# The California Legal Update

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

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**Robert C. Phillips** (858) 395-0302
**Deputy District Attorney (Retired)** RCPhill101@goldenwest.net

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www.sdsheriff.net/legalupdates



- **THIS EDITION'S WORDS OF WISDOM:**

"*Honestly, I don't even play an active role in my life anymore. Things just happen, and I'm like*: '*Oh, is this what we're doing now? Okay.*'" (Unknown)

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**ADMINISTRATIVE NOTES:**

***Sealing Search Warrants*:** The California Supreme Court held some 25 years ago that in limited circumstances, a court is empowered to seal a search warrant and/or any attached affidavits pending later court hearings. (See *People v. Hobbs* (1994) 7 Cal.4th 948.) The net effect is to prevent the public in general, and a targeted defendant in particular, from viewing the contents of the search warrant or affidavit at issue. The purpose of such a sealing is to allow law enforcement to prevent having to reveal sensitive information such as (but not necessarily limited to) an informant's identity which is sometimes necessary to insure the informant's safety or to preserve the integrity of an on-going investigation. Being an exception to the general rule that search warrants—once executed—are public records (P.C. § 1534(a)), sealing a warrant requires the magistrate's approval.

"*Hobbs* warrants," as they are commonly labeled, are not always favorably looked upon by the courts. In *People v. Theilen* (1998) 64 Cal.App.4th 326 (depublished), the author of the opinion criticized the procedure and argued that U.S. Supreme Court authority (*Waller v. Georgia* (1984) 467 U.S. 39, discussing the closure of a suppression hearing to the public) requires the prosecution to demonstrate an "*overriding interest*" and potential prejudice unless the warrant is sealed. More recently, the California Supreme Court has ordered Gov. Gavin Newsom to justify the sealing of his clemency requests for six twice-convicted felons, telling him that the public has a right to know his reasons absent an "*overriding interest*" in keeping his requests sealed. (Los Angeles Daily Journal: "*Newsom must redo sealed clemency requests*," May 28, 2019.) Despite this, various law enforcement agencies periodically get into the habit of asking to seal warrants on a reoccurring basis, and without always showing an "overriding interest" for doing so. Under the theory that "bad facts make for bad case law," it is strongly suggested that officers not request a warrant and/or affidavit to be sealed unless it is really necessary. Defendants have a substantial "due process" right to know the basis for the People's case against them, and cannot legally be deprived of that right without sufficient justification; i.e., an "*overriding interest*." While there is not yet any case law on what (and under what circumstances) sanctions might be imposed for unnecessarily sealing a warrant, you don't want that case when it does come to be yours.

***Marijuana In Prison or Jail*:** The Third District Court of Appeal held in *People v. Raybon* (June 11, 2019) __ Cal.App.5th __ [2019 Cal.App. LEXIS 532] (Sacramento County), that upon enactment of H&S § 11362.1, legalizing the possession of recreational marijuana by persons 21 years of age and older, those who get to enjoy such possession necessarily includes prison inmates. In enacting Proposition 64, passed in 2016, the voters amended Pen. Code, § 4573.6, eliminating criminal sanctions for possession of less than an ounce of marijuana by prison and jail inmates, while at the same time retaining criminal sanctions for possessing more than an ounce or for smoking or ingesting it. Per the Court, by expressly providing that laws pertaining to smoking and ingesting cannabis in prison and jail are not affected by the decriminalization of possession of less than an ounce of cannabis, the drafters and voters demonstrated they were aware of the prison population and chose to distinguish possession from consumption. This case also creates a split of opinion on this issue in that the First

District Court of Appeal (div. 2) held on March 1st of this year to the contrary. In *People v. Perry* (2019) 32 Cal.App.5th 885 (Solano County), it was specifically held that "Proposition 64 *did not* remove possession of marijuana in prison from the reach of P.C. § 4573.6 (Possession of a Controlled Substance in Prison), the statute under which [defendant] was convicted." (Italics added) Sounds like an issue that needs to be resolved by the California Supreme Court.

***Fifth Amendment Double Jeopardy*:** It's a long-standing rule that the Double Jeopardy Clause of the Fifth Amendment does *not* prevent separate jurisdictions (i.e., federal and state) from prosecuting a defendant for the same offense that is in violation of the laws of both jurisdictions. (See, for instance, *Abbate v. United States* (1959) 359 U.S. 187.) The continuing validity of this "*dual-sovereignty exception*" to the Double Jeopardy rule was just reaffirmed by the U.S. Supreme Court in a seven-to-two decision in *Gamble v. United States* (June 17, 2019) __ U.S. __ [2019 U.S. LEXIS 4173; 2019 WL 2493923]. Defendant Gamble pled guilty in Alabama to a state violation of possessing a firearm as a felon. Apparently unsatisfied, the feds followed up Gamble's state conviction by indicting him with the federal version of the same offense. Gamble complained that the Double Jeopardy Clause should prevent the U.S. Government from also prosecuting him for the possession of the same gun under the same circumstances. The Supreme Court ruled against him, holding that a crime under one sovereign's laws is not "the same offense" as a crime under the laws of another sovereign, and under the dual-sovereignty doctrine, both jurisdictions get a shot at him.

The U.S. Supreme Court in *Gamble* thus declined to overrule this long-standing interpretation of the Double Jeopardy Clause. But note that that being said, the defendant-friendly California Legislature doesn't like that rule, at least where the federal government takes its shot at the defendant first, so they legislated it away. The rule in California is that although the federal government can prosecute someone already prosecuted in California's Courts (whether convicted or acquitted; *Can you say* "*Rodney King*?"), California is prevented by statute from prosecuting someone already tried in federal court. Under Penal Code §§ 654 & 1023, an offense already prosecuted by another entity (e.g., federally) is *not* also punishable under California state law. (See *People v. Tideman* (1962) 57 Cal.2nd 574, for a discussion on double jeopardy principles as interpreted under California law.)

**CASE LAW:**

***Collection of DNA Samples from Felony Arrestees, per P.C. § 496(a)(2)(C)*:**
***Fruit of the Poisonous Tree and Attenuation of the Taint*:**

***People v. Marquez*** **(Jan. 15, 2019) 31 Cal.App.5th 402**

**Rule:** The warrantless collection of a DNA sample pursuant to a serious felony arrest is lawful. Evidence will not be suppressed under the Fruit of the Poisonous Tree Doctrine where the illegal taking of DNA is attenuated from a "cold hit" two years later when there are intervening circumstances and no evidence of purposeful or flagrant official misconduct.

**Facts:** Defendant was arrested on a felony drug possession charge (H&S § 11350) on September 29, 2006. Four days after this arrest, on October 3, the authorities collected a DNA sample from him, entering his DNA profile into a statewide database. This arrest, however, did not lead to a prosecution for reasons that were unexplained in the record, and charges were dropped. Subsequent to this arrest, between September, 2007, and October, 2008, defendant was convicted of a different offense for drug possession (again, H&S § 11350), and, on separate occasions, admitted to two probation violations. After each of three court hearing, defendant was ordered to submit a DNA sample. However, this was never accomplished for the apparent reason that the Attorney General has instructed law enforcement not to collect duplicate DNA samples when one such sample is already in the system. On August 5, 2008, defendant (still on probation and with a Fourth wavier) robbed a bank in Laguna Hills, simulating a weapon by warning the bank teller that he was armed. In the process of resisting the two bank employees' attempt to stop him from fleeing, he dropped a CD organizer he was carrying and a pair of glasses. DNA was retrieved from these items, leading to defendant being identified as a "candidate match" through the DNA that was still on file from his 2006 arrest. In 2012, defendant was contacted and voluntarily provided a new DNA sample. This DNA matched the DNA retrieved from the items dropped at the 2008 bank robbery. Charged with robbery in state court, with various prior convictions alleged, defendant's motion to suppress was denied. Convicted of all charges, he was sentenced to 25 years to life in prison plus 15 more years for the priors. Defendant appealed.

**Held:** Except to remand for resentencing due to a change in the law concerning a trial court's discretion to strike prior conviction allegations, the Fourth District Court of Appeal (Div. 3) affirmed. On appeal, defendant argued that the DNA sample he provided in 2006, which led to him being identified as the robbery suspect, had been obtained illegally, and that under the fruit of the poisonous tree doctrine, his subsequent DNA match should have been suppressed.

(1) *DNA Collection*: Since defendant's case, two important cases on the issue of DNA collection have been decided; *Maryland v. King* (2013) 569 U.S. 435, out of the U.S. Supreme Court, and *People v. Buza* (2018) 4 Cal.5th 658, from California's Supreme Court. In *King*, it was decided that following an arrest supported by probable cause for any "serious offense," the collection of an arrestee's DNA by taking a cheek swab during a routine booking procedure, although constituting a "search," is a lawful exception to the warrant requirement. It is irrelevant that the arrestee had not yet been convicted, or even formally charged (i.e., filed on in court). *Buza* similarly upheld the constitutionality of P.C. § 296(a)(2)(C), which provides for the collection of a DNA sample from anyone lawfully (i.e., with "probable cause") arrested—again without the necessity of a court hearing upholding the arrest—for "any felony offense." The arrest at issue in this new case was for a felony charge of possession of a controlled substance, per H&S § 11350. (H&S § 11350 was a felony offense at the time, and probably qualified as a "serious offense." See "Note," below.) On its face, the collection of defendant's DNA appears to be lawful under the principles espoused in *King* and *Buza*. However, the Court ruled that the People in the instant case failed to prove that defendant's 2006 arrest was with probable cause in that the circumstances of defendant's arrest are not shown in any court record, and defendant was never charged in court after this arrest. The record also failed to show that the 2006 DNA collection was accomplished pursuant to this arrest (defendant's DNA being collected some four days after his arrest). Because the record fails to show that defendant's 2006 sample was collected

pursuant to a lawful arrest, it has to be assumed that it was done so in violation of the Fourth Amendment.

(2) *Fruit of the Poisonous Tree and Attenuation of the Taint*: This, however, does not mean that the subsequent identification of defendant as the robber through the use of the illegally collected DNA must be suppressed. A recognized exception to the "fruit of the poisonous tree" doctrine is when the taint is so far attenuated from the eventual use of the evidence that suppression of the result can no longer be said to deter governmental misconduct. The whole purpose of exclusionary rule was to prevent law enforcement from having any incentive to violate the Constitution. When that goal is no longer being served, there is no purpose in suppressing the evidence. In determining whether the "attenuation doctrine" applies, the courts are to consider three factors. First, courts are to consider the "temporal proximity" (i.e., closeness in time) between the unconstitutional conduct and the later discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search; i.e., did a "substantial time" pass between the illegal search and its later use. Second, courts are to consider the presence of intervening circumstances. And third, courts are to examine "the purpose and flagrancy of the official misconduct." In this case, the Court found the two years between the illegal collection of defendant's DNA and its "cold hit" to be a substantial amount of time. There were also intervening circumstances in the form of three arrests and defendant's probationary status with corresponding court orders to provide DNA samples; something that was never accomplished arguably because it was believed that defendant's DNA was already in the system. Lastly, as to the "flagrancy" of the police conduct, even though the police were not statutorily authorized to collect defendant's DNA in 2006, there is nothing to indicate that they acted with an improper motive or that they somehow obtained the DNA sample in an inappropriate manner.

*Conclusion*: In sum, the Court concluded that there was a substantial time break, as well as intervening circumstances and a lack of evidence concerning flagrant official misconduct. Therefore, the DNA evidence lawfully collected from Marquez in Orange County in 2012 was held to be sufficiently attenuated from the DNA evidence unlawfully collected in 2006. Thus, the trial court properly denied defendant's motion to suppress evidence.

**Note:** The U.S. Supreme Court in *Maryland v. King* says that to be lawful, the warrantless collection of a DNA sample from an arrestee, done even before any judicial hearings, the offense must be a "serious" one. The State of Maryland apparently has a statutory list of what they consider to be "serious crimes." (See Md. Code Ann., Crim. Law § 14-101 (2012)) King was arrested for rape, which (not surprisingly) is listed in their statutes as "serious." The California Supreme Court in *People v. Buza* upheld the constitutionality of P.C. § 296(a)(2)(C) which allows a warrantless collection of DNA from anyone arrested for *any* felony offense, again upon their arrest and before any court hearings. Buza's crime was arson, which is certainly also serious. Defendant Marquez in this new case was arrested for personal possession of a controlled substance, per H&S § 11350, which was a felony offense at the time. It was not decided in *Buza*, however, whether P.C. § 296(a)(2)(C) can constitutionally allow for DNA collection in a felony offense situation where the felony is *not* considered to be serious, leaving this issue "for another day." (4 Cal.5th at pp. 681, 693.) The Court in *People v. Marquez* (at p. 537) suggests that the difference between "serious" and "non-serious" is whether or the offense

arrested for is "jailable" (citing *People v. Thompson* (2006) 38 Cal.4th 811, 824.), a definition that is no doubt broader than Maryland's statutory list, and of questionable validity when you consider that California statutes do not authorize the automatic collection of DNA in misdemeanor situations, jailable or not.

In other words, we do not yet know whether P.C. § 296(a)(2)(C) is constitutional when used to justify the warrantless taking of a DNA sample from an arrestee where the felony offense involved is not considered to be "serious," however this term is to be defined. The California Legislature certainly doesn't consider one's possession of a personal amount of dope, per H&S § 11350, to be serious, having reduced it to a misdemeanor offense. I mean, who really cares if someone—a person who at one time was presumably a respectable and productive human being—chooses to destroy their own lives as well as the lives of those who loved and cared for them, by pumping a foreign, mind-altering, body-destroying substance into their arm, only to become a useless, homeless, mentally unstable, non-productive drag on society, dropping his or her dirty needles on our streets and turning our cities into defecation infested, disease ridden, third world trash dumps? But I digress. Back to the point: Until some court tells us that section 296(a)(2)(C) is too broad to be constitutional and/or cannot legally include non-serious felonies, my suggestion is that we continue to use it to collect DNA samples from all felony (serious or not) arrestees.

***DUI Boat Drivers, per Har. & Nav. Code § 655(b)*:**
***Mandatory Advisal Requirements for Persons Arrested for DUI Boat*:**

***People v. Gutierrez*** **(Feb. 14, 2019) 33 Cal.App.5th Supp. 11**

**Rule:** Boat drivers arrested for DUI are not required to submit to any chemical testing of their blood/alcohol level, and must be so advised.

**Facts:** Yolo County Sheriff's Sergeant Sam Machado stopped a boat below the Broderick Boat Ramp for a speed-related violation of the Harbors and Navigation Code. Upon doing so, Sgt. Machado observed indications that the occupants had been drinking; e.g.. open containers of alcohol as well as the odor of alcohol. Defendant, who had been driving the boat, had red and watery eyes. Upon failing a variety of field sobriety tests administered by Sgt. Machado and Deputy Harbaugh, and after twice refusing to submit to a preliminary alcohol screening (PAS) test, defendant was arrested for a "boating while under the influence" of alcohol; Har. & Nav. Code § 655(b). Upon arresting defendant, Deputy Harbaugh advised him that he had "a choice of a blood or breath test." Defendant was *not* advised that he had the right to refuse to submit to either test. Faced with these two options, defendant chose to submit to a blood test. Deputy Harbraugh testified that it was department policy to require submission to either test. A blood sample was soon after obtained by medical staff (the results of which were not reported in the decision). Charged in state court with a violation of Har. & Nav. Code § 655(b), defendant filed a motion to suppress his blood/alcohol results. The trial court found that his consent to submit to a blood test was voluntary, and denied the motion. Defendant appealed this ruling to the Appellate Department of the Yolo County Superior Court.

**Held:** The Appellate Department of the Yolo County Superior Court reversed. The issue on appeal was whether defendant's consent to the blood draw was voluntary under the totality of the circumstances. Causing someone to submit to a blood test is a Fourth Amendment search. The Fourth Amendment requires that for any search, a search warrant must first be obtained, absent a recognized exception. Consent, of course, is a recognized exception to the warrant requirement. But such a consent must be freely and voluntarily given. Where the prosecution relies on consent to justify a warrantless search or seizure, it bears "the 'burden of proving that the defendant's manifestation of consent was the product of his free will and not a mere submission to a claim of lawful authority.'" (*Florida v. Royer* (1983) 460 U.S. 491, 497.) Whether or not a person has voluntarily given his consent is a question of fact which depends upon an evaluation of the totality of the circumstances. The issue is how a reasonable person under the circumstances would have understood the exchange between the officer and the person providing the consent.

California has an "implied consent statute" (V.C. § 23612) for drivers of motor vehicles which, it has been held, is to be included in a determination of the voluntariness of a DUI driver's consent to submit to a blood test. However, this statute only applies to "those who drive" a motor vehicle; i.e., "those who avail themselves of the public streets, roads, and highways to operate motor vehicles in this state." (*Troppman v. Valverde* (2007) 40 Cal.4$^{th}$ 1121, 1139.) There is no such implied consent statute for DUI boat drivers. To the contrary, Har. & Nav. Code § 655.1(b)(2)(B) specifically provides that someone arrested for driving a boat while under the influence "has a right to refuse chemical testing" of his blood or breath. Subd. (b)(2) also mandates that the arrestee be advised of this fact. Defendant here was never so advised. He was merely told that he had a choice of a blood or breath test. Under these circumstances, it is clear that defendant's consent to a blood test was no more than his mere submission to the officers' admonition to him that he had to submit to one or the other; a blood or breath test, and as such, was not voluntary. The trial court erred in failing to suppress the results of defendant's blood test.

**Note:** I can't say that I've ever really given a lot of thought to the fact the advisal rules for DUI boat drivers (the section actually covers the operation of "any vessel or manipulat(ion of) water skis, an aquaplane, or a similar device" ) are different than those for DUI motor vehicle drivers. I have to assume that the Yolo County Sheriff's Deputies involved in this case were similarly unaware that when arresting someone for DUI while driving such a vessel, etc., the rules are different. Hopefully, it is not really the Yolo County Sheriff's policy to do what the deputies did here, as claimed by Deputy Harbraugh in his in-court testimony. Specifically, per Har. & Nav. Code § 655.1(b)(2), a person arrested for DUI while operating a mechanically propelled vessel or manipulating any water skis, aquaplane, or similar device, must be advised of the following (paraphrased):

> (A) A criminal complaint may be filed against him . . . .
> (B) He or she has a right to refuse chemical testing.
> (C) An officer has the authority to seek a search warrant compelling the arrested person to submit a blood sample (per P.C. § 1524(a)(16).)
> (D) He or she does not have the right to have an attorney present before stating whether he or she will submit to the chemical testing, before deciding which chemical test or tests to take, or during the administration of the chemical test or tests chosen.

Defendant here was not told about any of this. Note also that per subd. (c), he must also be told that he has a choice between a blood or breath test if he chooses to submit to anything. This defendant was in fact so advised although as worded, it was never conveyed to him that he could refuse either without penalty. And then, per subd. (d), when a person is arrested for driving a boat when under the influence of a drug, he must also be advised that a test of his urine is available to him. Per subd. (e), an officer with "reasonable cause to believe" (i.e., "probable cause") that drugs are involved, may "request" that he submit to a urine test. But in no case may the arrestee be led to believe that he has no choice in whether to submit to any kind of testing. If he is, then his "consent" will inevitably be held to be involuntary, as it was in this case. If a boat-DUI suspect refuses, the officer must seek a warrant or be ready to explain why exigent circumstances justify a warrantless blood test.

***Search Warrants and Probable Cause*:**
***Search Warrants and Good Faith*:**

***United States v. Elmore*** **(9th Cir. Mar. 4, 2019) 917 F.3rd 1068**

**Rule:** A defendant having a motive to commit a crime, without any other evidence of his opportunity to do so, is insufficient, standing alone, to establish probable cause to believe that he did in fact commit the crime. Generally, an officer may rely upon a Superior Court magistrate's determination of probable cause to support the issuance and execution of a search warrant, absent a recognized exception. A recognized exception is when a warrant affidavit is so lacking in indicia of probable cause that an officer cannot reasonable rely upon the validity of the warrant.

**Facts:** At about 2:00 a.m. on June 4, 2012, Calvin Sneed was executed by a gunshot to the head by unknown persons in the area of Meade and Le Conte Avenues in the City of San Francisco. Responding police found a distraught L.G., Sneed's under-aged girlfriend, standing next to the car in which Sneed was seated. When interviewed, L.G. told investigators that she'd met Sneed in Los Angeles where, eight months earlier, she had moved in order to get a "fresh start." While in Los Angeles, L.G. lived with her older brother, Antonio Gilton, the defendant in this case. (Reginald Elmore, listed as the defendant in the case citation, is but one of ten defendants other than Antonio Gilton in this case, none of whom were involved in the issues discussed here.) Sneed was actually a pimp, and began pimping L.G. off as well; a fact that didn't sit well with the Gilton family including her parents who still lived in San Francisco. On May 31st, Sneed drove L.G. back to San Francisco and dropped her off at her parent's home.

By June 3rd, L.G. was already arguing with her parents about returning to L.A. with Sneed. After one such argument, L.G. texted Sneed to come and pick her up. Her mother did not want her to go. Her father—Barry Gilton—merely told her; "you grown," and instructed her to "turn the lights off" before she left. L.G. was waiting for Sneed outside her parents' home when she noticed a silver SUV parked nearby with its lights on. The SUV drove off as Sneed drove past

where L.G. was standing. The SUV quickly returned, however, accelerating towards Sneed's car. LG. heard gunshots and saw a muzzle flash from the SUV. Rushing to Sneed's car, L.G. found him "slumped in the driver's seat with a gunshot wound to the head." Sneed died from his wounds. L.G. was cooperative during the subsequent investigation, allowing police to search her cellphone. During the search, the investigators identified, as confirmed by L.G., cellphone numbers for her father, her mother, defendant (Antonio Gilton), and L.G.'s younger brother. Later that day, the police received confidential information implicating L.G.'s father, Barry Gilton, and a second unidentified individual in the murder.

Video surveillance from a camera near the site of the murder showed a light colored mid-size SUV believed to be the vehicle used in the shooting. Barry Gilton was interviewed. He claimed to have been home in bed at the time of the murder. Upon making an exigent circumstance request to T-Mobile for historical cell-site location information (CSLI) for the night of the murder, however, it was determined that Barry Gilton's cellphone had traveled from near his home to somewhere called the Western Addition, returning to the vicinity of the Gilton home around the time of the murder, and then out again to the northern area of the Mission after the shooting. Defendant was also believed to be a suspect, but proof that he was in the San Francisco area at the time of the shooting was lacking. So based on all the information set forth above, a San Francisco P.D. investigator wrote up a 14-page affidavit for a state search warrant, seeking CSLI data for two cellphones; i.e., a number associated with an unknown individual and the phone associated with defendant. In the affidavit, the investigator laid out in some detail what was known about the crime, Sneed's relationship with L.G., and the information learned from the confidential informant.

The investigator also described L.G.'s relationship to defendant (i.e., her brother), that she had been staying with him in Los Angeles where she first met Sneed and thereafter became engaged in prostitution, that defendant's cellphone number was in her cellphone, and that the murder was likely committed by a family member or members (e.g., her father and brother; i.e., Barry Gilton and defendant, respectively). The investigator concluded in the affidavit, that "there appear[ed] to be probable cause to believe that the cell phone numbers provided [would] tend to show . . . possible first-hand knowledge of those persons responsible for the shooting of . . . Calvin Sneed" and that "the cell-site tower locations used on the date and times listed could possibly lead to the proper identity and the whereabouts of additional persons associated with this crime." It was also stated in the affidavit that the affiant/investigator had "discussed the merits of the case with the District Attorney's Office."

A Superior Court judge issued the warrant based upon the above on June 6th, identifying three categories of information to be seized: (1) subscriber and billing information; (2) all incoming and outgoing calls and text messages from the period of May 1, 2012, to June 6, 2012; and (3) cell-site location information (CSLI). Only the third category—the CSLI data—was at issue in this appeal. Defendant (and 10 other defendants, including Barry Gilton and Reginald Elmore, none of whom are at issue in this decision) were all indicted for murder and other related counts

by a federal grand jury. Defendant filed a motion to suppress the CSLI obtained by the San Francisco police pursuant to the search warrant, which was granted by the federal district court judge. In the motion, the judge ruled that the warrant failed to establish the necessary probable cause to support the issuance of the warrant for the CSLI as it related to defendant, and that the officers' "good faith" did not save it. The Government appealed.

**Held:** The Ninth Circuit Court of Appeal, in a split 2-to-1 decision, reversed, the entire appellate panel holding that there was insufficient probable cause in the warrant affidavit to connect defendant to the crime, but with two of the justices ruling that, contrary to the trial court's decision, the officers' good faith in executing the warrant was sufficient to uphold the admissibility of the resulting evidence.

(1) *Probable Cause in a Search Warrant Affidavit*: The United States Supreme Court has recently held (overruling prior precedent) that a search warrant is generally needed to obtain cell site locator information (CSLI). (*Carpenter v. United States* (June 22, 2018) 138 S.Ct. 2206.) The San Francisco P.D. investigator attempted to comply with this mandate. Specifically, the investigator sought and obtained a warrant to get subscriber and billing information, incoming and outgoing calls, incoming and outgoing texts, and CSLI information for phones belonging to defendant (L.G.'s brother) and a second, unidentified person. Defendant argued that there was insufficient probable cause described in the affidavit to justify the obtaining of the CSLI information as it related to him. The federal district court judge agreed, as did the Ninth Circuit. While the investigator in his warrant alleged that there was a Gilton-family conspiracy to murder Calvin Sneed, who they blamed for dragging their daughter and sister, respectively, into becoming a prostitute, there was little if anything to tie defendant into this alleged conspiracy. The affidavit mentions defendant only three times: (1) L.G. "was staying with her elder brother in L.A.," (2) one of the phone numbers discovered in L.G.'s phone belonged to defendant, and (3) L.G. identified which number in her phone belonged to defendant. What was lacking was any proof that defendant was even in or around San Francisco at the time of the murder or that he was otherwise a co-principal in the murder. The Court agreed with the trial court judge that such "innocuous references" to defendant failed to establish a "fair probability" that evidence of the crime would be found in defendant's CSLI data. In so ruling, the Court rejected the Government's assertion that the totality of the circumstances supports an inference that "[t]he murder of Calvin Sneed was a family solution to a family problem." The fact that defendant may have had a motive (also a questionable conclusion, according to the Court) to murder Sneed is insufficient to establish a fair probability that he did so, particularly when there was no evidence that he was even in San Francisco at the time. Only one family member—Barry Gilton—was shown to have had both a motive and the opportunity to murder Sneed, along with evidence that he had lied about being home asleep at the time of the murder. As to defendant, however, the trial court judge properly found a lack of probable cause to show that he was also involved in the murder.

(2) *Good Faith*: The Government's backup argument was that even if there was insufficient probable cause described in the warrant affidavit to tie defendant to the murder, the officers who executed the warrant did so in good faith. The trial court judge did not think so, but a majority of the Ninth Circuit (with one dissenting opinion) did. The Fourth Amendment itself says nothing about suppressing illegally obtained evidence. The Exclusionary Rule is a judge-made rule invented for the purpose of discouraging law enforcement officers from violating the Constitution in the collection of evidence. The U.S. Supreme Court has held that whether or not the courts are to suppress illegally obtained evidence depends upon whether it is necessary to do so in order to deter similar illegal conduct by law enforcement. (*United States v. Leon* (1984) 468 U.S. 897; *Davis v. United States* (2011) 564 U.S. 229; see also *People v. Macabeo* (2016) 1 Cal.5th 1206.)

The value of the Exclusionary Rule, therefore, is in it deterrent effect. Whether or not the courts use the Exclusionary Rule depends in each case on balancing "the substantial social costs exacted by the Exclusionary Rule with the benefit of increased deterrence of police misconduct." Where there is little or no such benefit, then the Exclusionary Rule is not likely to be used. In those cases where an officer who executes a warrant does so because he or she is relying upon the search warrant magistrate's determination that probable cause exists, then there is very little if any deterrent effect by suppressing the resulting evidence. It is the magistrate's responsibility to determine whether an affiant's allegations in a warrant affidavit establishes probable cause.

Normally, an officer cannot be expected to question the magistrate's probable cause determination. "Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." However, the existence of a search warrant does not automatically preclude the use of the Exclusionary Rule. For instance, it is a recognized exception to the above rule of non-suppression that when the affidavit at issue is "so lacking in indicia of probable cause" that no reasonable officer would have believed that probable cause existed to justify the issuance of the warrant. Here, a 14-page warrant, written within two days of the murder, attempted to show a family vendetta, which included defendant, against Calvin Sneed. Although the Court determined that the warrant fell short in its attempt to tie defendant in with an alleged family conspiracy to murder Sneed, it would not go so far as to say that no reasonable officer could have relied upon the magistrate's probable cause determination. Good faith, therefore, was found to be applicable here, allowing for the admissibility of defendant's CSLI data at issue.

Note: This is a good case for describing the use of an officer's "Good Faith" to save an otherwise deficient warrant. The Court also lists the other three recognized exceptions to the Good Faith rule; i.e.: (1) When "the magistrate or judge . . . was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth;" (2) "(I)n cases where the issuing magistrate wholly abandoned his judicial role" by acting as "an adjunct law enforcement officer" or mere "rubber stamp" for the police; and (3) In cases where the warrant is "so facially deficient—i.e., in failing to particularize

the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid." You could also make the argument that there is a fifth exception to the Good Faith rule, and that is when the probable cause described in the warrant affidavit is based upon other illegally seized evidence. (See (*United States v. Vasey* (9th Cir. 1987) 834 F.2nd 782; *People v. Baker* (1986) 187 Cal.App.3rd 562; *People v. Brown* (1989) 210 Cal.App.3rd 849.) None of these exceptions, however, are relevant to this particular case. But they highlight an officer's responsibility to write good well-supported warrants and not merely throw anything together (i.e., a weak warrant with questionable facts) and take it to that judge an officer knows will approve just about anything submitted to him or her (i.e., "rubber stamp") by the police. When tested on appeal, such a practice is likely to come back to bite you.