SAN FRANCISCO
Daily Journal
www.dailyjournal.com

VOL. 123 NO. 203 THURSDAY, OCTOBER 19, 2017

GUEST COLUMN

Coming for your phone, again

By Scott A. Sugarman

You may have thought the contents of your cellphone were private. Sadly, the very recent decision in *People v. Sandee*, 15 Cal. App. 5th 294 (2017), illustrates law enforcement's constant efforts to gain access to all private data.

When the U.S. Supreme Court ruled more than 15 years ago police officers may arrest a driver for not wearing a seat belt, little did we know that decision would place officers in a position to get into your cellphone. However, unsurprisingly, here we are.

A bit of legal history. In *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), the Supreme Court found there was no constitutional impediment to police officers arresting an individual for an offense that could only be punished by a minor fine, such as driving a car in violation of the state's seatbelt law. "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." A few years later in *Virginia v. Moore*, 553 U.S. 164 (2008), the Supreme Court held an officer could lawfully arrest an individual for a minor crime (driving on a suspended license) even though state law expressly barred taking the driver into custody.

Under Fourth Amendment jurisprudence, officers may search an individual incident to arrest. In theory, such a search was intended to allow the officer to collect evidence of the crime and/or to protect the

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Daily Journal photo

California Chief Justice Tani Cantil-Sakauye and the state Supreme Court have decided there is no reason at this time to change the bar exam passing score.

State Supreme Court refuses to lower bar exam pass score

By Lyle Moran
Daily Journal Staff Writer

The California Supreme Court on Wednesday refused to lower the pass score for the state bar exam, resisting calls from law school deans and a powerful state lawmaker who claim the test is too difficult.

In doing so, the high court appeared to take a swipe at law schools that have been accused of lowering their acceptance standards to maintain class sizes.

The court encouraged the State Bar and law schools to work together to examine "whether student metrics, law school curricula, and teaching techniques and other factors might account for the recent decline in bar exam pass rates."

The State Bar presented the court last month with two options for reducing the cut score, in addition to retaining the existing standard of 1440, the nation's second highest. The Committee of Bar Examiners recommended maintaining the standard that has been in place 30 years.

California Chief Justice Tani G. Cantil-Sakauye and the five other justices wrote in a letter to bar leaders Wednesday that they had reviewed the agency's report, amicus letters and the bar's pass line study.

"Based on that review and balancing all considerations, the court is not persuaded that the relevant information and data developed at this time weigh in favor of departing from the long-standing pass score of 1440," the court wrote. "In making this determination, the court expects the State Bar to complete its other bar exam studies and to continue analyzing whether the exam or any of its components might warrant modification."

The court said the declining pass rates appear to be consistent with a "broader national pattern."

Just 43 percent of takers passed the July 2016 California test, a 32-year low. In July 2008, nearly 62 percent of applicants passed the state's test.

The bar sought to study the role student credentials have played in the falling pass rates, including by seeking data from law schools about their students. Law school deans have said they fear sharing that information would violate the federal Family Educational Rights and Privacy Act.

Deans of many of the state's American Bar Association-accredited law schools suggested the pass line be reduced to the 1350 to 1390 range to be more in line with other states. They said that having the highest pass line after Delaware most negatively impacts racial minorities.

Stephen C. Ferruolo, dean at University of San Diego School of Law, called the court's decision "extremely disappointing."

"There is no justification whatsoever for retaining a cut score at 1440 given the disparate impact it has on underrepresented minorities," Ferruolo said. "I hope the Supreme Court will take the opportunity to sit down with the deans of California law schools to hear their concerns about the court's decision and their ideas for moving forward."

The two options for lowering the passing score the bar presented to the court were 1414 and 1390. The bar had said a passing score of 1390 would have resulted in a 40 percent increase in the number of African Americans who passed the July 2016 exam.

"We thank the court for providing swift guidance in response to the passing score study so that the State Bar has certainty for grading the July 2017 bar exam," bar President Michael G. Colantuono said in a statement.

The panel that participated in the bar-commissioned pass line study produced a median recommended score effectively equivalent to the current standard.

Members of the Committee of Bar Examiners said in August they supported maintaining the pass line because not all the studies related to the exam, such as the one involving student credentials, had been completed.

Karen M. Goodman, a member of the examiners' panel and the immediate past chair, hailed the court's announcement Wednesday as "the right decision."

"How can you make an educated

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DOJ seeks stiff penalty for Google

Judge told company profits from resisting law enforcement

By Joshua Sebold
Daily Journal Staff Writer

SAN FRANCISCO — Google has a history of stonewalling government requests for its users' data and should face especially stiff sanctions for refusing to turn over information involving an overseas user, U.S. Justice Department lawyers argued Wednesday.

The case bears many similarities to a dispute under review at the U.S. Supreme Court, where Microsoft Corp. contends that a U.S. judge doesn't have the authority to extract its data from foreign jurisdictions. *In the Matter of a Warrant to Search a Certain E-mail Account Controlled and Maintained by Microsoft Corp.*, 17-2 (U.S. Supreme Court, filed June 23, 2017).

Google, a subsidiary of Alphabet Inc., is resisting the release of data tied to an overseas user. The company says it intends to wait until it receives a ruling from the 9th U.S. Circuit Court of Appeals or a decision from the U.S. Supreme Court before turning over any information.

U.S. District Judge Richard Seeborg ordered Google to turn over the data in August after U.S. Magistrate Judge Laurel Beeler batted aside a motion to quash the warrant.

The question before him now is how much should he punish Google for openly resisting compliance while waiting for an appeal to run its course. I*n the Matter of the Search of Content Stored at Premises Controlled by Google Inc. and as Further Described in Attachment A,* 16-MC80263 (N.D. Cal., filed Dec. 6, 2016).

Seeborg said he wasn't inclined to take some of the drastic actions called for by Andrew Sun Pak, an attorney from the U.S. Department of Justice's criminal division in Washington, D.C. But he said that a ruling from the Supreme Court might not be the last word on Google's predicament because of differences in the facts of this litigation and the Microsoft case.

"Frankly, I think the government's case is stronger here so we might not get entire clarity from the Supreme Court," Seeborg said.

Pak contended early in the hearing that Google's system wasn't designed to differentiate between information stored in the U.S. or overseas, until the 2nd U.S. Circuit Court of Appeals issued a ruling in the Microsoft case in July 2016, finding that a company couldn't be compelled to produce overseas data in response to a U.S. search warrant. Google ceased complying with all search warrants on the day that ruling came down and dedicated a large amount of engineering resources to quickly changing its system so that it could identify documents stored overseas and stop disclosing them, he said. Google very well could have moved data overseas to protect it during that time, he said.

Seeborg agreed this was an important distinction

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Attorneys want immigration law struck down

By Nicolas Sonnenburg
Daily Journal Staff Writer

The National ACLU, federal defenders from every district under the 9th U.S. Circuit Court of Appeals, and immigration rights groups from across the country urged the court on Wednesday to strike down as unconstitutional a federal statute that makes it a crime to encourage people to remain in the United States illegally.

Collectively, attorneys representing the groups said that the statute was void due to its vagueness, and violated the First Amendment's free speech protections. They also said it was overbroad and presented due process issues.

"The provision facially and undeniably targets a particular category of speech, namely speech concerning whether undocumented noncitizens should be welcome in this country," wrote Beth C. Neitzel, Mark C. Fleming and Megan E. Barringer of Wilmer Cutler Pickering Hale and Dorr LLP.

"Most perniciously, it uses the criminal law to pick a side in that discussion and punishes the expression of Congress' disfavored viewpoint as a felony," they continued in their filing on behalf of the Immigrant Defense Project and the National Immigration Project of the National Lawyers Guild.

The briefs came a month after a three-judge panel of the court, in an unusual move, requested amicus briefs in a criminal appeal that had been fully briefed, argued and submitted. *U.S. v. Sineneng-Smith*, 15-10614 (9th Cir., filed May 26, 2010)

The case started with the prosecution of a San Jose-based immigration consultant for encouraging illegal immigration, mail fraud, and tax fraud. But Judges Stephen R. Reinhardt, A. Wallace Tashima and Marsha S. Berzon seemed skeptical about the conviction for encouraging illegal immigration, questioning during oral arguments in April on how the statute could be interpreted.

"What is the limit of the statute?" Berzon asked the government's lawyer. "If I have a neighbor and he's illegal and he comes to me and he says, 'What should I do? Should I stay or leave?' And [I say], 'Oh you definitely should stay, because they're probably not going to find you.' Is that a crime?"

In a September order, the court asked for amicus briefs on whether 8 U.S.C. Section 1324(a)(1)(A)(iv) is overbroad under the First Amendment, whether it is void for vagueness, and whether the statute contains an implicit *mens rea* element.

The statute says that an individual

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DAILY APPELLATE REPORT

CIVIL LAW

Arbitration: Motion to compel arbitration erroneously denied where federal preemption applies given that resolution of controversy necessarily requires interpretation of parties' collective bargaining agreement. *Melendrez v. San Francisco Baseball Association LLC,* C.A. 1st/3, DAR p. 10067

WEEKLY APPELLATE REPORT Podcast

Hosted by Rulings Editor Brian Cardile
Aliens v. Corporations
As SCOTUS hears arguments in 'Jesner v. Arab Bank,' international law experts Kristin Linsley (Gibson, Dunn & Crutcher) and Professor Peter Margulies (Roger Williams Univ. School of Law) offer opposing views on whether the Alien Tort Statute applies to corporate defendants

Online at www.dailyjournal.com

New York Times News Service

Arnold Schwarzenegger, the former governor of California, speaks outside the Supreme Court building as justices heard arguments in a key gerrymandering case, Gill v. Whitford, *on Capitol Hill in Washington, Oct. 3.*

Letting the democratic process work

By Erwin Chemerinsky

The U.S. Supreme Court has the opportunity to dramatically improve the democratic process in the United States by putting an end to partisan gerrymandering. *Gill v. Whitford* was argued earlier this month, and no case this term is likely to be more important. As with so much else in the Supreme Court, the outcome of the case seems very much to depend on Anthony Kennedy and it is impossible to accurately predict what he will do.

Partisan gerrymandering — where the political party controlling the legislature draws election districts to maximize seats for that party — is nothing new. In fact, the practice is named for Massachusetts Governor Elbridge Gerry who in 1812 signed a bill that redrew the state senate election districts to benefit his Democratic-Republican party. But what has changed are the sophisticated computer programs that make partisan gerrymandering far more effective than ever before. The political party that controls the legislature now can draw election districts to gain a much more disproportionate number of safe seats for itself.

This is exactly what occurred in Wisconsin, where Republicans took advantage of their control of the Legislature to give themselves a much greater number of seats relative to their voting strength. The Republicans employed two gerrymandering techniques in order to lessen the effect of votes for Democrats statewide: "cracking" — "dividing a party's supporters among multiple districts so that they fall short of a majority in each one" — and "packing" — "concentrating one party's backers in a few districts that they win by overwhelming margins."

CHEMERINSKY

The gerrymandering worked. As the federal court explained: "In 2012, the Democrats received 51.4% of the statewide vote, but that percentage translated into only 39 Assembly seats. A roughly equivalent vote share for Republicans (52% in 2014), however, translated into 63 seats — a 24 seat disparity." Put another way, "[i]n 2012, the Republicans won 61% of Assembly seats with only 48.6% of the statewide vote. ... In 2014, the Republicans garnered 52% of the statewide vote but secured 64% of Assembly seats. ... Thus, the Republican Party in 2012 won about 13 Assembly seats in excess of what a party would be expected to win with 49% of the statewide vote, and in 2014 it won about 10 more Assembly seats than would be expected with 52% of the vote."

Similarly, in North Carolina, essentially a purple state, Republicans were able to convert a slim majority in the votes cast for the state legislature into a super-majority of the seats in both of the houses. The same is true in many other states.

Partisan gerrymandering is inconsistent with basic principles of democratic government, as well as constitutional guarantees of equality in voting. Democracy involves voters choosing their elected officials, but partisan gerrymandering has elected officials choosing their voters.

Justice Ruth Bader Ginsburg, writing for the court in *Arizona State Legislature v. Arizona Redistricting Commission* (2015), explained that independent redistricting commissions are desirable because they "impede legislators from choosing their voters instead of facilitating the voters' choice of their representatives."

California and Arizona are among a minority of states which have independent commissions to draw election districts. In a majority of the states, the political party that controls the state legislature draws districts for both the U.S. House of Representatives and for the state legislature. They inevitably do so in a way to maximize their political control.

In *Davis v. Bandemer* (1986), the Supreme Court held that challenges to gerrymandering are justiciable and that substantial vote dilution through gerrymandering denies equal protection. The court said that gerrymandering is unconstitutional if it involves "intentional discrimination against an identifiable political group and an actual discriminatory effect on that group."

But in *Vieth v. Jubelirer* (2004), the Supreme Court dismissed a challenge to partisan gerrymandering, and a plurality of four justices said that such suits are inherently nonjusticiable political questions. Republicans controlled the Pennsylvania Legislature and they drew election districts to maximize Republican seats. In *Vieth*, the plurality concluded that *Davis* had proven impossible to implement and the plurality opinion, written by Justice Antonin Scalia, concluded that challenges to partisan gerrymandering are nonjusticiable political questions. Justice Scalia, joined by Chief Justice William Rehnquist and Justices Sandra Day O'Connor and Clarence Thomas, said that there are no judicially discoverable or manageable standards and no basis for courts ever to decide that partisan gerrymandering offends the Constitution.

Justice Kennedy, concurring in the judgment, provided the fifth vote for the majority. He agreed to dismiss the case because of the lack of judicially discoverable or manageable standards, but he said that he believed that such standards might be developed in the future. Thus, he disagreed with the majority opinion that challenges to partisan gerrymandering are always political questions; he said that when standards are developed, such cases can be heard. Justices Stevens, Souter, and Breyer wrote dissenting opinions, which Justice Ginsburg joined, arguing that there are standards that courts can implement.

The Supreme Court offered no more clarity in a subsequent decision, *League of United Latin American Citizens v. Perry* (2006), where it again dismissed a challenge to partisan gerrymandering. After Republicans gained control of the Texas Legislature in 2002, they redrew districts for Congress so as to maximize likely seats for Republicans. The redistricting was very successful. The Texas congressional delegation went from 17 Democrats and 15 Republicans after the 2002 election to 11 Democrats and 21 Republicans in the 2004 election. Many lawsuits were brought, and again the Supreme Court, in a 5-4 decision with no majority opinion, dismissed the case.

It is in this context that the challenge to Wisconsin's gerrymandering is enormously important. This is the first court to find gerrymandering to be unconstitutional since these Supreme Court decisions. The three judge federal court, in a lengthy opinion by Judge Kenneth Ripple of the 7th U.S. Circuit Court of Appeals, said that it now is possible to measure the effects of partisan gerrymandering by quantifying an "efficiency gap." The court explained that "[t]he efficiency gap is the difference between the parties' respective wasted votes in an election, divided by the total number of votes cast."

The court applied this through a three-part test: First, plaintiffs have to establish that a state had an intent to gerrymander for partisan advantage. Second, the plaintiffs need to prove a partisan effect, by proving that the efficiency gap for a plan exceeds a certain numerical threshold. Third, and finally, if the plaintiffs meet these requirements, then the burden is on the defendants to rebut the presumption by showing that the plan "is the necessary result of a legitimate state policy, or inevitable given the state's underlying political geography." If the state is unable to rebut the presumption, then the plan is unconstitutional.

The three-judge court used this test and concluded in a 2-1 decision that the election districts for the Wisconsin Legislature were drawn with the purpose and effect of enhancing Republican seats and decreasing those for Democrats. The court found no legitimate purpose for this disparity and found the partisan gerrymandering to be unconstitutional.

The oral argument before the Supreme Court left the sense that the justices are deeply divided along ideological lines. Justice Kennedy's questions gave no sense of how he will vote. Nor do prior cases. In 2015, Justice Kennedy joined Justice Ginsburg's opinion in *Arizona Redistricting Commission* that strongly condemned partisan gerrymandering. But in 2017, he joined Justice Samuel Alito's dissenting opinion in *Cooper v. Harris* which defended the practice.

Partisan gerrymandering is undesirable whether done by Democrats or Republicans. The Supreme Court should hold that challenges to it can be heard in the federal courts and explain that districting is unconstitutional when it disproportionately favors a political party with no other explanation besides partisanship. This is a chance for the court to take a huge step to having our democratic process work.

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Cellphone searches and the 4th Amendment

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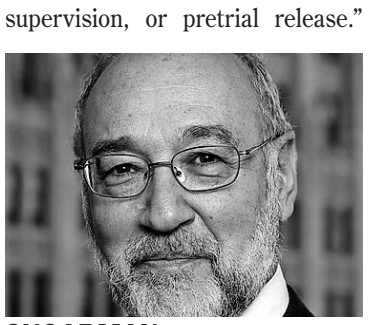
is on probation.

Sandee does offer a fig-leaf of protection, maybe. Sandee argued her cellphone's privacy was protected by California's Electronic Communications Privacy Act, Penal Code Section 1546 et seq. The ECPA requires a search warrant for a lawful search of a cellphone, though several exceptions are noted. Effective Jan. 1, 2017, there is a new exception: An officer may conduct a search of a cellphone if the individual "is subject to an electronic device search as a clear and unambiguous condition of probation, mandatory supervision, or pretrial release."



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Pen. Code Section 1546.1. In light of the ECPA, the Court of Appeal opined, "it may be reasonable, after the ECPA became effective, for a law enforcement officer conducting a search to interpret a general probation search condition authorizing a warrantless search of the probationer's property as excluding searches of the probationer's electronic device information, such as cell phone data," absent the "clear and unambiguous condition" required by statute.

During the recent television presentation of Ken Burns' "The Vietnam War," the narrator reminded us of the role played by the "domino theory" in seducing some Americans to support United States' involvement in that war. The domino theory argued the fall of one country to Communism would inevitably lead to the take-over of neighboring countries. While that political theory has long be discredited, the notion that undermining one basic right will lead to the loss of other rights seems to aptly describe the erosion of personal and privacy rights. That is, once the courts allowed cops to arrest anyone for very minor "crimes" — including offenses that could not result in a jail sentence — those judges set-up the process by which those same cops could strip away their privacy.

Riley and the ECPA sought to provide some guarantee of privacy to the contents of our cellphones. Denied direct access, courts and prosecutors like the ones in *Sandee* sought, by another means, to evisceration of the privacy of the data in our cellphones. They will just insist a defendant waive his/her privacy or choose prison instead. The board game just changes a bit. If we take privacy seriously, we should make that forced choice unavailable.

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