

# A Rodriguez Ripple

## Identifying Vehicle Passengers in a Traffic Stop

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SOME FOURTH AMENDMENT DECISIONS MADE BY THE U.S. SUPREME COURT ARE "NARROW" IN THAT THEY ARE LIMITED TO A VERY PARTICULAR SET OF FACTS UNDER PARTICULAR CIRCUMSTANCES. OTHER DECISIONS BY THE COURT CAN BE BROAD AND HAVE AN IMPACT ON LAW ENFORCEMENT ACTIONS IN MANY DIFFERENT SITUATIONS. LIKE A LARGE ROCK THROWN INTO A DEEP POND, THESE BROAD DECISIONS CREATE RIPPLES THAT TRAVEL FAR FROM THE CENTER AND HAVE AN EFFECT ON OTHER LAW ENFORCEMENT ACTIONS NOT CONTEMPLATED BY THE ORIGINAL DECISION. *RODRIGUEZ V. UNITED STATES* IS ONE SUCH DECISION.

### THE POND – TRAFFIC STOPS

Traffic stops are a routine part of law enforcement. A traffic stop is a warrantless seizure; therefore, it is governed by the Fourth Amendment and must be reasonable.<sup>1</sup> A traffic stop is more akin to a *Terry* stop than it is to a formal arrest.<sup>2</sup> In order for a traffic stop to be reasonable, there are two requirements. First, the traffic stop must be "valid at its inception."<sup>3</sup> In other words, at a minimum, the officer making the stop must have a reasonable suspicion that the driver of the vehicle has committed a traffic violation. Second, the scope of the detention must be reasonable, which means the duration of the stop must be limited to the time reasonably required to complete the mission.<sup>4</sup> "Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed."<sup>5</sup>

Many traffic stops are pretextual and motivated by a desire to uncover more serious criminal activity beyond a mere traffic violation. The U.S. Supreme Court has held that the subjective intent of the officer in making the

traffic stop does not make the stop unreasonable.<sup>6</sup> As a result, traffic stops are often used in drug interdiction operations and other criminal investigations. Investigations into criminal activity not related to the mission during a traffic stop are lawful *only if* the unrelated investigation does not measurably extend the duration of the stop.<sup>7</sup>

Over time, many lower courts adopted a rule of law, sometimes referred to as the "de minimis" rule, that stood for the proposition that a traffic stop could be extended for a *de minimis* period of time. "De minimis" means lacking significance or importance or being so minor as to merit disregard.<sup>8</sup> Under this rule, if a traffic stop is extended to conduct an investigation into a matter unrelated to the stop, the extension will be lawful as long as the duration of the extension is relatively insignificant.

### THE ROCK – *RODRIGUEZ V. UNITED STATES*

In April 2015, the U.S. Supreme Court issued its decision in *Rodriguez v. United States*.<sup>9</sup> In *Rodriguez*, a police officer in Nebraska extended a traffic stop by six to seven

minutes to allow backup to arrive before he walked his K9 around the defendant's Mercury Mountaineer. The U.S. Circuit Court of Appeals for the Eighth Circuit was one of several circuits that had adopted the *de minimis* rule. Applying this rule, the Eighth Circuit held that the six- to seven-minute extension of the traffic stop was "de minimis," and, therefore, the extended stop was reasonable under the Fourth Amendment.

The U.S. Supreme Court disagreed and invalidated the use of the *de minimis* rule that had been embraced by the Eighth Circuit.<sup>10</sup> In so doing, the Supreme Court reaffirmed the rule of law that

*A seizure justified only by a police-observed traffic violation, therefore, "become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission" of issuing a ticket for the violation.*<sup>11</sup>

This new rule, sometimes called the *Rodriguez* rule, holds officers to a strict time-related standard. Under this rule, the extension of a traffic stop to conduct an investigation unrelated to the traffic violation that permitted the stop must be supported by an independent reasonable suspicion of the criminal activity being investigated. If a defendant can show that a traffic stop was extended by an unrelated investigation without the requisite reasonable suspicion, there is a strong argument

for a Fourth Amendment violation and imposition of the exclusionary rule.<sup>12</sup>

### THE RIPPLE – IDENTIFYING PASSENGERS

When a vehicle is seized during a traffic stop, all of the occupants are seized as well.<sup>13</sup> Even though the passengers had nothing to do with the purpose of the stop, they are lawfully seized along with the driver. The courts have long recognized the dangers associated with a traffic stop where officers are vulnerable as they approach and reapproach a vehicle with unknown occupants. Accordingly, law enforcement officers are given the ability to safely conduct the detention, including the authority to order vehicle passengers out of the vehicle.<sup>14</sup>

Attempting to establish the identity of passengers in a vehicle during a traffic stop has become a common practice. For safety reasons, it is desirable to know who is sitting in a car when it is seized. But, although they are detained during the traffic stop, passengers are detained with no level of suspicion that they are involved in any activity subject to investigation (either the traffic violation or an unrelated criminal activity). Although the driver can be compelled to produce identification as a result of being the person in control of the vehicle and therefore responsible for the traffic violation, the passengers have no such relation to the stop.

Thus, the ripple: As a result of the *Rodriguez* decision, is it permissible to attempt to identify passengers during a traffic stop?

#### THE SMALL RIPPLE – REQUESTING IDENTIFICATION

It is not unusual for law enforcement officers to ask for identification from passengers. A question like: “Do you mind showing me your ID?” connotes a request and not a demand for identification. What if the passenger voluntarily provides the information pursuant to the request? Does the act of requesting identification and then running a “wants and warrants” through dispatch impermissibly extend a traffic stop under the *Rodriguez* rule?

Even though the production and running of a passenger’s identification arguably adds some amount of time to a traffic stop, the lower courts seem to have had no problem with it (thus far). For example, in *United States v. Burwell*, the Eleventh Circuit did not take issue with the officer running the identification of the passenger who voluntarily surrendered her identification.<sup>15</sup>

#### THE BIG RIPPLE – DEMANDING IDENTIFICATION

But what if the officer demands that the passenger provide identification and the passenger refuses? Can an officer extend a lawfully initiated vehicle stop because a passenger refuses to identify him- or herself, absent a reasonable suspicion that the individual has committed a criminal offense? That was precisely the question presented to the Ninth Circuit in *United States v. Landeros*.<sup>16</sup>

In *Landeros*, an officer initiated a traffic stop based on the vehicle’s speed, which was 11 miles per hour over the limit. In addition to the driver, there were three passengers

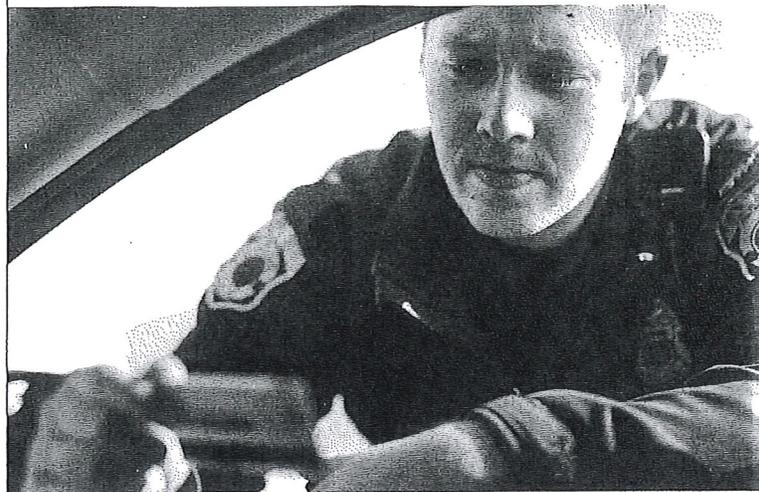
in the car, and the officer *demanded* identification from them all. The front passenger (Landeros) repeatedly refused to identify himself, and at that point, the officer called for backup. When backup arrived minutes later, Landeros again refused to identify himself and was ordered out of the vehicle. As he exited the vehicle the officers saw pocketknives, a machete, and open beer bottles on the floorboards by his seat. He was then arrested for the open containers and for failing to identify himself. During the search incident to arrest, the officers found six rounds of ammunition in his pocket, and Landeros was federally charged with possession of ammunition by a convicted felon.<sup>17</sup>

In reversing the district court’s denial of Landeros’s motion to suppress, the Ninth Circuit noted that “a demand for a passenger’s identification is not part of the mission of a traffic stop.”<sup>18</sup> The court held that although the stop was lawful at its inception,

*the stop was no longer lawful by the time the officers ordered Landeros to leave the car, as it had extended longer than justified by either the suspected traffic violation or any offense as to which there was independent reasonable suspicion.*<sup>19</sup>

#### CONCLUSION AND RECOMMENDATION

Routine traffic stops are anything but routine, and traffic stops are often fraught with danger to the officers making them. Identifying passengers in a vehicle during a traffic stop is one way of determining the level of risk involved when passengers are seized during a traffic stop. However, the *Rodriguez* decision has significantly limited the ability of officers to identify passengers during a traffic stop since the identification of



passengers is not related to the mission of the stop.

As of the date of this article, the Ninth Circuit is the only circuit to address this precise issue. But, based on the analysis provided, it is reasonable to conclude that other circuits may reach the same conclusion. The lessons learned from both *Burwell* and *Landeros* seem clear enough: obtaining and running identification does not unlawfully extend a traffic stop when information is voluntarily given, but extending a traffic stop due to a passenger’s failure to produce identification is unlawful unless there is independent reasonable suspicion that the passenger is directly involved in a criminal activity or the traffic infraction.

Many departments have long-standing practices of demanding identification from passengers. Accordingly, officers should be made aware of the current status of the law so they can modify their practices and make sound Fourth Amendment decisions when attempting to identify passengers during a traffic stop. ◻

#### NOTES:

<sup>15</sup>Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a ‘seizure’ of ‘persons’ within the meaning of this provision.” *Whren v.*

*United States*, 517 U.S. 806, 809-10 (1996).

<sup>16</sup> “[T]he usual traffic stop is more analogous to a so-called ‘Terry stop,’ see *Terry v. Ohio*, 392 U.S. 1 (1968), than to a formal arrest.” *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984). See also *Knowles v. Iowa*, 525 U.S. 113, 117 (1998).

<sup>17</sup>Petitioner’s concerns are met by the requirement that a *Terry* stop be justified at its inception and be ‘reasonably related in scope to the circumstances which justified’ the initial stop.” *Hibel v. Sixth Jud. Dist. Ct. of Nev., Humboldt Cty.*, 542 U.S. 177, 178 (2004).

<sup>18</sup>“A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.” *Illinois v. Caballes*, 543 U.S. 405, 407 (2005).

<sup>19</sup>*Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015).

<sup>20</sup>*Whren*, 517 U.S. 806.

<sup>21</sup>*Arizona v. Johnson*, 555 U.S. 323 (2009).

<sup>22</sup>*Merriam-Webster.com Dictionary*, s.v. *de minimis*.

<sup>23</sup>*Rodriguez*, 135 S. Ct. 1609.

<sup>24</sup>“A brief delay to employ a dog does not unreasonably prolong the stop, however, and we have repeatedly upheld dog sniffs that were conducted minutes after the traffic stop concluded.” *United States v. Rodriguez*, 741 F.3d 905, 907 (8th Cir. 2014).

<sup>25</sup>*Rodriguez*, citing *Caballes*, 543 U.S. 405, 407 (2005).

<sup>26</sup>See *United States v. Campbell*, 912 F.3d 1340 (11th Cir. 2019) where a 25-second inquiry into a non-related criminal matter impermissibly extended a traffic stop, thereby nullifying consent to search, which led to the exclusion of the firearm found in the car.

<sup>27</sup>*Brendlin v. California*, 551 U.S. 249 (2007).

<sup>28</sup>*Maryland v. Wilson*, 519 U.S. 408 (1997).

<sup>29</sup>*United States v. Burwell*, No. 18-13039 (11th Cir. 2019).

<sup>30</sup>*United States v. Landeros*, 913 F.3d 862 (9th Cir. 2019).

<sup>31</sup>18 U.S.C. §§ 922(g)(1), 924(a)(2).

<sup>32</sup>*Landeros*, 913 F.3d at 868.

<sup>33</sup>*Landeros*, 913 F.3d at 870.

**PEOPLE V. DELRIO (02-28-20) NO. A154848**

**SUMMARY**

Police conducted a warrantless search of Alejandro Delrio's cell phone. At the time Delrio was a convicted felon in the legal custody of CDCR as he served out the remainder of his term on parole. As a parolee, Delrio was subject to a statutorily mandated parole term that required him to submit to warrantless and suspicionless searches of his person, his residence, and any property under his control by a parole officer or other peace officer at any time. At the time of the cell phone search, police officers knew Delrio was on parole and had specific, articulable reasons to suspect he was involved in a residential burglary.

Delrio pleaded guilty to first degree burglary after the trial court denied his motion to suppress evidence obtained from the search of his cell phone. On appeal, Delrio claimed the search violated his Fourth Amendment rights because his written parole conditions gave him an expectation of privacy in the contents of his cell phone.

The Court of Appeal held that any expectation of privacy Delrio may have had did not outweigh the government's interest to suspect he was involved in a residential burglary and affirmed the trial court's ruling to deny the motion to suppress.

**FACTS**

In September 2014, a residential burglary was committed in Redwood City. A surveillance video from a neighbor's house showed two individuals walking from a black truck to the burglarized house and then walking away, each carrying a sack. After the residents of the home reported the burglary, Deputy Sheriff Robert Willett contacted Delrio and told him that a vehicle registered to him had been involved in a burglary. Delrio denied any involvement, told Deputy Willett that he had loaned the truck to a coworker, and further claimed that if the truck was involved with a burglary, it must have been used without his permission. Delrio then completed paperwork to report the vehicle stolen.

Deputy Willett reviewed the surveillance video and concluded that one of the two individuals shown in the video had "a very close resemblance to the defendant." Thus, Deputy Willett recommended that Delrio be re-contacted as a suspect.

Sergeant Henry Acosta conducted a records check on Delrio and determined that he was on active parole. At around 10:30 a.m. on September 26, 2014, Sergeant Acosta and several officers went to Delrio's house to conduct a parole search. While the officers searched the house, Sergeant Acosta interviewed Delrio and his girlfriend. Sergeant Acosta showed Delrio a still photo from the surveillance footage and said one of the suspects looked like him, but Delrio denied involvement in the burglary. During the search of the house, officers located a cell phone that belonged to Delrio. Sergeant Acosta later testified at the suppression hearing that he believed Delrio's parole obligations required him to surrender the password, and Sergeant Acosta may have told Delrio, "you're on parole. I need the password," or "give me your passcode." Delrio complied, and Sergeant Acosta gave the cell phone to a detective who used a Cellebrite device to download the contents of the cell phone before returning it to Delrio.

A few minutes after the officers left his house, Delrio called Sergeant Acosta and asked him to return to the house. Upon the officers' return, Delrio showed Sergeant Acosta a photograph from his cell phone in which Delrio was holding five \$100 bills. Delrio said the money was the proceeds from selling the stolen jewelry from the burglary. Delrio also told Sergeant Acosta about his involvement in the burglary and said he should not have reported his vehicle stolen.

Delrio was charged with first degree burglary along with several other charges and sentence enhancements. Delrio moved to suppress the evidence obtained from the cell phone search and all statements made by him as fruit of that search. The trial court denied the motion. Delrio pled guilty and was sentenced to seven years in prison. Delrio subsequently appealed.

## **HELD**

In the present case, there was no dispute that Delrio was on parole at time his cell phone was seized and its contents downloaded, or that the officers involved were aware of Delrio's parolee status at the time of the seizure. Delrio's argument on appeal was that he nevertheless maintained a reasonable expectation of privacy in his cell phone and its contents because of certain language in the form used by CDCR to notify him of his parole conditions. Specifically, Delrio argued that because the CDCR form did not have boxes checked for certain so-called "special conditions of parole" that would have required him to give his consent to, and any passwords for, searches of his electronic devices, he was not provided clear and unambiguous notice that his cell phone was subject to a parole search.

Delrio cited no case in which a search and seizure of a parolee's cell phone was invalidated under the Fourth Amendment, and the Court of Appeal's research found none. The Court noted that Federal courts have unanimously upheld such searches and cited several federal circuit decisions from different federal circuit of appeals. The Court stated the issue in the present case as whether the unchecked boxes on Delrio's CDCR form, standing alone, is a circumstance warranting a break with this clear trend.

The terms and conditions of Delrio's parole release were set forth in a form used by CDCR entitled "Notice and Conditions of Parole". On its first page, the form contains a general term modeled after 3067(b)(3) P.C. and Title 15, section 2511(b)(4) C.C.R., which states: "You, your residence, and any property under your control are subject to search or seizure by a probation officer, an agent or officer of the California Department of Corrections and Rehabilitation, or any other peace officer, at any time of the day or night, with or without a search warrant, with or without cause." In subsequent pages, the form lists various special conditions with boxes to check and a space for the parolee to initial.

In Delrio's case, the boxes that were checked off and initialed prohibited his use and possession of alcohol and narcotics, contact with the victim, association with co-defendants, and gang-related activity. No boxes were checked in the section titled "Computer Use and Electronic Media." Condition 90 of this section states: "You shall not use any method to hide or prevent unauthorized users from viewing specific data or files; e.g., encryption, cryptography, steganography, compression, password protected files. Log in and password information shall be provided to your parole agent upon request." Condition 92 states: "You shall consent to announced or unannounced examination and/or search of electronic devices to which you have access for the limited purpose of detecting content prohibited by your conditions of parole or court order; e.g., hard disks, zip disks, floppy diskettes, CD ROMs, optical disks, thumb drives, magnetic tape, and/or any other storage media whether installed within a device or

removable and separate from the actual computer device.” Delrio argued that because these boxes were not checked, the form must be understood as excluding searches of his cell phone.

The People argued that the failure to check off conditions 90 and 92 was of no consequence because those paragraphs relate only to computers, not cell phones. The Court of Appeal disagreed and cited the United States Supreme Court’s decision in *Riley v. California* (2014) 573 U.S. 373, 393 (*Riley*). *Riley* held that most modern cell phones are “minicomputers,” with many of the same capabilities commonly associated with computers, particularly in the areas targeted by the parole conditions relating to electronic media use (i.e., email, instant messaging, viewing sexually explicit materials or materials related to the parolee’s crime.) Furthermore, by their terms, conditions 90 and 92 apply to any “electronic devices” capable of storing, accessing, and password-protecting digital data.” This reasonably includes cell phones.

Delrio argued that an option to impose conditions 90 and 92 would be unnecessary if the general search term pertaining to “any property under your control” already encompassed searches of parolee’s cell phone. Thus, Delrio argued the CDCR form, considered as a whole, implies that searches of electronic devices are specifically covered by other paragraphs that were not selected in his case. The People did not respond to this argument. Nevertheless, the Court of Appeal held that the failure to select such conditions in the CDCR form neither restricts reasonable searches and seizures nor necessarily gives rise to a privacy interest in the areas covered by the condition.

At best, Delrio identified an ambiguity in the CDCR form as to the interplay between the general search term and the special electronic device conditions that remain unselected in a given case. The Court of Appeal addressed the following question: what is the effect of the perceived ambiguity on the reasonableness of a parole search conducted under the auspices of a statutorily-imposed search condition?

Relying on *Samson v. California* (2006) 547 U.S. 843 (*Samson*), Delrio argued that the above circumstance was sufficient to tilt the Fourth Amendment balance in favor of his privacy rights. In *Samson*, the United State Supreme Court determined that the petitioner’s acceptance of a “clearly expressed” suspicionless parole search condition was one of the circumstances that significantly diminished the petitioner’s reasonable expectation of privacy. Delrio further argued that an unclear and ambiguous cell phone search condition, such as in the present case, has no similar effect.

The Court of Appeal disagreed citing *People v. Schmitz* (2012) 55 Cal. 4<sup>th</sup> 909 (*Schmitz*). In *Schmitz*, the California Supreme Court emphasized that 3067(b)(3) P.C. provides that “every parolee is subject to warrantless and suspicionless parole searches,” and the reasonable scope of a parole search is not “strictly tied to the literal wording of the notification given to the parolee upon release.” Thus, while the reasonableness of a probation search has been dependent on the literal wording of the notification given to a probationer, the reasonableness of a parole search does not derive from a theory of consent as has been found in probation search cases, but rather, is assessed based on the totality of the circumstances. Moreover, as *Schmitz* recognized, officers are only required to know of an individual’s parole status in order to conduct a parole search. This means that the officers who performed the parole search of Delrio were not required to first ascertain and parse the language of the CDCR form. Thus, the CDCR form issued to Delrio may have lacked clarity with respect to searches of his electronic devices, that single circumstance is not dispositive of the Fourth Amendment challenge but is merely one of several to consider in the totality of the circumstances.

The Court of Appeal then assumed for the sake of argument that the scope of a parole search condition form lacks clarity with regard to cell phones, as in the present case, the parolee may have some reasonable expectation of privacy in his or her cell phone and its data. Nonetheless, as with any warrantless search, the reasonableness of the challenged parole search depends on the totality of the circumstances. Because a parolee remains in the legal custody of CDCR, he or she cannot reasonably expect to be free from warrantless cell phone searches under all circumstances, and any intrusion on this assumed privacy interest must still be balanced against the degree to which the search promotes legitimate governmental interests.

California has an overwhelming interest in supervising parolees in order to detect possible parole violations, reduce recidivism, and promote reintegration of parolees into society. The government also has a duty not only to assess the efficacy of its rehabilitative efforts but to protect the public, and the importance of the latter interest justifies the imposition of a warrantless search condition. Furthermore, the strength of the governmental interest in conducting a probation or parole search varies depending on the degree to which the government has a specific reason to suspect that a particular probationer or parolee is reoffending or otherwise jeopardizing his or her reintegration into the community.

In the present case, the officers knew Delrio was a parolee and they had specific, articulable reasons to suspect he was involved in a residential burglary and was therefore reoffending. The video surveillance evidence showed that the burglary involved Delrio's truck and two individuals, one of whom bore a "very close resemblance" to Delrio. Under these circumstances, the Court of Appeal held that the government had a particularly acute interest in determining whether Delrio had violated the conditions of his parole and was a danger to the public. It was reasonable for the investigating officers to believe there might be evidence of the burglary on Delrio's cell phone, such as text messages or calls with his accomplice, or photographs or location information regarding the targeted residence. Thus, despite any perceived expectation of privacy that Delrio may have had in his cell phone due to the lack of clarity in the written search conditions, consideration of the totality of the circumstances presented ultimately tilted the balance in favor of the government's substantial interests in supervising Delrio and protecting the public.

The Court of Appeal further held that the cell phone search was not arbitrary, capricious or harassing. Because the officers had specific reasons to suspect that Delrio was involved in a residential burglary, the search was related to legitimate parole monitoring and law enforcement's purposes, and there was no evidence suggesting the officers had personal animosity toward Delrio. The search took place at a reasonable hour and was not unreasonably prolonged.

**PEOPLE V. SHUMAKE (03-03-20) NO. 6093**

**SUMMARY**

Andre Shumake appealed the denial of his motion to suppress evidence after a search of the passenger compartment of his car revealed a loaded firearm. Shumake had been stopped for an equipment violation. Upon contacting Shumake, the officer smelled the strong odor of marijuana. Shumake admitted that he was in possession of marijuana. A search of the center console revealed 1.14 grams of marijuana flower. The officer continued the search of the passenger compartment and subsequently discovered the loaded firearm.

The trial court denied the motion to suppress. The Appellate Division of the Alameda Superior Court reversed and held the search to be unlawful.

**FACTS**

On September 1, 2017, at about 11:00 p.m., Berkeley Police Officer Megan Jones was on "specialized DUI patrol." She and her partner were in an unmarked patrol unit, heading northbound on University Av., when she saw a Hyundai being driven by Shumake southbound. There was no front license plate on the Hyundai, in violation of 5200 V.C. While on "specialized DUI patrol," Officer Jones looks for driving patterns indicating intoxication, such as weaving or other erratic driving. She also stops cars for traffic violations, to see if the driver might be impaired. Officer Jones testified Shumake's driving was normal, he immediately and safely pulled to the curb when she activated her unit's lights and siren, and he was cooperative. Officer Jones testified that she has conducted about 800 DUI investigations, with about 500 involving marijuana.

When Officer Jones approached the driver's door, she noticed a strong smell of marijuana, both fresh and "freshly burnt." Officer Jones testified that the smell of marijuana may linger on clothes or car upholstery for a week or more after it is smoked. Officer Jones asked Shumake if he had any marijuana. Shumake answered that he had "some bud" in the center console.

Officer Jones believed that any marijuana transported within a car must be in a closed, heat-sealed package. Officer Jones also believed that if marijuana is contained in that manner, she should not be able to smell it. Thus, believing Shumake might be in violation of the laws regulating marijuana possession, Officer Jones decided to search the Hyundai. She had Shumake and his passenger get out of the Hyundai.

Officer Jones first looked in the center console. Inside was a plastic tube containing 1.14 grams of marijuana bud, later described as "dried flower." The tube was closed. It could be open by squeezing the sides of the tube, which flexed the top open. Officer Jones testified that when she located the marijuana in the center console it, "gave me more probable cause to believe that there was more marijuana inside the vehicle." In the ensuing search, Officer Jones found a loaded firearm underneath the driver's seat. Officer Jones did not find any more marijuana or paraphernalia.

After she completed the vehicle search, Officer Jones conducted field sobriety tests to determine if Shumake was under the influence. Officer Jones concluded that Shumake was not under the influence.

Shumake filed a motion to suppress the evidence located during the vehicle search as lacking probable cause and violating his Fourth Amendment rights. The trial court denied the motion to suppress and Shumake subsequently appealed to the Appellate Division of the Alameda Superior Court.

## HELD

The Court addressed **two issues in the present case**: (1) whether the possession of the marijuana was lawful; and (2) whether the subsequent search of the Hyundai was lawful.

The relevant statute in question in the present case is 23222(b)(1) V.C. The applicable part of the statute states in part, that it is an infraction to possess, “while driving a motor vehicle upon a highway,...any receptacle containing any cannabis...which has been opened or has a seal broken, or loose cannabis flower not in a container....”

Shumake described to Officer Jones the 1.14 grams of cannabis as “bud.” Officer Jones later described it as “dried flower.” The plastic tube described by Officer Jones did not appear to have been “sealed” at the time of the search and it was unclear if it was ever “sealed.” From Officer Jones’s description of how she opened the tube by merely squeezing it, the container had been previously opened, if, for no other purpose than to put the cannabis inside it. Shumake did not argue that the cannabis was in a sealed condition. Shumake argued that it was “loose cannabis flower...in a container.” The People did not dispute this. The People also did not address the legality of the transportation of the 1.14 grams of cannabis flower in a closed plastic tube.

The Court held that a plain reading of the statute mandated the conclusion that the possession of the cannabis flower in the present case was lawful. Shumake possessed 1.14 grams of loose cannabis flower in a closed container. Officer Jones’s belief that any cannabis being transported in a vehicle must be in a heat-sealed container was not supported by the plain language of 23222(b)(1) V.C.

[The Court noted that although the rationale was unclear, Proposition 64 differentiates cannabis, **which must be in an unopened, sealed, container**, from “loose cannabis flower,” **which only needs to be in a closed container.**]

Officer Jones testified that when she discovered the plastic tube of cannabis flower in the center console it gave her “more probable cause to believe there was more marijuana in the vehicle.” The Court held that Officer Jones violated **11362.1 H&S** which states that **“no conduct deemed lawful by this section shall constitute the basis for detention, search, or arrest.”** Shumake’s container with 1.14 grams of loose cannabis flower was far below the 28.5 grams permitted by law. Since Shumake was lawfully transporting the marijuana, that marijuana **could not** then serve as the basis for the search of Shumake’s Hyundai.

The People did not address how to analyze the search of Shumake’s Hyundai if the evidence of the marijuana in the center console could not be used to support it. Officer Jones clearly relied on it to justify her further investigation. The People argued that the smell of marijuana coupled with Shumake’s admission of possession of the “bud,” justified the search of the entire car.

The Court considered that if it excluded the discovery of the tube of marijuana flower in Shumake's center console as a basis for Officer Jones's further search, could the loaded firearm still be admissible under the inevitable discovery rule.

The People cited *People v. Fews* (2018) 27 Cal. App. 5<sup>th</sup> 553 (Fews). In Fews, the driver of an SUV, in an area of San Francisco known for narcotics sales and violent crime, was driving erratically and then abruptly pulled to the curb when a police unit drew near. The driver quickly stepped out of the vehicle while the passenger (defendant) bent down inside the SUV, as if to hide something. The officer detained the driver back inside the SUV, could smell burnt marijuana, and saw the driver had a half-smoked cigar of marijuana. This case occurred after the passage of Proposition 64, but possession of such an "open container" in the car was (and remains) unlawful. In affirming the trial court's denial of the motion to suppress the gun found in the defendant's jacket, the Court of Appeal stated, "The evidence of the smell of recently burnt marijuana and the half-burnt cigar containing marijuana supported a reasonable inference that Mims was illegally driving under the influence of marijuana, or, at the very least, driving while in possession of an open container of marijuana."

The Court held that there were significant differences between Fews and the present case. First, the officers in Fews observed a violation of the cannabis open container law. Second, the half-burnt cigar, combined with the smell of burnt marijuana, leads to the inference that the occupants very recently smoked marijuana. This would increase the likelihood that the occupants were illegally smoking while driving, or that the driver was under the influence. Further, the driver of the SUV in Fews drove erratically, and both the driver and passenger acted strangely during the traffic stop.

In the present case there was no violation of the open container law. There was no partially smoked cannabis in plain view. Also, Officer Jones testified that the smell of marijuana can linger for a week or more. Lastly, Shumake's only traffic violation was missing a front license plate, and Shumake quickly and appropriately pulled to the curb and was cooperative throughout the traffic stop. These factors, combined with Shumake's successful completion of the field sobriety tests conducted by Officer Jones, did not support applying the inevitable discovery rule to the present case.

The Court concluded that, given the legality of personal use of marijuana in the State of California, there was not a fair probability that Officer Jones would find evidence of a crime in the Hyundai. Anyone 21 years and older can now lawfully smoke marijuana in California, and as Officer Jones testified, the smell can linger for more than a week. The law permits possession and transportation of up to 28.5 grams of cannabis in a car. Given the language of 23222(b)(1) V.C., upon Shumake telling Officer Jones he had some "bud" in the center console, Officer Jones could have conducted a further inquiry, including asking Shumake about the amount of marijuana, whether it was in a container, where it was located, when he last smoked, etc. This is consistent with the type of reasonable inquiry officers use when they smell the odor of an alcoholic beverage in a car. Marijuana and alcohol now receive similar treatment under the law. Officer Jones may have had justification at that point to administer field sobriety tests to ascertain Shumake's sobriety, but that justification was not tantamount to probable cause to search the remainder of Shumake's Hyundai.