IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KEWHAN ROBEY,	)	
Petitioner,	)	
v.	)	Case No. S197735
SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SANTA BARBARA,	)	
Respondent,	)	
PEOPLE OF THE STATE OF CALIFORNIA,	)	
Real Party in Interest.	)	

Second Appellate District, Division Six, No. B231019
Santa Barbara County Superior Court No. 1349412
The Honorable Edward Bullard, Judge

ANSWER BRIEF

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ANSWER BRIEF

TO: THE HONORABLE CHIEF JUSTICE, TANI CANTIL-SAKAUYE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

ISSUES PRESENTED

1. Could the police conduct a warrantless search of a package smelling of marijuana under a "plain smell" exception to the warrant requirement? – No, the police may not search a closed container based on a perceived odor alone.

2. Could police conduct a warrantless search of the package because the mobility of the box created exigent circumstances even after an officer seized the package from a common carrier and held it at the police station? – No, the circumstances demonstrate that once the package was under the custody and control of police officers there was no reason not to obtain a search warrant, since the officers had both the time and opportunity to do so.

INTRODUCTION

Real Party trumpets it has been almost 40 years since this court decided *Guidi v. Superior Court* (1973) 10 Cal.3d 1, lamenting that even now California does not have a "plain smell" exception to the Fourth Amendment's warrant requirement. These "crocodile tears" blind Real Party to the fact that for over 40 years California has not needed to tunnel one more exception through the Fourth Amendment. Real Party's own statistics (albeit unsupported) belie his claims. In footnote 1 of his brief, at page 2, Real Party suggests an unproven relationship between "medical marijuana" and shipments of marijuana from California, referring in to a 2010 ABC News report as his source. [1] Though the news article focuses on the increased use of the U.S. mail to deliver marijuana because of its convenience, the story has nothing to do with either medical marijuana or detecting the content of a package by smell. The article's only reference to "smell" explains how drug sniffing dogs are used to detect drugs in sealed packages. The article spends more time describing how sophisticated "data mining" techniques can be used to detect a large number of packages originating in a particular zip code so postal inspectors can be deployed to those areas. The article does refer to a case in New Jersey where postal inspectors, after obtaining a

[1] An article with similar content, dated March 16, 2010 can be found at: http://abcnews.go.com/Blotter/mail-marijuana-shipments-skyrocket/story?id=10108912

search warrant, discovered 300 grams of methamphetamine in a package. Ironically, though largely irrelevant, this article demonstrates the success of more efficient law enforcement techniques in intercepting marijuana shipments, without ever suggesting the need to skirt the Fourth Amendment.

Similarly, Real Party's reference at page 3 of his brief to an unattributed news release explaining the "Campaign Against Marijuana Planting (CAMP)" fails to prove that a "plain smell" exception to the requirements of a warrant will bolster law enforcement's ability to respond to an "increase" in marijuana transportation.[2] Real Party assumes as proven fact something that was neither presented nor proven in the court record before this court and which, if one were to read the CAMP news release, one would find it has nothing to do with transporting marijuana, discussing only the success the program has had in locating planted and growing marijuana.

Though we often hear the refrain "Only time will tell"; sadly, when time does speak, as it has in this case, we refuse to listen to time's response. Experience tells us California neither has nor needs a "plain smell" exception in its jurisprudence. Permitting a warrantless search based solely on an odor is unnecessary and imprudent. The "problem" raised by this case was caused by the failure to fully use existing investigative and jurisprudential resources, not because a needed Fourth Amendment exception was unavailable. A whiff should not and cannot replace a magistrate.

STATEMENT OF THE CASE

With the exception of the conclusory statement asserting the Court of Appeal's decision in this matter failed to properly follow the law, Petitioner accepts Real Party's Statement of the Case.

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[2] Information similar to that offered by Real Party can be found at: http://ag.ca.gov/bne/camp.php

ARGUMENT

I. Though These Officers Could Seize This Closed Container, They Could Not Open It Without A Warrant.

This case examines two distinct facets of Fourth Amendment law: the seizure of a closed container by police officers, followed by a warrantless search of that closed container. We are here because the petitioner "...consigned a sealed package to a common carrier for shipment. The package reeked of marijuana. The carrier notified the police, who seized the package and later opened it at the police station. The police did not seek a warrant even though no exigent circumstances existed at the time of the search." (*Robey v. Superior Court*, (2011) 200 Cal.App.4th 1, as modified (Nov. 15, 2011), review granted and opinion superseded sub nom. *Robey v. S.C.* (Cal. 2012) 136 Cal.Rptr.3d 666)

The failure to secure a warrant before searching this closed container in the absence of exigent circumstances or other exceptions to the warrant requirement fatally flaws this search, a point emphasized by our Supreme Court in *United States v. Jacobsen* (1984)) 466 U.S. 109:

> When the wrapped parcel involved in this case was delivered to the private freight carrier, it was unquestionably an "effect" within the meaning of the Fourth Amendment. Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy; warrantless searches of such effects are presumptively unreasonable. (footnote omitted) Even when government agents may lawfully seize such a package to prevent loss or destruction of suspected contraband, the Fourth Amendment requires that they obtain a warrant before examining the contents of such a package.(footnote omitted.) Such a warrantless search could not be characterized as reasonable simply because, after the official invasion of privacy occurred, contraband is discovered.(footnote omitted.)
>
> *(U.S. v. Jacobsen*, 466 U.S. 109, 114, 104 S.Ct. 1652, 1657 (1984) ; also, *People v. Pereira* (2007) 150 Cal.App.4th 1106, 1112.)

By re-casting this flawed search as an invitation to create a so-called "plain smell" exception to the warrant requirement, permitting searches based on odor alone, Real Party suggests convenience should trump constitutionality; arguing that smelling a thing is the same as seeing it, and for that reason Officer Totorica and Lieutenant Haley were legally entitled to open the container in question without a warrant and in the absence of exigent circumstances.

We need look no further than *Guidi* to understand why the officers' conduct in Mr. Robey's case was impermissible. *Guidi* recognizes and attempts to resolve the tension between the Fourth Amendment's protection against warrantless searches and law enforcement's occasional need to act quickly without "advance judicial approval of searches and seizures through the warrant procedure" that is made impossible or impractical when swift action is needed by the officer "on the beat". (*Guidi v. Superior Court* (1973) 10 Cal.3d 1, 8 ; citing *Terry v. Ohio* (1968) 392 U.S. 1) Recognizing the need to limit the warrantless searches permitted by the *Terry* rule to insure it remains a rule of necessity instead of a rule of convenience, the court explained:

> As a general rule, the reasonableness of an officer's conduct is dependent upon the existence of facts available to him at the moment of the search or seizure which would warrant a man of reasonable caution in the brief that the action taken was appropriate. And in determining whether the officer acted reasonably, due weight must be given not to his unparticularized suspicions or 'hunches,' but to the reasonable inferences which he is entitled to draw from the facts in the light of his experience; in other words, he must be able to point to specific and articulable facts from which he concluded that his action was necessary.'
> *Guidi v. Superior Court* (1973) 10 Cal.3d 1, 9 (Citations omitted)

Upholding the *Guidi* search, the court noted the search occurred in the course of arrests made during a controlled narcotic buy; the value of the contraband had a "street" value of $40,000; the officer was told the hashish was contained in a brown paper bag in the living room (it was in fact in a brown paper bag behind a three and a half foot counter partially separating the living room from the adjacent

kitchen); though the officer knew four of the occupants of the apartment had been taken into custody, he also heard sounds coming from a bedroom area at the rear of the apartment; and when the officer went to investigate these sounds, the officer saw a brown paper bag behind the counter that smelled of hashish and generally fit the description of the bag given by the informant; and the bag itself was also possibly evidence of the crime under investigation. Taking all this information into account, the court concluded the officer's actions were reasonable given the circumstances at the time.

> We hold that in the particular circumstances of the case before us, the seizure of the bag as evidence of the offense of offering hashish for sale was constitutionally reasonable. Here the bag had been described in advance to the arresting officers; when seen in plain view in the kitchen, the way in which the bag was neatly folded discounted its use as a mere trash bag. (Cf. *People v. Krivda* (1971) 5 Cal.3d 357, 96 Cal.Rptr. 62, 486 P.2d 1262, judgment vacated and cause remanded sub. nom. *California v. Krivda* (1972) 409 U.S. 33, 93 S.Ct. 32, 34 L.Ed.2d 45, opn. reiterated (1973) 8 Cal.3d 623, 105 Cal.Rptr. 521, 504 P.2d 457; *People v. Edwards* (1969) 71 Cal.2d 1096, 80 Cal.Rptr. 633, 458 P.2d 713.) These factors alone would not suffice as reasonable justification for the seizure, but Officer Holt also detected an odor of hashish which was strongest near the bag. The reasonableness of the seizure must be judged with due consideration to the total circumstances.
> *Guidi v. Superior Court* (1973) 10 Cal.3d 1, 15-17 (Footnotes omitted)

The court recognized good investigative police work and upheld both the seizure of the paper bag and its subsequent search (opening the bag).

Real Party's argument fails to recognize that *Guidi* distinguishes searches and seizures and instead chooses to treat seizures and searches as one and the same. They are not. Taking custody of an object and examining that object invoke different privacy interests protected by the Fourth Amendment, a distinction clearly recognized by our Supreme Court in *Horton v. California* (1990) 496 U.S. 128, a case applying the "plain view" doctrine to weapons seized

in the course of serving a warrant authorizing a search for the proceeds of a robbery. The court explained:

> The right to security in person and property protected by the Fourth Amendment may be invaded in quite different ways by searches and seizures. A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property. *United States v. Jacobsen,* 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984). The "plain-view" doctrine is often considered an exception to the general rule that warrantless searches are presumptively unreasonable, but this characterization overlooks the important difference between searches and seizures. If an article is already in plain view, neither its observation nor its seizure would involve any invasion of privacy. *Arizona v. Hicks,* 480 U.S. 321, 325, 107 S.Ct. 1149, 1152, 94 L.Ed.2d 347 (1987); *Illinois v. Andreas,* 463 U.S. 765, 771, 103 S.Ct. 3319, 3324, 77 L.Ed.2d 1003 (1983). A seizure of the article, however, would obviously invade the owner's possessory interest. *Maryland v. Macon,* 472 U.S. 463, 469, 105 S.Ct. 2778, 2782, 86 L.Ed.2d 370 (1985); *Jacobsen,* 466 U.S., at 113, 104 S.Ct., at 1652. If "plain view" justifies an exception from an otherwise applicable warrant requirement, therefore, it must be an exception that is addressed to the concerns that are implicated by seizures rather than by searches. *Horton v. California* (1990) 496 U.S. 128, 133-34 [3] [Footnotes Omitted]

Under these facts, we agree that Officer Totorica lawfully seized the package delivered by Mr. Robey to Fed Ex. (*Terry v. Ohio*, supra, Fourth Amendment permits limited "reasonable" intrusions on privacy without having probable cause, for example, "pat downs".) However, once Officer Totorica had control of the package, in these circumstances, he could not open that package without first securing a warrant. Real Party's "simple" reformulation of the Fourth

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[3] In the omitted footnotes (4 & 5) the court "reaffirmed" that searches without a warrant are "per se" unreasonable (citing *Mincey v. Arizona* (1978) 437 U.S.385 and noted the importance of distinguishing between "plain view" to justify the seizure of an object, and circumstances where an object is simply left where it can be seen by all.

Amendment conflates seizures and searches, treating a seizure the same as a search. This not the law and should not be the law. "Plain view" has never meant that whatever an officer lays eyes upon, the officer can examine. [4] For a search to be lawful, an officer must be able to invoke an appropriate exception to the warrant requirement, in addition to claiming the object to be searched was in "plain view". From the very first, Justice Stewart's seminal opinion in *Coolidge v. New Hampshire* (1971) 403 U.S. 443 explicitly imposes this limitation on the doctrine of "plain view":

> The limits on the doctrine are implicit in the statement of its rationale. The first of these is that plain view alone is never enough to justify the warrantless seizure of evidence. This is simply a corollary of the familiar principle discussed above, that no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.' Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal

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[4] Opening Brief on The Merits (OBM), pg 7, "...Logically, 'plain smell' is an exception to the warrant requirement under the Fourth Amendment akin to plain view." In his treatise, "Search and Seizure: A Treatise On The Fourth Amendment", Professor LaFave quotes a law review article by Judge Moylan [Moylan, The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle, 26 Mercer L.Rev. 1047, 1073–78, 1081–88 (1975).] to colorfully refute this sentiment:

> Seeing something in open view does not, of course, dispose, ipso facto, of the problem of crossing constitutionally protected thresholds. Those who thoughtlessly over-apply the plain view doctrine to every situation where there is a visual open view have not yet learned the simple lesson long since mastered by old hands at the burlesque houses, "You can't touch everything you can see."
>
> Light waves cross thresholds with a constitutional impunity not permitted arms and legs. Wherever the eye may go, the body of the policeman may not necessarily follow.
>
> 1 Search & Seizure § 2.2 (4th ed.) [Westlaw, LaFave, "Search and Seizure A Treatise On The Fourth Amendment, § 2.2"]

> suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure.
>
> *Coolidge v. New Hampshire* (1971) 403 U.S. 443, 468 [91 S.Ct. 2022, 2039, 29 L.Ed.2d 564] [Citations Omitted]

Real Party fails to acknowledge that the purpose of a search is to look inside a container to determine what is inside it; when that determination can be made by simply looking at the object, no search has occurred. There is nothing more that needs to be done. [5] In contrast, detecting an odor does not determine the content of a container. Because odors linger and vary in strength, an odor cannot indicate what is inside a container or when the suspected substance might have been placed there. Odor is but one indicia of what might be within a container, but it is neither the only indicia nor the best indicia of its contents. You still need to see (search) to determine the contents; smelling is not and cannot be seeing. [6]

Real Party raises the question whether the ability to detect contraband by its odor has been demonstrated; bolstering his argument that "plain smell" is as accurate as "plain view" in locating contraband by asserting a scientific study conducted by Professor Doty of the ability to smell marijuana through plastic. (*Doty, Marijuana Odor Perception: Studies Modeled From Probable Cause Cases, Law and Human Behavior, Vol 28, No. 2, (April 2004)*; cited at Brief, pg.

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[5] Or, perhaps more to the point, no search has taken place. *"Search" consists of looking for or* ***seeking out that which is otherwise concealed from view****. People v. Carlson, Colo., 677 P.2d 310, 316." Black's Law Dictionary, Sixth Edition, p. 1349.(Emphasis added).* One who leaves or places an object in the open can have no reasonable expectation of privacy, the object is visible to all and no search is needed. That is not the case when someone hides an object from view by placing it inside of a container.

[6] In this sense, the *Robey* Court's evaluation was correct; "to smell is not the same thing as to see."

8).[7] Real Party completely misreads the findings of this study. The study sought to replicate the fact pattern in two California cases in which the smell of marijuana provided the basis for warrantless searches; one an automobile search and the other the search of a marijuana "grow house" to determine how accurately marijuana might be smelled. The study's conclusion refutes Real Party's assertion. The authors wrote:

> "The present findings throw into question, in two specific instances, the validity of observations made by law enforcement officers using the sense of smell to discern the presence of marijuana. Although these instances reflect a very small set of studies with very specific constraints they do suggest that a blanket acceptance of testimony based upon reported detection of odors for probable cause is questionable and that empirical data to support or refute such testimony in specific cases is sorely needed."
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> Doty, et. Al., Marijuana Odor Perception: Studies Modeled From Probable Cause Cases, Law and Human Behavior, Vol 28, No. 2 (April 2004)

At its core, this is what this case is about: Under what circumstances can an officer open a container to determine its contents without having to obtain a warrant.

In *Guidi*, the officer could seize the container (paper bag) and subsequently search it because in addition to the odor of hashish, the office had other information that permitted him to suspect the paper bag had some evidentiary value in the case under investigation. In Mr. Robey's case, the officers failed to conduct any additional investigation that might warrant a further search. For example, the officers did not investigate whether the nominal recipient of the package existed, whether the address on the package could be located, and if the recipient's address on the package existed, whether the recipient was aware of the package's contents or the possibility the package contained contraband, or whether

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[7] The complete study can be located at: http://norml.org/pdf_files/brief_bank/marijuanaodorstudy.pdf

the nominal sender of the package existed and could himself be located. Had any of these additional indicia been investigated, the result in this case might well have been different. Once the officers took control of the package from Fed Ex, they had ample opportunity to further investigate or to seek a telephonic search warrant, a quick and convenient method of obtaining judicial approval to search a container. (See: Penal Code sec. 1526)

This is a container search. In *California v. Acevedo* (1991) 500 U.S. 565, 580 [111 S.Ct. 1982, 1991, 114 L.Ed.2d 619], our Supreme Court provided well-defined parameters for container searches by explaining that when officers have probable cause to believe contraband or other evidence is present within a container inside of an automobile, they may search a closed container in a vehicle, without a warrant. Otherwise, officers require a warrant in order to search a closed container:

> Our holding today neither extends the *Carroll* doctrine nor broadens the scope of the permissible automobile search delineated in *Carroll, Chambers,* and *Ross.* It remains a "cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions.' " *Mincey v. Arizona,* 437 U.S. 385, 390, 98 S.Ct. 2408, 2412, 57 L.Ed.2d 290 (1978), quoting *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967) (footnotes omitted). We held in *Ross:* "The exception recognized in *Carroll* is unquestionably one that is 'specifically established and well delineated.' " 456 U.S., at 825, 102 S.Ct., at 514
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> *California v. Acevedo* (1991) 500 U.S. 565, 580 [111 S.Ct. 1982, 1991, 114 L.Ed.2d 619]

Even if we were to assume the circumstances under which the container searched in the present case provided the officers probable cause to believe it contained contraband, the container was not found within an automobile, does not come under the *Acevedo* rule, or fall within any exception permitting a search without a warrant.

Real Party urges this court to uphold this search under the authority of *United States v. Place* (1983) 462 US 696, arguing that smelling contraband inside of a closed container (luggage) did not constitute an unlawful search. *Place* indeed holds this; however, Real Party misses the larger issue in *Place*. The odor emitted from the luggage in *Place* permitted officers to "...detain the luggage briefly to investigate the circumstances that aroused [the officer's] suspicion, provided the investigative detention is properly limited in scope." (*U.S. v. Place*, supra, 462 U.S. 696, 706) But, *Place* went on to hold that although the luggage could have been detained briefly to determine whether or not it contained narcotics, keeping the luggage over the weekend went well beyond what is permitted by the Fourth Amendment. The Court concluded, "...We conclude that, under all of the circumstances of this case, the seizure of respondent's luggage was unreasonable under the Fourth Amendment. Consequently, the evidence obtained from the subsequent search of his luggage was inadmissible, and Place's conviction must be reversed." (*U.S. v. Place*, supra, 462 U.S. 696, 710) In Mr. Robey's case, as in *Place*, while the law permits the closed container's seizure, it does not permit either a prolonged detention or a warrantless search based on an odor that has been detected. A warrant is required.

The fact this container was originally consigned to "Fed Ex", a common carrier, changes nothing; it is entitled to the protections afforded by the Fourth Amendment. (*U.S. v. Jacobsen* 466 U.S. 109, 114-115, 104 S.Ct. 1652, 1657 (U.S.Minn.,1984), wrapped parcel delivered to private freight carrier was unquestionably an "effect" within the meaning of and protected by the Fourth Amendment.) When the Fed Ex employees came to suspect the contents of the container, they called the Santa Maria Police Department. The employees did not independently open the container. (RT 8:24 – 9:5 [Package seized by the officer and taken to police station still sealed]). The container was delivered to police officers who took control of the container, returned to their station with the container in their possession and control, debated what course of action to follow,

and finally decided to open the container at the station. (RT 9: 2-13; 12: 12-22) The container was taken out of the shipping stream by the Fed Ex employees (RT 15: 4-10), and the officers never returned the package to the shipping stream after they took possession of it and searched it. There was no inquiry about the container (package) from anyone until several days later, when the defendant returned to the Fed Ex office to ask about his package. (*Robey v. Superior Court*, supra, at 200 Cal.App.4th 1) Clearly, there was no urgency to take any action related to this container once the container was possessed by the officers.

Real Party misreads the holding in *People v. McKinnon* (1972) 7 Cal. 3d 899. When *McKinnon* was first decided, it permitted warrantless searches of containers entrusted to common carriers based on probable cause alone. This is no longer the case. *McKinnon's* holding has been constrained by the holding of *Acevedo* (supra, only closed containers in automobiles can be searched without a warrant). Secondly, the need for immediate action present in *McKinnon* and not found here speaks to a far different circumstance than ours. Reviewing the facts in *McKinnon* illustrates the distance between that case and this one. There, officers were called to the San Diego airport after employees at the United Airlines freight counter, suspecting that five cartons consigned to them contained contraband, opened one of the cartons and discovered contraband. Upon discovering the contraband, the employees called police officers, who confirmed the observations of the employees, and upon learning that an individual with the same name as the consignee of the cartons was scheduled to take a flight to Seattle, the destination for the five cartons, within the hour arrested the men who consigned the cartons and subsequently opened the cartons that had been presented for shipment. The salient factors justifying the search in *McKinnon* were that the cartons containing contraband were opened by non-governmental agents, and the need to take quick action was obvious (the flight was departing imminently), as the *McKinnon* court observed:

> Here, in sharp contrast [to *Coolidge v. New Hampshire* (1971) 403 U.S. 443, where the possibility that evidence was contained in the car that was searched was known long before the warrantless search took palace], law enforcement authorities had not "known for some time" of the existence or probable contents of the five cartons presented by defendants for shipment; although defendants were not deliberately fleeing, both were departing from the premises and one was already on board an airplane preparing to fly out of the jurisdiction; the cartons were not resting on private property, but had been consigned to a common carrier for transportation to a remote destination; and there was probable cause to believe (see Part III, *post*) that the cartons were being "used for an illegal purpose" in that they contained not "mere evidence" but contraband. Each of these factors was specifically found to be lacking in *Coolidge*; measured by the high court's own standards, therefore, the opportunity to search in the case at bar was much more "fleeting" - and prompt action was far more imperative - than in *Coolidge*.
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> *People v. McKinnon* (1972) 7 Cal.3d 899, 911 [103 Cal.Rptr. 897, 500 P.2d 1097]

Courts have interpreted *Acevedo* and *Chadwick* (as it applies to non-automotive searches) as impliedly over-ruling *McKinnon* with regard to a "general rule" permitting warrantless searches of containers not found within an automobile when there is no exigency requiring a warrantless search. The court in *People v. Yackee* (1984) 161 Cal. App. 3d 843, a case involving a search of a passenger's luggage by the airline company, observed in footnote 2 of the opinion that reliance on *McKinnon* was no longer appropriate:

> Respondent urges on us as an alternative grounds for decision the holding in *People v. McKinnon* (1972) 7 Cal.3d 899, 103 Cal.Rptr. 897, 500 P.2d 1097, cert. den. 411 U.S. 931, 93 S.Ct. 1891, 36 L.Ed.2d 390 that packages assigned to a common carrier may be searched without a warrant. This holding of *McKinnon* has been impliedly overruled both by *United States v. Chadwick* (1977) 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 and *People v. Dalton* (1979) 24 Cal.3d 850, 157 Cal.Rptr. 497, 598 P.2d 467. (Cf. *Bell v. Superior Court* (1980) 101 Cal.App.3d 238, 244–45, 161 Cal.Rptr.

455; *People v. Sapper* (1980) 102 Cal.App.3d 301, 304, 162 Cal.Rptr. 360; *United States v. Ross* (1982) 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572.)

People v. Yackee (1984) 161 Cal.App.3d 843, 848 [208 Cal.Rptr. 44, 47]

The case law is really quite clear: an officer may not search a closed container not found within an automobile without a warrant unless exigent circumstances or some other recognized exception to the warrant requirement permits the warrantless search. Real Party spends considerable time invoking "Proposition 8" (Brief, Pg. 13). This incantation affords no protection, since the only Supreme Court cases directly "on point" support Petitioner:

> In addressing particular issues arising under Proposition 8, we look to federal constitutional standards as interpreted by the United States Supreme Court. (*People v. Camacho* (2000) 23 Cal.4th 824, 830, 98 Cal.Rptr.2d 232, 3 P.3d 878.) Decisions of federal district or appellate courts are not binding on us in the absence of a United States Supreme Court decision that is on point. (*People v. Rooney* (1985) 175 Cal.App.3d 634, 644, 221 Cal.Rptr. 49.) In determining federal law in the absence of a definitive United States Supreme Court decision, we are bound by California Supreme Court cases construing federal constitutional provisions. (*Ibid.*) If there is no conflict between state and federal law, state law governs. (*Lance W., supra,* 37 Cal.3d at pp. 886–888, 210 Cal.Rptr. 631, 694 P.2d 744.)
>
> *People v. Racklin* (2011) 195 Cal.App.4th 872, 877

In an attempt to skirt this clear requirement, Real Party claims Mr. Robey had no expectation of privacy in the container shipped through Fed Ex because he abandoned the property, insisting this is a "threshold issue" the court must decide. Not so. California Rules of Court, rule 8.520 (b) (3) prevents this court from taking this detour, since Real Party's Petition for Review did not seek review of

any claimed abandonment. [8] Understandably, then, this Court's Grant of Review did not specify the claim of abandonment as an issue to be addressed in this proceeding. Perhaps more to the point, when Real Party was in the trial court and had the opportunity to challenge Mr. Robey's privacy interest in the package that was searched, Real Party accepted the evidence presented establishing Mr. Robey's legitimate expectation of privacy in the object that was searched. [9] Counsel established Mr. Robey went to the Fed Ex office to inquire about the package he shipped and that when he was contacted by the investigating officer, he had the Fed Ex package slip matching the slip for the box containing marijuana. The Court found this evidence sufficient to establish Mr. Robey's legitimate expectation of privacy. After presenting her evidence, Mr. Robey's counsel asked: "Is that adequate [to establish "standing"] Your Honor?", and the Court answered; "This is sufficient...unless the People want...." Real Party (Deputy District Attorney Ms. Gresser), interjected: "That's fine, Your Honor." (RT 5:28-6:4) It is much too late to now withdraw that factual concession and challenge Mr. Robey's legitimate expectation of privacy. Had Real Party wanted Mr. Robey to present

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[8] Cal. Rules of Court, rule 8.520 (b) (3), "...Unless the court orders otherwise, briefs on the merits must be limited to the issues stated in [the order for briefing, or the statement of issues in the petition for review] and any issues fairly included in them." The record in this case illustrates the importance of fidelity to Rule 8.520. After the Court of Appeal issued its Order to Show Cause on April 7, 2011 and before Oral Argument on August 18, 2011, the Court of Appeals twice directed Real Party in Interest address issues specific to this Petition. In a letter dated March 3, 2011, the Court of Appeals requested Real Party to address five specific issues. After Real Party in Interest filed its response in an informal letter brief dated March 13, 2011, Petitioner filed an informal reply on March 31, 2011. The Court of Appeals then requested additional information from Real Party in Interest in a letter dated July 22, 2011. Real Party replied in an informal letter brief dated August 1, 2011 and Petitioner filed his informal reply on August 10, 2011.

[9] In the trial court, the parties used the phrase "standing" in place of the more accurate terminology: "legitimate expectation of privacy" in the searched object or place. *Rakas v. Illinois* (1978) 439 U.s. 128, 143

additional information establishing his legitimate expectation of privacy in the shipped container, Real Party should have asked for that information at a time when it could have been presented to the trier of fact. (See: *People v. Pereira* (2007) 150 Cal. App. 4th 1106, 1113 [Issue of abandonment a question of fact to be decided by the trial court])

The question really isn't whether the smell of marijuana can provide probable cause to search a person, place, or thing; instead, it is under what circumstances an odor can be used to base a warrantless search. Without a corresponding exception to the warrant requirement, probable cause alone cannot justify a warrantless search, and for that reason our answer has to be, "it depends on what is being searched and the circumstances of the search."

The law provides the greatest latitude when the odor provides probable cause to arrest a defendant, as shown by *People v. Mann* (1970) 3 Cal.3d 1. The assistant school superintendent in Rialto told officers that he had received reports of marijuana parties at a residence where several school teachers lived. The officers went to the residence, observed suspicious conduct and one of the officers walked to the front door of the residence, knocked, and heard a voice respond telling him to "come in". The officer did, and was "...greeted with a strong odor of marijuana smoke." (*Mann*, supra, 3 Cal. 3d 5) The officers entered, had the occupants of the residence gather in the living room, and searched the house, finding contraband and other evidence used to prosecute the defendants. The Court upheld the search, reasoning. "Since consent [to enter] was freely given and not induced by fraud or trickery, the officers' entry was lawful. The odor of marijuana smoke which greeted them constituted probable cause to arrest, and the search of the house was permissible as incident to that arrest. The marijuana discovered in that search is therefore admissible. (*Mann*, supra, 3 Cal.3d 9) *Mann* illustrates how probable cause to arrest based on identifying an odor, joined with the warrant exception for searches incident to arrest, will join to permit a warrantless search.

When an officer identifies an odor within an automobile, the probable cause arising from the identification of that odor, together with the *Carroll* exception permitting warrantless searches of automobiles justifies a warrantless search of the automobile and containers found in the automobile. (*People v. Cook* (1975) 13 Cal.3d 663, 670)

An odor will permit a warrantless entry into a structure when that odor or the circumstances alert an officer to a possible emergency requiring speedy intervention. (*People v. Duncan* (1986) 42 Cal.3d 91. Warrantless entry to investigate possible burglary resulted in seeing a drug lab and odor of ether, a highly flammable substance. Need to take quick action to prevent an explosion validated search.)

II. This Case Presents No Exigent Circumstances Permitting This Search Without First Obtaining A Warrant.

Any discussion of "plain view"/ "plain smell" necessarily involves consideration of exceptions to the warrant requirement, since when invoking the exception, not only must the object searched/seized be in plain view, but the officer seizing/searching the object must lawfully be present in the location where the object is viewed. Normally the officer is present at this location by virtue of an exception to the warrant requirement; and most frequently, the exception invoked is the "emergency exception". As we've noted, once the officers took Mr. Robey's container into their custody, any circumstances requiring immediate action ceased. The officers had sufficient time to obtain at least a telephonic search warrant, and should have done so. Raising *United States v. Johns* (1985) 469 U.S. 478 is unavailing, since *Johns* addresses an entirely different circumstance. In *Johns*, the contraband in question was found in an automobile, the law then and now is that probable cause to search an automobile extends to containers found within the automobile. (*California v. Acevedo* (1991) 500 U.S.

565, 580) Not surprisingly, the *Johns* court held that a brief delay in searching the packages that were seized by customs officers from the defendant's vehicle as the defendant unloaded them from an airplane that landed in a remote airstrip did not invalidate that search. The case is completely inapplicable to the search of this container. Nevertheless, the Court cautioned against prolonged detentions of seized items.

> We do not suggest that police officers may indefinitely retain possession of a vehicle and its contents before they complete a vehicle search. Cf. *Coolidge v. New Hampshire,* 403 U.S. 443, 523, 91 S.Ct. 2022, 2066, 29 L.Ed.2d 564 (1971) (WHITE, J., dissenting). Nor do we foreclose the possibility that the owner of a vehicle or its contents might attempt to prove that delay in the completion of a vehicle search was unreasonable because it adversely affected a privacy or possessory interest. Cf. *United States v. Place,* 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983). We note that in this case there was probable cause to believe that the trucks contained contraband and there is no plausible argument that the object of the search could not have been concealed in the packages. Respondents do not challenge the legitimacy of the seizure of the trucks or the packages, and they never sought return of the property. Thus, respondents have not even alleged, much less proved, that the delay in the search of packages adversely affected legitimate interests protected by the Fourth Amendment. Inasmuch as the Government was entitled to seize the packages and could have searched them immediately without a warrant, we conclude that the warrantless search three days after the packages were placed in the DEA warehouse was reasonable and consistent with our precedent involving searches of impounded vehicles. See *Florida v. Meyers,* 466 U.S. 380, 104 S.Ct. 1852, 80 L.Ed.2d 381 (1984); *Michigan v. Thomas,* 458 U.S. 259, 102 S.Ct. 3079, 73 L.Ed.2d 750 (1982); *Cooper v. California,* 386 U.S. 58, 61-62, 87 S.Ct. 788, 790-791, 17 L.Ed.2d 730 (1967) (upholding warrantless search that took place seven days after seizure of automobile pending forfeiture proceedings).
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> *U.S. v. Johns* (1985) 469 U.S. 478, 487-88 [105 S.Ct. 881, 887, 83 L.Ed.2d 890]

CONCLUSION

There is no reason to re-cast or revisit *Guidi v. Superior Court*. Real Party has not presented a circumstance where our existing jurisprudence is insufficient to address any issue raised. Certainly the case law fails to illustrate the need to create an exception to the Fourth Amendment that does not exist at this moment. The view expressed by Justice Mosk in *Marshall* and his quasi-dissent in *Guidi* is valid. But it fails to acknowledge that our senses do not work independently of each other; they work together, taking all circumstances into account before reaching a conclusion. *Guidi* recognizes this, holding the totality of circumstances presented therein permitted the warrantless seizure of the paper bag. In our daily lives, on those occasions when we are guided by the information presented by only one of our senses, without accounting for the information presented by the others, we jump, we are startled. In our daily lives and in setting the parameters of the Fourth Amendment we need to weigh all the circumstances involved before taking action. The perfect is the enemy of the good, and though one might conjure a hypothetical circumstance not yet presented in our case law to justify ignoring *Guidi*, that is hardly sufficient reason to abandon our existing jurisprudence. There is no reason to create a "plain smell" exception to the warrant requirement, and if there were, this is certainly not the case in which to do create one.

DATED: April 23, 2012

Respectfully submitted,

RAIMUNDO MONTES DE OCA
Public Defender

BY: _____
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Attorney for Petitioner

CERTIFICATION OF WORD COUNT

I certify that the word count of this document, excluding the tables of contents and authorities and the attached Court of Appeal decision, according to the word processing program used to prepare this petition, is 7520 words.

DATED: April 23, 2012

Respectfully submitted,

RAIMUNDO MONTES DE OCA
Public Defender

BY: 
RAIMUNDO MONTES DE OCA
Public Defender
Attorney for Petitioner

PROOF OF SERVICE

(Code Civ. Proc. §2013A and §2015.5)

STATE OF CALIFORNIA)
)
COUNTY OF SANTA BARBARA) ss.

I am employed in the County of Santa Barbara, State of California. I am over the age of 18 years and not a party to the within action; my business address is 1 East Anapamu, Santa Barbara, CA 9310.

On the date set forth below, I served the foregoing document described as:

ANSWER BRIEF

on the interested parties in this action by placing a true copy thereof in an envelope(s) addressed to each of the persons named below at the address(es) show: **SEE ATTACHED SERVICE LIST.**

_____**(BY PERSONAL SERVICE).** I caused to be personally hand-delivered.

_____**(BY OVERNIGHT COURIER).** I caused a copy(ies) of said document(s) to be turned over to an overnight courier service to be delivered the next day to the interested party(ies) as listed above. **[CODE CIV. PROC. §1011]**

✓ **(BY REGULAR U.S. MAIL).** I caused a copy(ies) of said documents(s) to be placed with the United States Postal Service for delivery by Regular U.S. Mail. **[CODE CIV. PROC. §1012]** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at Santa Barbara, California in the ordinary course of business.

I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

_____**(VIA FACSIMILE).** I caused the above identified document(s) t be transmitted via facsimile to the addressee(s) noted on this Proof of Service to the facsimile machine telephone number indicated thereon. **[CODE CIV. PROC. §1012.5 and §1013(e)]**

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed April 23, 2012, at Santa Barbara, California.

Dee Engler, Executive Secretary
Office of the Public Defender

ATTACHED SERVICE LIST

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