

The California Legal Update

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

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THIS EDITION’S WORDS OF WISDOM:

“*Gets your facts first; then you can distort them as you please.*” (Mark Twain)

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ADMINISTRATIVE NOTES:

National Thank a Cop Day: The other evening, after a couple of cocktails, I was sitting around the house brooding over the recent and reoccurring public displays of disrespect for law enforcement in general, and the Dallas and Baton Rouge (and now, Kansas City) murders of police officers in particular, wondering what I could do about it. And then at some point during my third Black Russian, it came to me: Why not launch a national “*Thank a Cop*” movement, encouraging people to approach any police officer they might encounter on the street and thank that officer for everything he or she does on a daily basis to keep us all safe? Jan, my wife, in rare agreement with one of my ideas, sent out a notice to all her Facebook friends (I don’t do Facebook and, as a lawyer, I have no friends) telling them that the arbitrarily selected date of August 14th was to be the National “*Thank a Cop*” day. I, for my part, wrote my South Dakota congressional representatives, Donald Trump, and even Bill O’Reilly of the FOX News “O’Reilly Factor” (none of whom, by the way, responded). But then the wind was taken out of my sails when told by my publisher that I (in effect) was not nearly as brilliant as I’d like to think I am; that the idea of establishing a national Thank a Cop day has been bandied about before, and continues to be. For instance, “*Concerns of Police Survivors*” (i.e., “C.O.P.S.”) has declared January 9, 2017, as “National Law Enforcement Appreciation Day.” (<http://www.nationalcops.org/lead.html>) “Turks and Caicos Weekly News” has set September 15, 2016, as a national “Thank a Police Officer” day. (<http://tcweeklynews.com/national-thank-a-police-officer-day-slated-for-september-p2884-127.htm>) September 19th has been declared “Thank a Police Officer” day by WHNT Channel 19 News (wherever that is). (<http://whnt.com/2015/09/21/national-thank-a-police-officer-day-is-an-important-reminder/>) Several Facebook pages have been established along the same lines. (<http://whnt.com/2015/09/21/national-thank-a-police-officer-day-is-an-important-reminder/>, <https://www.facebook.com/National-Tell-A-Police-Officer-Thank-You-Day-403793506351113/>, <https://www.facebook.com/National-Tell-a-Police-Officer-Thank-You-Day-09192015-SALEM-OR-513299935409917/>.) So while I’m not nearly as clever as I’d like to think I am, drunk or sober, the point of all this is that we all need to thank those men and women out on the front lines protecting us from harm every day. If you’re a cop; “*thank you*” for all that you do, from me and my wife, Jan. If you’re not, find a cop today, . . . and tomorrow, . . . and every day, and thank him or her. It’s time we show that “*blue lives matter*” just as much as any other color.

You’ve Got Mail: Some of you quit receiving the California Legal Update notifications sometime shortly after the first of the year. This was not intentional on our part. The problem, after some review, appears to be because of a change in the e-mail address from which our notifications are sent; i.e., from “rcphillips@legalupdate.com” to “info@legalupdate.com.” Some agencies, not recognizing the new Legal Update e-mail address, have automatically blocked your receipt of the notifications as potential spam. This can only be corrected by you contacting your agency’s IT section and clearing the new address with them. Sorry for the inconvenience.

CASES:

Arrest Warrants:

Fruit of the Poisonous Tree; Attenuation of the Taint:

Utah v. Strieff (June 20, 2016) __ U.S. __ [195 L.Ed.2nd 400]

Rule: Discovery of a valid preexisting arrest warrant during an illegal detention is an intervening circumstance that may be sufficient to allow for the admission of evidence discovered incident to arrest, at least where the police misconduct is not flagrant.

Facts: An anonymous tip to the South Salt Lake City Police Department's drug-tip line concerning possible "narcotics activity" at a particular residence led Narcotics Detective Douglas Fackrell to check out the residence. During intermittent surveillances of the house over the time span of a week, Detective Fackrell observed visitors who left a few minutes after arriving, consistent with dope dealing. Finally, Detective Fackrell observed defendant leave the house and walk to a nearby convenience store. Detective Fackrell detained defendant in the store's parking lot in what was later conceded by the state prosecutor to be an illegal detention, and obtained his identification.

A warrant check resulted in the discovery of an outstanding arrest warrant for an unpaid parking ticket. Defendant was arrested on the warrant. A search incident to arrest resulted in the discovery of a baggie of methamphetamine and drug paraphernalia. Charged in state court with the unlawful possession of methamphetamine and drug paraphernalia, defendant moved to suppress the evidence, arguing that it was inadmissible as the product of an unlawful investigatory stop. With the prosecutor conceding that defendant had been illegally detained, there being insufficient reasonable suspicion to justify the detention, it was argued instead that the evidence should *not* be suppressed in that the existence of a valid arrest warrant attenuated the connection between the unlawful detention and the discovery of the contraband. The trial court agreed and denied defendant's motion to suppress. After the Utah Court of Appeals affirmed (2012 UT App 245, 286 P. 3rd 317.), the Utah Supreme Court reversed (2015 UT 2, 357 P. 3rd 532.), ruling that the evidence should have been suppressed. The United States Supreme Court granted certiorari.

Held: The United States Supreme Court, in a split (5 to 3) decision, reversed the Utah Supreme Court, upholding the Utah trial court's denial of the motion to suppress. The issue on appeal was the applicability of the "attenuation doctrine" to the discovery of a valid pre-existing arrest warrant during an otherwise illegal detention. With the state conceding that defendant had been illegally detained, the discovery of the contraband on defendant's person appears on its face to be a product of that illegal detention and, under the "fruit of the poisonous tree doctrine," subject to suppression. However, there are exceptions to this rule.

One of the major exceptions is when the recovery of contraband is so far "attenuated" from the illegal actions of law enforcement that the "deterrence benefits" (i.e., encouraging law enforcement to follow the rules) of the Exclusionary Rule no longer "outweigh (the) substantial

social costs” of suppressing evidence. In other words, under the so-called “*attenuation doctrine*,” contraband will be admitted into evidence whenever the connection between unconstitutional police conduct (the illegal detention in this case) and the evidence (defendant’s methamphetamine) is remote or has been interrupted by some intervening circumstance, so that “the interest protected by the constitutional guarantee that has been violated (e.g., Fourth Amendment) is no longer served by suppression of that evidence. In this case, there was an “intervening circumstance;” i.e., a valid, pre-existing, and untainted arrest warrant. The sole issue here is whether an arrest warrant is legally sufficient to constitute an intervening circumstance sufficient to “break the causal chain between the unlawful stop and the discovery of drug-related evidence on (defendant’s) person.”

In evaluating this issue, the Court considered three factors; (1) “temporal proximity,” (2) “the presence of intervening circumstances;” and (3) “the purpose and flagrancy of the official misconduct.” The first, “temporal proximity,” favors the suppression of the evidence. This refers to the amount of time between the defendant’s illegal detention and the discovery of the contraband. Prior case law has declined to find this to be a factor unless “substantial time” has elapsed. In this case, we’re talking about only a matter of minutes when it’s been held before that two hours was not enough. (See *Brown v. Illinois* (1975) 422 U.S. 590.) However, the second factor—the presence of intervening circumstances—strongly favors the State. The Court found the existence of a valid warrant of arrest to be a strong intervening factor. “A warrant is a judicial mandate to an officer to conduct a search or make an arrest, and the officer has a sworn duty to carry out its provisions.” Defendant’s arrest, resulting in his person being searched incident to that arrest, was “independently compelled” by the existence of the warrant.

The third factor of the attenuation doctrine—flagrancy of the officer’s actions—reflects the judicial preference for suppression of evidence only when the police misconduct is most in need of deterrence; i.e., when it is “*purposeful or flagrant*.” In this case, Detective Fackrell’s was conducting “a bona fide investigation of a suspected drug house,” acting on informant information, supported by some minimal observations of the suspect residence. But he did not know how long defendant had actually been at the house, not having observed when he entered. What Detective Fackrell should have done was conduct a “consensual encounter,” rather than demand that defendant talk to him. But such “errors in judgment hardly rise to a purposeful or flagrant violation of (defendant’s) Fourth Amendment rights.” And then the decision to run the warrant check was a “negligibly burdensome precautio[n],” done for officer safety.

Absent any indication that this unlawful stop was part of systemic or recurrent police misconduct, or that the detective’s actions constituted a “suspicionless fishing expedition,” the Court found the detective’s actions to be “negligent,” at the worst. The lack of flagrancy in the detective’s actions, therefore, support a finding that the attenuation doctrine applies. In balancing these three factors, the Court ruled that the second and third factors far outweigh the first, and that because the attenuation doctrine therefore applies, the contraband found on defendant’s person was properly admitted into evidence against him.

Note: The Utah Supreme Court, in ruling that the evidence should have been suppressed, held that for an intervening circumstance to “attenuate the taint” of an illegal detention, the intervening factor had to be something of the defendant’s own making; i.e., “a voluntary act of a

defendant's free will (as in a confession or consent to search)." The U.S. Supreme Court here rejected that argument out of hand as a misinterpretation of its prior cases. So that ends that as an issue, if it ever was. This case is also consistent with prior California authority. (See *People v. Brendlin* (2008) 45 Cal.4th 262; and *People v. Carter* (2010) 182 Cal.App.4th 522.) Also, discovering that an illegally detained suspect is subject to a Fourth waiver (having previously waived his Fourth Amendment search and seizure rights) may be enough to attenuate the taint of an illegal detention, depending upon the circumstances. *People v. Durant* (1st Appellate District, 2012) 205 Cal.App.4th 57, says it is. But *People v. Bates* (6th Appellate District, 2013) 222 Cal.App.4th 60, says it is not. But don't take this case, or California's cases, as an excuse for you to start making illegal detentions in the hope that your suspect will have an outstanding arrest warrant. It was made clear by the Supreme Court that a determination of "flagrancy" takes into account whether a detention is part of some "purposeful," "systemic," or "recurrent police misconduct," and/or a "suspicionless fishing expedition." This case provides some good law for us. Abuse it and we'll lose it.

DUI Arrests and Blood or Breath Tests:

Searches with Exigent Circumstances:

Searches Incident to Arrest:

Implied Consent and DUI Arrests:

***Birchfield v. North Dakota* (June 23, 2016) __ U.S. __ [195 L.Ed.2nd 560]**

Rule: Non-consensual blood tests in DUI cases require a search warrant absent an express consent or exigent circumstances. Threatening penal (i.e., jail time) consequences for refusing a blood test is therefore illegal. Threatening penal consequences to refusing to take a breath test is not illegal in that no search warrant is required.

Facts: Three cases consolidated for appeal; two out of North Dakota (*State v. Birchfield* (2015) 858 N.W.2d 302, and *Beylund v. Levi* (2015) 859 N.W.2nd 403.) and one from Minnesota (*State v. Bernard* (2015) 859 N.W.2nd 762.) In all three cases, defendants (Danny Birchfield, Steve Michael Beylund, and William Robert Bernard, Jr., respectively) were arrested for driving while under the influence ("DUI") of alcohol. Defendant (A) Birchfield subsequently refused to submit to a blood test. Defendant (B) Bernard refused to submit to a breath test. And Defendant (C) Beylund agreed to a blood test, but only after being advised of the penal consequences (i.e., that he could go to jail) for refusing such a test.

(A) *Danny Birchfield:* Defendant Birchfield accidentally drove his car off a North Dakota highway where a state trooper observed him attempting to back out of the ditch. Contacting defendant, the trooper noticed objective indications that defendant was under the influence of alcohol. After doing poorly on some field sobriety tests, defendant agreed to take a roadside breath test (using what is called in California a "Preliminary Alcohol Screening," or "PAS" device), on which he blew a .254% BAC ("Blood/Alcohol Concentration"). Such evidence is not admissible in court in North Dakota, however. The state trooper arrested defendant for DUI and gave him the usual *Miranda* warnings. Defendant was also advised that he was obligated under North Dakota law to undergo BAC testing of his blood, and that if he refused to submit to such a test, he would be subject to criminal penalties; i.e., North Dakota's "implied consent

advisory.” Under North Dakota law, it is a misdemeanor for a DUI arrestee to refuse to submit to BAC testing. Defendant, with another DUI prosecution pending from a previous arrest, refused. He ultimately pled guilty, however, to his earlier DUI case and to violating the refusal statute in this new case. He appealed, arguing that the Fourth Amendment prohibited criminalizing his refusal to submit to BAC testing. Defendant’s argument, however, was rejected by the North Dakota District Court and the State Supreme Court.

(B) *William Robert Bernard, Jr.*: Defendant Bernard was contacted by Minnesota police as he and two other intoxicated men were unsuccessfully attempting to pull their boat out of the water at a boat launch. Witnesses identified the intoxicated defendant as the driver of their truck that had gotten stuck in the river. Defendant, while admitting to having been drinking, refused to perform any field sobriety test. After noting objective symptoms of alcohol influence, officers arrested him for driving while impaired. Taken to a police station where he was offered the option of taking a breath test, defendant was read Minnesota’s implied consent advisory which, like North Dakota, informed him that it is a crime under state law to refuse to submit to a legally required BAC test. Despite the prospect of a criminal prosecution, defendant refused to take a breath test. He was therefore subsequently charged in state court with “test refusal in the first degree,” a crime which, because of four prior DUI convictions, includes a mandatory three years in state prison. The Minnesota District Court dismissed the charges, however, on the grounds that requiring a warrantless breath test violated the Fourth Amendment. The Minnesota Court of Appeal reversed, and the State Supreme Court affirmed that judgment, ruling that no search warrant was required to obtain a breath test.

(C) *Steve Michael Beylund*: Defendant Beylund was observed by a police officer driving his vehicle on the streets of Bowman, North Dakota. The officer contacted defendant after observing him almost hit a stop sign as he unsuccessfully attempted to turn into a driveway. Observing an empty wine glass in the car and objective symptoms of being under the influence of alcohol, the officer arrested defendant for DUI. He was taken to a nearby hospital for the purpose of obtaining a blood sample. The officer read defendant North Dakota’s implied consent advisory, informing him that to refuse to take a blood test was a crime in itself. Defendant therefore agreed to have his blood drawn and analyzed. His BAC was subsequently determined to be a whopping 0.250%. Given the test results, defendant’s driver’s license was suspended for two years after an administrative hearing. He appealed the hearing officer’s decision to a North Dakota District Court, arguing that his consent to the blood test was coerced by the officer’s warning that refusing to consent would itself be a crime. The District Court rejected this argument, and the North Dakota Supreme Court affirmed. The United States Supreme Court granted certiorari in all three cases.

Held: The United States Supreme Court, in a split (5 to 3) decision, held that (A) Birchfield’s conviction is reversed, (B) Bernard’s conviction is upheld, and (C) Beylund’s case is remanded to the trial court for a determination as to whether his consent to submit to a blood test was coerced due to an illegal threat of incarceration should he refuse. The issue on appeal in all three cases was whether a motorist lawfully arrested for driving while under the influence may be convicted of a crime or otherwise penalized for refusing to submit to a warrantless blood or breath test measuring the blood-alcohol content in his or her bloodstream. As noted below, the differences between these three cases is significant, requiring different results. Defendants (A)

Birchfield and (C) Beylund were told that they were obligated to submit to a *blood test* under North Dakota law, and that it was a misdemeanor for them to refuse to comply. (A) Birchfield refused and (C) Beylund submitted. Defendant (B) Bernard was informed that a *breath test* was required under Minnesota law, and that it was a misdemeanor for him to refuse. He refused anyway, and was subsequently subjected to penal sanctions. Recognizing that both the taking of a blood sample and the administration of a breath test is a search, the key to all three cases is whether or not, under the Fourth Amendment, a warrant is required to force a DUI suspect's submission to a blood or breath test.

If the Fourth Amendment does not require a warrant, then penal sanctions (i.e., incarceration) may be imposed for refusing to comply. But if a warrant is required, then imposing penal sanctions for refusing to give an express consent is prohibited by the Fourth Amendment. The test is one of "reasonableness." In analyzing this issue, the Court considered the applicability of three exceptions to the search warrant requirement.

(1) *Exigent Circumstances*: The exigent circumstances exception allows a warrantless search when an emergency leaves police insufficient time to seek a warrant. DUI cases, where the suspect's BAC is naturally dissipating as time goes on, present a situation where an exigency is possible. But the natural dissipation of alcohol from the bloodstream does not always constitute an exigency justifying the warrantless taking of a blood sample. The other surrounding circumstances must be considered. Each case must be evaluated on its own facts, on a case-by-case basis. In each of the three cases at issue here, however, there were no other circumstances indicating a lack of sufficient time to obtain a search warrant. So this exception did not apply to any of them.

(2) *Incident to Arrest*: A warrantless search may be conducted incident to a lawful arrest. Under this theory, an arresting police officer, in order to prevent the arrestee from obtaining a weapon or destroying evidence, may lawfully search both "the person arrested" and "the area 'within his immediate control.'" The Court, in applying the search incident to arrest theory to the obtaining of a blood or breath sample to DUI cases, referred to this particular theory as "categorical," i.e., the mere "fact of the lawful arrest" justifies "a full search of the person" as well as the "lunging area" around him. But most recently, the Court has begun to find exceptions to this "categorical" rule. In applying the rule of "reasonableness," and recognizing that times have changed since the Fourth Amendment was first adopted by the Founding Fathers, the Court has determined that legitimate governmental interests must be balanced with the individual's personal right to privacy. In so doing, the Court found that the government has a strong interest in removing DUI drivers from the highways, given the amount of damage that they do.

Balancing this governmental interest with one's personal right to privacy, and the intrusiveness of blood and breath tests, the Court considered the level of intrusiveness of each test separately. Specifically, the Court noted that in obtaining a *blood sample*, where the skin is pierced for the purpose of extracting blood, one's privacy rights are intruded upon more than when subjected to a simple breath test that involves no more than blowing into a tube, with "a minimum of inconvenience" and embarrassment. Also, for a blood test, the government is thereafter in permanent possession of that blood sample which may arguably be used for whatever other purpose it deems necessary (e.g., DNA analysis). But when a breath sample is obtained, that

sample is used only to test for the BAC in one's system, and then is gone; unusable for any other purpose. Given these differences, the Court found the extraction of a blood sample to be more intrusive than the obtaining of a breath sample. Therefore, in balancing the degree of intrusiveness in the obtaining of a blood or breath sample with the governmental interests at stake, the Court held that in order to obtain a blood sample without the suspect's consent, the Fourth Amendment requires that a search warrant be obtained. But for obtaining a breath sample, being less intrusive, no warrant is required.

(3) *Implied Consent*: Consent is always an exception to the warrant requirement. But that consent must have been obtained freely and voluntarily. On this issue, the court noted that all fifty states have "implied consent" statutes which impose certain non-penal sanctions for refusing to submit to a BAC test upon being arrested for DUI. (California's implied consent provisions are contained in V.C. § 23612(a)(1)(D).) Such non-penal sanctions include a fine, suspension of the person's license to drive and/or use of the suspect's refusal in evidence against him. The Court here upheld the threatened use of such sanctions to encourage DUI arrestees to provide a breath or blood sample. Some states, however, such as both North Dakota and Minnesota (but not California), have enacted statutes making a refusal to submit to a blood or breath test a separate misdemeanor crime, with incarceration as a potential punishment. On the propriety of going this far to encourage DUI arrestees to provide a blood test (where a warrant is required) absent an express consent, the Court had some reservations. "It is another matter . . . for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads."

Per the Court, implied consent statutes apply only to the extent that they are reasonable. Non-penal consequences for refusing to provide a blood or breath sample are reasonable. But statutes that impose further criminal penalties for refusing to submit to a test of one's BAC were held to be reasonable only where a search warrant is not required (such as with a breath test). Where a warrant is required—i.e., for blood tests—it is a violation of the Fourth Amendment to impose penal sanctions for refusing to give one's express consent.

Conclusion: Defendant (A) Birchfield's Fourth Amendment rights were violated, having been convicted of refusing to give his express consent to the taking of a blood test. His conviction for this offense, therefore, was reversed. Defendant (B) Bernard, on the other hand, was criminally prosecuted for refusing a warrantless breath test. The Fourth Amendment does not require officers to obtain a warrant prior to demanding the taking of a breath test, and Bernard had no right to refuse it. His conviction, therefore, was upheld. Defendant (C) Beylund submitted to a blood test after police told him that the law required his submission. As noted above, the police may not constitutionally threaten penal sanctions for refusing to give an express consent to the taking of a blood sample. The issue left undecided in Beylund's case was whether his consent was the product of that illegal threat. His case, therefore, was remanded for an evidentiary hearing to on that issue.

Note: This is a long and complicated case, given that three different cases, with different circumstances, are included. There is also a lengthy dissent, advocating the need for a search warrant in all cases except where an exigency applies. But the varied findings discussed here are

important. Even though California does not made it a separate crime to refuse to submit to a blood or breath test, it does impose some sentence “enhancements” upon conviction for V.C. §§ 23152 or 23153 where the defendant refused to take a blood or breath test. (See V.C. §§ 23612(a)(1)(D) & 23577) These enhancements are likely illegal, at least in cases where the arrestee specifically refuses to take a blood test. So some agencies, I am told, are advising its officers to eliminate the reference to “mandatory imprisonment” in the implied consent advisory as described in V.C. § 23612(a)(1)(D) when a blood test is contemplated. That’s probably a good idea.

Officer Safety:

Detentions Without Reasonable Suspicion:

People v. Steele (Apr. 25, 2016) 246 Cal.App.4th 1110

Rule: Activating a patrol car’s emergency lights necessarily results in the detention of the occupants of a stopped vehicle. Officer safety concerns, however, overcome the lack of individualized reasonable suspicion of criminal activity in detaining a person.

Facts: Shasta County Sheriff’s Deputies Jerry Fernandez and Megan Bliss were on patrol at around 10:00 p.m. when they noticed two vehicles moving in apparent tandem. The officers followed the two vehicles to a dark dead-end road. A records check on the license plates for the two vehicles yielded information that the lead vehicle had an expired registration and the second vehicle was a rental car. Given the remoteness of the area, the deputies decided not to stop the vehicles. However, the officers where then informed that there was an outstanding felony arrest warrant for the owner of the lead vehicle.

The two vehicles drove into a driveway. The patrol car entered the driveway behind them as the vehicles came to a stop at the end of a driveway. Deputy Bliss activated their patrol car’s emergency lights as she stopped behind and a little to the right of the second vehicle. The lead vehicle was directly in front of the second vehicle. The area of the stop was hidden from the road by shrubbery. The deputies approached the second vehicle first. Deputy Fernandez later testified that he contacted the second vehicle first for officer safety reasons and to inform the driver of that vehicle that the deputies were interested only in the lead vehicle. Per Deputy Fernandez: “As law enforcement officers, we are not going to walk past a vehicle in the middle of the night with a subject in it.”

Upon contacting the driver of the second vehicle, later identified as the defendant, Deputy Fernandez noticed the odor of marijuana emanating from the vehicle. Flash-lighting the interior of the car, Deputy Fernandez observed a green, leafy substance consistent with marijuana on the backseat. After removing defendant from the car, the car was searched. A bag of marijuana and two baggies of methamphetamine were found in the car along with some other paraphernalia. Defendant was arrested and charged in state court with possession of methamphetamine for purposes of sale. His motion to suppress the evidence was denied by the trial court. Defendant therefore pled no contest and admitted to a prior strike conviction. Sentenced to six years in state prison, he appealed.

Held: The Third District Court of Appeal affirmed. Defendant’s argument on appeal was that the evidence discovered in his car was the product of an illegal detention. Citing *People v.*

Brown (2015) 61 Cal.4th 968, it was noted that the California Supreme Court has ruled recently that when a police officer pulls up behind a stopped vehicle and activates his emergency lights, the occupants of that vehicle necessarily feel that they are not free to leave. Such a circumstance constitutes a detention. As a general proposition, such a detention is unlawful absent a reasonable suspicion to believe that the occupants of that vehicle are involved in criminal activity. In this case, the officers had cause to stop and detain the occupants of the car in front of defendant's car, but not defendant himself. The Court here, however, ruled that this argument ignores the necessities of the situation and issue of officer safety. "Officer safety is a weighty public interest."

In preparing to contact the occupants of the lead vehicle, the owner of which had an outstanding felony arrest warrant, and with the officers' emergency lights activated, the deputies decided to contact defendant first. Per *Brown*, defendant was in fact detained under these circumstances in that a reasonable person would not have felt that he was free to just walk away. But this detention was based upon the need to insure the safety of the officers and not upon any reason to believe that defendant himself was involved in criminal activity. Citing another California Supreme Court case, *People v. Glaser* (1995) 11 Cal.4th 354, it was noted that such a suspicionless detention, based upon the need to insure the officers' safety, is lawful. Officers are not required to ignore the presence of a third person at the scene of an otherwise lawful contact.

In *Glaser*, the temporary detention of a subject who showed up unexpectedly at a residence where officers were attempting to execute a search warrant was upheld. "(L)aw enforcement officers may lawfully detain a defendant when detention is necessary to determine the defendant's connection with the subject of a search warrant and related to the need of ensuring officer safety." The same rule applies to this case. Recognizing the dangerousness of any traffic stop, and the particular circumstances of this case (i.e., dark, isolated area in the middle of the night, with the defendant's vehicle between the deputies and the suspect vehicle), the Court found that the deputies acted reasonably when they first contacted defendant to insure that he did not pose a danger to them as they prepared to approach the subject of a felony arrest warrant in the other car. As occurred in *Glaser*, "detaining the defendant was not only reasonable, but virtually unavoidable." Upon making contact with defendant, and noticing the odor of marijuana and the plain sight observation of marijuana on the back seat, the deputies had developed the necessary probable cause needed to justify a prolonged detention and the search of defendant's vehicle. The contraband in defendant's car, being lawfully discovered, was properly admitted into evidence against him.

Note: Whether you believe it or not, the courts are seriously concerned with officer safety. And when you think about it, much of what you do while in the field, and how you do it, is guided by your innate need for self-preservation and officer safety. So while you shouldn't abuse the privilege, don't be afraid to inject into your reports and testimony "officer safety" as at least one of your reasons for making contacts and detaining people at the scene of arrests, searches, or anything else you do. Where objectively justifiable, officer safety carries a lot of weight with the courts and can make or break a search and seizure issue.

Gang Prosecutions:
Gang-Related Expert Opinions:

People v. Sanchez (June 30, 2016) __ Cal.4th __ [2016 Cal. LEXIS 4577]

Rule: Case-specific out-of-court statements testified to by a prosecution expert as a basis for his opinion concerning a defendant’s gang membership, presented as true statements of fact without independent proof, constitute inadmissible hearsay *and* a violation of *Crawford v. Washington*.

Facts: Defendant was observed by two Santa Ana police officers as he stood outside an apartment complex. When defendant noticed he was being watched, he suddenly reached into a nearby electrical box with one hand and then ran upstairs and into an apartment while holding the other hand near his waistband as if hiding something. The officers chased him into the apartment and found him hiding in a bathroom. A resident of the apartment told officers that defendant did not live or belong there. Outside, under the bathroom window, the officers found a loaded handgun and a plastic bag containing 14 bindles of heroin and four baggies of methamphetamine.

Defendant was charged in state court with possession of a firearm by a felon, possession of drugs while armed with a loaded firearm, active participation in the “Delhi” criminal street gang per P.C. § 186.22(a), with gang enhancements for committing a felony for the benefit of the Delhi gang, per P.C. § 186.22(b). A Santa Ana police detective, David Stow, with 17 years of experience as a gang suppression officer and over 500 gang-related investigations under his belt, testified for the prosecution as a gang expert at defendant’s subsequent trial. His expertise was not contested. In his testimony, Detective Stow told the jury about gang culture in general and about Santa Ana’s Delhi street gang in particular. As for defendant, Detective Stow admitted that he had never met him. But he was allowed to testify that in his opinion, defendant was a member of, and that his conduct benefited, the Delhi gang.

Aside from this offense occurring in the Delhi gang’s territory, Detective Stow’s opinion about defendant was based upon information he had obtained by reviewing a “STEP notice” and four “F.I.” cards prepared by other officers, backed up by other police reports, which contained admissions by defendant concerning his association with the Delhi gang. A “STEP notice” (California “Street Terrorism Enforcement and Prevention” Act) is a form given to individuals, a copy of which is kept by the police department, telling the person that he is associating with a known gang, that the gang engages in criminal activity, and that if the recipient commits certain crimes with gang members he may face increased penalties for his conduct.

The issuing officer records, along with identifying information, any statements made by the person contacted. An “F.I.” (“Field Interview”) card is a brief record of an officer’s contact with an individual in the field. Like the STEP notice, this form also contains personal information and any statements made at the time of the interaction. The STEP notice described defendant’s admission to the officer that he had “kicked it” (hung out and associated) with Delhi gang members for four years, and had been arrested with them once before. From the four F.I. cards, along with related police reports, Detective Stow was made aware of, and testified about, other police contacts with defendant between 2007 and 2009, including statements made by defendant

to the officers during those contacts reflecting his association with the Delhi gang. In answering a hypothetical question posed to him by the prosecutor, assuming all the above was true, Detective Stow was able to opine that defendant was in fact a gang member and that his acts benefited the Delhi gang. The jury convicted defendant on all counts and enhancements. The Court of Appeal reversed defendant's conviction for the alleged active gang participation but otherwise affirmed. The California Supreme Court granted review.

Held: The California Supreme Court reversed as to the P.C. § 186.22(b) gang enhancements, but otherwise affirmed defendant's conviction. The issue on appeal was whether a law enforcement gang expert witness should be allowed to testify to case-specific hearsay statements made by the defendant as a basis for his expert opinion.

Hearsay: The Court first considered whether Detective Stow's testimony about what defendant had told other officers about his gang affiliation was offered into evidence as substantive evidence of the truth of those statements. Hearsay is legally defined as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200(a)) In simpler terms, hearsay refers to statements (including writings), made prior to the current court hearing, that are offered into evidence through the testimony of a person other than the "declarant" (i.e., the one who made the statement). When those statements are offered into evidence as substantive proof of their contents, then they are hearsay. Unless an exception applies, hearsay is generally inadmissible in court (E.C. § 1200(b)).

In this case, we have what is known as "double hearsay." Defendant's statements to other officers about being a gang member, which were recorded in various police reports, is the first level. Had those officers testified to what defendant told them, the evidence would have been admissible under the "party admission" exception to the hearsay rule (E.C. § 1220). Detective Stow's testimony about the content of these statements is the second level. There is no exception to the hearsay rule for admitting Detective Stow's testimony relative to these statements if offered as substantive evidence of his gang affiliations. The People argued here that Detective Stow's testimony was admissible as non-hearsay, in that it was not being used as substantive evidence of whether or not defendant was actually a gang member, but rather solely as a basis for his ultimate expert opinion that he was. The Court didn't buy this argument.

While lay witnesses are generally limited to testifying only about matters within their personal knowledge, "expert witnesses" are given greater latitude. An "expert" is one who "has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (E.C. § 720(a)) An expert may express an opinion about "a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (E.C. § 801(a)) In addition to matters within their own personal knowledge, experts may relate information acquired through their training and experience, even though that information may have been derived from conversations with others, lectures, studies of learned treatises, etc. But an expert is not allowed to testify to "*case-specific*" facts relayed to him by other people, there being a legal "distinction between generally accepted background information and the supplying of case-specific facts." "*Case-specific facts*" are those relating to the particular events and participants alleged to have been involved in the case being tried. The

“case-specific” facts in this case were defendant’s statements to other officers, memorialized in the STEP notice, F.I. cards, and other reports, concerning his gang-affiliation and activity. These were “case-specific” facts which were only in evidence because of Detective Stow’s testimony describing what he’d learned from the STEP notice, F.I. cards and other reports; i.e., inadmissible hearsay, and not from the detective’s own personal knowledge.

To be admissible, the officers who actually collected this information should have been called to testify themselves as to what defendant told them. This was not done. The Court also rejected the argument that a jury instruction, telling the jury that Detective’s Stow’s testimony about defendant’s admissions in these police reports were not being offered for the “truth of the matter,” but only as a basis for his ultimate opinion, was enough to undo the prejudice to the defendant, specifically overruling prior cases to the contrary (See fn. 13).

Crawford v. Washington (2004) 541 U.S. 36, and the Sixth Amendment: Defendant further complained that because he was not provided with the opportunity to confront and cross-examine the officers who had submitted the STEP notice, F.I. cards, and other reports, his Sixth Amendment right to confrontation had been violated. The Court agreed. *Crawford*, when decided (2004), overturned earlier precedent with a new rule to the effect that a mere showing of a hearsay statement’s reliability was not sufficient in itself to satisfy the Sixth Amendment’s confrontation clause. Under the new rule of *Crawford*, admission of testimonial hearsay against a criminal defendant violates the confrontation clause unless (1) the declarant is unavailable to testify and (2) the defendant had a previous opportunity to cross-examine the witness or forfeited the right by his own wrongdoing. In this case, the officers who wrote out defendant’s admissions as contained in the STEP notice, F.I. slips, and other reports, are the “declarants” whose hearsay statements were testified to by Detective Stow. There was no showing that these officers were unavailable to testify. And even if they were unavailable, defendant had not had an opportunity to cross-examine them. However, the *Crawford* rule applies only when the statements in issue are “testimonial” in nature, as that term is defined by the U.S. Supreme Court. And while what is, and what is not “testimonial” is often an issue, it has been held that statements made in response to police questioning, other than during on-going emergency or when made for some other purpose unrelated to preserving facts for later use at trial, are testimonial.

While such hearsay statements are admissible in evidence when testified to by the officer who actually heard the statements under the “party admissions” exception to the hearsay rule, the *Crawford* requirements are met only when that officer does testify and is subject to cross-examination. In this case, the Court found the STEP notice to be testimonial. Whether the F.I. cards and related police reports were testimonial was not clear from the record, but either way, Detective Stow’s testimony about the contents of these reports was held to be prejudicial, requiring reversal of the gang-related enhancements.

Note: This is a long and confusing case decision which I briefed primarily for the benefit of prosecutors. I don’t know how many times as a prosecutor I was able to get away with presenting expert testimony which included “case-specific” facts, mainly because no one (myself included) really knew what that meant. No more. The problem can be solved, however, by calling as witnesses the person or persons who originally heard the hearsay that we’re trying to get into evidence, assuming an exception to the hearsay rule applies. *Crawford*, on the other

hand, is whole ‘nother can of worms, but one for which there is now a whole bunch of relevant case law explaining the ins and outs of this issue, and all of which I have summarized in a Sixth Amendment training outline. If you wish to get a copy, just let me know and I’ll send it to you.