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

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THIS EDITION’S WORDS OF WISDOM:

“Congressmen should wear uniforms, You know, like NASCAR drivers, so we could Identify their corporate sponsors.” (Unknown)

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ADMINISTRATIVE NOTES:

Cell-Site Location Information (CSLI) and Search Warrants: 18 U.S.C. § 2703(d) of the federal “**Stored Communications Act**,” which requires no more than a “court order,” obtainable from a federal magistrate upon an officer describing “specific and articulable facts showing that there are reasonable grounds to believe” that specified historical cell-site location information (CSLI) records “are relevant and material to an ongoing criminal investigation,” had been upheld as constitutional in a number of federal court decisions. The Sixth Circuit Court of Appeal decision of *United States v. Carpenter* (6th Cir. 2016) 819 F.3rd 880, is one of the cases so-holding. In *Carpenter*, as in other cases, this historical cellphone information was important because the resulting records put defendant near specific cellphone towers that themselves were in the geographical areas of a series of robberies, at the time of those robberies. A search warrant, based upon probable cause, was held by the Circuit Court *not* to be necessary under § 2703(d). The U.S. Supreme Court, however, just reversed this rule in *Carpenter v. United States* (June 22, 2018) ___ U.S. ___ [___ S.Ct. ___; ___ L.Ed.2nd ___; 2018 U.S. LEXIS 3844], in cases of “historical” CSLI information; a close 5-to-4 decision. The new rule is that in order to obtain a cellphone’s “pinging” history (i.e., “historical CSLI information”), a search warrant, based upon a showing of *probable cause*, is required. The Court specifically held that “an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. The location information obtained from Carpenter’s wireless carriers was the product of a search,” thus requiring a search warrant to obtain those records.

However, it was also noted in this case that the decision is “*a narrow one*,” expressing no opinion as to whether search warrants are required in cases involving (1) the pinging of a suspect’s cellphone while on the move, referred to by the court as “real-time” situations, and (2) “tower dumps” (a download of information on *all* the devices that connected to a particular cell site during a particular interval). The Court also noted that other related situations are not affected by this decision; e.g.; (1) the rules of *Smith v. Maryland* (1979) 442 U.S. 735 [61 L.Ed.2nd 220], involving the warrantless obtaining of trap & trace information, and *United States v. Miller* (1976) 425 U.S. 435, 440 [48 L.Ed.2nd 71], involving the obtaining of bank records without a search warrant, (2) the use of conventional surveillance techniques and tools, such as security cameras, (3) other business records that might “*incidentally*” reveal location information, or (4) other information collection techniques involving foreign affairs or national security. Exigencies are also specifically included by the Court as an exception to the new rule. “Such exigencies include the need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm (e.g., bomb threats, active shootings, and child abductions), or prevent the imminent destruction of evidence.” A serious down-side to this new rule, however, is that you won’t be able to obtain CSLI historical information via a subpoena anymore, as (I’m told) is often done in order to establish probable cause and/or during or in preparation for trial. A search warrant is now required. This, in turn,

will likely eliminate your ability to obtain CSLI historical information in misdemeanor cases that don't fit into P.C. § 1524(a)'s list of situations in which search warrants are available. What other new problems *Carpenter* will generate are yet to be determined.

Demise of the Exclusionary Rule in State Courts? U.S. Supreme Court Justice Clarence Thomas, in concurring that the officer violated the **Fourth Amendment** in the below briefed case of *Collins v. Virginia*, makes the interesting and unique argument that maybe suppression of the resulting evidence is *not* the proper remedy. Per Justice Thomas, a judicially imposed requirement that state courts abide by the federal Exclusionary Rule, suppressing illegally seized evidence, is “*legally dubious*,” and an issue that should be reconsidered by the Court. As suggested by Justice Thomas, mandatory imposition of the Exclusionary Rule on the states, if tested today, “could not withstand even the slightest scrutiny.” In his lengthy concurring opinion, Justice Thomas lays out a heavily cited analysis of why *Mapp v. Ohio* (1961) 367 U. S. 643, which first imposed the Exclusionary Rule on the states, was wrongly decided. When and if the rule of *Mapp* is indeed “reconsidered” by the U.S. Supreme Court, we might, in our respective lifetimes, see the demise of the Exclusionary Rule.

In the meantime, it seems to me that state prosecutors need to take up this gauntlet, as thoroughly discussed by Justice Thomas, and run with it. Every filed P.C. § 1538.5 search and seizure motion premised on a violation of the **Fourth Amendment** (if not other constitutional protections) should include an argument similar to that made by Justice Thomas, pointing out that suppression is neither constitutionally required, nor an appropriate remedy (except, perhaps, in the most egregious cases where it cannot be denied that the Fourteenth Amendment due process clause is violated). While the trial courts may be bound by prior decisions (thousands of them) requiring the suppression of evidence produced as a product of a **Fourth Amendment** violation, making an argument similar to the one made by Justice Thomas will preserve the issue for appeal, eventually getting back to the U.S. Supreme Court for a thorough consideration of this theory. Justice Thomas has already done the research for you. Check out Justice Thomas' argument in *Collins* at pp. 201 L.Ed.2nd at pp. 21-31.

CASE LAW:

The Curtilage of a Home: Warrantless Searches of Vehicles:

***Collins v. Virginia* (May 29, 2018) ___ U.S. ___ [138 S.Ct. 1663; 201 L.Ed.2nd 9]**

Rule: Law enforcement entering the curtilage of a home, such as its driveway, and then searching a vehicle parked in the curtilage without a search warrant, is illegal.

Facts: Officers of the Albemarle County Police Department, in Virginia, observed the driver of a distinctive orange and black motorcycle with an extended frame commit traffic infractions on two different occasions. In both cases, the driver of the motorcycle eluded the officers when they attempted to stop him. Further investigation resulted in a determination that the motorcycle,

although stolen, was in the possession of Ryan Collins; i.e., defendant in this case. Checking the defendant's Facebook profile, it was discovered that what appeared to be the same orange and black motorcycle was featured, showing it parked at the top of a driveway of a house. Further investigation led to a specific address later determined to be defendant's girlfriend's house where defendant stayed a couple times a week. (Defendant's privacy interest [i.e., "standing"] in the residence was not contested.) An officer involved in one of the previous eluding incidents went to the address and observed what appeared to be a motorcycle with an extended frame parked in the same location as depicted in the Facebook photograph. However, the motorcycle was parked some 30 feet away from the curb, in an area of the driveway that was immediately adjacent to the house, and was covered by a tarp. So the officer walked up to the top of the driveway, pulled off the tarp, and verified that it was in fact the same orange and black motorcycle that had been involved in the two eluding incidents.

Checking the license plate and VIN numbers verified it as having been stolen. Defendant was later contacted at the residence and, claiming to have purchased the bike but without documentation of its title, was arrested. Charged in state court with possession of stolen property, defendant filed a motion to suppress. Upon denial of his motion, defendant was convicted and appealed. With his conviction being upheld by the Virginia Court of Appeal, and again by the Virginia Supreme Court, the U.S. Supreme Court granted certiorari.

Held: The U.S. Supreme Court, in an eight-to-one decision, reversed. The Court first noted that this case involves two Fourth Amendment concepts; (1) the so-called "automobile exception" to the search warrant requirement, and (2) searches within the curtilage of a home. It is a long-standing rule that a warrantless search of an automobile is generally reasonable. (It is assumed, without discussing, that the lifting of the tarp and the inspection of the license plate and VIN number, as occurred in this case, constitutes a "search.") Had such a search occurred out on the street, away from the curtilage of a residence, and with probable cause, there would have been no issue that the search (under the "automobile exception") was lawful. But merely because such a search is generally lawful does not mean that a law enforcement officer can enter a constitutionally protected area, such as the curtilage of a home, to conduct such a search.

In this case, the motorcycle was parked in an area of the driveway immediately adjacent to the side of the house and which was enclosed on two sides by a brick wall about the height of a car, and on a third side by the house itself. A side door provided direct access between this partially enclosed section of the driveway and the house. Someone who wished to approach the front door of the house would have to walk part way up the driveway and then veer off before reaching the enclosure, following a walkway to the front porch. The Court found that the enclosed portion of the driveway in issue here was clearly within the curtilage of the house; i.e., that area that was "immediately surrounding and associated with the home," and as such, a "part of the home itself for Fourth Amendment purposes;" i.e., "an area adjacent to the home and 'to which the activity of home life extends.'" As such, this area is accorded the same Fourth Amendment constitutional protections as within the house itself.

Entering this area for the law enforcement purpose of conducting a search requires (absent exigent circumstances or consent) a search warrant. "Nothing in our case law . . . suggests that the automobile exception gives an officer the right to enter a home or its curtilage to access a

vehicle without a warrant.” The officer in this case bypassed the walkway and entered into the enclosure where the motorcycle was parked. To do this without a search warrant violated the Fourth Amendment. The evidence resulting from this violation should have been suppressed.

Note: The lone dissenting opinion argued that when the motorcycle is visible from the street, entering into the curtilage of the home to inspect it more closely should be lawful, at least when the officer could see enough of the bike to give him probable cause to believe it was the same motorcycle that they were looking for. No one argued that there wasn’t sufficient probable cause in this case. More interesting, however, is a concurring opinion authored by Justice Clarence Thomas, arguing that even though the officer here violated the Fourth Amendment, imposing the Exclusionary Rule on the states is no longer a viable sanction.

The U.S. Supreme Court ruled some six decades ago that the Exclusionary Rule did in fact require state courts to suppress illegally seized evidence. (*Mapp v. Ohio* (1961) 367 U. S. 643.) Justice Thomas makes an interesting and unique argument, complete with citations, to the effect that *Mapp* was wrongly decided; i.e., that contrary to the current belief, the Fourteenth Amendment’s “due process” clause *does not* necessarily require the states to suppress illegally seized evidence. Rather, Justice Thomas argues that “the exclusionary rule is (nothing more than) a ‘judicially created; doctrine that is ‘prudential rather than constitutionally mandated.’” *Wow!* Can you imagine the consequences of a Supreme Court ruling that illegally seized evidence is no longer subject to suppression? See the Administrative Note, above, for more on this argument.

Searches of Rented Vehicles; Standing:

***Byrd v. United States* (May 14, 2018) __ U.S. __ [138 S.Ct. 1518; 200 L.Ed.2nd 805]**

Rule: A person in otherwise lawful possession and control of a rented car has a reasonable expectation of privacy in that car even if the rental agreement does not list him or her as an authorized driver, at least as a general rule.

Facts: In September, 2014, defendant and a friend, Latasha Reed, drove in defendant’s Honda Accord to a Budget car-rental facility in Wayne, New Jersey, and rented a Ford Fusion. Reed actually did the renting while defendant remained in his Honda. The rental agreement specified that only Reed and other specified individuals, not including defendant, could drive the car. But defendant took control of the car anyway, as Reed drove the Honda. Defendant drove the rented Ford to his own home in Patterson, New Jersey, and loaded the trunk up with 49 bricks of heroin and some body armor before heading out, traveling by himself into Pennsylvania.

With defendant en route to Pittsburg via Interstate 81, Pennsylvania State Trooper David Long observed him as he drove by. Trooper Long’s suspicions were aroused because defendant was driving with his hands at the “10 and 2” position on the steering wheel (isn’t that what they teach us to do?), sitting far back from the steering wheel, and driving an apparent rental car (based upon a visible barcode in one of its windows). Trooper Long decided to follow Byrd and, a short time later, stopped him for a traffic infraction (the infraction itself not described in the decision).

Upon contacting defendant, it was verified that the car was a rental. It was also noted that defendant, who appeared to be “visibly nervous,” was not the person listed on the rental agreement as an authorized driver. During the contact, defendant was asked if he had anything illegal in the car. Although initially claiming that he did not, upon being asked for consent to search the car he admitted that there was a “blunt” in there. Understanding this to mean that he had some marijuana, and rejecting defendant’s offer to retrieve it himself, the trooper decided that as an unauthorized driver, defendant did not have legal standing to contest a search of the car. So the Trooper Long searched it without his consent.

The body armor and heroin were recovered from the trunk. Defendant was charged in federal court with the unlawful distribution and possession of heroin with the intent to distribute (21 U.S.C. § 841(a)(1)) and possession of body armor by a prohibited person (18 U.S.C. § 931(a)(1)). His motion to suppress the evidence was denied, the court basing its decision upon the theory that defendant lacked the necessary standing to challenge the legality of the search. Upon entering a conditional plea of guilty while reserving the right to appeal, the federal Third Circuit Court of Appeal affirmed. The U.S. Supreme Court granted certiorari.

Held: The U.S. Supreme Court unanimously reversed. The issue on appeal was whether a driver of a rented vehicle, when that person is *not* listed as an authorized driver on the rental agreement, has a reasonable expectation of privacy in that rented car. In other words, does that non-authorized driver have the right—i.e., the “*standing*”—to object to a search of the vehicle under the circumstances of this case; i.e., assuming that the vehicle is searched without probable cause or other legal justification? The answer is “*yes*,” he has such a right.

In analyzing this issue, the Court first noted that that the test most often associated with one’s legitimate expectation of privacy supplements, rather than displaces, the traditional property-based understanding of the Fourth Amendment. Recognizing this, defendant first argued that he had a common-law property interest in the rental car as a “second bailee” that provided him with a cognizable Fourth Amendment interest in the vehicle. (A “bailee” is defined as a person or party to whom goods are delivered for some specific purpose, but without transfer of ownership.) However, having failed to raise this issue in the courts below, the Supreme Court declined to decide it at this late date. The Court did note, however, that reference to property concepts does in fact aid the Court in assessing whether the driver of a rental car has a reasonable expectation of privacy despite not being listed as an authorized driver on the rental agreement.

Starting from the basics, it is clear that one who owns or lawfully possesses a car will almost always have a reasonable expectation of privacy in it. It is also a rule, however, that a person need not always have a recognized common-law property interest in the place or thing being searched to be able to claim standing. What is necessary, however, is a lawful presence and the right to exclude others. Based upon this analysis, the Court held here that the mere fact that a driver in otherwise lawful possession or control of a rental car is not listed on the rental agreement does not preclude him from exercising the right to exclude others. As such, this type of situation does not defeat his or her reasonable expectation of privacy. Defendant, therefore, had the necessary standing to contest the lawfulness of the search of the car. The Government argued, however, that because defendant intentionally used a third party as a “strawman,” in effect, in a calculated plan to mislead the rental company, it is not much different than if he had

actually stolen the vehicle. It is a fact that a person in possession of a stolen automobile will *not* generally have a right to object to the lawfulness of a search of that vehicle.

This argument, however, was not raised in the courts below and as such, cannot be decided by the Supreme Court. The Government also argued that under the facts of this case, and aside from the issue of standing, the trooper had probable causes to search the vehicle given defendant's admission that it contained marijuana. This also was an issue that was not decided below, and as such, cannot not be decided by the Supreme Court. Therefore, based upon the facts present before the Court, defendant did indeed have a reasonable expectation of privacy in the rented vehicle. The Appellate Court was reversed on this issue. However, the case was remanded to the lower courts for consideration of the Government's other two arguments; i.e., (1) that one who intentionally uses a third party to procure a rental car by a fraudulent scheme, for the purpose of committing a crime, is no better situated than a car thief, and (2) that probable cause justified the search in any event.

Note: The written decision in this case is long and very convoluted, involving an esoteric discussion of common-law property concepts vs. modern Fourth Amendment constitutional search and seizure considerations. And in the end, the Court really didn't decide the primary issue; i.e., whether or not one who does not qualify under the rental agreement as an authorized driver of the car, when that car is obtained by misrepresenting to the rental company who the driver is to be, retains his standing to test the legality of a search of that car. It is still up for grabs whether such a person, given the fraud involved in renting the car under false pretenses, is really no better off than if he had stolen it. Hopefully, whatever is decided by the Third Circuit on this issue is published so that we will then have a little better guidance. In the meantime, I think we have to take this case for what it's worth and just assume that whether or not a driver is listed in the rental agreement, and whether or not he intended a fraud by having someone else rent it for him, he does in fact have the necessary legal standing to prevent its otherwise unlawful search.

Consent Searches:

Parole Searches:

Searches of Cellphones:

Hearsay Testimony Offered to Rebut Third Party Culpability Evidence:

United States v. Johnson (9th Cir. Nov. 27, 2017) 875 F.3rd 1265

Rule: Consent searches of a residence are lawful so long as the resident's consent is free and voluntary. One's status as a parolee significantly diminishes that person's privacy interests as compared to the average citizen or a probationer. A parolee's cellphone is subject to a warrantless search. Potential hearsay evidence, when offered not for the truth of the matter but rather to rebut a third party culpability defense, is admissible in evidence.

Facts: On February 2, 2014, San Francisco Police Department officers responded to a 911 third-party call from defendant's ex-girlfriend to the effect that defendant, Valentino Johnson, had shot himself at an apartment in a Bayview District public housing project. The apartment was later determined to belong to Luana McAlpine; another former girlfriend of the defendant's although

initially described as his aunt. Before arriving, officers received information that defendant actually lived in Emeryville with his ex-girlfriend, across the bay in Alameda County, but had been forced to move out of there by a domestic violence temporary restraining order issued some 4 days earlier. The officers were also made aware of the fact that an “all-points-bulletin” (“APB”) had been issued to the effect that defendant was a suspect in a recent armed burglary involving a damaged 9mm handgun.

The officers were further told that defendant was currently on mandatory “PRCS” (“Post-Release Community Supervision”) parole supervision with prior arrests for murder, attempted murder, assault, kidnapping, false imprisonment, domestic violence, carjacking, and robbery. Upon arrival at McAlpine’s apartment, the officers discovered that the call had been a false alarm; that defendant was alive and well. A quick investigation revealed that defendant either now lived with McAlpine, or was at least staying there temporarily. McAlpine orally consented to a search of her apartment to ensure no one was inside who had been hurt. McAlpine, however, later testified that she didn’t feel like she had a choice because the officers wanted to conduct a Fourth waiver search based upon defendant’s parole status. The officers testified that they never mentioned “parole” in asking for permission. Either way, McAlpine consented and a warrantless search was conducted.

A written consent obtained from her after the search was completed. A Taurus PT-92 semi-automatic 9mm pistol with a damaged heel and the magazine missing was recovered. Sixty eight rounds of various types of ammunition were also found. Defendant’s clothing, mail and three prescription bottles in his name were found in one of the bedrooms. McAlpine, visibly upset because she knew that the presence of the gun could cause problems for her with the housing authority, told officers that the gun belonged to defendant. Meanwhile, defendant had been handcuffed during the search of the apartment. He was told by the officers that they had received a call from his ex-girlfriend saying that he had shot himself. Denying that he had had any contact with his ex-girlfriend, defendant invited an officer to check the call logs and text messages of his cellphone as proof of this fact. Checking the phone, the officer found no calls from defendant’s cellphone around that time.

Defendant, however, was arrested for possession of the firearm. In an interview at the police station, defendant again invited officers to “look at the text messages on [his] phone” to verify that he had tried to reconcile with his ex-girlfriend around January 21, 2014. After the interview, defendant remained in custody and his phone was held for forensic analysis. Three days later, SFPD’s multimedia forensics unit reported to detectives that they were unable to make a digital copy of the cellphone’s content because the phone was too new for the unit’s software. But checking the phone by hand resulted in the discovery of an incriminating text sent on January 28th that read, “*Who you know that has 9-mm clips? I just busted mine. It’s a PT-92 Taurus. . . . So how do I get it?*” A full year later, on February 2, 2015, after defendant had been indicted on federal charges of being a felon in possession of a firearm (18 U.S.C. §§ 922(g)(1) & 924(e)), but before trial, the Bureau of Alcohol, Tobacco, Firearms & Explosives (“ATF”) obtained a search warrant for the phone, noting the same incriminating message. The gun itself and the incriminating text message were later admitted into evidence over defendant’s objection. Convicted by a jury and sentenced to eight years in prison, defendant appealed.

Held: The Ninth Circuit Court of Appeal affirmed (except for the 8-year sentence, ruling, in effect, that defendant’s sentence was improperly calculated and that he should probably get more time). Among the issues on appeal was the trial court’s refusal to suppress both the gun and the incriminating contents of defendant’s cellphone.

(1) *Warrantless Search of the Apartment and Recovery of the Gun:* As for the search of the apartment and the recovery of the pistol, defendant argued that McAlpine’s consent was invalid in that she had been coerced into letting the officers into her apartment. In evaluating the validity of a consent, the Court noted the following factors that need to be considered: I.e., (a) whether the person giving consent was in custody, (b) whether the officers had their guns drawn, (c) whether *Miranda* warnings had been given, (d) whether the person giving consent was told that he/she had a right not to consent, and (e) whether the person giving consent was told that a search warrant could be obtained. In this case, there was conflicting testimony as to some of the above factors. The trial court, however, found the officers’ version to be credible, and not that of McAlpine. The Ninth Circuit found no “clear error” in the trial court’s conclusions on this issue. First, it is undisputed that McAlpine was not in custody. Secondly, the officers at no time had displayed their firearms. *Miranda* warnings were not give, but under the circumstances of this case, with McAlpine not the target of the investigation, “it would . . . make little sense to require *Miranda* warning. . . .” As a factor in defendant’s favor, McAlpine was never told that she had the right to refuse to give her consent. But McAlpine was also never told that a search warrant could be obtained, which would have implied that her refusal to consent would be fruitless. Although McAlpine apparently knew that defendant, as a parolee, was subject to warrantless searches, the trial court did not believe her when she testified that knowing this fact, she didn’t feel like she had any choice but to consent, or that the officers used this fact to coerce her consent. In all, the Court found that McAlpine’s consent was freely and voluntarily obtained as a matter of law.

(2) *Search of the Cellphone:* Citing the U.S. Supreme Court decision of *Riley v. California* (2014) 134 S.Ct. 2473, 189 L.Ed.2nd 430, defendant argued that the search of his cellphone was illegal. *Riley* held that warrantless searches of cellphones incident to arrest violate the Fourth Amendment. Defendant also cited the Ninth Circuit decision of *United States v. Lara* (9th Cir. 2016) 815 F.3rd 605, which held that a warrantless search of a cellphone cannot be justified by the fact that as a “probationer,” the suspect had previously waived his Fourth Amendment search and seizure rights. The Court here rejected defendant’s arguments on the basis that defendant’s rights as a “parolee” are significantly different than the rights of the defendants in both *Riley* and *Lara*. Defendant, in the instant case, had served a prison sentence in county jail under California’s “Post-Release Community Supervision Act of 2011” (“PRCS”), per P.C. §§ 3450 et seq., and as such, having been released and on parole, was then under the “mandatory supervision” of a probation officer as provided in P.C. § 1170(h)(5)(B). The Ninth Circuit has already held that “the State’s interest in supervising offenders placed on (PRCS) mandatory supervision is comparable to its interest in supervising parolees.” (*United States v. Cervantes* (9th Cir. 2017) 859 F.3rd 1175.) As a parolee, defendant automatically waived his search and seizure rights and was statutorily subject to search “without a search warrant or with or without cause.” (P.C. § 3067(b)(3).) It has “repeatedly (been) recognized that one’s status as a parolee significantly diminishes one’s privacy interests as compared to the average citizen,” or even as compared to a probationer’s interests. In *Riley*, the uniqueness of the modern cellphone was

recognized, noting that cellphones “differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee’s person . . . (being) in fact minicomputers that . . . could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers.” The arrestee in *Riley*, however, was not subject to a search and seizure waiver as the defendant was in the instant case. *Riley* is a “search incident to arrest case,” not involving a waiver of the suspect’s Fourth Amendment rights, and thus inapplicable to defendant’s dilemma. In *Lara*, it was held that the defendant’s cellphone was not subject to a warrantless search despite the fact that the defendant was subject to search and seizure conditions. However, the defendant in *Lara* was on probation as opposed to parole. Given the fact that parolees typically have committed the more serious offenses, their rights are diminished to a greater degree than are probationers. Per the Court, “(defendant’s) parole status alone distinguishes our case from *Lara* and *Riley*.” But in addition, defendant Lara’s search and seizure conditions made subject to search his “containers” and “property.” The court in *Lara* found that cellphones themselves do not fall into either category. The Court in the instant case held that the defendant’s search and seizure conditions, under P.C. § 3067 where he was subject to search “at any time of the day or night, with or without a search warrant or with or without cause, . . . sweeps more broadly than the probation search condition at issue in *Lara*, . . .” Additionally, defendant argued that the three-day delay between seizure of his cellphone and its inspection by SFPD’s multimedia forensics unit, and then the year’s delay in obtaining a search warrant by ATF for a more thorough search, were unreasonable. Noting that “(t)he touchstone is reasonableness,” the Court held, while also noting that defendant never made a motion for the return of his phone, that the delays here were justified by the circumstances, were not unreasonable, and did not render the searches “arbitrary, capricious, or harassing.” Defendant’s motion to suppress, therefore, was properly denied by the trial court. (The Court does not discuss whether defendant had validly consented to the search of his cellphone.)

(3) *Admissibility of Alleged Hearsay Evidence*: Of interest perhaps only to attorneys (both prosecutors and defense attorneys) was the Court’s discussion of the admissibility of an officer’s testimony concerning McAlpine’s statement to the officers, telling them that “there was only one person [the gun] could belong to, and that was Valentino Johnson.” Defendant objected to the jury hearing this from the officer, arguing that it was “hearsay;” i.e., an out-of-court statement offered to prove the truth of the matter asserted, per E.C. § 1200 (The “matter asserted” being that defendant possessed the offending firearm in this case). The trial court ruled, however, and the Ninth Circuit agreed, that this testimony was properly admitted into evidence for the “non-hearsay purpose” of rebutting defendant’s argument that the gun belonged to another person. It helped, however, that the jury was instructed that they were not to use this testimony as evidence of defendant’s guilt, and the prosecutor never argued that it was. Recognizing that this was a close call, the Court covered its collective butt by noting that even if it was error to admit such testimony, the error was harmless in light of an already strong case.

Conclusion: Except to remand for resentencing, defendant’s conviction was upheld.

Note: The Ninth Circuit is clearly of the opinion that a probationer’s Fourth Amendment waiver is not as inclusive as that of a parolee, making it a serious issue as to whether we can use the waiver to get into a probationer’s cellphone. California law is perhaps not quite so clear. The Fourth District Court of Appeal (Div. 1) held in *In re I.V.* (2017) 11 Cal.App.5th 249, at pages 259-263, that when interpreting a minor’s conditions of probation, reference to defendant’s

“property,” as “reasonably construed,” does *not* include “electronic data,” citing the Ninth Circuit’s *Lara* case as described above. However, the same Appellate Court, in *People v. Sandee* (2017) 15 Cal.App.5th 294, at pages 302-304, noted that because the Ninth Circuit uses a balancing test, while California uses an objective test, in analyzing whether the probationer consented to the search by accepting the specific probation search conditions at issue (see pg. 303, fn. 6), *Lara* is *not* persuasive authority and does not preclude a finding that the search of text messages contained in defendant’s cellphone was lawful under the probationer’s Fourth waiver conditions, thus including a cellphone under her “*property*” and “*personal effects*.” But then, as discussed in *Sandee*, we now have the so-called Electronic Communications Privacy Act which took effect on January 1, 2016, and which restricts searches of all “electronic devices.”

The Act provides that the government shall not “[a]ccess electronic device information by means of physical interaction or electronic communication with the electronic device” unless one of several statutory exceptions applies, including obtaining the specific consent of the authorized possessor of the device. (P.C. § 1546.1(a)(3) & (c)(4)) The Act does not discuss what constitutes a “specific consent.” An exception to the above prohibition was then enacted, effective January 1, 2017, providing that a government entity may physically access electronic device information “[e]xcept where prohibited by state or federal law, if the device is seized from an authorized possessor of the device who is subject to an electronic device search as a clear and unambiguous condition of probation, mandatory supervision, or pretrial release.” (*Id.*, P.C. § 1546.1(c)(10)) Therefore, to make sure a probation search condition of a cellphone (or any “electronic device”) is “clear and unambiguous,” it is suggested that when a search and seizure Fourth waiver is imposed on a probationer, that his conditions specifically include authorization to conduct warrantless, suspicionless searches of all electronic devices owned or in the possession of the probationer. Hopefully, that will help resolve this issue.

Fourth Waiver Searches:

Warrantless Searches of Residences Over a Resident’s Objection:

***Smith v. City of Santa Clara* (9th Cir. Nov. 30, 2017) 876 F.3rd 987**

Rule: Police officers may conduct a warrantless search of a probationer’s residence despite the objection of a co-occupant.

Facts: On October 4, 2010, Vahid Zarei gave Justine Smith a ride in his car. Shortly thereafter, Zarei discovered that the spare key to his car was missing and his car had been stolen. He reported the theft to the police. On October 7, a friend of Zarei’s found the missing car in Santa Clara. The friend drove Zarei to Santa Clara to retrieve the car. But upon arriving, they observed Justine and an unknown male get into the car and drive away with it. While following Justine and the male, the male got out of the car, approached Zarei, and stabbed him in the stomach. Justine and the male fled the scene while Zarei was taken to the hospital with a life-threatening injury. The Santa Clara police Department investigated the incident.

Upon Justine being identified as the thief, it was discovered that she was on felony probation with search and seizure conditions from a 2009 conviction for grand theft and forgery. The

Probation Department showed that she had reported her address on December 22, 2009, as 940 Gale Drive. On January 6, 2010, Justine reported to the California Department of Motor Vehicles that her address was 942 Gale Drive; the other half of the 940-942 duplex. 940 Gale Drive was the home of Justine's mother, Josephine. Further investigation revealed that a county database showed Justine's address as of January 27, 2010, and then again on May 14, 2010, as 940 Gale Drive. Lastly, Justine once again reported to Probation on January 2, 2010, that her address was 940 Gale Drive, but noted that she was in the process of moving.

Officers went to the duplex and contacted Justine's mother, Josephine (plaintiff in this lawsuit), at 940 Gale Drive. She declined to allow the officers to enter her residence without a search warrant. The Officers entered anyway, searching for Justine. They also searched 942 Gale Drive for which Josephine supplied the key, but only after the officers threatened to force entry. Justine was not found at either address. Josephine sued the City of Santa Clara and the individual police officers involved in the search in federal court, alleging violations of their constitutional rights under 42 U.S.C. § 1983 and California's "Bane Act" (Cal. Civ. Code § 52.1). (The Bane Act provides a state cause of action for individuals whose "rights secured by" federal or California law have been interfered with "by threat, intimidation, or coercion." Cal. Civ. Code § 52.1(a)-(b)) Josephine's primary complaint was that searching her residence without a warrant and over her objection violated her Fourth Amendment rights.

The trial court granted the civil defendants' (Santa Clara and the police officers) motion for summary judgment on the § 1983 claim, but denied it as to the Bane Act allegations. At trial, the court refused to instruct the jury, as requested by Josephine, that Justine's probationary search and seizure conditions were insufficient to make the search reasonable so long as Josephine was present and objected to the search. The trial court also denied Josephine's motion for judgment as a matter of law. With the case proceeding to trial, the civil jury found for the defendant officers and the City of Santa Clara. Josephine appealed.

Held: The Ninth Circuit Court of Appeal affirmed. On appeal, Josephine challenged both the refusal of the trial court to instruct the jury to the effect that her refusal to consent to a search of her residence over-shadowed Justine's waiver of her Fourth Amendment search and seizure rights, as well as the trial court's pretrial denial of her motion for judgment as a matter of law. The relevant issue as to both claims is the same: "Is a warrantless search of a residence that the police have probable cause to believe is the residence of a probationer (with search and seizure conditions), and that is otherwise reasonable as to the probationer, unreasonable as to a non-probationer occupant of the residence who is present at the time of the search and refuses to consent to the search?" Josephine's authority for her argument was the landmark U.S. Supreme Court decision of *Georgia v. Randolph* (2006) 547 U.S. 103. *Randolph* did in fact hold that even if a person who apparently possesses common authority over a home consents to a warrantless search (the probationer, Justine, in this case), the search is not reasonable as to a second occupant (i.e., Josephine) if that second occupant is physically present and refuses permission to search.

On its face, this appears to support Josephine's argument that her refusal to consent to the officers' entry and search of her residence should have been respected despite Justine's Fourth waiver condition. However, a search based upon a waiver of one's Fourth Amendment rights is an exception to the rule of *Randolph*. Fourth waiver searches (probation and parole) come under

the category of a “*special needs*” search. In this regard, the U.S. Supreme Court held in *Griffin v. Wisconsin* (1987) 483 U.S. 868, that the state’s interest in supervising a probationer (or a parolee) give rise to “special needs” that permitted “a degree of impingement upon privacy that would not be constitutional if applied to the public at large.” The Court then found that these special needs make the warrant requirement impracticable; interfering to an appreciable degree with the probation system, setting up a magistrate rather than the probation officer as the judge of how close a supervision the probationer requires.

Moreover, the delay inherent in obtaining a warrant would make it more difficult for probation officials to respond quickly to evidence of misconduct, and would reduce the deterrent effect that the possibility of expeditious searches would otherwise create. *Randolph*, on the other hand, is purely a “consent” search case, not involving the state’s special needs in supervising probationers. The rule of *Randolph*, therefore, is inapplicable to this case. For a Fourth waiver search, the test is whether or not it was “reasonable” under a “totality of the circumstances.” The mere existence of a Fourth waiver makes a warrantless search “reasonable” despite the objections of a co-occupant. In this case, it is undisputed that the police knew that Justine was serving a felony probation term for serious offenses. It is further undisputed that the police had probable cause to believe that Justine had just been involved in the theft of an automobile and a stabbing, and that she was still at large. The officers also had probable cause to believe that Justine lived in Josephine’s home. Under these circumstances, the warrantless search of the residence was reasonable.

Note: The Ninth Circuit’s standards for such a search are more stringent than required under California’s interpretation of the law. For instance, in California, it is generally recognized that no suspicion of renewed criminal activity is required for a probation search to be lawful. (*People v. Bravo* (1987) 43 Cal.3rd 600; *People v. Brown* (1987) 191 Cal.App.3rd 761; *People v. Reyes* (1998) 19 Cal.4th 743, 748-749.) Federally, a reasonable suspicion is necessary, as noted in this case. Also, the Ninth Circuit has invented the rule that a probationary Fourth waiver is enforceable only if the underlying felony offense for which the person is on probation is at least a serious offense (*United States v. Lara* (9th Cir. 2016) 815 F.3rd 605, 609-612.), and maybe even a violent offense. (*United States v. Job* (9th Cir. 2017) 871 F.3rd 852, 860.) California has no such requirement. Lastly, the Ninth Circuit requires full probable cause to believe that the probationer lives at the residence searched, as noted in this case. California requires only a reasonable suspicion. (*People v. Downey* (2011) 198 Cal.App.4th 652, 657-662.) The U.S. Supreme Court has been particularly unhelpful in resolving these differences.