The California Legal Update

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

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THIS EDITION'S WORDS OF WISDOM:

"*The coronavirus has turned us all into dogs. We roam the house all day looking for food. We're told 'No' if we get too close to strangers. And we get real excited about car rides.*" (Unknown)

IN THIS ISSUE:

ADMINISTRATIVE NOTES:

The Insanity Defense: The U.S. Supreme Court ruled last month that the U.S. Constitution's Due Process Clause does *not* require states to provide criminal defendants with an insanity defense to criminal liability. (***Kahler v. Kansas*** (Mar. 23, 2020) __U.S.__ [140 S.Ct. 1021; 206 L.Ed.2nd 312].) Under Kansas law (pursuant to a statutory amendment effective in 1995), defendants are precluded from arguing they were insane and unable to make moral judgments as an excuse for having committed a criminal act. Instead, Kansas law allows defendants to argue that due to a mental defect, they did not intend to commit the crime as an affirmative defense. One's mental issues may also be argued by a defendant at the time of sentencing as a factor in mitigation. But under Kansas law, insanity itself does not provide a criminal defendant with a complete defense to his or her criminal culpability.

In this ruling, the Supreme Court rejected the argument that the **Fifth Amendment's Due Process** protections require the acquittal of any defendant who is unable to tell the difference between right and wrong because of a mental defect of some sort. Kansas' legal theory, eliminating the commonly used defense of insanity, is constitutional, per the U.S. Supreme Court. California, of course, allows for an insanity defense, employing the so-called common law "***McNaghten Rule***" where a criminal defendant is entitled to an acquittal (i.e., "*not guilty by reason of insanity*") if he can prove that he was insane at the time of his or her crime. Per **P.C. § 25(b)**: "In any criminal proceeding, including any juvenile court proceeding, in which a plea of not guilty by reason of insanity is entered, this defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act *and* of distinguishing right from wrong at the time of the commission of the offense." (See also **CALCRIM 3450**.) Given California's current trend towards being soft on criminals, the state is not likely to take this form of exoneration away from criminal defendants anytime in the near future. But should the day ever come when California decides to delete the **McNaghten Rule** from its statutes, the U.S. Supreme Court says that we have that option.

Is Marijuana Addictive? As of today, eleven states and the District of Columbia have fully legalized the recreational use of marijuana; more modernly referred to as "*cannabis*." California, of course, is among those states. In addition to these 12, twenty-two other states have legalized the limited use of marijuana for medicinal purposes. *But is the use of marijuana addictive*? Most users of the substance would likely say "*no*." But despite a marijuana smoker's obviously biased opinion, there is in fact increasing evidence to the effect that marijuana is indeed addictive. Treatment specialists are estimating that as of today, one-in-ten users of marijuana (one-in-six for those who start before the age of 18) will become addicted, "meaning they continue to use compulsively even when it messes up their lives." Marijuana addiction even has a name: "*Cannabis*

Use Disorder." "Marijuana Anonymous" organizations, patterned after "Alcoholics Anonymous" but with their own 12-step program for getting unhooked, are springing up nationally as the use of the drug is becoming more and more popular. A number of war stories describing lives spiraling down into depression, lost jobs, broken families, and worsening financial issues, are summarized in a news article on the subject as published in the Rapid City Journal, dated March 28, 2020. ("*Think marijuana isn't addictive? Former users strongly disagree*" Google this title and you'll get numerous articles on the issue. And while you're at it, Google "*Marijuana and Brain Damage*.") But what do the experts think? An administrator (Michael Mahoney) at the Hazelden Betty Ford Treatment Center on Chicago's Near North Side, is quoted as saying: "People want to stop using and can't. They have to use in greater quantities to get the same effect or just have a feeling of normalcy. Along the way, problems emerge." Dr. Itai Danovitch, chair of the department of psychiatry at Cedars-Sinai in Los Angeles, and a member of the American Society of Addiction Medicine, tells us that the hallmarks of cannabis use disorder are similar to those of other addictions. Per Dr. Danovitch, a user becomes physically dependent on the drug, needing more to achieve the same effect.

At some point the user loses control over his or her consumption, continuing to use even after the person's use causes him or her to suffer adverse consequences. Those consequences, however, at least to the user, seem to be less pronounced with marijuana, leading him or her to overlook the drug's problematic properties. "People are able to function in a way that's very hard to do with other drugs of abuse," says Dr. Danovitch. "But they're not functioning at the peak of their own performance." Eventually, the user will get to the level of use where he or she will suffer withdrawal symptoms upon attempting to stop. But why am I telling you this? I don't know. I guess it's just because I've never been a big fan of legalizing yet another mind-numbing, reality-escaping, responsibility-avoiding, chemical substance. But legal it is; so I've quit crying about it (for the most part). But the next time that teenage juvenile delinquent wanna-be of yours (you know, the one with "*the attitude*") comes home past curfew, with the blank stare, glassy-eyed, and smelling of breath mints, you can tell him (or her) that while the choice is his (given the fact that you won't be able to stop him once he's crossed that line), just remember that when making that choice, he should prepare to lose control of yet another aspect of his life. *And prepare to get hooked*.

***The Coronavirus Pandemic*:** I've vowed to stay away from any comments about the current coronavirus pandemic; there already being more than enough stuff written about it. But someone sent me an interesting document from the John Hopkins University describing the nature of the coronavirus protein. The value in this short but informative document is that it best describes what kills the coronavirus, in what environments the coronavirus protein thrives, and where it does not. In effect, the article describes for you how to best protect yourself from letting it get into your body and making you sick. If you'd like a copy, let me know and I'll send it to you. Also, to check the status of the virus in the 50 states (with a link to the world), cut and paste the below into your browser. It's kept up to date by its authors even though there's no way to verify how accurate the numbers are, particularly from other countries.
https://www.worldometers.info/coronavirus/country/us/

CASE LAW:

***Traffic Stops*:**
Reasonable Suspicion vs. "Hunch":"

Kansas v. Glover **(Apr. 6, 2020) __ U.S. __ [__ S.Ct. __; __ L.Ed.2nd __; 2020 U.S. LEXIS 2178]**

Rule: Making a traffic stop on a vehicle based upon an officer's knowledge that the owner's driver's license has been revoked is legal, even if it is unknown for sure who is driving the vehicle, at least in the absence other information that negates the inference that the driver of that vehicle is its registered owner.

Facts: Douglas County Deputy Sheriff Mark Mehrer, in the State of Kansas, observed a 1995 Chevrolet 1500 pickup truck with Kansas plates, being driven on the public streets. Running a random radio check on the plates, Deputy Mehrer discovered that the vehicle was registered to a Charles Glover Jr. and that Mr. Glover's driver's license had been revoked. Assuming that it was Mr. Glover (i.e., defendant) who was driving the vehicle, but without making any attempts to verify this assumption, Deputy Mehrer made a traffic stop. No moving violations had been observed. The sole reason for the stop was the fact that the vehicle's owner had a revoked driver's license. As it turned out, it was in fact defendant/Glover who was driving. Charged in state court with driving as a "habitual violator," defendant filed a motion to suppress all information obtained as a result of the traffic stop, arguing that the deputy lacked sufficient reasonable suspicion to justify the stop. The above facts were entered into evidence by stipulation between the parties, with no one actually testifying (thus no additional evidence being presented). The trial court agreed with defendant and suppressed the evidence, thus dismissing the case. The State appealed to Kansas' intermediate appellate court, which reversed the trial court. Defendant's appeal to the Kansas Supreme Court resulted in another reversal, Kansas' High Court agreeing with the trial court that Deputy Mehrer's traffic stop was illegal. (*State v. Glover* (July 27, 2018) 308 Kan. 590, 422 P.3d 64.) The United States Supreme Court granted certiorari.

Held: The United State Supreme Court, in a split (8-to-1) decision, with two Justices writing an important concurring opinion (see Note, below), reversed the Kansas Supreme Court, finding the traffic stop to be lawful. The issue is simple: Is a traffic stop lawful when all an officer knows is that the owner of a vehicle observed being driven on a public roadway has had his driver's license revoked? In answering this question, the Supreme Court noted that the standard for such a traffic stop is but a mere "reasonable suspicion." Per the Court: "Although a mere 'hunch' does not create reasonable suspicion, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause." "The reasonable suspicion inquiry 'falls considerably short' of 51% accuracy." Such reasonable suspicion takes into account an officer's training and experience, as well as his "common sense," based upon the totality of all the officer's life's experiences.

Upon making the traffic stop in this case, Deputy Mehrer was fulfilling the State of Kansas' "vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles [and] that licensing, registration, and vehicle inspection requirements are being observed." In protecting this "vital interest," all Deputy Mehrer knew was that the owner of the Chevy pickup he observed on the road had had his driver's license revoked. Under Kansas law, one's license is not revoked unless he has previously committed some prior offense serious enough to demonstrate that that person has little regard for the law. Empirical studies have shown, and "common experience readily reveals," that drivers with a revoked license frequently continue to drive, thus posing safety risks to other motorists and pedestrians. To meet the necessary "reasonable suspicion" standard for making a lawful traffic stop, it is not necessary that the officer know for sure, or that he even have probable cause to believe, that it was defendant, with the revoked license, who was driving the vehicle.

The Court held that it was enough that the deputy "drew the commonsense inference that (defendant, as the registered owner) was likely the driver of the vehicle, which provided more than reasonable suspicion to initiate the stop." It is also to be noted, however, that the necessary reasonable suspicion includes an evaluation of the "totality of the circumstances." If Deputy Mehrer had had other information to the effect that it was not defendant himself who was driving the vehicle, then the necessary reasonable suspicion would not have existed, and the stop would have been illegal. But that was not the case here. Defendant, therefore, based solely on the fact that the vehicle was registered to him and the deputy's knowledge that his license had been revoked, was lawfully stopped.

Note: In the "concurring opinion" by two of the nine justices, the fact that additional information, if it existed, might have been enough to negate the deputy's reasonable suspicion was discussed. Examples cited include circumstances such as if it been observed, before the stop, that it was an obviously older man than defendant, or maybe a woman, driving. This would have clearly been enough to negate the deputy's reasonable suspicion. It might even be enough if there is more than one registered owner for that particular vehicle. More troublesome, however—taking a lot of the wind out of this case—is the fact defendant's license had been "revoked." If it had been noted before the stop that defendant's license was merely "suspended," instead of "revoked," would this fact have made a difference? With evidence that people with revoked licenses tend to disregard the fact that it is illegal for them to continue driving being a factor (the majority opinion citing studies to this effect), justifying the stop in this case, and with the concurring Justices noting that under Kansas law, a suspension (as opposed to a revocation) might mean no more than that defendant has failed to pay parking tickets, court fees, or even child support (all indicating that his problem might be simply that he doesn't have a lot of money), none of which necessarily shows a disrespect for Kansas' rules against unlicensed driving, then this factor alone might have been enough to convert the deputy's reasonable suspicion into nothing more than a mere unsupported "hunch."

I haven't researched California's laws concerning "suspensions" vs. "revocations." But assuming they are similar to Kansas' laws, then you'll be making case law if you attempt a traffic stop based upon no more information than the fact that the vehicle owner's license is suspended, as opposed to revoked. In such a case, however, it will help to justify your traffic stop if you make the effort before stopping the vehicle to (1) get a physical description of the

vehicle's owner, and (2) get a look at the driver to see if he or she is similar to that description. A similarity in description should be more than enough to give you the necessary reasonable suspicion, irrespective of whether the owner's license has been revoked or merely suspended.

***Vehicle Searches and the Legal Possession of Cannabis*:**
***Vehicle Searches and the Odor of Cannabis*:**
***Inevitable Discovery*:**

People v. Shumake **(Dec. 16, 2019) 45 Cal.App.5th Supp. 1**

Rule: Possession of a legal amount of marijuana (i.e., cannabis), stored in a vehicle as allowed under the law, does not, by itself, justify a search for more marijuana. The odor of fresh marijuana in a vehicle, by itself, not knowing how long that odor might linger, does not justify a search of the vehicle for the source of the odor. (But see "Note," below.)

Facts: Berkeley Police Officer Megan Jones was on "specialized DUI patrol" on September 1, 2017, at about 11:00 p.m., when she observed a vehicle without a front license plate. Recognizing this as a violation of V.C. § 5200, Officer Jones, an experienced and trained DUI expert (i.e., "800 DUI investigations, with about 500 involving marijuana"), lit up the vehicle. Defendant, as the driver of this car, immediately and safely pulled to the curb and stopped. Upon approaching the driver's side door, Officer Jones noticed a strong smell of marijuana—both fresh and "freshly burnt"—coming from the vehicle. Asked if he had any marijuana in the car, a cooperative defendant responded that he had "some bud" in the center console. Officer Jones was of the opinion that any cannabis transported within a vehicle had to be in a closed, heat-sealed package, and believed that if defendant's cannabis was sealed accordingly, she wouldn't be able to smell it. She had also been trained that the smell of marijuana may linger on clothes or car upholstery for a week or more after it is smoked. (But see "Note," below.)

Believing that defendant was in violation of V.C. § 23222(b)(1) (opened, unsealed container of cannabis in a vehicle), Officer Jones decided to search his car. After removing defendant (and a passenger) from the car, Officer Jones first searched the vehicle's center console, finding a plastic tube containing 1.14 grams (far less than the 28.5-gram legal limit) of marijuana bud, later described as "dried flower." Although the tube was closed, it could easily be opened by merely squeezing its sides, causing the top to pop open. Believing this to in fact be a violation of V.C. § 23222(b)(1), Officer Jones considered this as further probable cause to search the rest of the vehicle. In so doing, she found a loaded, illegally possessed, pistol under the driver's seat. (No more marijuana or paraphernalia was found.) After successfully completing a field sobriety test—showing that defendant was not DUI—defendant was arrested. He was charged in state court. (The charges were not specified in the opinion, but appear to have been for at least the illegal possession of the firearm, and possibly also a violation of V.C. § 23222(b)(1), for the opened container of cannabis in a vehicle.) Upon the denial of defendant's motion to suppress (and apparently after his conviction for one or more of the unspecified alleged offenses), defendant appealed to the Appellate Division of the Superior Court.

Held: The Appellate Division of the Superior Court of California, for Alameda County, reversed, finding the search of defendant's vehicle to be illegal. The current status of California's cannabis restrictions, as relevant here, is not in dispute:

> *V.C. § 23152(f)*: A person cannot lawfully drive under the influence of any drug, including marijuana.
>
> *H&S Code § 11362.3(a)(7) & (8)*: Neither a driver nor a passenger can smoke marijuana while in a moving vehicle.
>
> *H&S Code § 11362.3(a)(4)*: It is illegal to possess an open container of cannabis while driving. See also *V.C. § 23222(b)(1)*.
>
> *H&S Code § 11362.1(a)(1)*: A person over 21 years of age may possess and transport cannabis in an amount of not more than 28.5 grams.

With the Court noting that Officer Jones' credibility was not in issue, two justifications for the search of defendant's vehicle were offered by the People; i.e., (1) the open container of cannabis provided probable cause to search for more, and (2) the odor of marijuana emanating from defendant's car provided probable cause to search for more.

(1) *The Open Container of Cannabis*: Veh. Code § 23222(b)(1) makes it an infraction to possess, "while driving a motor vehicle upon a highway, . . . a receptacle containing any cannabis . . . which has been opened or has a seal broken, or loose cannabis flower not in a container . . . ." Defendant here admitted, when asked, that he had "some bud" (i.e., "cannabis flower") in the center console. Officer Jones testified that it was her understanding that unless cannabis, in any form, was in a "heat-sealed" container, it violated V.C. § 23222(b)(1). Officer Jones was wrong. Subdivisions (b)(1) and (2) of section 23222, by its terms, specifically exempts "*cannabis flower*" from the unopened container requirements applicable to other forms of cannabis, making it illegal only when the cannabis flower is not in a container at all; i.e., "*loose*." The cannabis flower defendant had in the console of his car was both under the maximum 28.5-gram limit *and*, because it was in a container, legal to possess in the car whether or not its container was sealed. H&S Code § 11362.1 specifically provides that "no conduct deemed lawful by this section shall constitute the basis for detention, search, or arrest." In that defendant was lawfully transporting his marijuana, having it in his car cannot provide the basis for the search of that car.

(2) The *Odor of Marijuana*: Using an "inevitable discovery" analysis, the People further argued that because the strong odor of both "fresh" and "freshly burnt" marijuana on its own provided the necessary probable cause to believe there might be more marijuana in defendant's car, irrespective of the legality of a search based upon the discovery of the tube of cannabis flower, the car would have been searched anyway, and defendant' gun would have "inevitably" been found. The problem with this argument, per the Court, is that smelling fresh or burnt marijuana—by the officer's own testimony—was not probable cause to believe that there might be more marijuana in the car. Specifically, Officer Jones testified that it was her opinion, based upon her training and experience, that the smell of marijuana may linger on clothes or car upholstery for a week or more after it is smoked. Absent the smell of marijuana, there were no other factors tending to indicate that there might be more marijuana somewhere in defendant's vehicle. (See *People v. Fews* (2018) 27 Cal.App.5th 553.) Assuming the officer to be correct in her opinion that a strong odor of marijuana may linger on for a week or more (but see below), then it is not reasonable to conclude (or at least that there is a "fair probability") that there might

be more marijuana in defendant's car at the time it was stopped and searched. Therefore, per the Court, the Officer did not have sufficient probable cause justifying the search of defendant's car for marijuana. The gun, having been discovered during that illegal search, should have been suppressed.

Note: I am told that Officer Jones' conclusion to the effect "that the smell of (fresh or burning) marijuana may linger on clothes or car upholstery for a week or more after it is smoked," is based upon some erroneous training she'd received. To the contrary, narcotics experts (including at least one person I consulted—whose identity shall remain anonymous—talking from personal, college-level experience) will tell you that there is a distinct difference between the odor of fresh or burning marijuana and its "*stale odor*," and that the difference becomes evident in a matter of hours; not days. There are in fact many case decisions describing the value of the fresh or burning odor of marijuana, sometimes without any corroborating evidence, in establishing the probable cause needed to justify a warrantless search of a vehicle. This case, therefore, is "*wrongly decided*," and should probably be ignored (except that competent defense counsel will likely latch onto this case like bees on honey). But in the Court's defense, its decision was based upon the officer's unchallenged misconception of the value of a strong—fresh or burning—odor of marijuana, emanating from defendant's vehicle. As an experienced officer, she perhaps should have been aware that the training she got was wrong. But that's a problem for someone else to resolve (and, as I am told, has been resolved).

***Border Searches*:**
***The Lawful "Scope" of a Border Search*:**
***Cellphone Searches at the Border*:**
***Brady v. Maryland*; *A Prosecutor's Duty to Provide Potentially Exonerating Evidence*:**

United States v. Cano **(9th Cir. Aug. 16, 2019) 934 F.3rd 1002**.

Rule: (1) Although a warrantless manual search of a cellphone at the U.S./Mexican border by border officials is lawful without individualized suspicion, a forensic examination of a cellphone requires a showing of a reasonable suspicion that it contains digital contraband. Only immigration officials may conduct warrantless border searches. Border searches are limited in scope, i.e.; to look for contraband (including "digital contraband") being smuggled over the border. (2) A prosecutor is not responsible for providing a defendant with potentially exonerating information held by another law enforcement agency absent having knowledge of, and access to, such information.

Facts: Defendant Miguel Cano—a U.S. citizen living in Tijuana, Mexico, and a carpet layer by trade—attempted to drive across the border at the San Ysidro Port of Entry into San Diego on July 25, 2016. A computer check by a Customs and Border Protection (CBP) agent showed that this was the sixth time defendant had come across the border recently, sometimes returning to Mexico within 30 minutes. Sent to the secondary inspection area, a drug-sniffing dog alerted on the spare tire in his trunk. Opening up the tire resulted in the discovery of 14 vacuum-sealed packages containing 14.03 kilograms (30.93 pounds) of cocaine. Defendant was arrested and his cellphone was seized. Agents Petonak and Medrano, from Homeland Security Investigations (HSI), were called to take over the investigation. Upon arriving, Agent Petonak "briefly" looked

at defendant's cellphone, manually reviewing it. In so doing, he noticed a "lengthy call log," but no text messages. The stated purpose for this initial search was "to find some brief investigative leads in the current case," and "to see if there's evidence of other things coming across the border." Waiving his *Miranda* rights and agreeing to talk, defendant denied any knowledge of the cocaine. He told Agent Petonak that he lived with his cousin, Jose Medina, in Tijuana, crossing the border frequently to look for work. On this particular day, he was headed to a carpet store in Chula Vista, but couldn't remember the name of the store or provide its address. Asked why there were no text messages in his phone, defendant claimed that his cousin had suggested that he delete them "just in case" he got pulled over in Mexico by the Mexican police, so as to avoid "any problems." As this questioning was going on, Agent Medrano conducted a second manual search of defendant's cellphone, browsing the call log (writing down some of the numbers), and photographing two new text messages that had arrived after defendant's arrest.

The first message stated "*Good morning*," and the second message stated; "*Primo, are you coming to the house*?" Using a software program called "Cellebrite," Agent Medrano conducted a "logical download" of the phone. (A Cellebrite search enables the user to access text messages, contacts, call logs, media, and application data on a cell phone and to select which types of data to download. It does not, however, allow the user to access data stored within third-party applications.) The Cellebrite results revealed that defendant had not sent any text messages. It also showed that none of the phone numbers in the call log corresponded to any carpeting stores in San Diego. Later, defendant's cellphone was subjected to a more thorough forensic search, resulting in the recovery of more incriminating evidence that was subsequently used against him at trial. Defendant, charged in federal court with illegally importing cocaine, filed a motion to suppress the information retrieved from his cellphone both during the initial search at the time of his arrest and from the later forensic search. The trial court denied defendant's motion and the matter proceeded to trial. At trial, defendant put on a "third party culpability" defense, claiming that it was Cousin Medina who put the cocaine into his spare tire. In support of this defense, defendant introduced evidence to the effect that Medina was a member of a Chicago-based gang called the Latin Kings, and that the Latin Kings gang, being involved with a Mexican cartel that trafficked drugs across the border, was known to smuggle cocaine into the United States. Defendant also put on evidence that Medina had both the means and the opportunity to put cocaine into defendant's car without his knowledge. Defendant was eventually convicted (a first jury having hung), and appealed.

Held: The Ninth Circuit Court of Appeal reversed.

(1) *The Searches of Defendant's Cellphone*: The primary issue on appeal was the legality of the warrantless searches of defendant's cellphone, both at the border and in a later forensic search. The legal standards are well established: For any search to be lawful, the search must be found to have been "*reasonable*" under the circumstances. The general rule, of course, is that for a government search to be reasonable, it must have been done through the use of a search warrant, supported by probable cause. "(S)earches conducted outside the judicial process, without prior approval by judge or magistrate (i.e., via a search warrant), are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." (*Katz v. United States* (1967) 389 U.S. 347, 357.) The "'specifically established and well-delineated exceptions' include exigent circumstances, searches incident to arrest, vehicle searches, and border searches." The search of defendant's cellphone in this case comes

within one of these recognized exceptions; i.e., a border search. But there are exceptions to each of these exceptions, including for a border search.

First, any search conducted under an exception must be within the scope of the exception. *Second*, some searches, even when conducted within the scope of the exception, may be so intrusive that they require additional justification, up to and including probable cause and a search warrant. (Citing *United States v. Montoya de Hernandez* (1985) 473 U.S. 531.) Every case must be decided on its own unique set of facts and circumstances. So where do cellphones come within all these exceptions? The United States Supreme Court in *Riley v. California* (2014) 573 U.S. 373, in a case involving the "*search incident to arrest*" exception to the warrant requirement, dictated the general rule that given the nature of today's cellphones (i.e.; "minicomputers that also happen to have the capacity to be used as a telephone."), they are to be accorded a higher expectation of privacy than other personal items that might be found on an arrestee's person. Therefore, as a general rule, a search warrant will be necessary in order to access cellphones. However, the Court here held that *Riley* does not apply to border searches. As a general rule, border searches do not require any particularized suspicion so long as they are "routine inspections and searches of individuals or conveyances seeking to cross our borders."

There are but two limitations to the rules for border searches. (1) "The authorizing statute (see 19 U.S.C. § 482) limits the persons who may legally conduct a 'border search' to 'persons authorized to board or search vessels.' This includes customs and immigration officials, but not general law enforcement officers such as FBI agents." Agents Petonak and Medrano, from Homeland Security Investigations, clearly fall into the category of law enforcement agents who may conduct border searches. (2) In discussing the "scope" issue, it is a rule that a border search must be conducted for the purpose of enforcing importation laws, and not for "general law enforcement purposes." On this issue, the Supreme Court has identified two principal purposes behind warrantless border searches; i.e., to identify "[t]ravellers . . . entitled to come in" and to verify their "belongings as effects which may be lawfully brought in." (*Carroll v. United States* (1925) 267 U.S. 132, 154.) Border inspections of a person's cellphone are allowed under the theory that cellphones may be used to smuggle in "digital contraband," a common example being child pornography. Differentiating the "border exception," applicable in this case, to a "search incident to arrest" as discussed in *Riley v. California*, the Court found the rule of *Riley* to be inapplicable to border searches. Given the government's strong interest in preventing the importation of illegal "digital contraband," the Court found that warrantless, suspicionless inspections (or searches) of a person's cellphone at the border to be lawful.

There are but two limitations to this rule. *First*, immigration officials may *not* go looking for evidence related to other crimes. Such searches are limited to insuring that illegal contraband (e.g., "digital data") is not then and there being brought across the border. *Secondly*, this does not justify a later, more intrusive, forensic search of a cellphone absent, at the very least, a reasonable suspicion to believe that the phone contains illegal digital data. As noted above, even if a warrantless search falls within one of the recognized exceptions to the search warrant requirement, a higher standard of proof, and maybe even a search warrant, may be required if the search in issue is overly intrusive. (*United States v. Montoya de Hernandez*, *supra*., a case where the suspect was subjected to a rectal examination and was detained for three days as immigration officials waited for some 88 balloons of cocaine to pass from her body.) The initial

search of defendant's cellphone at the border in this case was not overly intrusive. As such, no suspicion was required; anything observed at that point (i.e., both agents' initial inspection of defendant's cellphone) was admissible against defendant. But the later, more thorough forensic examination of defendant's cellphone was held to be more intrusive, to the extent that a *reasonable suspicion* that it contained evidence was required. Also, an issue not decided by the Court was whether the "Cellebrite" search, conducted by Agent Medrano, constituted a "forensic search." If it is, then an articulable reasonable suspicion was necessary for that search to be lawful as well. The Court here was unable to find any evidence in the record supporting a finding that the agents had a reasonable suspicion to believe that defendant's cellphone contained any evidence relevant to the issue of whether defendant was smuggling digital contraband in it. Per the Court, "the record does not give rise to any objectively reasonable suspicion that the digital data in the phone contained contraband." (But, see "Note," below.) As such, after rejecting the Government's argument that the agents acted in "good faith" (finding no case authority upon which the agents could have relied upon), defendant's conviction was reversed and the case was remanded to the trial court with instructions to suppress any evidence retrieved as a product of the forensic search of defendant's cellphone. And, should it be determined by the trial court that the Cellebrite search also constituted a "forensic search," to suppress that information as well. "Absent reasonable suspicion, the border search exception did not authorize the agents to conduct a warrantless forensic search of (defendant's) phone, and evidence obtained through a forensic search should be suppressed."

(2) *Brady v. Maryland*: In support of his "third party culpability" defense, alleging that his cousin, Jose Medina, was the true culprit, defendant filed a pre-trial motion for discovery of information allegedly in the possession of the DEA and FBI, arguing that such information (if it existed) would help him prove that Medina was a member of a Chicago-based gang called the Latin Kings, and that the Latin Kings, being involved with a Mexican cartel that trafficked drugs across the border, were known to smuggle cocaine into the United States. Adding some credence to this argument was the fact that despite being offered immunity in exchange for this testimony in this case, Medina later contacted the government on his own and offered to help them with the "biggest RICO case" and "drug seizures of 20 to 25 kilograms at a time." The U.S. Supreme Court, in *Brady v. Maryland* (1963) 373 U.S. 83, dictated that the prosecution in any criminal case has a legal duty imposed by the Due Process Clause, to produce "evidence favorable to an accused upon request . . . where the evidence is material either to guilt or to punishment." (*Id*., at p. 87.) Similarly, the Federal Rules of Criminal Procedure, Rule 16, dictates that the government must, upon request, turn over any documents "within the government's possession, custody, or control" that are "material to preparing the defense." (Fed. Rules of Crim. Pro. 16(a)(1)(E)(i))

Pursuant to subsequent case law, the "individual prosecutor has a duty to learn of any favorable evidence known to [those] acting on the government's behalf" (*Youngblood v. West Virginia* (2006) 547 U.S. 867.) In an effort to comply with this obligation, the Prosecution in this case requested information from the Drug Enforcement Administration (DEA) and the Federal Bureau of Investigation (FBI) in compliance with defendant's request. Both agencies politely declined to cooperate. On appeal, defendant argued that the failure of the prosecution to secure this information for him violated his due process rights. The Ninth Circuit, however, disagreed. The general rule is that "(d)ocuments held by another executive branch agency are deemed to be 'in the possession of the government' if the prosecutor has 'knowledge of and access to' the

documents." This issue here was whether any material held by the DEA and/or FBI should be deemed "within the government's possession." In answering this question, the Court was unable to find any evidence that the prosecution had knowledge or possession of evidence showing that Medina or the Latin Kings were involved in drug trafficking at the Mexico-California border. Also, it must be shown that the prosecution had "*both knowledge of and access to*" the documents sought by the defendant. The Court here found that the prosecution had neither. To the contrary, Agent Petonak ran Medina's name through two different law enforcement clearinghouses—in which both the FBI and DEA both participate—and neither search returned any hits. (A police "clearinghouse" works for the purpose of "deconfliction" by notifying an agency if another agency has an investigation pending against the same person or item. Both the DEA and FBI participate in the two clearinghouses searched by Agent Petonak. Fn. 2.) Based upon this, the Government was not shown to have violated defendant's *Brady*/Rule 16 due process rights.

Note: If all this is confusing to you (as well it might be), just know that an initial cellphone search at the border is lawful even without a warrant or any reasonable suspicion (let alone probable cause) that it contains incriminating evidence. (Note, however, that the U.S. Supreme Court has yet to decide whether they agree with the Ninth Circuit; that *Riley v. California* does not govern the searches of cellphones at the border.) Follow-up "forensic" searches, however, do require a reasonable suspicion, but still no warrant. Also, only immigration officials may conduct border searches, and even then they are limited to searching for illegal items being smuggled across the border. That's all this case really says. What the Court fails to discuss, however, is how they reached the conclusion that there was no evidence supporting a belief that the agents had a reasonable suspicion to believe that defendant's cellphone contained incriminating "digital contraband."

One might disagree, noting that with defendant being caught smuggling dope over the border, and with a history of frequent crossings under suspicious circumstances, plus all his text messages having been deleted as if he had something to hide, there did in fact appear to be a reasonable suspicion that incriminating evidence existed elsewhere in his phone. As for the *Brady* issue, I'm actually surprised that the Court let the Government off so easy. Typically, law enforcement, for purpose of a *Brady* motion, is considered to be a part of the "*prosecution team*," holding everyone responsible for not turning over to the defense potentially exonerating information. What appears to save the prosecutor's bacon here is the fact that it did not appear that either the DEA or the FBI had any information on Cousin Medina's participation with the Latin Kings or any Mexican drug cartels in drug smuggling. Just don't expect this case to authorize any police agency, whether or not directly involved in a particular prosecution, to keep hidden in their files relevant *Brady* information. We don't usually get away with that argument. (E.g., see *People v. Zambrano* (2007) 41 Cal.4th 1082, 1132; The duty of disclosure "is not limited to evidence the prosecutor's office itself actually knows of or possesses, but includes 'evidence known to the others acting on the government's behalf in the case, including the police.'")