1. Unusual Suppression Issue

I am attempting to suppress a search of my client's cell phone that turned up child pornography. The circumstances of the search are what have me stumped as they don't seem to fit into any of the cases I have read. Here are the facts:

Client's phone is given to another person (X) by Client's girlfriend, she also gives X the numeric passcode and the "finger swipe" code. Allegedly X finds child pornograpny on the phone and calls the police, the Officer gets a consent to search from X (not the owner of the phone and X tells him he's not the owner that he borrowed it without my client's permission) and finds child pornography. Officer then fills out a warrant and affidavit stating to search the phone stating the images he saw as part of his probable cause. He states that X was in "care, custody, and control" of the phone because he had the numeric passcode as well as the finger swipe code. The officer also states the assertion made by X that he borrowed the phone without my client's consent and that X is not the owner of the phone.

My thoughts are that it's not a good search since the Officer knew X did not own the phone and could not give consent but used this "consent" to get evidence to support the later warrant to search the phone. However, I am worried about the inevitable discovery doctrine because X told the Officer he had seen child pornography and the officer may have been able to get a warrant off of that alone.

Am I fighting a losing battle or does anyone here see anything I may have missed? Thank you in advance for your help!

Ciara Tanner

2. RE: Unusual Suppression Issue

You might want to look at State v. Ruiz, 4th court today, no. 14-16-00226-CR. I only had time to look at it quickly, but it deals in part with private persons and others cell phones.

David B. Black

3. RE: Unusual Suppression Issue

Hello,

The Inevitable Discovery Doctrine has been rejected by the Texas Court of Criminal Appeals in State v. Garcia, 829, S.W.2d 796 (Tex.Cr.App.1992) and further in State v. Daugherty, 931 S.W.2d 268 (Tex.Cr.App.1996). Texas is the only state, if I am not mistaken, that has rejected such doctrine.

I think you have a good case here to suppress because X did not have the effective consent of the owner to either possess, care, control, or manage the cell phone. I can see your case being similar to a trespasser (T1) giving access to another trespasser (T2) to a home or habitation and then T2 calling the police after he or she discovered drugs, but told the police he or she was not the owner and did not have consent of the owner to be there. Look at the below statute.

Art. 38.23. EVIDENCE NOT TO BE USED. (a) No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.
In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

(b) It is an exception to the provisions of Subsection (a) of this Article that the evidence was obtained by a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause.

Respectfully,
Moises Flores Jr, Esq., M.A.

4. RE: Unusual Suppression Issue

Recently, in McClintock v. State, PD-1641-15, 2017 Tex. Crim. App. LEXIS 291 (Tex. Crim. App. March 22, 2017) (designated for publication), the TCCA again observed that the inevitable discovery doctrine does not comport with Art. 38.23(a) because the doctrine assumes that the evidence has been obtained illegally. Make sure you cite this case in your motions because it's the most recent turn on the issue at the TCCA.

Note that this is different than the independent source doctrine, which provides that evidence derived from a lawful source independent from the illegal source is admissible. Previously, in Wehrenberg v. State, 416 S.W.3d 458 (Tex. Crim. App. 2013), the court held that its rejection of the inevitable discovery doctrine does not imply that it rejects the independent source doctrine.

Michael Mowla

5. RE: Unusual Suppression Issue

Look at the following cases:

CASELLA v. BORDERS, ET AL. ___ F.3d ___, No. 09-2160 (9th Cir. 12-15-10) (Unpublished)

1. LOANED CELL PHONE: No Reasonable Expectation of Privacy

The police arrested Jessie Casella's then-boyfriend, Nathan Newhard. They seized Casella's cellular phone that she had lent Newhard "for his personal use." An officer opened the cellular phone's images folder, and found nude images of Casella and Newhard in "sexually compromising positions." Sergeant Matt Borders eventually gained possession of the phone. Casella alleged Borders then announced over the Town of Culpeper radio system to several additional unnamed officers, county deputies, and members of the public "that the private pictures were available for their viewing and enjoyment." She further claimed that several officers unassociated with Newhard's arrest, as well as an acquaintance unassociated with the police department, traveled to police headquarters and viewed the pictures. Casella alleged that she never gave consent to Newhard or any other party to share or transmit the contents of the phone. She claims that as a result of these actions, she suffered fear and anxiety over widespread dispersion of the images, leading to depression and other medical issues. Casella and Newhard filed separate actions against the Town of Culpeper Police Department and several of its officers, alleging intentional infliction of emotional distress and violations of 42 U.S.C. §1983. The district court dismissed the §1983 claims and declined to exercise supplemental jurisdiction over the state-law claim. Casella appealed the dismissal of her §1983 claims.

The Court of Appeals held: (1) to state a claim under §1983, a plaintiff must allege the violation of a right preserved by another federal law or by the Constitution – Casella alleged a violation of her Fourth Amendment rights but the capacity to claim the protection of the Fourth Amendment depends upon whether the person who claims the protection has a legitimate expectation of privacy in the invaded place. To be legitimate, a subjective expectation of privacy must be objectively reasonable; (2) where an individual claims an expectation of privacy in property held by another, this Court has looked at whether that person claims an ownership or possessory interest in the property, and whether he has established a right or taken precautions to exclude others from the property; (3) the parties agreed that Casella had a

subjective expectation of privacy in the contents of the cellular phone, but differed as to whether Casella's expectation of privacy was reasonable once she relinquished physical control of it; (4) Casella alleged no facts indicating she exercised a right to control the cell phone or its contents after giving the phone to Newhard. She undoubtedly hoped and intended that the images would not be viewed by anyone other than Newhard, but hopes and intentions do not make Fourth Amendment rights; (5) Casella failed to allege any demands or limitations regarding dissemination of the cellular phone's contents, rather, she rests on the allegation that "At no time did Plaintiff give her consent to Nathan Newhard or any other party to the transmission or any sharing of the contents of her cellular telephone." The mere absence of Casella's consent to transmit or share the images, however, does not make her expectation of privacy in those images reasonable; (6) while the officers' actions as alleged may be reprehensible, the Fourth Amendment's scope of protection does not extend to Casella because she failed to plead facts from which it is plausible to conclude that she had a reasonable, and therefore legitimate, expectation of privacy in the contents of the cellular phone. In addition, when Newhard was arrested, nearly two months had passed since Casella had lent him the phone, suggesting she lent the phone to Newhard for an extended period rather than on a day-to-day basis; (7) Casella lacked a legitimate expectation of privacy in the contents of the cellular phone, and the district court's dismissal of her §1983 claim was affirmed.

United States v. Lopez-Cruz, 730 F.3d 803 (9th Cir. 2013)

The government appealed a suppression order. Affirmed.

Two border patrol agents stopped a car because they did not recognize as belonging to any of the residents of the nearby small town, and because the driver was "brake tapping" – behavior that the agent recognized as consistent with people being "guided in to pick up somebody or something." The agents walked up to the car driven by Andres Lopez-Cruz and began questioning Lopez. During their discussion, agent Soto noticed two cell phones in the car's center console. Soto asked Lopez whether the phones were his and Lopez said they belonged to a friend. The agent then asked, "Can I look in the phones? Can I search the phones?" Lopez consented by responding "yes." Soto took the phones behind the car, so Lopez could neither see nor hear what the agent was doing with the phones. During the time the agent had the phones, he answered three phone calls pretending to be Lopez. In the third call, the caller said there were two people next to a house where there was a lot of lighting, and gave instructions to drive there, flash his high beams, and the two people would come out. The agents arrested Lopez and followed the caller's instructions, which led them to pick up two people, who admitted to being Mexican citizens without documents. Lopez was charged with conspiracy to transport illegal aliens.

Lopez filed a motion to suppress the evidence obtained when the agent answered the incoming calls, arguing that the agent exceeded the scope of his consent. Lopez submitted a declaration stating that he "didn't understand that he had a choice to say no" when the agents asked for consent to search the phones and that "it never occurred to him that agents were going to answer incoming calls on the cell phone." He further stated that "had he believed that agents would answer the phones, he never would have given his permission to search the phones." The government argued that Lopez did not have standing to contest the search because he disclaimed ownership of the phones, or, in the alternative, that answering incoming calls fell within the scope of Lopez's consent.

The district court granted Lopez's motion to suppress, finding: (1) Lopez had standing to challenge the search of the cell phones because the phones were in his possession and were being used by him at the time of the encounter; (2) Lopez's consent was limited to an examination of the phone itself and that further legal justification was required before the agents answered it; (3) a reasonable person would not believe that a consent to look at or search a cell phone would include consent to answer incoming calls. The government filed a motion for reconsideration, urging for the first time that answering of the incoming call was justified by the exigent circumstances exception to the warrant requirement. The district court declined to consider the newly raised argument for two reasons: (1) the new evidence that the government offered was available at the time of the evidentiary hearing; and (2) the government did not raise the exigent circumstances argument in the initial or supplemental briefing submitted when the court first considered the motion to suppress. The district court went on to conclude that in the alternative, even if it were to consider

the newly raised exigent circumstances argument, it would have rejected it because the agent did not have probable cause.

1. Cell Phone -- Consent to Search - Scope of Consent

Scope of Consent: "It is a violation of a suspect's Fourth Amendment rights for a consensual search to exceed the scope of the consent given." United States v. McWeeney, 454 F.3d 1030, 1034 (9th Cir. 2006). The district court determined that the agent's act of answering the incoming phone call exceeded the scope of Lopez's consent. Appellate courts review "[a] district court's finding as to the scope of consent [] for clear error." United States v. Huffhines, 967 F.2d 314, 319 (9th Cir. 1992). The government argues that the standard of review should be de novo because this case presents the legal question of whether a general consent to search a phone includes consent to answer it. See United States v. Shaibu, 920 F.2d 1423, 1425 (9th Cir. 1990) (noting that a pure question of law in Fourth Amendment cases is reviewed de novo). Because we reach the same result under either standard, we consider whether consent to search a phone, without more, generally includes consent to answer it.

The scope of consent is determined by asking "what would the typical reasonable person have understood by the exchange between the officer and the suspect?" Florida v. Jimeno, 500 U.S. 248, 251, 111 S. Ct. 1801, 114 L. Ed. 2d 297 (1991). The test is an objective one. The district court explained that a reasonable person would not "believe that a consent to look at or search a cell phone would include consent to answer incoming calls." It held that Lopez's "consent in this case was limited to an examination of the phone itself and that further legal justification was required before the agents answered it."

The district court explained that a reasonable person would not believe that a consent to look at or search a cell phone would include consent to answer incoming calls.

The Court of Appeals held:

(1) the district court was correct: (a) an individual who gives consent to the search of his phone does not, without more, give consent to his impersonation by a government agent, nor does he give the agent permission to carry on conversations in which the agent participates in his name in the conduct of criminal activity. (b) when an agent answers the incoming call and engages the caller in conversation, as agent Soto did here, he intercepts a call intended for the individual in possession of the phone and pretends to be that person in order to obtain information or create a new exchange with the caller; (c) the agent's impersonation of the intended recipient constitutes a meaningful difference in the method and scope of the search in contrast to merely pushing a button in order to view a text message; (d) the agent is not simply viewing the contents of the phone (whether incoming text messages or stored messages), but instead, is actively impersonating the intended recipient;

(2) the government likened the consent given by Lopez to the contents of a search warrant; that because courts have held that answering incoming calls when executing a search warrant does not exceed the scope of the warrant. This argument was rejected because a search warrant is materially different from consent: (a) a search pursuant to a warrant is "limited by the extent of the probable cause" on which the warrant is based. In contrast, a search pursuant to consent is limited by the extent of the consent given for the search by the individual; (b) unlike a scope of the search warrant case, in which courts review for whether the evidence seized was reasonably related to the purpose of the search, in a scope of consent case, courts review for what the typical reasonable person would have understood the parties to have said to each other; (c) an individual who gives consent to search his phone does not, without more, give consent to his impersonation by a government agent, nor does he give the agent permission to carry on conversations in which the agent participates in his name in the conduct of criminal activity; (3) consent to search a cell phone does not extend to answering incoming calls, and the agent's answering of the phone exceeded the scope of the consent that he obtained and, thus, violated Lopez's Fourth Amendment right.

Motion for Reconsideration: The government raised for the first time on a motion to reconsider, that exigent circumstances justified the answering of the phone calls. No precise "rule" governs a district court's

inherent power to grant or deny a motion to reconsider, rather, the district court's authority to revisit a ruling is within its sound judicial discretion.

The Court of Appeals held: (1) the district court exercised its discretion in a manner consistent with prior cases.

United States v. Wicks, 73 M.J. 93 (C.A.A.F. 2014)

Violating general regulations. Reversed.

TSgt Samuel Eicks and TSgt Ronda Roberts were drill instructors at Lackland Air Force Base in San Antonio. They were having a fling and one night while Wicks was sleeping, Roberts checked his cell phone and found sexually explicit text messages between Wicks and two trainees – Wade and Benoit. When their affair ended a few months later, Roberts stole Wicks cell phone. She searched the phone and found a number of text messages as well as some sexually explicit videos and photographs. Some eight months later, the Lackland sex scandal became news and there was a general inquiry from the command regarding anyone who had information on misconduct, Detective Rico from the Security Forces Office of Investigations (SFOI) interviewed Roberts. She told Detective Rico she had evidence proving that Wicks had inappropriate relationships with trainees. Although Roberts did not supply the cell phone at that meeting, she provided verbal descriptions of the text messages she had seen. This led to six searches of Wicks' cell phone data by various parties: (1) when Roberts examined Wicks' cell phone while he was sleeping; (2) when Roberts once again searched Wicks' cell phone after she stole it; (3) Bexar County detectives searched Wicks' SIM card; (4) Detective Rico searched Wicks' cell phone after she got it from Roberts; (5) when the Government sent the phone for analysis by the Bexar County Sheriff's Office, and (6) when Detective Rico reviewed the text messages a second time. In a pending court-martial, Wicks was charged with violating general regulations. Defense Counsel's motion to suppress evidence obtained from Wicks' cell phone was granted and the prosecution appealed.

1. Cell Phones and Reasonable Expectations of Privacy

The Fourth Amendment of the U.S. Constitution protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Whether a search is reasonable depends, in part, on whether the person who is subject to the search has a subjective expectation of privacy in the object searched and that expectation is objectively reasonable. Katz v. United States, 389 U.S. 347, 361, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring); see also United States v. Runyan, 275 F.3d 449, 457 n.9 (5th Cir. 2001). In Katz, for example, the Supreme Court recognized that the Fourth Amendment protects privacy interests outside the home and directly associated with the person, in that case, a person taking bets in a public telephone booth. Katz, 389 U.S. at 359.

The Fourth Amendment further provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. A search that is conducted pursuant to a warrant is presumptively reasonable whereas warrantless searches are presumptively unreasonable unless they fall within "a few specifically established and well-delineated exceptions." Katz, 389 U.S. at 357. "Where the government obtains evidence in a search conducted pursuant to one of these exceptions, it bears the burden of establishing that the exception applies." United States v. Basinski, 226 F.3d 829, 833 (7th Cir. 2000); see also M.R.E. 311; Coolidge v. New Hampshire, 403 U.S. 443, 455, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971) ("[T]he burden is on those seeking the exemption to show the need for it.") (quotation marks and citations omitted). See generally 42 Geo. L.J. Ann. Rev. Crim. Proc. 46-47 & nn. 106-14 (2013) (surveying warrantless search and seizure cases in the Supreme Court and federal courts of appeals); M.R.E. 314. In this case, the Government proceeded without a warrant or search authorization.

The military judge did not err as a matter of law in determining that Appellant had a reasonable expectation of privacy in his cell phone and that his expectation was objectively reasonable. To begin, every federal court of appeals that has considered the question of cell phone privacy has held there is nothing intrinsic

about cell phones that place them outside the scope of ordinary Fourth Amendment analysis. See, e.g., United States v. Wurie, 728 F.3d 1, 8-9 (1st Cir. 2013), cert. granted, 134 S. Ct. 999, 187 L. Ed. 2d 848, 82 U.S.L.W. 3424 (U.S. Jan. 17, 2014) (No. 13-212); United States v. Flores-Lopez, 670 F.3d 803, 805-06 (7th Cir. 2012); United States v. Murphy, 552 F.3d 405, 411 (4th Cir. 2009); United States v. Zavala, 541 F.3d 562, 577 (5th Cir. 2008); see also United States v. Yockey, No. CR09-4023-MBW, 2009 U.S. Dist. LEXIS 67259, at *7-*8, 2009 WL 2400973, at *3 (N.D. Iowa Aug. 3, 2009) (citing federal appellate and district courts in stating that "[a] search warrant is required to search the contents of a cell phone unless an exception to the warrant requirement exists").

A cell phone used as a communications device is like a portable phone booth albeit with modern media capacity. Modern cell phones can also serve as an electronic repository of a vast amount of data akin to the sorts of personal "papers[] and effects" the Fourth Amendment was and is intended to protect. "The papers we create and maintain not only in physical but also in digital form reflect our most private thoughts and activities." United States v. Cotterman, 709 F.3d 952, 957 (9th Cir. 2013). Today, individuals "store much more personal information on their cell phones than could ever fit in a wallet, address book, briefcase, or any of the other traditional containers." Wurie, 728 F.3d at 9.

Therefore, cell phones may not be searched without probable cause and a warrant unless the search and seizure falls within one of the recognized exceptions to the warrant requirement. See Wurie, 728 F.3d at 8-9; see also Flores-Lopez, 670 F.3d at 805-06. Here no exception applied.

2. Private Search Doctrine -- Its Limits

Private Search Doctrine and Its Limits: The Government argued the military judge erred in applying the private search doctrine to this case. The Government does not dispute that Roberts acted in a private capacity when she searched Wicks' phone. However, it argued that subsequent Governmental searches did not materially exceed the scope of the original private search and that any remaining expectation of Wicks' privacy was not violated by the Government's subsequent search because Roberts's private search had already frustrated that expectation.

The private search doctrine is based on the well-established principle that the Fourth Amendment and its antecedent case law-derived search and seizure rules do not apply to searches conducted by private parties. United States v. Jacobsen, 466 U.S. 109, 113-14, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984). As such, once a private party has conducted a search, any objectively reasonable expectation of privacy a person may have had in the material searched is frustrated with respect to a subsequent government search of the same material. See United States v. Reister, 44 M.J. 409, 415-16 (C.A.A.F. 1996) (concluding that government was not restrained from using information obtained from a private party's search of the appellant's logbook and notes because the original expectation of privacy was frustrated); United States v. Portt, 21 M.J. 333, 334 (C.M.A. 1986) (upholding government's warrantless search of an unlocked locker as valid where private party had already searched contents).

However, there are two essential limits to this doctrine. First, the government cannot conduct or participate in the predicate private search. Specifically, "[t]o implicate the Fourth Amendment in this respect, there must be 'clear indices of the Government's encouragement, endorsement, and participation' in the challenged search." United States v. Daniels, 60 M.J. 69, 71 (C.A.A.F. 2004) (quoting Skinner, 489 U.S. at 615-16). There is no bright line test as to when the government involvement goes too far, rather, courts have relied on the particular facts of particular searches to make this determination. See United States v. Steiger, 318 F.3d 1039, 1045 (11th Cir. 2003) ("A search by a private person does not implicate the Fourth Amendment unless he acts as an instrument or agent of the government."); United States v. Jarrett, 338 F.3d 339, 344 (4th Cir. 2003); United States v. Hall, 142 F.3d 988, 993 (7th Cir. 1998).

The second limitation on the private search doctrine pertains to the scope of any subsequent Government search. The government may not exceed the scope of the search by the private party, including expansion of the search into a general search. Jacobsen, 466 U.S. at 115, 117-18. This rule is based on the theory behind the private search doctrine. Once the "frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now-nonprivate information" unless the

government uses information for which the expectation of privacy has not already been frustrated. Id. at 117. Thus, the "additional invasions of respondents' privacy by the government agent must be tested by the degree to which they exceeded the scope of the private search." Id. at 115.

Applying this to modern computerized devices like cell phones, the scope of the private search can be measured by what the private actor actually viewed as opposed to what the private actor had access to view. See generally Orin S. Kerr, Searches and Seizures in a Digital World, 119 Harv. L. Rev. 531, 548, 556–57 (2005).

The Court held: (1) the military judge correctly concluded that what was actually viewed by Roberts in her search of Wicks' cell phone mattered when determining the scope of subsequent searches; (2) the military judge was unable to determine whether Detective Rico limited her search of Wicks' cell phone to the information that Roberts had previously discovered during her private search, the judge concluded that the Government failed to meet its burden, thus excluding the evidence.

United States v. Camou, 773 F.3d 932 (9th Cir. 2014)

Possession of child pornography. Reversed.

Border Patrol agents stopped a truck belonging to Chad Camou at a primary inspection checkpoint. Camou was driving the truck, while his girlfriend, Ashley Lundy, sat in the passenger seat. Agents grew suspicious when Lundy did not make eye contact, so they asked Camou if they could open the door to the truck. Once they opened the door, the agents saw Alejandro Martinez-Ramirez, an undocumented immigrant, lying on the floor behind the truck's front seats. Consequently, agents arrested Camou, Lundy, and Martinez-Ramirez. The agents also seized Camou's truck and a cell phone found in the cab of the truck. At some point during the booking process, Border Patrol Agent Andrew Baldwin inventoried Camou's cell phone as "seized property and evidence." One hour and twenty minutes after Camou's arrest, Agent Walla searched Camou's cell phone, claiming that he was looking for evidence of "known smuggling organizations and information related to the case." Agent Walla did not assert that the search was necessary to prevent the destruction of evidence or to ensure his or anyone else's safety. Agent Walla searched the call logs, the videos, and photographs. He "scrolled quickly through about 170 of the images before stopping. Agent Walla called ICE, the sheriff's office, and the FBI to pursue child pornography charges against Camou. The government did not pursue alien smuggling charges against Camou because it "did not meet prosecution guidelines." Border Patrol agents were informed of his decision the same day Camou's cell phone was searched. Several days later, the FBI executed a federal warrant to search Camou's cell phone for child pornography. Pursuant to the warrant, the FBI found several hundred images of child pornography on the cell phone. Camou was charged with possession of child pornography.

Camou moved the district court to suppress the child pornography images found on his cell phone, arguing that the warrantless search of his cell phone at the checkpoint's security offices violated his Fourth Amendment rights. The district court denied Camou's motion. The district court found that the search of the phone was a lawful search incident to arrest and, even if the search was unconstitutional, the good faith and inevitable discovery exceptions to the exclusionary rule were satisfied.

Camou argued the warrantless search of his cell phone was unconstitutional because the search was not incident to arrest, and no other exceptions to the warrant requirement apply. Camou also argued that the exclusionary rule bars the admissibility of the images found on his phone.

1. Cell Phone -- Warrantless Search - Inevitable Discovery Doctrine

The government argued that, even if the warrantless search of Camou's cell phone was unconstitutional, that the photographs found as a result of the search should not be suppressed because the inevitable discovery and good faith exceptions to the exclusionary rule are met.

Inevitable Discovery: The exclusionary rule allows courts to suppress evidence obtained as a result of an unconstitutional search or seizure. Mapp v. Ohio, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86

Ohio Law Abs. 513 (1961); Weeks v. United States, 232 U.S. 383, 393, 34 S. Ct. 341, 58 L. Ed. 652, T.D. 1964 (1914). But if the government can establish by a preponderance of the evidence that the unlawfully obtained information "ultimately or inevitably would have been discovered by lawful means," the exclusionary rule will not apply. Nix v. Williams, 467 U.S. 431, 444, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984). The Ninth Circuit court has "never applied the inevitable discovery exception so as to excuse the failure to obtain a search warrant where the police had probable cause but simply did not attempt to obtain a warrant." United States v. Young, 573 F.3d 711, 723 (9th Cir. 2009) (quoting United States v. Mejia, 69 F.3d 309, 320 (9th Cir. 1995)). As we reasoned in Mejia, "[i]f evidence were admitted notwithstanding the officers' unexcused failure to obtain a warrant, simply because probable cause existed, then there would never be any reason for officers to seek a warrant." 69 F.3d at 320.

The Court of Appeals held: (1) the government argued that a warrant to search Camou's cell phone for evidence of smuggling activity inevitably would have been sought and approved, and therefore that the inevitable discovery doctrine applied. This argument failed for two independent reasons. First, the government has not proved by a preponderance of the evidence that it would have applied for a warrant to search Camou's phone for evidence of alien smuggling activity. In fact, the record points to the opposite conclusion: that no search warrant would have been sought and thus that no search warrant would have been approved. Camou was ultimately charged only with possession of child pornography, not with alien smuggling. Border Patrol agents knew the day Agent Walla searched Camou's cell phone that Camou would not be charged with alien smuggling. The Sector Prosecutions Office informed the agents that day that "prosecution was declined" in the smuggling case against Camou because the case "did not meet prosecution guidelines." Because the reasonable conclusion from the record is that no search warrant would have been sought, the inevitable discovery exception to the exclusionary rule is not satisfied. Second, and more importantly, by asking this court to conclude that the inevitable discovery exception applies here because a search warrant would have issued, the government is asking us to"excuse the failure to obtain a search warrant where the police had probable cause but simply did not attempt to obtain a warrant. Mejia, 69 F.3d at 320. Under Mejia, this is impermissible and the inevitable discovery exception to the exclusionary rule is not satisfied.

2. Cell Phone -- Warrantless Search - Good Faith

Good Faith: When the officer executing an unconstitutional search acted in "good faith," or on "objectively reasonable reliance," the exclusionary rule does not apply. See United States v. Leon, 468 U.S. 897, 922, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). The burden of demonstrating good faith rests with the government. United States v. Kow, 58 F.3d 423, 428 (9th Cir. 1995). The test for good faith is an objective one: "whether a reasonably well trained officer would have known that the search was illegal in light of all the circumstances." United States v. Herring, 555 U.S. 135, 145, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009).

In Herring, the Supreme Court applied the good faith exception to an officer's arrest and search incident to arrest of the defendant. The Court held that the officer had reasonably relied on the county clerk's assertion that the defendant had an active arrest warrant. Id. at 149-50. The clerk based her assertion on another law enforcement employee's negligent bookkeeping entry, which falsely indicated that the defendant had an active arrest warrant. Id. In holding that the good faith exception applied, the Court reasoned that "the error was the result of isolated negligence attenuated from the arrest" and that "an error that arises from nonrecurring and attenuated negligence is . . . far removed from the core concerns that led us to adopt the rule in the first place." Id. at 138, 144. The Court further stated that "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." Id. at 144.

The Court of Appeals held: (1) the good faith exception did not; (2) the governing law at the time of the search made clear that a search incident to arrest had to be contemporaneous with the arrest, See, e.g., United States v. Hudson, 100 F.3d 1409, 1419 (9th Cir. 1996). The government did not met its burden to prove that a reasonably well-trained officer in Agent Walla's position could have believed that the search of Camou's cell phone one hour and 20 minutes after Camou's arrest was lawful. But Herring is distinguishable. Herring dealt with an officer's reliance on a county clerk's assertion that the defendant had an outstanding warrant, which was in turn based on another law enforcement employee's negligence. The

officer was not negligent himself; the negligence was two degrees removed from the officer and thus amounted to "isolated negligence attenuated from the arrest." 555 U.S. at 137. In Herring, as in its prior good faith jurisprudence, the Supreme Court found the good faith exception was met because the officer reasonably relied on an external source, which turned out to be erroneous. Id.; see also Arizona v. Evans, 514 U.S. 1, 14, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995) (holding that good faith exception was met where police reasonably relied on erroneous information concerning an arrest warrant in a database maintained by judicial employees); Illinois v. Krull, 480 U.S. 340, 358-60, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987) (extending good faith exception to searches conducted in reasonable reliance on subsequently invalidated statutes); Leon, 468 U.S. at 922 (holding that the officer's reasonable reliance on a warrant later held to be invalid met the good faith exception); (3) The Supreme Court has never applied the good faith exception to excuse an officer who was negligent himself, and whose negligence directly led to the violation of the defendant's constitutional rights; (4) the district court's denial of Camou's motion to suppress was reversed.

Carter v. State, 463 S.W.3d 218 (Tex. App.--Amarillo 2015)

Money laundering from the 100th District Court, Carson County. Reversed.

1. Search -- Cell Phone - Unlawful

Carter and Johnson challenge the trial court's failure to suppress evidence obtained by the trooper's warrantless search of the cell phones. In the trial court and on appeal, the State contends the trooper properly reviewed the data on the cell phones as a search incident to a lawful arrest. Here, the record leaves significant doubt whether search of the cell phones was incident to the arrest. The phones were discovered and searched after Johnson and Carter and their vehicle were taken to the DPS barn, and while they were securely in custody. It also is undisputed that at the time Johnson was handcuffed, the trooper told Johnson, in Carter's presence, that he was under arrest at that time, for money laundering. The trooper's written report states "both subjects were placed under arrest" at the roadside. The trooper's trial testimony is consistent with his report, that Johnson and Carter were arrested at the roadside stop before the cell phones were found and searched. A search is incident to arrest only if it is substantially contemporaneous with the arrest and is confined to the area within the immediate control of the arrestee. This means generally a search incident to arrest is not justifiable if the search is remote in time or place from the arrest or no exigency exists. Despite the hearing testimony, the undisputed evidence might well establish that Johnson and Carter, as a matter of law, were subjected to a custodial arrest when they were handcuffed on the roadside and transported to the DPS barn, well before their phones were searched.

On appeal, the State contended the trooper properly reviewed the data on the cell phones as a search incident to appellants' lawful arrest. See Chimel v. California, 395 U.S. 752, 763, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969) (explaining when an arrest is made "[t]here is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'-construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence"); United States v. Finley, 477 F.3d 250, 259-60 (5th Cir. 2007) (citing United States v. Robinson, 414 U.S. 218, 235, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973)). A search incident to arrest is authorized because officers need to seize weapons and dangerous objects which might be used to assault an officer and to prevent the loss or destruction of evidence. State v. Granville, 423 S.W.3d 399, 410 (Tex. Crim. App. 2014) (citing Robinson, 414 U.S. at 224-26).

2. Warrantless Cell Phone Search -- Violation of Article 38.23 - No Good Faith Exception

The State relied heavily on Finley, 477 F.3d at 259-60, in which the court, prior to Riley, upheld search of a cell phone incident to arrest. And, although the parties did not address the good-faith reliance, the Court of Appeals considered the possibility that, before the issuance of the Riley opinion, law enforcement might have relied in good faith on case law like Finley.

Here, the motions to suppress asserted the troopers' conduct violated Article 38.23 V.A.C.C.P. as well as the Fourth Amendment. Article 38.23(a) provides in part, "No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the

Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case." Tex. Code Crim. Proc. Ann. art. 38.23(a) (West 2005). The only good faith exception to the function of this rule is when an officer "acting in objective good faith" relies on a warrant issued by a magistrate based on probable cause. Tex. Code Crim. Proc. Ann. art. 38.23(b) (West 2005).

The Court of Appeals held: (1) a warrant was not involved, and since Article 38.23 permits no exception for good-faith reliance on case law, exclusion of the evidence acquired from the cell phones was required under Texas law in any event; (2) the trial court's judgments of conviction were reversed and remand the trial court for proceedings consistent with this opinion.

See: Appellant's Brief; State's Brief

Greg S. Velasquez

6. RE: Unusual Suppression Issue

While he may have had no expectation of privacy, and the kiddie porn was found on the phone, exclusive possession and control of the phone is not present here. Furthermore, he was not in possession of the phone when the alleged kiddie porn was found. While the photographs may show that someone accessed kiddie porn with the phone, it certainly doesn't show WHO accessed the kiddie porn. Sounds like your client could be a victim of a set up. But, that's just my opinion.....

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