feb. 8, 2011) 192 Cal.App.4th 637**

Rule: Downloading digital data from a vehicle's sensing and diagnostic module (SDM) after disposition (i.e., the defendant's plea) of a hit and run case involving that vehicle is illegal due to the lack of continuing probable cause supporting the search.

Facts: Defendant was driving his 2002 GMC Denali SUV in San Jose at 12:30 a.m. on May 6, 2006, as he approached an intersection. Just then, the 260-pound, six-foot-seven-inch tall Marcus Keppert, wearing all dark clothing, stepped out into the street against a red light. Defendant apparently saw Keppert at the last second but was unable to stop or swerve in time to avoid hitting him. After knocking Keppert down, defendant continued a short distance, stopped, and then drove off. Another motorist followed defendant to where he parked his car. The motorist called the police reporting the license number and location of the vehicle and then returned to the accident scene. Keppert died from his injuries. Defendant was located at his nearby home by responding San Jose police officers who, upon noting indications of alcohol influence, arrested him. It was later determined that defendant's blood alcohol level at the time of the accident was 0.22%. An accident reconstruction expert determined that defendant's speed at the time was probably at about 55 miles per hour in a 45 mph zone, which was not unreasonable under the circumstances. It was also determined that given the poor lighting conditions, the fact that Keppert was wearing dark clothing, and with Keppert walking against a red light, the accident appeared to be unavoidable. Defendant's alcohol influence was considered to be only "an associated collision factor." On May 5, 2007, a year after the accident, defendant pled no contest to felony hit-and-run (§ 20001(a), (b)(2)), misdemeanor driving under the influence (§ 23152(a)), and misdemeanor driving with an unlawful blood-alcohol level of 0.08% (§ 23152(b)), as alleged in the complaint. Up to this point, no one had checked defendant's vehicle's "sensing and diagnostic module" ("SDM"), sometimes also referred to as an "event data recorder" ("EDR"). It was believed at the time that unless the vehicle's air bags deploy, the SDM doesn't record any useful information. However, the investigator learned in subsequent training that sudden deceleration of the vehicle can cause the module to "wake up" and briefly record information such as the vehicle's speed. Six days after defendant's plea, while pending sentencing, and at the request of the prosecutor, the investigator entered defendant's still-impounded vehicle and downloaded the information from the SDM. No search warrant was obtained. It was determined that (among other things) defendant had been driving at a speed of between 69 to 76 mph immediately before the accident, decelerating within 1.3 to 2.1 seconds before impact, and hitting Keppert while still driving at a speed of 60 or 61 mph instead of the previously believed 55 mph. With this new information, it was opined that speed was in fact a substantial factor in the crash and that alcohol contributed to the crash by effecting defendant's perception and reaction time. As such, it was determined that had defendant been driving at a more reasonable speed the accident could have been avoided. Based upon this new information, the prosecutor moved to vacate defendant's plea and reinstate the criminal prosecution. Upon granting of this motion, one count of felony vehicular manslaughter (P.C. § 192(c)(3)) was added to the complaint. A motion to

suppress the information obtained from the SDM was denied. Convicted by a jury on all counts and sentenced to prison, defendant appealed.

Held: The Sixth District Court of Appeal reversed. On appeal, the defendant argued that the warrantless search of the SDM violated his expectation of privacy. The People, on the other hand, argued that because a vehicle carries with it a diminished expectation of privacy, and because vehicles may be searched after the fact so long as probable cause exists at the time of the defendant's arrest, no warrant was required. First, the Court rejected the People's argument that the defendant did not have a reasonable expectation of privacy in the SDM in his vehicle. In an extensive review of the cases talking about the lack of a reasonable expectation of privacy in the exterior portions of a vehicle, the vehicle being driven on the public roadway where its speed and movements can be observed by anyone, the Court found that the same is not true for an internal mechanism that stores electronic data. The digital data contained in the SDM is not exposed to public view. The Court concluded that a motorist's expectation of privacy with regard to his or her own vehicle encompasses the digital data held in the vehicle's SDM. Defendant further argued that the actual search of the SDM, downloading the data later used against him at trial, was not supported by probable cause. The Court agreed. The rule is that probable cause to conduct a warrantless search must exist at the time the warrantless search is executed. The search in this case didn't occur until after defendant had pled no contest, terminating the prosecution of the case. Because there was no pending case at the time of the search, there was no longer any probable cause supporting a search for further evidence. Also, although California law has recognized that items (such as a vehicle) lawfully seized as evidence of a crime are subject to closer examination and scientific testing, that theory is also based upon the current existence of probable cause to believe there is evidence there to seize. The retrieval of raw data from a vehicle's SDM originally not believed by police to hold any evidence of a crime is not a reexamination or closer look at areas of a vehicle already reasonably believed to contain evidence of a crime; it (per the court) is a new and different intrusion. The warrantless retrieval of the digital data from defendant's SDM, therefore, was unlawful.

Note: Certainly, before defendant's no contest plea, there would have been probable cause to believe that the SDM contained relevant evidence. The idea that the case, as well as the investigation, is over once defendant pleads guilty (or "no contest"), and that all preexisting probable cause suddenly evaporates, is a new one on me. I'd like to see that theory tested with a petition to the Supreme Court. The Court further noted that V.C. § 9951 did not apply to this case in that by its terms, this section only applies to vehicles manufactured on or after July 1, 2004. Section 9951, which restricts access to a vehicle's SDM, specifically provides that a court order is required for law enforcement to retrieve the data it may contain. My recommendation has always been to get a search warrant in such a case. But also, as noted by the Court, even if an officer violates this statutory requirement for a warrant, nothing will be suppressed because 9951's statutory restrictions are not required by the U.S. Constitution. The only reason the Court suppressed the SDM digital data in this case is because by the time the officers decided to retrieve the information, any probable cause justifying the "search" no longer existed once defendant plead no contest.

***Medical Marijuana; Transportation*:**

People v. Wayman **(Oct. 15, 2010) 189 Cal.App.4th 215**

Rule: The transportation of marijuana by or for a qualified medical marijuana user must take into account whether the method, timing, and distance of the transportation were reasonably related to the patient's current medical needs.

Facts: Defendant was stopped for speeding by California Highway Patrol Officer Juan Ulloa. The traffic stop resulted in defendant's arrest for driving while under the influence of alcohol. In a search of the passenger area incident to arrest, the officer found a gram of marijuana and $120. A search of the trunk resulted in the recovery of a backpack containing 26 baggies of marijuana, each labeled 3.5 grams, five baggies of marijuana labeled five grams each, 14 small bottles of concentrated cannabis, an electronic scale, and some other packaging paraphernalia. In his wallet was a medical marijuana card attached to a physician's certificate authorizing his use of marijuana for medical purposes. In addition to the DUI charges, defendant was charged in state court with the illegal transportation of marijuana (H&S § 11360), possessing marijuana for purposes of sale (H&S § 11359), and possession of concentrated cannabis (H&S § 11357). At trial, defendant's defense was that he needed marijuana for chronic back pain. He testified that he had that amount of marijuana with him in his car because he had just recently purchased it and his mother, with whom he lived, didn't want it in the house. At trial, the trial court instructed the jury that the "Compassionate Use Act of 1996" ("CUA;" H&S § 11362.5) allows a person to transport marijuana for personal medical purposes when a physician has recommended or approved the patient's use of marijuana. (CALCRIM NO. 2361) But the court also instructed the jury that the amount of marijuana transported must be "reasonably related to the patient's current medical needs." In deciding if marijuana was being lawfully transported for medical purposes, the jury was told to consider "whether the method, timing, and distance of the transportation were reasonably related to the patient's current medical needs." The prosecutor was also allowed to argue to the jury that storing marijuana in his vehicle for future use was not lawful. Defendant was convicted of the transportation charge (along with the DUI counts). He appealed.

Held: The Fourth District Court of Appeal (Div. 3) affirmed. On appeal, defendant claimed that the trial court had misinstructed the jury regarding the circumstances under which a person may lawfully transport medical marijuana. In defendant's view, a person who otherwise qualifies for medical marijuana use under the CUA may transport his stash around "without qualification" and not be limited to his "current medical needs." The Court disagreed. When first enacted, the CUA provided protection from criminal prosecution only for the possession and cultivation of marijuana when needed for medical purposes and authorized by a physician. Subsequent cases conflicted on the issue of whether this impliedly allowed for the transportation of marijuana otherwise coming within the dictates of the CUA. The cases that allowed for it, however, limited such transportation to those circumstances where "the quantity transported and the method, timing and distance of the transportation are reasonably related to the patient's current medical needs." While this split in authority was being considered by the California

Supreme Court (See *People v. Wright* (2006) 40 Cal.4th 81.), the Legislature solved the problem by enacting the "Medical Marijuana Program" (or "MMP;" H&S §§ 11362.7 et seq.). Among its provisions, the MMP specifically provides an affirmative defense to a charge of illegally transporting marijuana when done by individuals entitled to the protections of the CUA. (See H&S § 11362.765) In a footnote to this now moot California Supreme Court decision (pg. 92, fn. 7.), the Court noted that a consideration of the "the method, timing and distance of the transportation," as discussed in prior cases, remained a "useful analytic tool" in determining whether the transportation of marijuana is lawful. Defendant, nonetheless, argued that the MMP provided protection from arrest and prosecution so long as the marijuana transported was intended for medical use by a qualified patient. The Court disagreed, noting that the MMP in fact provides protection from arrest and prosecution for transporting marijuana only when the transportation of that marijuana is reasonably related to the use of that marijuana by a qualified patient. The CUA and the MMP were not intended to provide marijuana patients with an unfettered right to take their marijuana with them wherever they go, regardless of their current medical needs. "(N)othing in the law allows a user to store his entire marijuana supply in his car and transport it wherever he goes, just to appease his mother."

Note: *Thanks a lot, mom*. Just because you wouldn't let Wayman bring his dope (oops, sorry; medicine) in the house, he now has a felony conviction on his record. But aside from Wayman's problems, this case is important in giving us guidance as to when transporting marijuana around town is lawful, and when it is not. Good case.

***Residential Entries*:**

***Huff v. City of Burbank* (9th Cir. Jan. 11, 2011) 632 F.3rd 539**

Rule: A non-consensual, warrantless entry into a residence cannot be justified by an unsubstantiated rumor.

Facts: Burbank Police Officers responded to a high school to investigate a report by the principal concerning rumors that a student, Vincent Huff, had written a letter threatening to "shoot up" the school. Principal Sister Milner, concerned about the safety of her students, asked the officers to investigate. Several other students were interviewed, but the officers couldn't verify the existence of such a letter. Vincent hadn't been at school for two days. So they decided to go to Vincent's home where he lived with his parents, George and Maria. At the Huff residence, no one responded when the officers knocked at the door and announced their presence. The officers called the residence by telephone, but no one answered. They then called Maria's cell phone. Maria answered. Informed that the officers wished to talk to her and her son, she hung up on them. Two minutes later, Maria and Vincent came out on the front steps. When the officers told them that they were there investigating some threats at the school, Vincent responded; "*I can't believe you're here for that*." Maria was asked if they could go inside to talk, to which Maria responded; "No," not without a warrant. Asked if there were any guns in the home, Maria avoided the question and responded that she would get her husband. She then turned and went into the house. One of the officers followed her in. Vincent and a second officer also went inside. One of the officers testified to making entry into the

house out of concern for their safety. Two other officers entered the house after everyone else. The officers all remained in the living room as George entered the room and challenged their authority for being there. After a five to ten minute conversation in the living room, upon satisfying themselves that the rumors about shooting up the school were false, the officers all left. The Huffs thereafter sued the Burbank Police Department and the officers involved in federal court. The trial court found for the civil defendants after a two-day bench trial. The Plaintiff Huffs appealed.

Held: The Ninth Circuit Court of Appeal reversed. The issue on appeal was whether upon making the warrantless entry into the Huff's residence, the officers had probable cause and exigent circumstances. The Ninth Circuit ruled that they had neither and that the entry into the Huff residence was done in violation of the Fourth Amendment. Likening the officers' entry of the Huff home to an entry done for the purpose of conducting a warrantless search, the Court held that such an entry is lawful only when officers have "a reasonable belief that their entry is necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts." The Court interpreted this requirement as requiring "probable cause." But you can't justify probable cause on information that amounts to no more than an unsubstantiated rumor. Secondly, even if the officers had probable cause, there must also be "exigent circumstances" requiring an immediate entry. The exigent circumstances argued here by the civil defendants was for the safety of the officers or the occupants of the house. The civil defendants (i.e., officers) argued that, in addition to the rumor concerning Vincent possibly threatening to shoot up the school, the following facts were sufficient to warrant a finding of exigent circumstances: (1) The unusual behavior of the parents in not answering the door or the telephone; (2) Maria hanging up on the officers when they finally reached her on her cell phone; (3) Maria not inquiring about the reason for their visit or expressing concern that they were investigating her son; (4) Maria refusing to tell the officers whether there were any guns in the house; and (5) Maria running back into the house while being questioned about the possible presence of firearms. These facts, per the Court, amounted to no more than "speculation" on the part of the officers that their safety was in jeopardy. Lastly, the Court noted that although not argued by the civil defendants, the "emergency circumstances" theory also fails to justify a warrantless entry into the home. "Emergency circumstances," allowing for a warrantless entry into a residence, may be found when officers reasonably believe entry is necessary to protect or preserve life or avoid serious injury. "Probable cause" is not necessary. But the officers must have "some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched." In this case the Court found that there was "no objectively reasonable basis for concluding that there was an immediate need to protect others or themselves from serious harm." The entry of the house, therefore, was in violation of the Fourth Amendment, providing the Huffs with a cause of action for civil damages.

Note: This case is so screwy, and so wrong, that I almost didn't brief it. In justifying their belief that the entry into the house was illegal, the Court wanders through all sorts of irrelevant legal theories, using tests and factors applicable to searches. Although this

case involved a warrantless entry into a residence, it did not involve a search. Same constitutional amendment—the Fourth—but different problem altogether. This case involved officers trying to protect themselves while responding to a situation reportedly involving firearms. Although I don't have a case directly on point supporting my argument, it seems to me that if an officer can pat a person down for weapons based upon no more than a "reasonable suspicion," then they should be allowed to follow an uncooperative homeowner into the house under circumstances that would lead any reasonable officer to believe that she just might be intending to fetch a firearm. The United States Supreme Court has already rejected the Ninth Circuits attempts to fit potentially dangerous situations into neat little categories meant for searches. In ***Brigham City v. Stuart*** (2006) 547 U.S. 398, the High Court upheld a warrantless residential entry in a case involving "an objectively reasonable basis for believing" that someone may suffer serious injury if an immediate entry is not made. As for the dangerousness of the situation in the Huff case, the Court failed to mention Vincent's very telling remark; "*I can't believe you're here for that*." While this might very well be interpreted as Vincent's denial that he ever intended a threat, it also serves as validation for the argument that he did in fact say or write something that could be interpreted as a threat to shoot up his school. So were the officers, while responding to a report potentially involving firearms and a threatened school shooting, when confronted by some very uncooperative parents of the potential shooter, justifiably concerned for their own safety when the parent suddenly decided to disappear back into her house during an inquiry about weapons? In my humble opinion; *you betcha*!

***Jail Strip Searches*:**

Byrd v. Maricopa County Sherriff's Department et al. **(9Th Cir. Jan. 5, 2011) 629 F.3rd 1135**

Rule: A "cross-gender" strip search of a jail inmate, absent an emergency situation, is a Fourth Amendment constitutionally unreasonable search as a matter of law.

Facts: Charles Byrd, the plaintiff in this civil case, was a pretrial detainee in the Maricopa County Jail; a minimum security facility administered by the Maricopa County Sheriff's Department, in Arizona. Due to several fights and a suspicion of contraband in the jail, it was decided to conduct a surprise search of Byrd's housing unit. The Maricopa County Special Response Team, supplemented by some 25 to 30 cadets from the detention officer training academy, entered the jail to do the search. They brought four to six inmates at a time into a day room. Inmate Byrd was ordered to remove all his clothing except for his boxer shorts, which were made of very thin (pink) material. The cadets were assigned the task of searching the inmates with 10 to 15 training supervisors present. Kathleen O'Connell, a female detentions cadet, searched Byrd while male deputies stood by watching. In so doing, O'Connell had Byrd turn away from her, spread his feet, and raise his arms above her his head. Wearing rubber gloves, O'Connell then felt his waistband. She felt his outer thigh from his hip to the bottom of his shorts. She then felt his inner thigh, applying slight pressure, moving his penis and scrotum out of the way with the back of her hand as she did so. She did this to both sides. Through his

shorts, she also ran her hand up over his anus, separating his butt cheeks by applying slight pressure. This procedure took ten to twenty seconds (a full minute, per Byrd). After his inmate grievance was ignored, Byrd sued in federal court alleging, among other things, a violation of his Fourth Amendment right against unreasonable searches. In pretrial motions, the district (trial) court dismissed the bulk of the allegations against all the civil defendants except for Cadet O'Connell. And in O'Connell's case, the district court found that the search was not conducted in violation of the Fourth Amendment, limiting the jury's consideration to whether O'Connell had, as Byrd claimed, intentionally squeezed or kneaded his penis or scrotum, and whether the search was conducted for an actual identified security need. A jury found in the civil defendant's favor, including O'Connell, on these issues. Byrd appealed.

Held: And en banc panel (i.e., eleven justices) of the Ninth Circuit Court of Appeal, in a split 6-to-5 decision, reversed, finding that the trial court had improperly taken the Fourth Amendment search issue away from the jury. The jury should have been allowed to determine whether having a female detentions cadet conduct a "strip search" of a male inmate (i.e., a "cross-gender" search) was an unreasonable search under the Fourth Amendment. In evaluating this issue itself, the Ninth Circuit ruled that as a matter of law, such a cross-gender strip search is in fact a Fourth Amendment violation. In making this determination, the Court noted that four factors must be considered: (1) The scope of the particular intrusion; (2) the manner in which it is conducted; (3) the justification for initiating it; and (4) the place in which it is conducted. As for factors 3 and 4, the Court found in the civil defendant's favor, noting that the recent jail fights and suspicion of controlled substances in the jail justified the search. And the use of the day room, with other inmates present, making it difficult to conduct an abusive search, was a proper place to conduct the search. But as to the first factor—the scope of the search—the Court concluded that the search was constitutionally unreasonable. The Court first noted that despite the civil defendant's attempt to categorize the search as no more than a "frisk," when an inmate is required to strip down to his shorts only, particularly when those shorts are of no more than a thin material, the search is closer to a full "strip search" than to a frisk through an inmate's clothes. The case law from other jurisdictions, and even the Maricopa County's own "Contraband Policy," restricts "strip searches" to being conducted by someone of the same sex as the inmate, absent an emergency situation. While there was a justifiable reason for the search in this case, there was no emergency. And even respecting the jury's determination that Cadet O'Connell did not squeeze or knead Byrd's private parts, allowing her to even touch them with the back of her hand, through his shorts, was an unreasonable manner under these circumstances (i.e., a cross-gender search). With factors 1 and 2 outweighing 3 and 4, a cross-gender strip search, not under an emergency situation, is, as a matter of law, a Fourth Amendment violation.

Note: The dissent disagreed, obviously, as did the trial court and the original three-judge panel that heard this case. That's how close the issue is. Also, a "writ of certiorari" has been filed (but not yet granted) with the U.S. Supreme Court, so we may hear more on this before the issue is settled. But I thought that this ever-sensitive issue is one that needed discussion so that in the meantime, our jail authorities have some guidance.