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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THIS EDITION'S WORDS OF WISDOM:

"*I don't care how nice the hand soap smells. You should never walk out of the restroom sniffing your fingers.*" (Unknown)

IN THIS ISSUE:

***Administrative Notes*:**

Constitutional and Statutory Issues Raised by Delays in Criminal Proceedings*:** For those of you (including me) who have been wondering what the legal effects might be of all the recent delays in criminal court proceedings, given a criminal defendant's statutory and constitutional rights to a "*speedy trial*," the first case discussing the issue has been decided. California's First District Court (Div. 4) decided in ***Stanley v. Superior Court (June 9, 2020) 50 Cal.App.5th 164, that the severity of the global COVID-19 pandemic and the impact it has had within the state independently supports the trial court's finding of good cause to continue the last day for the start of defendant's trial by an extra 90 days under **Pen. Code, § 1382**. The Appellate Court rejected defendant's contention that the 90-day continuance violated his constitutional right to access the courts and to due process. Defendant had not been denied access to the courts, as reflected by the very consideration of his speedy trial motion. And defendant's due process rights were not violated even though he had to sit out the delay in custody. The Court also noted that defendant did not allege that the conditions of his confinement posed a particular health risk to him sufficient to raise constitutional issues.

***Case Law*:**

***The Automobile Exception to the Search Warrant Requirement*:**
***Proposition 64, H&S § 11362.1(c), and the Lawful Possession of Marijuana*:**

People v. Johnson **(June 15, 2020) __ Cal.App.5th __ [2020 Cal.App. LEXIS 533]**

Rule: The plain sight observation of a legal amount of marijuana, enclosed in a container not open at that time, even with the odor of marijuana emanating from the vehicle, fails provide the necessary probable cause to search for more marijuana. Proposition 64 and H&S § 11362.1(c) provide an adult person in lawful possession of less than ounce of marijuana protection from being detained, searched, or arrested.

Facts: Stockton Police Officers Aron Clark and William Hall were on patrol (in uniform and in a marked patrol car) when they observed defendant Dammar Darrell Johnson sitting in a parked car on the side of the road. Noting the absence of a valid vehicle registration tab, the officers decided to stop and check him out. Activating their emergency lights, Officer Clark got out of the patrol car as an agitated defendant got out of his. Defendant refused to return to his car despite being told to do so, demanding to know (as he "yelled" at the officers) why he had to get back into his car. When Officer Clark grabbed defendant's arm to maintain control, defendant tensed up and pulled away. Defendant continued to pull away and yell at the officers, resulting in his arrest for resisting (i.e., P.C. § 148). Defendant was handcuffed and placed in the patrol car.

Finding the vehicle's registration to be expired, the officers intended to do an inventory search in preparation for towing it (see Note, below). As Officer Clark approached the driver's side door, he could smell the odor of marijuana emanating from the vehicle. After checking underneath the driver's seat, the officer "went to the center console where (he) found a small bag," of "possibly a couple of grams" of marijuana, "knotted at the top." Believing he now had probable cause to search the entire vehicle for more marijuana, Officer Clark did so, finding a loaded pistol. Charged in state court with being a felon in possession of a firearm (among other charges), defendant's motion to suppress the gun was denied. After pleading "no contest" to this charge, defendant appealed.

Held: The Third Circuit Court of Appeal reversed. With the People failing to argue the possible applicability of an "inventory search" theory, or that the search of defendant's vehicle was a valid "search incident to arrest" (see Note, below), the sole issue on appeal was whether, given what the officers knew at the time, they have sufficient probable cause to search defendant's car? The magistrate at defendant's preliminary examination as well as the Superior Court trial judge both ruled that they did. The Appellate Court disagreed. Under the so-called "automobile exception" to the search warrant requirement, "police who have probable cause to believe a lawfully stopped vehicle contains evidence of criminal activity or contraband may conduct a warrantless search of any area of the vehicle in which the evidence might be found." The "totality of the circumstances" must be considered in determining whether such probable cause exists.

On November 8, 2016, prior to defendant's arrest, California's voters passed the "*Control, Regulate and Tax Adult Use of Marijuana Act of 2016*," also known as "*Proposition 64*." Prop. 64 included the enactment of Health & Safety Code § 11362.1(a)(1), legalizing the possession of up to 28.5 grams (an ounce) of marijuana (aka; "*cannabis*") by adults, 21 years of age or older. Subdivision (c) of Section 11362.1 provides marijuana users with protection from being detained, searched, or arrested, when all that is known is that the user has in his or her possession a legal amount of marijuana. Specifically: "*Cannabis and cannabis products involved in any way with conduct deemed lawful by this section are not contraband nor subject to seizure, and no conduct deemed lawful by this section shall constitute the basis for detention, search, or arrest*." Thus the legal possession of marijuana is not to be considered when assessing whether "probable cause" exists. The People argued, however, that Section 11362.1(c)'s protection from detention, search, or arrest is inapplicable in this case because defendant was not in lawful possession of marijuana, having violated both H&S Code § 11362.3(a)(4) (operating a vehicle with an open container of marijuana), and/or Vehicle Code § 23222(b) (driving a vehicle with an unsecured container of marijuana).

Although the record was not clear, the Court assumed for the sake of argument that defendant's baggie of marijuana was both observed in plain sight (i.e., before any search of the car had been initiated) and "knotted" at the top. Based upon these assumptions, what Officer Clark knew at the time he initiated the search of defendant's car that ultimately resulted in the recovery of the gun was that there was an odor of marijuana emanating from the vehicle and that under an ounce of marijuana was observed in plain sight. The People cited three pre-Prop. 64 cases, all indicating that possession of marijuana in under these circumstances was illegal. In *People v. Strasburg* (2007) 148 Cal.App.4th 1052, the odor of marijuana coming from defendant's car—

even though defendant offered proof to the effect that he was a lawful "medical marijuana" user—was held to justify a warrantless search of the car. It was held in *Strasburg* that the medical marijuana law (*Medical Cannabis Regulation and Safety Act; Bus. & Prof. Code §§ 19300 et seq.*), effective at the time, provided immunity from prosecution, but did not act as a shield from a reasonable investigation and did not detract from the officer's probable cause. When *Strasburg* was decided, however, "*nonmedical*" marijuana was still illegal. Thus, the odor of marijuana would always, at that time, provide probable cause to search a car. However, since passage of Prop. 64 (Nov. 2016) and enactment of H&S Code § 11362.1(c), such a circumstance as occurred in *Strasburg* (i.e., possession of a legal amount of marijuana, along with its odor), now being lawful, no longer constitutes probable cause justifying the search of a car for more.

The Court similarly rejected the continuing validity of *People v. Waxler* (2014) 224 Cal.App.4th 712. In *Waxler*, it was held that the odor of burnt marijuana and the observation of a marijuana pipe containing what appeared to be burnt marijuana residue in the pipe's bowl established the necessary probable cause to justify the search of defendant's car for more. *Waxler*, however, was also decided pre-Prop. 64, and at a time when the observation of any amount of marijuana provided sufficient probable cause to search a vehicle. Since enactment of H&S Code § 11362.1(c), however, making such simple possession legal, that is no longer the case. Lastly, the Court rejected the People's reference to *People v. Souza* (1994) 9 Cal.4th 224, where it was held that an opened bottle of tequila in plain view in defendant's car entitled the officer to look for more. In *Souza*, it was held that the observation of an opened bottle of booze established, as a matter of law, probable cause to believe there might be other such bottles in the car. H&S Code § 11362.3(a)(4) provides an exception to Section 11362.1(c), making it illegal to possess an "*open container*" of marijuana while operating a vehicle.

Similarly, V.C. § 23222(b) prohibits driving with a receptacle of cannabis that had been opened or with its seal broken, whether or not that container is open when observed by law enforcement. The Court held here that defendant's baggie of marijuana, being tied and "knotted" at the top, was in fact *not* open, and that the section (H&S § 11362.3(a)(4)) applies only to a container or package of cannabis that is open when found. The fact that it may have been open at one time, or could easily be reopened, does not constitute a violation of H&S Code § 11362.3(a)(4). Section 11362.1(c) therefore continued to provide defendant with protection from detention, search, or arrest. Also, because there was no evidence presented to the effect that defendant had been driving, the Court held that V.C. § 23222(b) (driving with a container of marijuana that *had been* opened) did not apply to this case. The only post-Prop. 64 case discussed was *People v. Fews* (2018) 27 Cal.App.5th 553, where defendant was contacted as a passenger in a car from which emanated the odor of recently burned marijuana, and where the driver was holding a half-burnt cigar which was found to contain marijuana. Noting that it is illegal to drive while under the influence of a drug (V.C. § 23152(f)) and to possess an opened container of marijuana (V.C. § 23222(b)), the *Fews* Court held that the driver of the car in which defendant was a passenger was potentially in violation of both. As such, the *Fews* court held that Section 11362.1(c)'s protection from detention, search, and arrest was inapplicable, allowing for the search of the car in which Fews was a passenger. The current case, however, is different. Because defendant here was shown only to be in possession of a lawful amount marijuana, contained in a closed, knotted, baggie, and not in violation of any other statutory restriction, he was shielded from being

detained, searched, or arrested pursuant to Section 11362.1(c). The search of his vehicle was therefore unlawful.

Note: So why wasn't it argued on appeal that the gun would have inevitably been found during a lawful inventory search of defendant's car upon its impoundment? That's probably because the officers could not have impounded the car without first showing compliance with the "*Community Caretaker Doctrine*" which requires proof that the vehicle, if left at the scene, was parked illegally, is blocking traffic or passage, or stands at risk of theft or vandalism. The fact that there is a statute authorizing such an impoundment *does not* take precedence over the Community Caretaking rules. (See the lengthy Admin. Note on this topic; *California Legal Update*, Vol. 24, #12, Nov. 23, 2019, or ask me for it and I'll send it to you.) So how about a "*search incident to arrest*?" Well, with defendant secured in the patrol car, and it not reasonably believed that evidence related to the cause of the arrest (i.e., resisting the officers) might be found in the car, the U.S. Supreme Court has ruled that this theory for conducting a warrantless search of an arrestee's vehicle is no longer valid. (*Arizona v. Gant* (2009) 556 U.S. 332.)

The trial court ruled accordingly on both theories (see fn. 1.) and the People wisely chose not to make either an issue on appeal. But the important point of this case is that the plain sight observation of a legal amount of marijuana, enclosed in a container not observed to be open at that time, even with the odor of marijuana emanating from the vehicle but with no other potential violations of the law, does not, by itself, provide the necessary probable cause to search the suspect's motor vehicle. An exception might be if the defendant is observed driving the vehicle (or there otherwise being probable cause to believe he had been driving the vehicle) while smoking the stuff (a possible violation of V.C. § 23152(f); driving while under the influence of a drug, and/or V.C. § 23222(b), having an *opened* container [even if it has been reclosed] of marijuana in a vehicle). In either case, H&S § 11362.1(c) will no longer shield the driver from being detained, searched, or arrested. And while there's no case law on it yet, we might be able to argue that if an officer of proven expertise can credibly testify that the odor he smelled was of "*bulk*" marijuana, indicating the illegal possession of more than an ounce, or perhaps "*recently burned marijuana*," suggesting that the driver may be in violation of V.C. § 23222(b) (See *People v. Fews*, *supra*, where the driver also cop'd to smoking a cigar laced with marijuana while driving), then we might have an exception to H&S § 11362.1(c) which would allow for a search of the vehicle. On these issues, we must await further clarifying case law.

***DUI Arrests; Veh. Code § 23612; and Implied Consent to a Breath or Blood Test*:**
***Implied vs. Actual Consent to a Blood Test*:**

***People v. Lopez* (Mar. 11, 2020) 46 Cal.App.5th 317**

Rule: Implied consent to submit to a breath or blood test, as contained in Veh. Code § 23612, is but one factor to consider in determining whether a DUI arrestee gave actual consent. The giving of the statutory advisals, as contained in V.C. § 23612, is also a factor to consider in determining whether a DUI arrestee consented to a breath or blood test.

Facts: On September 29, 2013, defendant was stopped and detained by a Rocklin police officer for suspicion of driving while under the influence. (The circumstances leading to the

traffic stop were not contested and thus not described in the written decision). Officer Evan Adams assumed responsibility for the investigation. Although a field sobriety test indicated that defendant was in fact impaired, and noting that she exhibited an unsteady gait, constricted pupils, and slurred speech, she nonetheless blew a 0.000% on a Preliminary Alcohol Screening (PAS) device. This indicated to Officer Adams that defendant was under the influence of a controlled substance as opposed to alcohol. Defendant was therefore arrested and transported to the county jail.

Officer Adams later testified that what he normally did (and that he did with this defendant) was to advise defendant that she was required by law to provide a blood sample. Specifically, he told her that she was under arrest for DUI, and that because he believed she was under the influence of a controlled substance, she was required by law to submit to a blood test (as opposed to a breath or urine test). Officer Adams also incorrectly told defendant that her license would be suspended for two to three years if she refused the blood test. Per Officer Adams, defendant "consented and cooperated," not objecting or resisting at any point, eliminating the necessity of getting a search warrant for her blood, which, he said, he would have done had she not consented. Per Officer Adams, although defendant did not expressly consent, the he believed that her consent was implied by the fact that she never objected, cooperating throughout the entire procedure.

Phlebotomist Sasha Perez arrived at the jail to perform the blood withdrawal. Although Perez did not recall defendant, she also did not recall anybody having to be forced to give a blood sample that day. (Defendant testified that she was never asked for consent to provide a blood sample, and that she was physically forced to provide the blood sample over her objections; testimony the trial court judge rejected as unbelievable.) Charged in state court with driving while under the influence of a controlled substance (Veh. Code, § 23152(a)), defendant filed a motion to suppress the blood test results. After hearing the above described testimony, the trial court specifically ruled that Officer Adams' account was more credible—that defendant, through her cooperation, had consented to the procedure, and that her blood was in fact drawn in a reasonable manner by a professional phlebotomist—and denied defendant's motion to suppress the blood results. The Appellate Department of the Superior Court upheld the trial court's decision. The Superior Court then stayed proceedings pending a decision by the Third District Court of Appeal.

Held: The Third District Court of Appeal affirmed. The basic rules are well established: It is now well-settled, for instance, that "(a) blood draw is a search of the person." (*Birchfield v. North Dakota* (2016) 579 U.S. ___ [136 S. Ct. 2160].) As such, taking a blood sample from a DUI suspect requires a search warrant, absent a free and voluntary consent or an exigency. The normal dissipation of drugs or alcohol from one's blood does not, by itself, constitute an exigency. (*Missouri v. McNeely* (2013) 569 U.S. 141.) An exigent circumstance exists only when blood-alcohol evidence is dissipating *and* "some other factor creates pressing health, safety, or law-enforcement needs that would take priority over a warrant application." (*Mitchell v. Wisconsin* (2019) 588 U.S. ___ [139 S.Ct. 2525].) Nor can a warrantless blood draw be justified as a "*search incident to arrest*." (*Birchfield v. North Dakota*, *supra*.) In this particular case, it was never argued that an exigency existed. The issue, therefore, was whether or not defendant had consented to the warrantless blood draw.

California has an "implied consent" statute; i.e.; Veh. Code § 23612. Per subdivision (a)(1)(A) & (B) of Section 23612, anyone driving a motor vehicle is "deemed to have given her (or his) consent to chemical testing of her (or his) breath or blood if she (or he) was lawfully arrested for diving (while) under the influence.) But this statute does not, by itself, establish "actual consent." It is but a single factor to consider amidst the totality of the circumstances when determining whether a driver arrested for DUI did in fact consent to a test of his or her blood or breath. Despite the connotation of California's so-called "implied consent" statute, a DUI suspect retains the right withdraw her implied consent and refuse to provide a breath or blood sample. Also to be considered is whether the officer provided the necessary admonitions to an arrested DUI suspect, as required by statute. Pursuant to subdivision (a)(2)(A) & (B) of Section 23612, Officer Adams was required to inform defendant that she could choose between a breath test or a blood test. If defendant, however, chose a breath test, then Officer Adams—with reasonable cause to believe that she was under the influence of a drug and knowing that a breath test would not substantiate such a belief—was authorized to request that she take a blood test. (Veh. Code § 23612(a)(2)(C).) Should a DUI arrestee refuse to give her actual consent, such a refusal has consequences.

The implied consent law required Officer Adams to inform defendant that her refusal to submit to testing would result in a fine, suspension of her driver's license, and, if she was convicted of DUI, mandatory imprisonment. (Veh. Code § 23612(a)(1)(D).) The law also required Officer Adams to inform defendant that a refusal to submit to the test could be used against her in a court of law, and that she was not entitled to have an attorney present when she decided whether to take the test or during the test. (Veh. Code § 23612(a)(4).) With defendant challenging the validity of her consent, it became the People's burden to prove that she did in fact freely and voluntarily consent; i.e., that it was not coerced by threats or force, or in submission to a claim of lawful authority. In this case, defendant never expressed her actual consent to having blood withdrawn. But neither did she expressly object.

The Court, in looking at the totality of the circumstances, principally her lack of objection and total cooperation with the entire procedure, held here that defendant did in fact consent to the withdrawal of her blood. As for the necessary advisements, the Court found that although Officer Adams failed to tell defendant that she had a choice between a breath test and a blood test, he did in fact correctly tell her that she was required to undergo a blood test given the fact that it appeared that it was drugs, as opposed to alcohol, that was in her system. In response, defendant did not object or refuse to undergo a blood test. She did not resist, but instead voluntarily placed her arm on the table to allow the phlebotomist to draw her blood. The fact that Officer Adams failed to first tell defendant that she had a choice between a breath test or a blood test was held to be insufficient, by itself, to invalidate her consent. Also, even though the officer incorrectly told defendant that her license would be suspended for two to three years if she refused the blood test, he correctly stated defendant's license would be suspended. Rejecting defendant's arguments that her consent should be invalidated as it was a mere submission to the officer's apparent authority, or that she had been coerced into consenting, the Court found that there was substantial evidence to support the trial court's denial of defendant's motion to suppress.

Note: I have to believe that most (if not all) law enforcement agencies have written down Section 23612's advisal requirements into an easy to use checklist. If not, then they certainly should. (If you have such a list, I'd love to see it.) Assuming this to be true, it seems to me that officers would be well advised to use it and just read the required advisals, one by one. Such a practice would go a long way in insuring that the "totality of the circumstances" will consistently weigh in favor of a judicial ruling that a DUI arrestee did in fact freely and voluntarily consent to a breath or blood test. Also, this whole appeal would have been moot (saving a lot of judicial and prosecutorial time, effort, and paper work, not to mention the officer's personal time having to wait in a courthouse hallway to testify) had the officer just sought out an actual, express consent. It appears from the issues discussed here that the officer cut a lot of corners by winging some of the necessary steps in processing this particular DUI arrestee, thus generating some appellate issues that could have gone either way.

***Tape-Recordings and Transcriptions of a Defendant's Confession*:**
***Offers of Leniency and Coercion; Comments on the Death Penalty*:**
***Mental Impairment and a Knowing and Intelligent Waiver of Rights*:**
***Delay in Arraignment for a Prisoner Subject to a Parole Hold*:**
***Incompetence of Counsel and Trial Strategy*:**
***Brady Error*:**

Benson v. Chappell **(9th Cir. May 1, 2020) 958 F.3rd 801**

Rule: (1) Tape-recordings and transcriptions of a defendant's confession need not be error free, so long as no prejudice is shown. (2) Inappropriately inferring to a criminal suspect that he is not subject to the death penalty, absent evidence that the comment was the cause of defendant's later confession, does not constitute an offer of leniency nor coercive interrogation tactics, and is not reversible error. (3) Mental impairment by itself does not prevent a knowing and intelligent waiver of one's constitutional rights. (4) A prisoner's right to a speedy (48-hour) arraignment and concurrent probable cause determination is not violated when he is being held on a parole hold. (5) An unsuccessful trial strategy does not necessarily constitute incompetence of counsel. (6) It is not *Brady* error to fail to provide defense counsel with potentially relevant evidence absent a showing that such failure was prejudicial.

Facts: Laura Camargo lived in Nipomo, California, with her three children—Stephanie (age four), Shawna (age three) and a boy; Sterling (age twenty-three months)—in a small, two-room shack that shared an unattached bathroom with another unit. Defendant Richard Allen Benson lived in an apartment about ten miles away, in Oceano, with two of Laura's friends; Barbara and Katrina. On January 4, 1986, Laura visited Barbara, Katrina, and defendant. When it was time for Laura to leave, defendant secured a ride for her back to her shack. Taking measures to conceal his destination from Barbara and Katrina, defendant accompanied Laura to Nipomo, carrying with him a heavy briefcase later found to contain child pornography. Defendant, an admitted pedophile, later admitted that he "went out there with the intention of doing something to (Laura's) kids." Upon arriving at Laura's shack, and after the baby-sitter had departed, defendant initiated his plan. Picking up a claw hammer he found in the shack and, with the intention of "tak(ing" her out," defendant repeatedly and violently struck Laura in the back of the head. He then stuffed socks into and over her mouth until she was dead. Once this was

accomplished, defendant proceeded to sexually assault Stephanie and Shawna throughout that night and next day, January 5th. At some point during this time, he strangled two-year old Sterling to death, thus allowing him to be alone with Laura's two daughters in what he later described as "a molester's type of heaven . . . being completely able to get what he wanted with no interference." Defendant continued to molest Stephanie and Shawna into January 6th when he finally decided that he had had enough, and needed to kill them as well. Using a heavy steel jeweler's mandrel that he had in his briefcase (being a jeweler by trade), defendant repeatedly struck the two girls in the head. He finally finished them off with the claw hammer he'd used to kill Laura.

His reasons for killing Stephanie and Shawna was "to protect my freedom." Then, to cover up his crimes, he set the shack on fire, and fled. The next day, January 7th, having hooked a ride back to Oceano, defendant asked K.S., a friend, for a ride to Los Osos; a town north of San Luis Obispo. After they got a far as San Luis Obispo, defendant forced K.S. to continue the drive while threatening her at first with a knife, and then with some sort of "cylinder with something like a needle sticking out of it," telling "her it would kill her if he pricked her with it." Defendant had a terrified K.S. drive him to an abandoned house where he took his belongings and went inside. K.S. fled, driving straight to the San Luis Obispo Police Department. Officers returned with K.S. to the abandoned house and arrested defendant, booking him on a charge of kidnapping at around 11:30 p.m. on January 7. Upon determining that defendant was on parole, a parole hold was placed on him. He was soon connected to the above-described murders.

On January 9th, Detective Bolts and Investigator Hobson of the San Luis Obispo Sheriff's Department questioned defendant in a tape-recorded, 12-hour interview. Defendant was read his *Miranda* rights, stated that he understood them, and provided an express waiver of those rights. Defendant was initially questioned about the kidnapping of K.S. Eventually, however, the officers got into a discussion of the murders of Laura Camargo and her three children. At one point during the interrogation, defendant commented; "*I don't see, I don't see how you can say it's not the end of the line*." Detective Bolts responded; "*It's not*.", to which defendant replied; "*It is for me*." Bolts then said: "*Why*? *There's no death penalty here*." Defendant responded; "*That doesn't matter*." Perhaps attempting to divert the discussion away from this obviously incorrect statement, Investigator Hobson interjected; "*Wait a minute, before we talk about that, we don't know what happened in that house . . . .*"

Although defendant initially claimed he didn't remember what had happened, he eventually proceeded to provide a complete confession to his crimes, admitting to the murders of Laura and Sterling, and then having molested the two girls for some 30 hours before murdering them as well. Defendant was subsequently booked on murder and child molestation charges. The next day (January 10th), Dr. Gordon, as a member of the Sexual Assault and Response Team, interviewed defendant. After again being advised of his rights, defendant agreed to talk with him, providing a detailed description of the molestation of Stephanie and Shawna. Finally, on January 13th, six days after his initial arrest, Detective Bolts and Investigator Hobson interviewed defendant once again, for another three hours. Defendant provided the officers with further details of his crimes. At the end of this interview, in response to the officers' questions, defendant specifically conceded that he had not been threatened in any way, nor did he receive any offers of leniency to get him to admit his crimes, stating that to the contrary, he was

"surprised that that (topic) came up." Defendant was finally arraigned on January 14th; some seven days after his initial arrest. Defendant was charged in a 14-count complaint with murder, child molestation, arson, and kidnapping, with special circumstances alleged, making this a death-penalty case. Convicted on all counts and with special circumstances found to be true, defendant was sentenced to death. His conviction and sentence (except for two witness-killing special circumstances) was upheld by the California Supreme Court. (*People v. Benson* (1990) 52 Cal.3rd 754.) Among his post-conviction appeals, defendant filed a Writ of Habeas Corpus in the federal district (i.e., trial) court. Defendant appealed from the district court's denial of his writ, the district court's decision coming down in a 373-page memorandum.

Held: The Ninth Circuit Court of Appeal, in a split (2-to-1) decision, affirmed. The issue at this stage of the proceedings was the correctness of the federal district court's rulings as to whether the California Supreme Court's decision, in affirming defendant's conviction and sentence, was "contrary to, or involved an unreasonable application of, clearly established Federal law," or, to the contrary, was "based on an unreasonable determination of the facts." (28 U.S.C. § 2254(d)). In his Writ of Habeas Corpus, defendant primarily challenged the admissibility of his confession.

(1) *Reliability of the Tape-Recorded Confession*: Defendant first argued that the taped recordings and the transcriptions thereof, reflecting his statements to the officers, was unreliable and inaccurate. Noting only that no there is no clearly established federal law requiring complete accuracy in tape-recordings and transcriptions of uncoerced admissions, the Court held that despite there being numerous errors and omissions in the tapes and transcripts, defendant failed to identify any errors or omissions which were materially prejudicial to him.

(2) *Voluntariness of Defendant's Confession*: Defendant argued that Detective Bolts' comment about California not having a death penalty (i.e., "*There's no death penalty here*.") constituted an improper offer of leniency, making his subsequent confession involuntary. The Court held here that the California Supreme Court's rejection of this argument was not unreasonable. Specifically, the California Supreme Court ruled that (1) Bolts' statement about there not being a death penalty did not constitute a promise of leniency, (2) Hobson's following statement (about "*what happened in that house*.") effectively countered the death penalty statement, (3) defendant's testimony that Bolts comment induced him to confess lacked credibility, and (4) defendant's true motivation for confessing was "a compunction arising from of his own conscience." The Court found these conclusions to be a reasonable interpretation of the facts, and "that police coercion played no role in causing (defendant) to" confess. Specifically, the Ninth Circuit upheld the California Courts' (trial court and Supreme Court) determination that the officers had not been coercive and that their statement regarding the death penalty was not what eventually induced defendant to confess.

The "pivotal question . . . is whether the defendant's "will was overborne" when the defendant confessed." The lower courts held that it was not. The trial court described the interview as "totally aboveboard," and noted that there was "no mention of the degree of any charge pending . . . [or] an implied promise of a reduced charge" should defendant merely admit his culpability. The trial court further found that there had been no false promises. It ruled that there was no deception in that there was "no suggestion of different treatment if (defendant) chose to make any confessions or admissions," and no "implied promise of leniency." The trial court concluded

that "Mr. Benson's statements were not coerced . . . but rather were made freely and voluntarily." As for Investigator Bolts' unfortunate reference to there being no death penalty available, defendant's response that it "*didn't matter*" indicates the fact that it was not this comment that induced his eventual confession. The California Supreme Court agreed with the trial court's conclusions on this issue. The Ninth Circuit Court found these conclusions on the part of the lower courts to be reasonable.

(3) *Voluntariness of Defendant's Waiver and Subsequent Confession*: Defendant argued that when he waived his *Miranda* rights, both to the detectives and then to Dr. Gordon, his waiver was not "*voluntary, knowing, and intelligent*." The Court initially pointed out that he had been read his *Miranda* rights before each questioning, and then expressly indicated that he understood his rights and agreed to waive them. Defendant, however, argued that he could not intelligently waive his rights due to his mental condition and incompetence. Specifically, defendant claimed that he "suffers from diffuse organic brain damage and frontal lobe damage which severely affects his mental functioning." He argued that these impairments "create irrational belief systems and behavior," and denied him "the capacity to recall accurately the events that he recounted." He argued for purposes of this Writ that the California Supreme Court, in denying this claim, "unreasonably determined the facts, and unreasonably applied Supreme Court precedent." The Court noted, however, that none of his own experts were of the opinion that he did not knowingly or intelligently waive his rights due to his mental condition or that he was incompetent to waive those rights.

It was also noted by the federal district court, upon defendant arguing that he was mentally incompetent, that "(t)he full record establishes that (defendant) was unusually focused and responsive, and was acutely aware of the proceedings." The record showed defendant to be verbose and elaborate in his confession, providing excruciating descriptions of how he molested the children and eventually killed them. He did not simply agree to suggestions posed by the police officers. Although defendant began his interview by claiming that he did not remember what had happened, after getting caught in lies, he provided the officers with a detailed confession. Defendant's trial attorney never argued that his client's psychological state made him incapable of rendering a voluntary confession. "Accordingly, the California Supreme Court could reasonably have concluded that (defendant's) proffer of 'conclusory evidence was insufficient to establish a prima facie case that his waiver of *Miranda* rights was not knowing or intelligent,'" or that he confession was involuntary.

(4) *Delay in Arraignment*: The United States Supreme Court determined in *Riverside v. McLaughlin* (1991) 500 U.S. 44, that an arrestee is entitled to arraignment and a probable cause determination within 48 hours of his arrest. It has further been held that it is a Fourth Amendment violation to delay one's arraignment and concurrent probable cause determination for the purpose of interrogating him. (*United States v. Ramirez-Lopez* (9th Cir. 2003) 315 F.3rd 1143, 1151.) Defendant in this case was interrogated three times (twice by the investigators and once by a prosecution shrink) in the seven-day time span between his arrest and his eventual arraignment. Defendant argued that this delay tainted his confessions and that they therefore should have been suppressed. It was first noted that defendant's initial interrogation did in fact take place within the 48-hour window dictated by *McLaughlin*, and was therefore lawful. As for the follow-up interrogations, Defendant might have had a valid argument except for the fact that he was being

held on a parole hold. There is "no clearly established federal law requir(ing) compliance with the 48-hour time frame set forth in *McLaughlin* for a prisoner being held on a parole hold." And even if *McLaughlin* did apply to such a circumstance, the Court found no evidence in the record to the effect that the delay in arraignment was designed to frustrate or prevent defendant from being provided with the assistance of legal counsel. As such, the Court found that suppression was not a proper remedy in this case.

(5) *Ineffective Assistance of Counsel at the Penalty Phase*: Defense counsel in this case presented a defense to the effect that defendant, at least in his early childhood, was a "'normal' little boy . . . who was not born evil, but was a poor child taken from a normal life . . . and exposed to severe deprivation when his (alcoholic and abusive) father (assumed custody of) him and his brothers." On appeal, defendant argued that his attorney was constitutionally "ineffective" (i.e., "incompetent") for not having presented evidence that in fact, defendant displayed a "predisposition to mental illness, exposure to alcohol in his mother's womb, the physical, sexual, and psychological abuse inflicted (by his foster parents) . . . , and his numerous serious and longstanding mental deficiencies." If known by the jury, as argued by defendant on appeal, a death penalty recommendation might have been avoided.

The general rule when evaluating a defense attorney's tactical trial decisions is this: A defense attorney exercising his "constitutionally protected independence," including "the wide latitude counsel must have in making tactical decisions," is not reflective, in itself, of "ineffectiveness" or "incompetence." Counsel's strategy in this particular case was to attempt to humanize an otherwise very unlikeable client, and to point to at least one moment in time when he appeared to be happy, normal, and relatable. This defense, although unsuccessful, was not an unreasonable strategy. Although defendant, after the fact, may not be happy with such a trial strategy, this is not a case where defense counsel failed to investigate, and then to present, any defense at all. Defendant also argued that his counsel was ineffective because he did not investigate whether defendant suffered from an organic brain injury. However, the California Supreme Court reasonably concluded that trial counsel had not been on notice that such an organic brain injury even existed, and therefore was not required to investigate it. Lastly, the Court found that even if defense counsel was legally incompetent as to any of these issues, such incompetence was not prejudicial. By that the Court meant that given the strength of the evidence of defendant's guilt, and the appropriateness of the death verdict due to the gravity of his offense, defendant would have inevitably been convicted and sentenced to die anyway.

(6) *Brady Error*: Pursuant to *Brady v. Maryland* (1963) 373 U.S. 83, the prosecution has a Fourteenth Amendment due process obligation to turn over to the defense any potentially exculpatory information possessed by the "law enforcement team" (meaning the prosecution or law enforcement itself). Here, defendant argued that the prosecution failed to disclose (1) information tending to impeach Dr. Gordon (i.e., a "judicial reprimand" for destroying a victim's taped interview in a prior case), (2) a lab report showing that defendant had methamphetamine in his urine three days after his arrest, (3) that three witnesses had their pending criminal charges reduced subsequent to their testimony, and (4) officer's notes showing that a teenage neighbor visited Laura on Sunday, January 5, when, according to other evidence, Laura was already dead (the teenager being described as unbelievable because she was a "champion airhead") . There are three components to a true *Brady* violation: The evidence at issue must (1) be favorable to the

accused, either because it is exculpatory or because it is potentially impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued. In each of the above, the Court found the prosecution's failure to provide the described evidence to the defense was non-prejudicial given the strength of the evidence of defendant's guilt. As such, no sanctions were appropriate.

Conclusion: Based upon the above, the Ninth Circuit found that the California Supreme Court's rulings (particularly its ruling as to the admissibility of defendant's various confessions) as reasonable, and upheld the federal district court's denial of defendant's Writ of Habeas Corpus.

Note: The dissenting opinion disagreed with the majority's ruling on defense counsel's *Ineffective Assistance of Counsel at the Penalty Phase* issue (#5, above), arguing that there was a lot of potentially relevant information concerning defendant's tough childhood left out that, despite the "abhorrent" nature of defendant's crimes, may have affected the jury's death penalty recommendation. But be that as it may, I briefed this case primarily for two reasons. *First*, when interrogating a murder suspect, *never, never, never* mention the possible availability (or non-availability) of the death penalty. I prosecuted a murder case some years back where one of my interrogating officers in a video-taped interview mentioned the death penalty in some innocuous context. This seemingly innocent comment suddenly woke the judge up who promptly called a halt to the proceedings, dismissed the jury for the day, and initiated a day's hearing as to the context of the comment and its potential legal implications. We eventually prevailed, but the admissibility of some very important incriminating admissions were unnecessarily put a risk. The problem is that talking about the death penalty may be found, depending upon the context, to be an *offer of leniency* or, at the other end of the spectrum, a *threat*, either of which may render a resulting confession inadmissible.

Secondly, we have to talk about *Brady v. Maryland*. In this case, the Court did no more than find that four potentially relevant bits of evidence (described above) were never provided to the defense as they should have, but that the error was harmless. It is apparent in this case that it was the prosecutor who had all of this evidence, but didn't take affirmative steps to make sure that defense counsel was aware of it. (See pg. 837, fn. 28, noting that merely giving the defense open access to the prosecutor's file is not sufficient.) If, however, any of the four listed pieces of potentially relevant evidence had been in the possession of the cops involved, and even though the prosecutor never knew about it, then we would still have had a potential "*Brady error*" issue that risked the guilty verdict and/or death sentence. The point I'm making here is that whether or not some piece of evidence is potentially favorable to the accused, either because it is exculpatory or because it tends to impeach a witness, is not the officer's decision. Ultimately, only the trial court has the authority to make that decision. You, as a law enforcement officer, are obligated to turn over that evidence to the prosecutor who, given his or her expertise, will decide whether the trial judge needs to decide its relevance. In this case, the only reason the missing evidence did not result in a reversal was because of the overwhelming strength of the other evidence of the defendant's guilt. In a factually weaker case, *Brady* would have been found to require a reversal of the guilty verdict and we would have had to start all over. Not cool.