

# POINT of VIEW



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# Probation and Parole Searches

*Parole is a risky business. Recidivism is high.*<sup>1</sup>

For some people, committing crimes is a way of life, almost part of the daily routine. As the Supreme Court explained, such people “have necessarily shown a lapse in the ability to control and conform their behavior to the legitimate standards of society by the normal impulses of self-restraint.”<sup>2</sup> In discussing this subject, the writers of the book *Inside The Criminal Personality* summarized one of their findings as follows: “If we were to calculate the total number of crimes committed by all the men with whom we worked, it would be astronomic.”<sup>3</sup>

This is, of course, the main reason that many—maybe most—probationers and all parolees are required to submit to warrantless searches as a condition of their release from custody.<sup>4</sup> The theory is that search conditions help “minimize the risk to the public safety”<sup>5</sup> because the probationer or parolee will be “less inclined” to possess the fruits and instrumentalities of crime, such as weapons.<sup>6</sup> And for those who continue to commit crimes while on the outside, search conditions provide another valuable public service: they help put them back inside.

Despite this, the law pertaining to probation and parole searches has been a source of much confusion thanks mainly to several dubious published opinions by some appellate courts. But, as we will explain in this article, thanks to more recent decisions by the United States Supreme Court and the California Supreme Court, most of this confusion has been eliminated.

We will begin by briefly discussing the fundamentals of probation searches, parole searches, and the newer Postrelease Community Supervision (PRCS) searches. Then we will cover the requirements for conducting each of these searches, their permissible scope and intensity, and the special requirements for searching homes, vehicles, and cell phones.

## The Basics

**PROBATION SEARCHES:** When a defendant is convicted of a crime, the judge may grant probation if the defendant agrees to certain conditions which often include submission to warrantless searches.<sup>7</sup> Unlike parole and PRCS searches, however, the scope of probation searches varies because it is determined by the sentencing judge and is based on the circumstances of each case. (This, of course, creates problems for officers, as we will discuss later.) Probation searches are deemed “consent” searches because the probationer is technically free to choose between accepting a search condition or serving time in jail or prison.<sup>8</sup>

**PAROLE SEARCHES:** In contrast to probationers, California parolees do not consent to search conditions. Instead, they are required to submit per statute. Furthermore, all parolees are subject to searches of the same places and things.<sup>9</sup> This, too, will be discussed later.

**PRCS SEARCHES:** Under California’s Postrelease Community Supervision Act of 2011, people who have been convicted of certain lower-level felonies may be permitted to serve their prison sentences in

<sup>1</sup> *Latta v. Fitzharris* (9th Cir. 1975) 521 F.2d 246, 249.

<sup>2</sup> *Hudson v. Palmer* (1984) 468 U.S. 517, 526.

<sup>3</sup> Samuel Yochelson and Stanton Samenow, *The Criminal Personality* (Published by J. Aronson, 1976)

<sup>4</sup> See *United States v. Knights* (2001) 534 U.S. 112, 116 [a search clause is a “common California probation condition”].

<sup>5</sup> *People v. Constancio* (1974) 42 Cal.App.3d 533, 540.

<sup>6</sup> *In re Anthony S.* (1992) 4 Cal.App.4th 1000, 1002, fn.1.

<sup>7</sup> See *United States v. Knights* (2001) 534 U.S. 112, 116.

<sup>8</sup> See *People v. Schmitz* (2012) 55 Cal.4th 909, 920 [“a probationer who is subject to a search clause has explicitly consented to that condition”].

<sup>9</sup> See *People v. Schmitz* (2012) 55 Cal.4th 909, 916 [“every inmate eligible for release on parole is subject to search or seizure by a parole officer or other peace officer”].

a local county jail.<sup>10</sup> Then, upon release, they will be supervised for up to three years by a county probation officer. Even though the person is not confined in a state prison or supervised by a parole officer, the Court of Appeal has ruled that his status is substantially the same as that of a parolee.<sup>11</sup> (Because there is no significant difference between PRSC and parole searches, all further references to parole searches will include PRCS searches.)

## Requirements

Although probation and parole searches differ in many ways, they share the same four basic requirements: (1) officers must have known that the target of the search was on parole or searchable probation, (2) the search must have furthered a legitimate law enforcement interest, (3) the officers must have confined their search to places and things they were expressly or impliedly permitted to search (see “Scope of the Search,” below), and (4) the search must have been reasonable in its intensity (see “Intensity of the Search,” below). As noted, there are additional requirements for conducting searches of homes, vehicles, and cell phones which we will discuss later.

Significantly, there is one thing that is *not* required for these searches: Officers are not required to justify the search by proving they had probable cause, reasonable suspicion, or any other level of proof that the probationer or parolee had violated the law or the terms of his release.<sup>12</sup> This is because the main purpose of these searches is to give probationers and parolees an incentive to avoid drugs, weapons, and so forth. And one way to do this is to

make them aware that they may be searched at any time for no reason whatsoever. As the California Supreme Court explained, “[T]he purpose of the search condition is to deter the commission of crimes and to protect the public, and the effectiveness of the deterrent is enhanced by the potential for random searches.”<sup>13</sup> Regarding probation searches, it should be noted that a sentencing judge might require that officers possess at least a low level of proof that the probationer had committed some crime. But such a requirement is seldom imposed and it will not be implied.<sup>14</sup>

### Knowledge of probation or parole status

The first requirement is that officers must have been aware that the target of the search was on parole or searchable probation.<sup>15</sup> This is mainly because a search that is conducted without such knowledge is “wholly arbitrary” and “without any perceived limits to [the officers’] authority.”<sup>16</sup>

### Legitimate law enforcement purpose

Even if officers had knowledge of the search condition, a warrantless search will not be upheld unless they conducted it for a legitimate law enforcement or rehabilitative purpose.<sup>17</sup> The courts usually express this requirement in the negative; specifically, the search must not have been “arbitrary, capricious, or harassing.”<sup>18</sup> And this necessarily occurs if “the motivation for the search was unrelated to rehabilitative, reformatory or legitimate law enforcement purposes.”<sup>19</sup> In this section we will discuss the types of motivations that have been deemed “legitimate”.

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<sup>10</sup> See Pen. Code §§ 3450 et seq.

<sup>11</sup> *People v. Fandinola* (2013) 221 Cal.App.4th 1415, 1422 [PRCS is “akin to a state prison commitment; it is not a grant of probation or a conditional sentence.”].

<sup>12</sup> See *People v. Bravo* (1987) 43 Cal.3d 600, 611; *People v. Douglas* (2015) 240 Cal.App.4th 855, 861.

<sup>13</sup> *People v. Reyes* (1998) 19 Cal.4th 743, 753.

<sup>14</sup> See *People v. Bravo* (1987) 43 Cal.3d 600, 607, fn.6 [“a reasonable-cause requirement will not be implied”].

<sup>15</sup> See *People v. Sanders* (2003) 31 Cal.4th 318, 333; *People v. Schmitz* (2012) 55 Cal.4th 909, 916.

<sup>16</sup> *People v. Robles* (2000) 23 Cal.4th 789, 797.

<sup>17</sup> See *People v. Robles* (2000) 23 Cal.4th 789, 797; *People v. Bravo* (1987) 43 Cal.3d 600, 611; *People v. Medina* (2007) 158 Cal.App.4th 1571, 1577 [search requires “rehabilitative, reformatory or legitimate law enforcement purposes”].

<sup>18</sup> See *Samson v. California* (2006) 547 U.S. 843, 856; *People v. Bravo* (1987) 43 Cal.3d 600, 610; *People v. Schmitz* (2012) 55 Cal.4th 909, 916 [the search must not be “arbitrary, capricious, or harassing”].

<sup>19</sup> *People v. Zichwic* (2001) 94 Cal.App.4th 944, 951.

**ROUTINE SEARCHES:** A search is legitimate if it was conducted as a matter of routine and its purpose was just to make sure the probationer or parolee was not carrying drugs, weapons, or instrumentalities of a crime.<sup>20</sup> As the Supreme Court pointed out, “unexpected” and “unprovoked” searches provide information that affords “a valuable measure of the effectiveness of the supervision.”<sup>21</sup>

**RANDOM SEARCHES:** A probation or parole search is not “arbitrary” or “capricious” merely because it was unscheduled and was prompted by the sudden availability of the probationer or parolee (e.g., seeing him walking down a street). While it has been argued that such searches are “arbitrary” (i.e., depending completely on individual discretion) and “capricious” (i.e., sudden, impulsive), the courts permit—and even encourage—them.<sup>22</sup>

For example, in *In re Anthony S.*,<sup>23</sup> officers in Ventura learned that several members of the “Ventura Avenue Gangsters” were on probation, and that the terms of probation included authorization to search their homes for stolen property and gang paraphernalia. So they searched the home of a member named Anthony and found handguns and other contraband. The trial judge ruled that the search was unlawful, claiming it was a “random” search in which the officers decided “let’s go search the gang members today.” But the court disagreed, ruling “the evidence shows that the officers were motivated by a law enforcement purpose; i.e., to look for stolen property, alcohol, weapons, and gang paraphernalia at the homes of the Ventura Avenue Gangsters members. This is a legitimate law enforcement purpose.”

**INVESTIGATIVE SEARCHES:** A search is not unlawful merely because officers suspected that a particular probationer or parolee had committed a new crime, and the objective of the search was to see if he possessed any evidence of the crime.<sup>24</sup> This is because the commission of a new crime is necessarily a violation of probation or parole.<sup>25</sup> As the California Supreme Court observed in *People v. Stanley*, “Clearly, investigation of defendant’s involvement in a murder would have a parole supervision purpose.”<sup>26</sup> This probably sounds too obvious to warrant discussion, but the Ninth Circuit took a different position, and was admonished for it by the Supreme Court. This case was *United States v. Knights*.<sup>27</sup>

In *Knights*, Napa County sheriff’s deputies suspected that Knights committed a series of pipe bombings and other acts of vandalism against PG&E and Pacific Bell facilities. They also learned that Knights was on probation in a drug case, and that the terms of probation authorized, among other things, a search of his residence. So, in hopes of obtaining evidence of the crimes, deputies conducted a probation search of his apartment and found a detonation cord, bolt cutters, blueprints stolen from a building that had been bombed, and other evidence linking Knights to the crimes. As the result, Knights was convicted of conspiracy to commit arson and possession of an unregistered destructive device.

But in an especially absurd decision, the Ninth Circuit ruled the search was unlawful because its purpose was to obtain evidence that Knights had committed certain violent crimes, rather than ascertaining whether he was complying with the terms of probation. The Supreme Court was aghast, and it

<sup>20</sup> See *United States v. Knights* (2001) 534 U.S. 112, 117; *People v. Robles* (2000) 23 Cal.4th 789, 799; *People v. Lewis* (1999) 74 Cal.App.4th 662, 671.

<sup>21</sup> *People v. Mason* (1971) 5 Cal.3d 758, 763-64.

<sup>22</sup> See *People v. Bravo* (1987) 43 Cal.3d 600, 608.

<sup>23</sup> (1992) 4 Cal.App.4th 1000.

<sup>24</sup> See *People v. Reyes* (1998) 19 Cal.4th 743, 752; *People v. Woods* (1999) 21 Cal.4th 668, 675, 678; *U.S. v. Reyes* (2nd Cir. 2002) 283 F.3d 446, 463 [“[T]he objectives and duties of probation officers and law enforcement officers are unavoidably parallel and are frequently intertwined.”].

<sup>25</sup> See *People v. Robles* (2000) 23 Cal.4th 789, 797; *U.S. v. Barner* (2nd Cir. 2012) 666 F.3d 79, 85; *In re Anthony S.* (1992) 4 Cal.App.4th 1000, 1004.

<sup>26</sup> (1995) 10 Cal.4th 764, 790.

<sup>27</sup> (2001) 534 U.S. 112.

informed the Ninth Circuit that the public and law enforcement have a legitimate interest in determining whether probationers are bombing things, setting buildings on fire, or committing other less serious crimes.

**PRETEXT RESIDENTIAL SEARCHES:** A search of a home in which a probationer or parolee lives is pretextual if the officers' sole objective was to obtain evidence against another occupant, such as a roommate. Thus, a pretext search is, by definition, an illegal search because its sole objective is to obtain evidence against the roommate, not the probationer or parolee.

Pretext searches are, however, rare since the officers' investigation will seldom focus exclusively on the roommate. Instead, it is often reasonable for them to believe that probationers and parolees know about the criminal activities of the people they live with, and might even be assisting them.<sup>28</sup>

Dual purpose searches are not, however, without limitation. Specifically, officers who are conducting them will be required to limit their searches to common areas and places and things over which the probationer or parolee had sole or joint control. This subject is discussed in more detail in the section on the scope of probation and parole searches.

**SEARCH AFTER ARREST, SUMMARY PROBATION REVOCATION OR PAROLE HOLD:** The terms of probation and parole, including search terms, remain in effect even if the probationer or parolee had been arrested, was being held on a parole hold, or if his probation was summarily revoked.<sup>29</sup> As the Ninth Circuit observed in *Latta v. Fitzharris*, a parole officer's interest in inspecting a parolee's home does not termi-

nate upon his arrest, "if anything, it intensified."<sup>30</sup> Consequently, search conditions and other terms of probation and parole do not terminate until a court has held a hearing and, as the result, ordered the revocation of probation or parole.

For example, in *People v. Hunter*<sup>31</sup> the driver of a stolen car bailed out when officers signaled him to stop. After identifying Hunter as the driver, officers learned that he was back in prison awaiting a parole revocation hearing. They also learned that he had rented a storage unit. So they searched it pursuant to the terms of parole and found stolen property. On appeal, Hunter argued that the search could not be justified as a parole search because his "parole was violated and he had been physically returned to prison as the result of that violation. The court pointed out, however, that the terms of parole remained in effect because "Hunter was still a parolee until his parole was formally revoked."

**FREQUENT, PROLONGED, OR LATE NIGHT SEARCHES:** A probation or parole search might be deemed harassing (and therefore illegal) if it occurred after several unproductive searches with no reason to believe that a new one would be fruitful, or if it was conducted late at night or in the early morning hours and there was insufficient reason for such an intrusion.<sup>32</sup> However, the court in *People v. Clower* ruled that "[s]ix searches over a four- to five-month period, without more, do not necessarily indicate harassment,"<sup>33</sup> and the court in *People v. Sardinas* ruled that a second search one day after an unproductive search was not harassing because the circumstances surrounding the second search indicated the defendant might have resupplied.<sup>34</sup>

<sup>28</sup> See *People v. Woods* (1999) 21 Cal.4th 668, 679; *People v. Robles* (2000) 23 Cal.4th 789, 797. Also see *Maryland v. Pringle* (2003) 540 U.S. 366, 373 [drug dealing is "an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him"].

<sup>29</sup> See *People v. Barkins* (1978) 81 Cal.App.3d 30, 33 ["Actual revocation of probation cannot occur until the probationer has been afforded the due process," and until then "the terms of probation remain in effect."]; *People v. Burgener* (1986) 41 Cal.3d 505, 536 ["Nor is it relevant that the parolee may already be under arrest when the search is conducted."];

<sup>30</sup> (9th Cir. Cir. 1975) 521 F.2d 246, 252.

<sup>31</sup> (2006) 140 Cal.App.4th 1147, 1152.

<sup>32</sup> See *People v. Reyes* (1998) 19 Cal.4th 743, 753; *People v. Zichwic* (2001) 94 Cal.App.4th 944, 951; *People v. Medina* (2007) 158 Cal.App.4th 1571, 157.

<sup>33</sup> (1993) 16 Cal.App.4th 1737, 1743.

<sup>34</sup> (2009) 170 Cal.App.4th 488, 494.

## Scope of the Search

In the context of probation and parole searches, the term “scope” refers to the places and things that officers are permitted to search. As we will now discuss, the permissible scope of a search depends on whether it was a probation or parole search.

### Scope of probation searches

Because there are no “standard” probation search conditions, the permissible scope of a probation search depends on what the sentencing judge wrote on the probation order. Thus, the Court of Appeal explained that “the officer must have some knowledge not just of the fact someone is on probation, but of the existence of a search clause broad enough to justify the search at issue.”<sup>35</sup> Consequently, officers must have knowledge of the places and things that were included in the suspect’s probation order.

This does not mean, however, that officers must have seen an actual copy of the court’s order. Instead, because certain combinations of searchable places and things appear regularly in probation orders, many counties have developed systems by which these combinations have been given code numbers which, in turn, are incorporated into police databases. The following are some examples.

**“FULL” SEARCH:** The most common search condition, sometimes called a “full” or “four-way,” typically authorizes a search of (1) the probationer, (2) his residence, (3) vehicles, and (4) other property under his control. Note that a “full” probation search is the same as a parole search, except that a vehicle search is implied by the terms of parole (i.e., property

under the parolee’s control) while it is expressly authorized by the terms of probation.

**“PROPERTY UNDER YOUR CONTROL”:** A probation search condition that includes authorization to search property under the probationer’s control is tantamount to a four-way because “property under your control” includes his residence.<sup>36</sup>

**LACK OF UNIFORM TERMINOLOGY AND CODING:** Before going further, it is necessary to point out that California does not have a statewide coding system by which officers can determine from a computer terminal exactly what they may search.<sup>37</sup> Some counties might have a good internal system but others (such as Alameda County) have conflicting and redundant codes that have emerged piecemeal over many years. Furthermore, some terms may lack precise definition.

For example, a judge might authorize searches of property under the probationer’s control because he or she thinks (correctly) that this authorizes searches of the probationer’s person, residence, vehicle, and personal property—all of which he “controls”.<sup>38</sup> But another judge sitting at a motion to suppress might conclude that because the search condition did not expressly authorize searches of the probationer’s person, home, and vehicles, the scope of the search was limited to whatever personal property he happened to be carrying.<sup>39</sup>

This uncertainty could be eliminated if the California courts adopted a uniform listing of search terms and a coding system so that officers throughout the state could be certain of the permissible scope of the probation searches they conduct.

<sup>35</sup> *People v. Douglas* (2015) 240 Cal.App.4th 855, 863. Also see *People v. Bravo* (1987) 43 Cal.3d 600, 607 [search conditions “must be interpreted on the basis of what a reasonable person would understand from the language of the condition itself”].

<sup>36</sup> See *People v. Spratt* (1980) 104 Cal.App.3d 562, 566-67 [“property under my control” authorized a search of probationer’s residence]; *People v. Bravo* (1987) 43 Cal.3d 600, 602, fn.1, 607 [Probation order stated: “Submit his person and property to search or seizure”; discussing the search of the probationer’s home, the court said, “We think the wording of appellant’s probation search condition authorized the instant search.”].

<sup>37</sup> See *People v. Douglas* (2015) 240 Cal.App.4th 855, 863 [“probation search clauses are not worded uniformly”].

<sup>38</sup> See *People v. Bravo* (1987) 43 Cal.3d 600, 602, fn.1, 607 [Probation order stated: “Submit his person and property to search or seizure”; discussing the search of the probationer’s home, the court ruled, “We think the wording of appellant’s probation search condition authorized the instant search.”]; *People v. Spratt* (1980) 104 Cal.App.3d 562, 566-67 [“property under my control” authorized a search of probationer’s residence].

<sup>39</sup> See *U.S. v. Grandberry* (9th Cir. Cir. 2013) 730 F.3d 968, 981 [“the government has cited no case—and we have found none—applying the ‘property under your control’ search condition to a residence.”]. Note: It appears the court was unaware of *Bravo* and *Spratt*, cited above.

## Scope of parole searches

Unlike probationers, all parolees are subject to the same search condition: “You and your residence and any property under your control may be searched without a warrant at any time by any agent of the Department of Corrections or any law enforcement officer.”<sup>40</sup> It should be noted that, unlike California parole, the terms and conditions of federal parole will vary because they are imposed at the discretion of the sentencing judge.<sup>41</sup> Thus, officers must ordinarily not conduct federal parole searches until they have confirmed that the parolee is subject to warrantless searches of the places and things they intend to search.

## Intensity of the Search

The term “intensity” is used to describe how aggressive or intrusive the search may be. Since there is not much law on the subject, we have looked to cases covering the intensity of warranted searches, consent searches, and searches incident to arrest.

**REASONABLY “THOROUGH” SEARCH:** Searches of homes, vehicles and other places may be reasonably thorough because, as one court put it, a cursory search “is of little value.”<sup>42</sup>

**NO DAMAGE OR DESTRUCTION:** The search must not be destructive.<sup>43</sup> “Excessive or unnecessary destruction of property in the course of a search,” said the Supreme Court, “may violate the Fourth Amend-

ment, even though the entry itself is lawful.”<sup>44</sup> However, if officers have probable cause to believe that evidence is hidden in a place or thing that must be damaged to seize it, there is authority for doing so.<sup>45</sup>

**LENGTH OF SEARCH:** The permissible length of the search will depend on the number and nature of the places and things that will be searched, the amount and nature of the evidence that the officers are seeking, and any problems that caused a delay.<sup>46</sup>

**SEARCHES BY K9s:** Officers may use a trained dog (e.g., drug- or explosives-seeking) to help with the search. This is because a dog’s sniffing does not materially increase the intensity of the search.<sup>47</sup>

## Special Requirements

In addition to the requirements discussed above, there are additional requirements that pertain to searches of homes, vehicles, and cell phones.

### Searches of homes

As noted earlier, the terms of all parole searches expressly authorize the search of the parolee’s home. In contrast, some probation search agreements expressly authorize searches of homes and some do not. But even if a search of the home is not expressly authorized, officers have implied authority to do so if, as noted earlier, the terms of probation included authorization to search property under the probationer’s control.<sup>48</sup>

<sup>40</sup> 15 CCR § 2511(b)(4). Also see Pen. Code § 3067(b)(3); *People v. Middleton* (2005) 131 Cal.App.4th 732, 739 [“A search condition for every parolee is now expressly required by statute”].

<sup>41</sup> See *Johnson v. United States* (2000) 529 U.S. 694, 696-97.

<sup>42</sup> *U.S. v. Torres* (10th Cir. 1981) 633 F.2d 1019, 1027. Also see *People v. Crenshaw* (1992) 9 Cal.App.4th 1403, 1411 [“permission to search contemplates a thorough search. If not thorough it is of little value.”].

<sup>43</sup> See *People v. Crenshaw* (1992) 9 Cal.App.4th 1403; *U.S. v. Gutierrez-Mederos* (9th Cir. Cir.1992) 965 F.2d 800, 804.

<sup>44</sup> *United States v. Ramirez* (1998) 523 U.S. 65, 71.

<sup>45</sup> See *United States v. Ross* (1982) 456 U.S. 798, 818; *Dalia v. United States* (1979) 441 U.S. 238, 258.

<sup>46</sup> See *People v. \$48,715* (1997) 58 Cal.App.4th 1507, 1510 [“The bed of the truck was loaded with luggage and bags of pasture seed.”].

<sup>47</sup> See *People v. \$48,715* (1997) 58 Cal.App.4th 1507, 1516; *People v. Bell* (1996) 43 Cal.App.4th 754, 769; *U.S. v. Perez* (9th Cir. 1994) 37 F.3d 510, 516 [“Using a narcotics dog to carry out a consensual search of an automobile is perhaps the least intrusive means of searching because it involves no unnecessary opening or forcing of closed containers or sealed areas of the car unless the dog alerts.”].

<sup>48</sup> See *People v. Bravo* (1987) 43 Cal.3d 600, 602, fn.1, 607 [Probation order stated: “Submit his person and property to search or seizure”; discussing the search of the probationer’s home, the court ruled, “We think the wording of appellant’s probation search condition authorized the instant search.”]; *People v. Spratt* (1980) 104 Cal.App.3d 562, 566-67 [“property under my control” authorized a search of probationer’s residence].

**PROOF THAT PROBATIONER OR PAROLEE LIVES THERE:**

Even if a residential search was expressly or impliedly authorized, officers may not search a residence unless they have “reason to believe”—much less than probable cause—that the probationer or parolee lives there. As the court said in *People v Downey*, “[A]n officer executing an arrest warrant or conducting a probation or parole search may enter a dwelling if he or she has only a ‘reasonable belief,’ falling short of probable cause to believe, the suspect lives there and is present at the time.”<sup>49</sup>

While some other federal circuit courts (including the Ninth Circuit) have ruled that probable cause is required,<sup>50</sup> it doesn’t seem to matter which standard of proof is applied because officers usually have sufficient information about where the arrestee lives to satisfy both. In fact, we are unaware of any case in which a court ruled that an entry was illegal because the officers had reasonable suspicion but not probable cause.<sup>50</sup>

What constitutes “living” in a residence? Although this question has “given difficulty to many courts,”<sup>51</sup> it generally occurs if the probationer or parolee has been spending the night there regularly, even if not every night.<sup>52</sup> A probationer or parolee may also be deemed to be living in two or more residences at the same time; and motel guests “live” in the motel in which they are registered.<sup>54</sup> On the other hand, the fact that the probationer or parolee stays in a home “occasionally” is insufficient.<sup>55</sup>

**GENERAL PRINCIPLES:** In determining whether officers had reasonable suspicion that the probationer or parolee lived in a certain residence, the courts will apply the following principles:

**NO HYPERTECHNICAL ANALYSIS:** The courts will consider the totality of circumstances known to the officers, and these circumstances will be analyzed by applying common sense, not hypertechnical analysis.<sup>56</sup>

**MULTIPLE CIRCUMSTANCES:** Although a single circumstance will sometimes suffice, in most cases it takes two or more.

**LACK OF DIRECT EVIDENCE:** The courts will take into account that the officers’ inability to obtain direct evidence that the probationer or parolee lives in a certain house may be the result of his attempt to prevent them from learning his whereabouts.<sup>57</sup> But that doesn’t change the fact that reasonable suspicion is required.

**FRIENDS MIGHT LIE:** Because the friends of the probationer or parolee might lie, officers are not required to accept information from a less-than-disinterested source as to his place of residence.<sup>58</sup>

**IF OFFICERS WERE WRONG:** It is irrelevant that officers learned afterward that the probationer or parolee did not live in the house they entered. What counts is whether they reasonably believed so at the time.<sup>59</sup>

**RELEVANT CIRCUMSTANCES:** The following circumstances are relevant in determining whether there is

<sup>49</sup> (2011) 198 Cal.App.4th 652, 662.

<sup>50</sup> See *U.S. v. Grandberry* (9th Cir. Cir. 2013) 730 F.3d 968, 973; *Motley v. Parks* (9th Cir. 2005) 432 F.3d 1072, 1080; *U.S. v. Vasquez-Algarin* (3rd Cir. 2016) \_\_ F.3d \_\_ [2016 WL 1730540]; *U.S. v. Barrera* (5th Cir. 2006) 464 F.3d 496, 501, fn.5 [“The disagreement among the circuits has been more about semantics than substance”].

<sup>51</sup> *U.S. v. Diaz* (9th Cir. Cir. 2007) 491 F.3d 1074, 1077.

<sup>52</sup> See, for example, *Washington v. Simpson* (8th Cir. 1986) 806 F.2d 192, 196.

<sup>53</sup> See *Case v. Kitsap County Sheriff’s Department* (9th Cir. 2001) 249 F.3d 921, 931; *U.S. v. Bennett* (11th Cir. 2009) 555 F.3d 962, 965; *U.S. v. Bervaldi* (11th Cir. 2000) 226 F.3d 1256, 1263.

<sup>54</sup> See *U.S. v. Franklin* (9th Cir. 2010) 603 F.3d 652, 657.

<sup>55</sup> See *U.S. v. Franklin* (9th Cir. 2010) 603 F.3d 652, 656; *Perez v. Simpson* (9th Cir. 1989) 884 F.2d 1136, 1141.

<sup>56</sup> See *U.S. v. Graham* (1st Cir. 2009) 553 F.3d 6, 14; *U.S. v. Lovelock* (2nd Cir. 1999) 170 F.3d 339, 344; *U.S. v. Gay* (10th Cir. 2001) 240 F.3d 1222, 1227.

<sup>57</sup> See *U.S. v. Gay* (10th Cir. 2001) 240 F.3d 1222, 1227.

<sup>58</sup> See *Motley v. Parks* (9th Cir. en banc 2005) 432 F.3d 1072, 1082.

<sup>59</sup> See *U.S. v. Graham* (1st Cir. 2009) 553 F.3d 6, 12; *Valdez v. McPheters* (10th Cir. 1999) 172 F.3d 1220, 1225; *U.S. v. Route* (5th Cir. 1997) 104 F.3d 59, 62-63.

sufficient reason to believe that a probationer or parolee was living in a particular residence:

**LISTED ADDRESS:** The address was listed as his residence on one or more forms that reasonably appeared to be current, such as a rental or lease agreement,<sup>60</sup> hotel or motel registration,<sup>61</sup> utility billing records,<sup>62</sup> telephone or internet records,<sup>63</sup> credit card application,<sup>64</sup> employment application,<sup>65</sup> post office records,<sup>66</sup> DMV records,<sup>67</sup> vehicle repair work order,<sup>68</sup> jail booking records,<sup>69</sup> bail bond application,<sup>70</sup> police reports and probation and parole records.<sup>71</sup>

**INFORMATION FROM OTHERS:** A citizen informant or a police informant who has been tested or whose information has been corroborated notified officers that the probationer or parolee presently lived at the address.<sup>72</sup>

**CELL PHONE DATA:** Cell site location data for the probationer's or parolee's cell phone showed significant recurring contact with a cell tower located in the home's service area.<sup>73</sup>

**OBSERVATIONS BY OFFICERS, OTHERS:** Officers, neighbors, or others repeatedly or recently saw

the probationer or parolee on the premises.<sup>74</sup> It is especially significant that he was observed doing things that residents commonly do; e.g. taking out the garbage, chatting with neighbors, opening the door with a key.<sup>75</sup>

**CAR PARKED OUTSIDE:** A car that was owned or used by the probationer or parolee was regularly parked in the driveway, in front of the residence, or nearby.<sup>76</sup>

**PRESENCE OF PROBATIONER/PAROLEE NOT REQUIRED:** Unless the terms of probation stated otherwise, officers may conduct a search even though the probationer was not present.<sup>77</sup> As for parolees, their presence is not required.

**KNOCK-NOTICE:** Officers must enter the premises in a "reasonable" manner.<sup>78</sup> As the Court of Appeal explained in *People v. Ureziceanu*, "[T]he remaining policies and purposes underlying the statutory knock-notice provisions must be satisfied in the execution of a probation search of a residence."<sup>79</sup> Accordingly, officers must comply with the knock-notice requirements unless there is good cause to make an unannounced entry.

<sup>60</sup> See, for example, *U.S. v. Edmonds* (3rd Cir. 1995) 52 F.3d 1236, 1247-48.

<sup>61</sup> See *People v. Fuller* (1983) 148 Cal.App.3d 257, 263; *U.S. v. Franklin* (9th Cir. 2010) 603 F.3d 652, 657.

<sup>62</sup> See *People v. Downey* (2011) 198 Cal.App.4th 652, 659 [officer testified that "utility bills were a very good source in finding out where someone lives because in his experience many probationers and parolees ... did not know that police had access to utility bills"].

<sup>63</sup> See *People v. Icenogle* (1977) 71 Cal.App.3d 576, 581; *U.S. v. Terry* (2nd Cir. 1983) 702 F.2d 299, 319.

<sup>64</sup> See *U.S. v. Route* (5th Cir. 1997) 104 F.3d 59, 62, fn.1.

<sup>65</sup> See *People v. Jacobs* (1987) 43 Cal.3d 472, 478.

<sup>66</sup> See *U.S. v. Route* (5th Cir. 1997) 104 F.3d 59, 61, fn.1.

<sup>67</sup> See *People v. Boyd* (1990) 224 Cal.App.3d 736, 740; *U.S. v. Ayers* (9th Cir. 1991) 924 F.2d 1468, 1480.

<sup>68</sup> See *U.S. v. Manley* (2nd Cir. 1980) 632 F.2d 978, 983.

<sup>69</sup> See *Washington v. Simpson* (8th Cir. 1986) 806 F.2d 192, 196; *U.S. v. Clayton* (8th Cir. 2000) 210 F.3d 841, 842-43.

<sup>70</sup> See *U.S. v. Barrera* (5th Cir. 2006) 464 F.3d 496, 504.

<sup>71</sup> See *People v. Kanos* (1971) 14 Cal.App.3d 642, 645, 648; *People v. Ott* (1978) 84 Cal.App.3d 118, 126; *U.S. v. Ayers* (9th Cir. 1991) 924 F.2d 1468, 1479; *U.S. v. Mayer* (9th Cir. 2008) 530 F.3d 1099, 1104; *U.S. v. Lovelock* (2nd Cir. 1999) 170 F.3d 339, 344; *U.S. v. Thomas* (D.C. Cir 2005) 429 F.3d 282, 286; *U.S. v. Graham* (1st Cir. 2009) 553 F.3d 6, 13.

<sup>72</sup> See *People v. Alcorn* (1993) 15 Cal.App.4th 652, 655; *People v. Dyke* (1990) 224 Cal.App.3d 648, 659; *U.S. v. Franklin* (9th Cir. 2010) 603 F.3d 652, 656.

<sup>73</sup> See *U.S. v. Bohannon* (2nd Cir. 2016) \_\_ F.3d \_\_ [2016 WL 3067993].

<sup>74</sup> See *People v. Gibson* (2001) 90 Cal.App.4th 371, 381; *U.S. v. Risse* (8th Cir. 1996) 83 F.3d 212, 217.

<sup>75</sup> See *People v. Kanos* (1971) 14 Cal.App.3d 642, 648 [officers saw the suspect leaving the house at 7:30 A.M. with his wife and child]; *U.S. v. Harper* (9th Cir. 1991) 928 F.2d 894, 896.

<sup>76</sup> See *People v. Icenogle* (1977) 71 Cal.App.3d 576, 581; *U.S. v. Harper* (9th Cir. 1991) 928 F.2d 894, 896.

<sup>77</sup> See *People v. Mason* (1971) 5 Cal.3d 759, 763; *Hart v. Superior Court* (1971) 21 Cal.App.3d 496, 502.

<sup>78</sup> See *Wilson v. Arkansas* (1995) 514 U.S. 927, 934.

<sup>79</sup> (2005) 132 Cal.App.4th 747, 790.

**PROTECTIVE SWEEPS:** Upon entering the premises, officers may conduct a protective sweep to locate any people who might constitute a threat.<sup>80</sup>

**WHAT PLACES MAY BE SEARCHED:** Officers may search all common areas such as the living room, kitchen, garage, and all other rooms and areas to which the probationer or parolee appeared to have sole or joint access or control.<sup>81</sup> This is true regardless of the probationer's or parolee's assurances to the contrary.<sup>82</sup> Officers may also search the curtilage; e.g., a garden, yards.<sup>83</sup> Conversely, officers may not search places if there is "no basis for officers to reasonably believe the probationer has authority over those areas."<sup>84</sup>

**WHAT THINGS MAY BE SEARCHED:** Officers may search a container or personal property inside a residence if they had reasonable suspicion that the probationer or parolee owned or accessed it solely or jointly with another occupant.<sup>85</sup> Significantly, probable cause is not required.<sup>86</sup> For example, the courts have ruled that officers reasonably believed that probationers or parolees had sole or joint control of the following property:

- A jewelry box on a dresser in the bedroom of a female probationer.<sup>87</sup>
- A "gender neutral" handbag on a bed in a home occupied by a male parolee and his girlfriend.<sup>88</sup>

- A paper bag in the parolee's bedroom closet.<sup>89</sup>
- A stationery box in a drawer in the living room.<sup>90</sup>
- Trash under the kitchen sink.<sup>91</sup>
- The refrigerator in the kitchen.<sup>92</sup>

**ARRESTING OCCUPANTS:** Officers who enter a residence to conduct a probation or parole search may arrest anyone on the premises if there is probable cause to do so, regardless of whether probable cause existed at the time of entry or developed in the course of the search. In other words, neither a conventional nor a *Ramey* warrant is required to arrest a person inside a residence if officers have lawfully entered to conduct a probation or parole search.<sup>93</sup>

### Searches of vehicles

The permissible scope of a vehicle search will depend largely on whether the probationer or parolee was the owner or driver, or whether he was merely a passenger.

**DRIVER OR OWNER ON PROBATION OR PAROLE:** If the probationer or parolee was driving the vehicle or owned it, officers may ordinarily search the following:

PROPERTY OWNED BY PROBATIONER OR PAROLEE: Property that the officers reasonably believed was owned by the probationer or parolee,<sup>94</sup> or property over which the officers reasonably believed

<sup>80</sup> See *Samson v. California* (2006) 547 U.S. 843]; *U.S. v. Lopez* (9th Cir. 2007) 474 F.3d 1208, 1213 ["Because a protective sweep is a less intrusive search than an parole search, [the Supreme Court] necessarily makes both the protective sweep, and the parole search, lawful." Citing *Samson v. California* (2006) 547 US 843].

<sup>81</sup> See *People v. Schmitz* (2012) 55 Cal.4th 909, 917; *People v. Ermi* (2013) 216 Cal.App.4th 277, 280; *People v. Carreon* (2016) \_\_ Cal.App.4th \_\_ [2016 WL 3566262].

<sup>82</sup> See *People v. Boyd* (1990) 224 Cal.App.3d 736, 749; *People v. Britton* (1984) 156 Cal.App.3d 689, 701.

<sup>83</sup> See *People v. Barbarick* (1985) 168 Cal.App.3d 731, 741.

<sup>84</sup> *People v. Robles* (2000) 23 Cal. 4th 789, 798

<sup>85</sup> See *People v. Schmitz* (2012) 55 Cal.4th 909, 918, 926; *People v. Ermi* (2013) 216 Cal.App.4th 277, 280; *People v. Baker* (2008) 164 Cal.App.4th 1152, 1159; *People v. Smith* (2002) 95 Cal.App.4th 912, 919; *People v. Boyd* (1990) 224 Cal.App.3d 736, 749; *U.S. v. Davis* (9th Cir. 1991) 932 F.2d 752, 758.

<sup>86</sup> See *People v. Boyd* (1990) 224 Cal.App.3d 736, 744; *U.S. v. Davis* (9th Cir. 1991) 932 F.2d 752, 758.

<sup>87</sup> See *Russi v. Superior Court* (1973) 33 Cal.App.3d 160.

<sup>88</sup> See *People v. Boyd* (1990) 224 Cal.App.3d 736, 749; *People v. Ermi* (2013) 216 Cal.App.4th 277, 281.

<sup>89</sup> See *People v. Britton* (1984) 156 Cal.App.3d 689.

<sup>90</sup> See *Russi v. Superior Court* (1973) 33 Cal.App.3d 160.

<sup>91</sup> See *People v. Burgener* (1986) 41 Cal.3d 505.

<sup>92</sup> See *People v. Palmquist* (1981) 123 Cal.App.3d 1.

<sup>93</sup> See *People v. Evans* (1980) 108 Cal.App.3d 193, 196; *People v. Lewis* (1999) 74 Cal.App.4th 662, 673.

<sup>94</sup> See *People v. Schmitz* (2012) 55 Cal.4th 909, 913.

the probationer or parolee had the ability to exert control.<sup>95</sup>

**PROPERTY BELONGING TO PASSENGER:** Officers may search a container belonging to a passenger if they reasonably believed that the parolee could have stowed his personal belongings in the container when he became aware of police interest; e.g., he apparently became aware that he was being followed.<sup>96</sup> However, in the absence of direct or circumstantial evidence that a male probationer or parolee attempted to stow property in a female passenger's purse, the court *might* find that it was unreasonable to search the purse, especially if it was closed and "closely monitored" by the woman; e.g., it was at her feet.<sup>97</sup>

**PASSENGER ON PROBATION OR PAROLE:** If only a passenger was on parole or probation, officers may search "those areas of the passenger compartment where the officer reasonably expects that the parolee could have stowed personal belongings or discarded items when he became aware of police interest."<sup>98</sup>

Officers need not, however, "articulate specific facts indicating that the parolee has actually placed property or contraband in a particular location in the passenger compartment before searching that area." As discussed above, however, a search of a purse may be unlawful if the probationer or parolee was a male. Finally, it is unsettled whether officers may search closed compartments in the vehicle (e.g., glove box, console) if the probationer or parolee was merely a passenger.<sup>99</sup> Finally, officers may

stop a car for the purpose of conducting a parole or probation search even though the person on parole or probation was only a passenger.<sup>100</sup>

### Search of cell phones

As the result of California's Electronic Communications Privacy Act (CalECPA), it appears that officers may not search a cell phone or other communications device pursuant to a probation or parole search condition. The reason is, although probation searches are deemed "consensual," CalECPA requires something it calls "specific consent," which it defines as "consent provided directly to the government entity seeking information."<sup>101</sup> This seems to mean that searches of electronic communications devices are not covered under the scope of a probation search because such consent is not given "directly" to officers. Instead, it is given directly to the sentencing judge in exchange for the judge's agreement not to send the probationer directly to jail or prison.<sup>102</sup> As for parole searches, there is simply nothing in CalECPA to indicate that communication devices may be searched pursuant to the "property under your control" search authorization.

Consequently, if officers want to search a communication device that is found within a searchable vehicle, and if they believe they have probable cause, they may seize the device and promptly apply for a warrant.<sup>103</sup> They may also conduct a warrantless physical examination of its exterior and case because there are weapons on the market that are disguised as cell phones.<sup>104</sup>

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<sup>95</sup> See *People v. Schmitz* (2012) 55 Cal.4th 909, 913.

<sup>96</sup> See *People v. Schmitz* (2012) 55 Cal.4th 909, 926

<sup>97</sup> See *People v. Schmitz* (2012) 55 Cal.4th 909, 932; *People v. Baker* (2008) 164 Cal.App.4th 1152, 1160 ["Here, there is nothing to overcome the obvious presumption that the purse belonged to the sole female occupant of the vehicle"].

<sup>98</sup> See *People v. Schmitz* (2012) 55 Cal.4th 909, 926; *People v. Ermi* (2013) 216 Cal.App.4th 277, 281.

<sup>99</sup> See *People v. Schmitz* (2012) 55 Cal.4th 909, 926, fn16.

<sup>100</sup> See *In re William J.* (1985) 171 Cal.App.3d 72, 77.

<sup>101</sup> See Pen. Code §§ 1546(k), 1546.1(c)(3).

<sup>102</sup> **NOTE:** Assuming that's what "specific consent" means, it admittedly represents irrational legislative overreaching. After all, it would mean that officers may search the probationer's entire home and its contents—including documents and personal property—but not his cell phone. Why should a person's cell phone be entitled to more privacy than his home? This is a question the Legislature should be required to address.

<sup>103</sup> See *Riley v. California* (2014) \_\_\_ U.S. \_\_\_ [134 S.Ct. 2473, 2486].

<sup>104</sup> See *Riley v. California* (2014) \_\_\_ U.S. \_\_\_ [134 S.Ct. 2473, 2485].

# The Shatzer Dilemma: Miranda's 14-Day Waiting Period

*When an accused has invoked his right to have counsel present . . . [he] is not subject to further interrogation until counsel has been made available to him, unless the accused himself initiates further communication.*<sup>1</sup>

That was the ruling of the Supreme Court in the 1981 case of *Edwards v. Arizona*. This passage is remarkable, not just because the Court had announced an important new rule of law. It's also because the rule was plainly irrational.

As the cited language demonstrates, the Court was saying that when a suspect invokes his *Miranda* right to counsel, officers cannot seek to question him *for the rest of his life*. Thus, the Court essentially granted a large percentage of America's felons with a lifetime free from the consequences of police interrogation. It didn't matter that they were later released from custody for 10, 20, or 50 years. They were forever *Miranda*-proof.

While it is likely that the Court did not intend such a result, its ruling was unambiguous and it remained binding authority for almost 30 years. And yet—and this is especially remarkable—it did not result in as many miscarriages of justice as would be expected. That's because most lower court judges ignored it! How could they?

What happened is that the judges realized (correctly, as it turned out) that the above passage from *Edwards* was an error. So, they dealt with it by interpreting *Edwards* as prohibiting police-initiated questioning only until the suspect was released from custody. In one such case, *People v. Storm*, the California Supreme Court referred to *Edwards*' "break-in-custody exception."<sup>2</sup> Although the court didn't cite any authority for this "exception," it really didn't need to because, as the late Supreme Court Justice Antonin Scalia once wrote, "[I]t is a venerable principle that a law will not be interpreted to produce absurd results."<sup>3</sup>

But there is more to this unusual story. In 2010, the Supreme Court in *Maryland v. Shatzer*<sup>4</sup> acknowledged that the lower courts were correct by ignoring its ruling in *Edwards*, at least the part about the lifetime ban on police-initiated questioning. Although the Court did not actually admit to a misstep, it did say—without even a hint of displeasure—that the lower courts "have uniformly held that a break in custody ends the *Edwards* presumption" of police coercion. It went even further and said it was "far fetched" to think that a suspect who had invoked, but who was then released from custody, would feel coerced into waiving his rights. So the Court in *Shatzer* made it official: Officers may recontact a suspect if, after he invoked, he had been released from custody.

Unfortunately, the Court did not end its ruling on such a logical note. Instead, it ruled that, although officers could recontact a released suspect after an invocation, they could not do so unless they waited at least 14 days. Why 14 days? While it was admittedly an arbitrary number, the Court thought that 14 days was about the amount of time it would take to make sure that the suspect had time to talk with an attorney and not feel pressured into waiving his rights when he was recontacted. Of course, many people believe that a 14-day waiting period is excessive, especially because the Court acknowledged elsewhere that a suspect who has invoked "knows from his earlier experience" that he has the power to refuse to speak with officers. But the 14-day waiting period remains the law.

At this point, it would be fitting to ask why is it necessary to write an article (even a brief one) about a six-year old ruling that, despite its shortcomings, is still the Law of the Land. It's because the peculiar history of this rule of law has generated so much uncertainty that many officers and prosecutors can-

<sup>1</sup> *Edwards v. Arizona* (1981) 451 U.S. 477. 484-85. Edited.

<sup>2</sup> (2002) 28 Cal.4th 1007. 1013. Also see *U.S. v. Whaley* (6th Cir.1994) 13 F.3d 963, 966.

<sup>3</sup> *K Mart v. Cartier, Inc.* (1988) 486 U.S. 281, 324, fn.2 (conc. opn. by Scalia, J.) NOTE: Ironically, Justice Scalia wrote the decision in *Shatzer* which might someday be overturned on grounds it produced "absurd results".

<sup>4</sup> (2010) 559 U.S. 98.

not be sure about its effect on day-to-day police operations. We hope to fix this, and we think the best way to understand the subject is to consider how it affects invocations by (1) prison inmates, (2) jail inmates, and (3) arrestees.

## Invocations By Prison Inmates

Most inmates who have invoked their *Miranda* right to counsel will not be released from prison for a long time. Instead, they will usually remain in custody for years, decades, or maybe forever. So if officers were required to wait 14 days after the inmate had been physically released from the facility, they would have to wait a long time, probably long after they retired.

Fortunately, the Court in *Shatzer* anticipated this problem and ruled that inmates will be deemed “released from custody” if they were released from “*Miranda* custody—not physical custody. This is important because inmates are seldom in *Miranda* custody, and therefore officers will usually be required to wait for only 14 days *after the invocation*.”

What is “*Miranda* custody”? It results when a suspect reasonably believes that his freedom of movement had been restricted to the degree associated with a formal arrest.<sup>5</sup> Or, as stated in somewhat more dramatic language, *Miranda* custody exists when an arrested suspect was “cut off from his normal life and companions, thrust into and isolated in an unfamiliar police-dominated atmosphere where his captors appear to control his fate.”<sup>6</sup>

While *Miranda* custody sounds a lot like physical custody in prison, they are quite different. For one thing, inmates who are questioned inside the prison walls are, in many ways, on their own “turf,” while the officers who are questioning them are the outsiders. More important, prison inmates are unlikely to feel much, if any, pressure to answer questions because they know that the officers have no say in

how much time they must spend in prison. As they say, “That ship has sailed.” Thus, the Court in *Shatzer* observed, “Without minimizing the harsh realities of incarceration, we think lawful imprisonment imposed upon conviction of a crime does not create the coercive pressures identified in *Miranda*.”

Accordingly, the Court ruled that the 14-day post-invocation waiting period for inmates starts running when they return to their “normal prison life,” meaning they “return to their accustomed surroundings and daily routine” and “regain the degree of control they had over their lives prior to the interrogation.”

What is “normal” prison life? The Court didn’t talk much about this, but the California Department of Corrections and Rehabilitation explained that there are different levels of custody in California’s prison system which represent different levels of inmate control. Specifically, there is (1) “minimum custody” where inmates “can live or work outside of the normal confines of a secure perimeter facility, such as fire camps”; (2) “medium custody” in which inmates “live within a secure perimeter facility, but can live in dorms or cells and have more freedom of movement within the facility”; (3) “close custody” where inmates “live in celled facilities, are restricted in their work assignments, and are counted more frequently than other offenders,” and (4) “maximum custody” where inmates “live in celled units designated as an administrative segregation or security housing unit.”<sup>7</sup>

While there is not yet any case authority on this issue, it seems likely that a break in *Miranda* custody would result if, following an invocation, the inmate returned to minimum, medium, and probably “close” custody. In contrast, most inmates temporarily serving time in maximum custody would probably not experience a break in custody until they had been moved into one of the other custody settings.

<sup>5</sup> See *Berkemer v. McCarty* (1984) 468 U.S. 420, 440 [“the safeguards prescribed by *Miranda* become applicable as soon as a suspect’s freedom of action is curtailed to a degree associated with formal arrest”]; *Howes v. Fields* (2012) \_\_ U.S. \_\_ [132 S.Ct. 1181, 1189] [“As used in our *Miranda* case law, ‘custody’ is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion.”].

<sup>6</sup> *Maryland v. Shatzer* (2010) 559 U.S. 98, 106. Also see *Howes v. Fields* (2012) \_\_ U.S. \_\_ [132 S.Ct. 1181, 1189] [in the “paradigmatic *Miranda* situation,” a suspect is arrested and “whisked to a police station for questioning”; this “represents a sharp and ominous change, and the shock may give rise to coercive pressures”].

<sup>7</sup> “The Future of California Corrections,” www.cdcr.ca.gov, accessed on May 13, 2016.

To help understand how this issue arises and is analyzed, it may be helpful to review the facts in *Shatzer*. It started when officers in Maryland received a report that Michael Shatzer might have sexually abused his three-year old son. They also learned that Shatzer was currently serving time in a Maryland prison on another child abuse case. An officer went to the prison to see if Shatzer was willing to talk about the new case, but he invoked his *Miranda* right to counsel, at which time he was “released back into the general prison population.” For the next three years, the investigation stalled. But then Shatzer’s son provided the investigators with additional incriminating information, so they returned to the prison and asked Shatzer if he would now speak with them without having an attorney present. He said yes, waived his *Miranda* rights, and made some statements that were used against him at his trial for molesting his son. He was convicted.

On appeal to the Supreme Court, Shatzer argued that his statements were obtained in violation of *Edwards* because he had remained in physical custody for the preceding three years. But, as noted, the Court ruled that what matters is whether the inmate was released from *Miranda* custody, not physical custody; and it ruled that Shatzer had, in fact, been released from *Miranda* custody after he invoked because he returned to general population. As the Court pointed out, when prison inmates are released back into the general prison population, “they return to their accustomed surroundings and daily routine,” they “regain the degree of control they had over their lives prior to the interrogation,” and are “not isolated with their accusers.”

To summarize, although a prison inmate is not ordinarily in *Miranda* custody while he is in minimum, medium, or maybe “close” custody, he is in *Miranda* custody when he is temporarily removed to a room in the facility where he is confronted by investigators who question him about a pre-prison or in-prison crime for which he is suspected.<sup>8</sup> And if, whether before or during the interview, he invokes his *Miranda* right to counsel, officers must immediately terminate the questioning. However, if he is then returned to his “accustomed surroundings,”

the termination of *Miranda* custody would occur 14 days later, meaning that officers could then recontact him to determine if he had changed his mind about talking to them without an attorney.

## Questioning Jail Inmates

Although the Court’s ruling in *Shatzer* pertains to prison inmates, it was based on principles that have equal application to the legality of questioning county jail inmates who had previously invoked their *Miranda* the right to counsel. This is important because most invocations are made by jail inmates and (as we will discuss later) recent arrestees.

To apply these principles to jail inmates, however, it will be necessary to distinguish between (1) jail inmates who were serving prison time under California’s realignment program; (2) jail inmates who were serving county time; and (3) jail inmates who were awaiting trial or a pretrial court appearance, such as arraignment.

**INMATES SERVING PRISON TIME:** Under California’s Criminal Justice Realignment Act of 2011, people who have been convicted of certain felonies may be permitted to serve their prison sentences in a local county jail. Even though the inmate is not confined in prison, his status is “akin to a state prison commitment.”<sup>9</sup> This means the rules pertaining to recontacting prison inmates apply equally to inmates who are serving prison time in a county jail.

**INMATES SERVING COUNTY TIME:** Based on the principles set forth in *Shatzer*, officers should be able to recontact county time-servers who had previously invoked their *Miranda* right to counsel if they then spent at least 14 days in general population so that it became their “normal” or “familiar” environment.

**JAIL INMATES AWAITING COURT APPEARANCE:** If the inmate invoked while awaiting arraignment or other court appearance, it is unclear whether officers could recontact him if he had returned to general population. This is because (1) the inmate might not have been in jail long enough for it to have become “familiar,” and (2) the inmate might feel pressure to cooperate with officers who might still be viewed as having some control over what happens with his case.

<sup>8</sup> See *Howes v. Fields* (2012) \_\_\_ U.S. \_\_\_ [132 S.Ct. 1181, 1187].

<sup>9</sup> *People v. Fandinola* (2013) 221 Cal.App.4th 1415, 1422.

## Questioning Arrestees

The Court in *Shatzer* did not discuss whether officers are required to wait 14 days before recontacting an arrestee who (1) invoked at the scene of the arrest or while being questioned in an interview room, and (2) was then released on bail or for lack of evidence. There is, however, reason to believe that, while officers may not be required to wait the entire 14 days, they may need to wait for at least a few days. This is because the Court, in one of its most dubious observations, said that when a prisoner invokes his *Miranda* right to counsel there are certain unspecified “coercive” and “lingering” effects that make it necessary to protect him for 14 days against being asked if he had changed his mind. It did not, however, explain how an arrestee who is released from custody—especially for lack of evidence—would feel any “lingering” effects other than relief and joy. Yet, the Court seemed to be adamant.<sup>10</sup>

Another reason to believe that some waiting period is required is concern that officers might try to avoid *Shatzer* by releasing an arrestee who invoked his right to counsel, then rearrest him a few hours later or maybe even after he walked out the door. But such an attempt is unlikely to succeed because the Court in *Shatzer* made it clear that the courts would not tolerate such tactics. In fact, the California Court of Appeal recently dealt with a case involving just such an issue.

In *People v. Bridgeford*<sup>11</sup> the defendant and two other men, one of them armed with a .22 caliber rifle, committed a home invasion robbery in Dos Palos. The victim identified one of the perpetrators as Bryan Bridgeford, an old childhood friend. The next day, two men were found murdered in a garage located off a nearby highway. They were shot with a .22 caliber rifle and a shotgun. Merced County

sheriff’s deputies who were investigating the murders received information that Bridgeford might have been involved. So they contacted him and, although they told him he was not under arrest, they handcuffed him and took him to the sheriff’s station for questioning. Thus, Bridgeford was “in custody” when he was questioned there. At some point during the interview, he invoked his right to counsel and, because the investigators lacked probable cause to arrest him for the murders, they released him.

Within an hour or so, deputies who were investigating the murders executed a warrant to search the home of another suspect, Jose German. During the search, they found a .22 caliber rifle. Based on this and some other things, officers arrested Bridgeford for the murders, transported him back to the sheriff’s station and questioned him after obtaining a waiver. He said he was innocent. Investigators then placed him in a wired room with German and left them alone. German then told Bridgeford that the deputies had found the rifle, and that they knew Bridgeford was one of the shooters. The investigators then removed Bridgeford from the room and continued to question him about the murders and German’s comments. He confessed.

Bridgeford filed a motion to suppress the confession on grounds that it was obtained in violation of *Shatzer*. Although he had been released from custody for two to three hours after he invoked, the court suppressed his confession on grounds that there are no exceptions to *Shatzer*’s 14-day waiting period. It is possible that *Bridgeford* will not be the last word on the subject because there was reason to believe that the release was a ploy to avoid having to wait 14-days to confront him with the new evidence. This is because the deputies had probable cause to arrest him on the home invasion charge (he was positively ID’d), and therefore their decision to release him was somewhat suspicious. POV

<sup>10</sup> NOTE: Here are some of the Court’s comments: “[When] a suspect has been released from his pretrial custody and has returned to his normal life for some time before the later attempted interrogation, there is little reason to think that his change of heart regarding interrogation without counsel has been coerced.” At p. 107. Emphasis added. “The only logical endpoint of *Edwards* disability is termination of *Miranda* custody and any of its lingering effects.” At p. 109. Emphasis added. “[W]hen a suspect who initially requested counsel is reinterrogated after a break in custody that is of sufficient duration to dissipate its coercive effects ...” At p. 109. Emphasis added]. The 14-day waiting period “provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody.” At p. 109. Emphasis added.

<sup>11</sup> (2015) 241 Cal.App.4th 887.

# Walking On Front Yards

Walking onto someone's front yard is so commonplace and unremarkable that it is hard to imagine why it should be a topic of conversation, much less the subject of an article in a legal publication. After all, since the days of cavemen, virtually everyone was permitted to walk to the front area of most single family caves because the Neanderthals generally agreed that cave dwellers could not reasonably expect privacy in places that were fully visible to passersby and which could ordinarily be entered without difficulty.<sup>1</sup>

This arrangement worked well for the next 50,000 years or so. But then in 2013 the U.S. Supreme Court thought it would be a good idea to change things. So, in *Florida v. Jardines* it ruled that an officer's act of walking onto someone's front yard constituted a "search" under the Fourth Amendment if the officer was interested in obtaining incriminating evidence. This ruling had very practical consequences for officers because it meant that, in the absence of exigent circumstances, an officer's warrantless entry into the front area of a home is lawful only if both of the following circumstances existed:

- (1) **Implied authorization to enter:** Officers entered only those areas to which they were impliedly authorized to enter.
- (2) **Restricted activities:** They engaged in only those activities that were impliedly authorized by the occupants.<sup>3</sup>

Although these restrictions are fairly straightforward, they have generated some confusion because they are based on the hazy standard of what a reasonable officer would imply, and also because they conflict with the longstanding rule—a rule that was covered thoroughly in most police academies—that front yards are not private places. And because this had been the rule for decades, there are still many citable published cases in which the courts essentially ruled that front yards are open territory. For example, the following appellate court rulings are now incorrect in light of *Jardines*:

- Just like any other visitor to a residence, a police officer is entitled to walk onto parts of the curtilage that are not fenced off.<sup>4</sup>
- The Fourth Amendment "prohibits unreasonable searches and seizures, not trespasses."<sup>5</sup>
- "The sanctuary of the home simply does not extend to the front yard."<sup>6</sup>

So it is not surprising that officers might be confused as to exactly what they can and cannot do if they want to enter the front yard of a person's home, especially the home of a suspect. That's why we decided to revisit *Jardines* and the few cases that have interpreted it and explain what the Court did and how it affects daily police work.

For starters, there are four issues that can be covered with little discussion. First, *Jardines* does not affect the legality of an officer's entry onto private property if there were exigent circumstances, or if an occupant expressly consented to

<sup>1</sup> **NOTE:** We think this is accurate, and it makes sense, but we couldn't find any Neanderthals to confirm it.

<sup>2</sup> (2013) \_\_\_ U.S. \_\_\_ [133 S.Ct. 1409]. Also see *U.S. v. Whitaker* (7th Cir. 2016) 820 F.3d 849, 852 ["[W]hen the police physically intruded into the defendant's property to gather evidence without a warrant or consent, they had conducted a search without a license to do so, in violation of the Fourth Amendment."].

<sup>3</sup> See *Florida v. Jardines* (2013) \_\_\_ U.S. \_\_\_ [133 S.Ct. 1409, 1416].

<sup>4</sup> *People v. Zichwic* (2001) 94 Cal.App.4th 944, 953.

<sup>5</sup> *Cohen v. Superior Court* (1970) 5 Cal.App.3d 429, 434.

<sup>6</sup> *U.S. v. Hayes* (2nd Cir. 2008) 551 F.3d 138, 145.

<sup>7</sup> *Hudson v. Palmer* (1984) 468 U.S. 517, 525; *New York v. Class* (1986) 475 U.S. 106, 112.

the entry, or if the premises had been abandoned.<sup>7</sup> Second, officers are free to walk upon so-called “open fields,” which is an historical term that, although it cannot be usefully defined, ordinarily consists of undeveloped private property in rural areas where the distance between the main house and the field was so great that it would have been unreasonable for the residents’ to expect that others would not walk on it.

In contrast to “open fields,” there is the so-called “curtilage” of the home (another historical concept) which consists of that area near the residence that is so closely associated with everyday living and family activities that an entry into it is viewed as a search of the home itself.<sup>8</sup> And, as noted, such a search is illegal unless there were exigent circumstances, or unless the occupants expressly or impliedly authorized officers to enter. Two obvious examples of curtilage would be the front porch area and, in most cases, the driveway.

Third, although the Supreme Court in *Jardines* did not place any additional restrictions on so-called knock-and-talks, as we will discuss it clarified what officers can and cannot do when approaching the front door. Finally, *Jardines* did not affect the validity of the cases pertaining to aerial surveillance of homes.<sup>9</sup>

### Where officers may walk

Several years ago the California Supreme Court observed that “[a] sidewalk, pathway, common entrance or similar passageway offers implied permission to the public to enter.”<sup>10</sup> *Jardines* went further and ruled that an officer’s entry becomes a

search if “he steps off those thoroughfares and enters the Fourth Amendment’s protected areas.” The reason that walking on thoroughfares remains permissible is that the existence of a front door constitutes implied consent for visitors to walk to the door for the purpose of contacting the occupants, so long as the visitors stay on normal access routes. As the Court in *Jardines* observed:

We have recognized that the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds. This implicit license typically permits the visitor to approach the home by the front path.<sup>11</sup>

Conversely, as the dissent in *Jardines* pointed out, a visitor “cannot traipse through the garden, meander into the backyard, or take other circuitous detours that veer from the pathway that a visitor would customarily use.”

One problem with this rule is that the physical layouts of many homes are unusual or the yards are in such disarray that it may be difficult for officers to figure out exactly what constitutes a normal access route. The Court, however, dodged this issue with sarcasm, saying that it is such a simple matter that it is “generally managed without incident by the Nation’s Girl Scouts and trick-or-treaters.” We note, however, that Girl Scouts and trick-or-treaters generally manage to avoid many of the residences that officers are required to visit.

**SIDE AND BACK DOORS:** Officers may also walk on access routes leading to doors in the side or back

<sup>8</sup> See *Florida v. Jardines* (2013) \_\_ U.S. \_\_ [133 S.Ct. 1409, 1414] [“We therefore regard the area immediately surrounding and associated with the home—what our cases call the curtilage—as part of the home itself for Fourth Amendment purposes.”]; *Oliver v. United States* (1984) 466 U.S. 170, 180 [“[T]he common law distinguished ‘open fields’ from the ‘curtilage’ ... The distinction implies that only the curtilage, not the neighboring open fields, warrant the Fourth Amendment protections that attach to the home.”].

<sup>9</sup> **NOTE:** Citing *California v. Ciraolo* (1986) 476 U.S. 207, 213 the Court said the Fourth Amendment permits “visual observation of the home from public navigable airspace,” if the flight was conducted “in a physically nonintrusive manner.”

<sup>10</sup> See *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 629. Also see *U.S. v. Shuck* (10th Cir. 2013) 713 F.3d 563, 567 [“The portion of the curtilage that is the normal route of access for anyone visiting the premises is only a semi-private area on which police may set foot if they restrict their movements to places visitors could be expected to go.”].

<sup>11</sup> (2013) \_\_ U.S. \_\_ [133 S.Ct. 1409, 1415]. Edited.

yards if, based on the layout of the property and the nature of the walkway, they reasonably believed that visitors were also impliedly invited to use these doors to contact the occupants.<sup>12</sup>

**APARTMENTS:** Walking to the front of an apartment building or other multi-occupant residence, opening an unlocked front door and entering the vestibule and other common areas of an apartment building does not constitute a search.<sup>13</sup> A search is, however, apt to result if officers entered with a drug-detecting dog or engaged in any activities that would not be expected of visitors; e.g., looking into open doors and windows, or generally exploring the premises.<sup>14</sup>

**“NO TRESPASSING” SIGNS:** The presence of NO TRESPASSING signs outside homes and apartments does not ordinarily constitute a revocation of the occupants’ implied consent to walk to the front door via normal access routes.<sup>15</sup> As the Tenth Circuit observed:

[J]ust the presence of a “No Trespassing” sign is not alone sufficient to convey to an objective officer, or member of the public, that he cannot go to the front door and knock. Such signs, by themselves, do not have the talismanic quality.<sup>16</sup>

The court added, however, that a “No Trespassing” sign might operate as a revocation of implied consent if it “clearly revoked the implied license extended to members of the public, including police officers, to enter the home’s curtilage and knock on the front door, seeking to speak consensually with the occupants.”

**FENCES:** Based on the logic pertaining to NO TRESPASSING signs, it would seem that the existence of a fence surrounding the front yard would not prevent officers from opening the gate to the fence and walking to the front door except in the unusual situation in which the fence was locked or was constructed in a manner that clearly constituted an implied revocation of implied consent to enter.

### Actions at the door

The Court in *Jardines* also ruled that, even if officers have reached the front door via a normal access route, they may do only those things that the occupants impliedly authorized them to do. In most cases, this means they may “knock promptly, wait briefly to be received, and then (absent an invitation to linger longer) leave.” This is why *Jardines* does not affect the legality of knock and

<sup>12</sup> See *U.S. v. Garcia* (9th Cir. 1993) 997 F.2d 1274, 1280 [officers may go to the back door if they reasonably believe “it is used as a principal entrance to the dwelling.”]; *U.S. v. Hopkins* (8th Cir. 2016) \_\_ F.3d \_\_ [2016 WL 3063344] [the walkway “created an implied invitation for a visitor to go up and knock on one or both of the two doors.”]; *U.S. v. Shuck* (10th Cir. 2013) 713 F.3d 563 [“the officers used the normal route of access, which would be used by anyone visiting this trailer”].

<sup>13</sup> See *People v. Shaw* (2002) 97 Cal.App.4th 833, 840; *U.S. v. Sweeney* (7th Cir. 2016) \_\_ F.3d \_\_ [2016 WL 2642058] [“there is generally no reasonable expectation of privacy in shared and common areas in multiple-dwelling residential buildings”]; *U.S. v. Jackson* (4th Cir. 2013) 728 F.3d 367, 375 [“the trash can was sitting in the common area of the apartment complex courtyard, which included the grass areas and common sidewalks, readily accessible to all who passed by”].

<sup>14</sup> See *U.S. v. Burston* (8th Cir. 2015) 806 F.3d 1123 [sniff six to ten inches from an apartment window]; *U.S. v. Whitaker* (7th Cir. 2016) 820 F.3d 849, 854 [“The practical effects of *Jardines* also weigh in favor of applying its holding to dog sniffs at doors in closed apartment hallways.”]; *U.S. v. Hopkins* (2016) \_\_ F.3d \_\_ [2016 WL 3063344] [a drug-detecting dog was “directly in front” of the apartment” and “was within six to eight inches of the door”];

<sup>15</sup> See *Oliver v. United States* (1984) 466 U.S. 170, 182, fn.13 [“Certainly the Framers did not intend that the Fourth Amendment should shelter criminal activity wherever persons with criminal intent choose to erect barriers and post ‘No Trespassing’ signs.”]; *New York v. Class* (1986) 475 U.S. 106, 114 [“[E]fforts to restrict access to an area do not generate a reasonable expectation of privacy where none would otherwise exist.”]; *California v. Ciraolo* (1986) 476 U.S. 207, 213 [“Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer’s observations from a public vantage point where he has a right to be and which renders the activities clearly visible.”].

<sup>16</sup> *U.S. v. Carloss* (10th Cir. 2016) 818 F.3d 988, 995.

<sup>17</sup> See *People v. Rivera* (2007) 41 Cal.App.4th 304, 310 [“A number of federal and state courts employ this phrase [‘knock and talk’] to describe officers knocking on the door of a house, identifying themselves as police officers, asking to talk to the occupant about a criminal complaint, and eventually requesting permission to enter.”]

talks since that is the usual procedure.<sup>17</sup> “*Jardines* expressly recognizes,” said the Tenth Circuit, “that a police officer, like any member of the public, has an implied license to enter a home’s curtilage to knock on the front door, seeking to speak with the home’s occupants.”<sup>18</sup>

### What officers may do on normal access routes

Although officers have implied consent to walk on normal access routes, the Court in *Jardines* ruled they do not have implied consent to engage in activities that go beyond what is expected of visitors. As the Court explained, “The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose.”<sup>19</sup> And because the “specific purpose” of the officers’ entry is limited to reaching the front door, they are not permitted to search the area or do anything else that visitors would not normally do. For example, the Court pointed out that officers may not “peer into the house through binoculars with impunity.”

At this point, the facts of *Jardines* may help put the new rule into perspective. It started with a tip to Miami-Dade police (the Court didn’t say whether it was a reliable tip) that Joelis Jardines was growing marijuana inside his home. Consequently, two officers with a marijuana-detecting K9 went to Jardines’ home and walked up to the front door. But before they knocked, the dog signaled that he could smell marijuana. Specifically, he started “energetically exploring the area for the strongest point source of that odor” and “began tracking that airborne odor by tracking back and forth.” So the officer gave the dog “the full six feet of the leash plus whatever safe distance [he could] give him,” and he also stood back so that he would not “get knocked over” while the dog was “spinning around trying to find” the source.

Based on the dog’s behavior, officers obtained a warrant to search Jardines home and, as expected, they found marijuana plants. On appeal, the Florida Supreme Court ruled that the marijuana plants should be suppressed on grounds that “the use of the trained narcotics dog to investigate Jardines’ home was a Fourth Amendment search.” The state appealed to the United States Supreme Court.

The Court acknowledged that, like any other visitor, the officers had implied consent to walk to his front door. But it ruled they did not have his implied consent to search for evidence while doing so—and that’s what they did by means of the K9. Said the Court:

To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police.

Consequently, the Court concluded that the search warrant was invalid because it was based on information obtained illegally. Said the Court, “That the officers learned what they learned only by physically intruding on Jardines’ property to gather evidence is enough to establish that a search occurred.”

Although, as noted earlier, *Jardines* should not affect the legality of knock-and-talks per se, a knock and talk could become an illegal search if officers engaged in conduct on the property that went beyond the degree of intrusiveness that residents normally expect from uninvited callers. This might occur, for example, if the officers remained standing at the front door for an extended period of time without knocking, or if a resident indicated he did not want to talk to the officers but they stayed anyway and tried to convince him to change his mind. POV

<sup>18</sup> *U.S. v. Carloss* (10th Cir. 2016) 818 F.3d 988, 882.

<sup>19</sup> ALSO SEE *U.S. v. Lundin* (9th Cir. 2016) 817 F.3d 1151, 1160 [“[T]he scope of the license to approach a home and knock is limited not only to a particular area but also to a specific purpose.” Emphasis added.].

# Recent Cases

## Birchfield v. North Dakota

(2016) \_\_ US \_\_ [136 S.Ct. 216]

In *Birchfield*, the Supreme Court made the following rulings pertaining to obtaining blood and breath samples from DUI arrestees:

**BREATH TESTS:** Pursuant to the Fourth Amendment and California’s Implied Consent Law,<sup>1</sup> a DUI arrestee who refuses to submit to a breath test may be subjected to additional penal consequences as required by Vehicle Code section 23577. Thus, officers should continue to notify arrestees of such consequences when seeking consent to a breath test.

**BLOOD TESTS:** The taking of a blood sample from a DUI arrestee without a warrant or consent violates the Fourth Amendment. Said the Court in *Birchfield*, “[T]he search incident to arrest doctrine does not justify the warrantless taking of a blood sample.” Although California has an Implied Consent Law by which consent to blood testing may be implied,<sup>2</sup> the Court in *Birchfield* effectively ruled that this law cannot produce implied consent for the taking of a blood sample because that procedure is much more intrusive than the taking a breath sample. We say “effectively” because the Court’s exact ruling was that a statute may not impose penal consequences or otherwise criminalize a DUI arrestee’s refusal to submit to a blood test. And yet, California Vehicle Code sections 23577 and 23612(a)(1)(B) do just that by requiring mandatory and additional jail time if the arrestee refused to submit to blood testing and was later convicted.

What about seeking the arrestee’s express consent to a blood draw? It has been suggested that officers can obtain voluntary consent if they ignore the legal requirement that they inform the arrestee that his refusal to submit will result in mandatory and additional jail time if he is convicted.<sup>3</sup> The theory is that, without such notification, the arrestee’s consent would probably be deemed voluntary because he would be unaware that a refusal would

have penal consequences and, therefore, he would not feel coerced into submitting to a blood test. This might work, but there could be a downside. We have noticed that some proponents refer to this tactic euphemistically as “tinkering” with the Vehicle Code. And that’s what it does. The problem is that when DUI defense lawyers raise this issue in court (and they *will*) the judges who preside over these cases might not take such a cavalier attitude about officers “tinkering” with California statutes, or about prosecutors urging them to do so. Remember there is another option: apply for a search warrant.

## Utah v. Strieff

(2016) \_\_ U.S. \_\_ [136 S.Ct. 2056]

### Issue

If officers detain a suspect illegally, but then learn he is wanted on an arrest warrant, must a court suppress any evidence discovered during a search incident to the arrest?

### Facts

An officer in Salt Lake City detained Strieff after seeing him walk out of a house that was under surveillance for suspected narcotics activity. So he detained him and in the course of the detention was notified that Strieff was wanted on a traffic-related arrest warrant. So he searched him incident to the arrest and discovered drug paraphernalia and a baggie of methamphetamine. Strieff filed a motion to suppress the evidence on grounds that the officer lacked reasonable suspicion to detain him.

Although there were, in fact, insufficient grounds to detain Strieff, the prosecution argued that the evidence was nevertheless admissible because the link between the illegal detention and the discovery of the evidence was sufficiently attenuated by the discovery of the arrest warrant. The trial court agreed, and Strieff eventually appealed to the Supreme Court.

<sup>1</sup> Veh. Code § 23612.

<sup>2</sup> Veh. Code § 23612(a)(1)(B).

<sup>3</sup> See Veh. Code §§ 23577(a)(2); 23612(a)(1)(D).

## Discussion

Under the so-called “Fruit of the Poisonous Tree Rule,” evidence that would otherwise be suppressed may be admissible if prosecutors can prove that the link between its discovery and the officer’s misconduct was sufficiently weakened or attenuated by an “independent intervening act.” This rule is based on the principle that “the chain of causation proceeding from the unlawful conduct” may become sufficiently weak so as “to remove the ‘taint’ imposed upon that evidence by the original illegality.”<sup>4</sup> How do the courts determine whether such a break in the chain of causation has occurred? As a practical matter, it requires three things:

- (1) DERIVATIVE EVIDENCE: The “fruit of the poisonous tree” exception applies only to evidence that was “derivative,” which essentially means that the illegal search or seizure generated an act, condition, situation, or information that had the potential to—but did not inevitably—result in the discovery of the evidence.<sup>5</sup> In contrast, evidence is deemed “primary” if there was a swift and predictable progression from the constitutional violation to the discovery of the evidence.
- (2) OFFICER’S MISCONDUCT NOT FLAGRANT: Evidence will almost always be deemed tainted if the officers intentionally or recklessly disregarded the law for the purpose of obtaining it.<sup>6</sup> As the Court of Appeal observed, “[F]lagrancy and purposefulness of police misconduct, is considered the most important [factor] because it is tied directly to the rationale underlying the exclusionary rule, deterrence of police misconduct.”<sup>7</sup>

- (3) INDEPENDENT INTERVENING ACT: If a search was not flagrantly illegal, the resulting evidence will usually be admissible if something happened between the time of the officer’s misconduct and the discovery of the evidence. As noted, such an occurrence is called an independent intervening act.<sup>8</sup> “Evidence is admissible.” said the Court in *Strieff*, “when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance . . . .”

In *Strieff*, it was apparent that the first two requirements were met. First, the evidence was “derivative” because its discovery did not result from a swift and predictable progression beginning with the illegal detention. Second, although the prosecution conceded that the officer lacked reasonable suspicion to detain Strieff for suspicion of possessing drugs, the officer’s actions were not flagrant because the officer was aware of some circumstances that tended to—although they ultimately failed—to establish reasonable suspicion. As the Court pointed out, “[T]here is no evidence that [the officer’s] illegal stop reflected flagrantly unlawful police misconduct.”

The question, then, was whether the officer’s discovery of the outstanding arrest warrant constituted an independent intervening act. It did, said the Court, pointing out that “the warrant was valid, it predated [the officer’s] investigation, and it was entirely unconnected with the stop.” Accordingly, the Court ruled that the “discovery of that warrant broke the causal chain between the unconstitutional stop and the discovery of evidence by compelling [the officer] to arrest Strieff.”<sup>9</sup>

<sup>4</sup> *United States v. Crews* (1980) 445 U.S. 463, 471.

<sup>5</sup> See *Murray v. United States* (1988) 487 U.S. 533, 536-37 [evidence is “derivative” if it was “the product of the primary evidence, or [was] otherwise acquired as an indirect result of the unlawful search”]; *New York v. Harris* (1990) 495 U.S. 14, 19 [“the indirect fruits of an illegal search or arrest should be suppressed when they bear a sufficiently close relationship to the underlying illegality”].

<sup>6</sup> See *Kaupp v. Texas* (2003) 538 U.S. 626, 633; *Brown v. Illinois* (1975) 422 U.S. 590, 604.

<sup>7</sup> *People v. Bates* (2013) 222 Cal.App.4th 60, 70.

<sup>8</sup> See *People v. Sims* (1993) 5 Cal.4th 405, 445 [“The degree of attenuation that suffices to dissipate the taint requires at least an intervening independent act by the defendant or a third party to break the causal chain in such a way that the [evidence] is not in fact obtained by exploitation of the illegality.”]; *In re Richard G.* (2009) 173 Cal.App.4th 1252, 1262.

<sup>9</sup> Also see *People v. Brendlin* (2008) 45 Cal.4th 262, 272 [“[T]he outstanding warrant sufficiently attenuated the connection between the unlawful traffic stop and the subsequent discovery of the drug paraphernalia.”].

## People v. Espino

(2016) 247 Cal.App.4th 746

### Issues

(1) Was a traffic stop unduly prolonged? (2) Was the defendant under illegal de facto arrest when he consented to a search of his car?

### Facts

At about 7:30 P.M. an officer in Gilroy stopped Espino for speeding. After obtaining Espino's license, registration, and proof of insurance, the officer returned to his patrol car and ran a warrant check. There were no warrants, but the computer showed that Espino was a registered sex offender. The officer attempted to verify that Espino still lived at the address listed on his sex offender registration form but was unable to reach the officer who might have had that information. About then, a detective contacted the officer and asked him to "hang on" to Espino until the detective arrived at the scene because the detective had information from a reliable informant that Espino was selling drugs and firearms. Based on this information, the officer ordered Espino to remain in his car while he waited for the detective.

When the detective and backup arrived about six minutes later, the officer ordered Espino to step out and walk to the sidewalk. While Espino was explaining that he still lived at the address on the registration form, he put his hands in his pockets several times. For that reason, the officer obtained Espino's consent to search his pockets. During the search, he felt a "hard, small, little object" that was consistent with rock cocaine. At that point, Espino was handcuffed. The officer then used his patrol car spotlight to closely examine the suspected cocaine and discovered it was a diamond. While possession of a diamond in the pocket of a detainee is unusual, it is not illegal. Thus, probable cause to arrest suddenly disappeared.

Still suspicious, the officer sought and obtained Espino's consent to search his car. But Espino remained handcuffed and was also told to sit on the curb. In the course of the search, officers found several grams of methamphetamine and an electronic scale. The time that elapsed between the car stop and the search of the car was about 13 minutes. In the trial court, Espino argued that the evidence should be suppressed because his detention was illegal. The trial court denied the motion and Espino pled guilty.

### Discussion

The detention and handcuffing of Espino raised several legal issues that had to be resolved to determine if his consent to search his car was given during a lawful detention. Those issues were as follows.

**DURATION OF DETENTION:** As noted, Espino was detained for about 13 minutes. Although there is no absolute time limit on detentions,<sup>10</sup> and although officers are not required to "move at top speed,"<sup>11</sup> they must carry out their duties diligently. As the Supreme Court explained in the context of traffic stops, "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."<sup>12</sup>

Officers are, however, permitted to do certain things that are not directly related to the traffic matter. Again quoting the Supreme Court, "Beyond determining whether to issue a traffic ticket, an officer's mission includes ordinary inquiries incident to the traffic stop."<sup>13</sup> Such inquiries, said the Court, typically involve "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." Furthermore, as the court in *Espino* explained, "If the police develop reasonable suspicion of some other criminal activity, they may expand the scope of the detention to investigate that activity."

<sup>10</sup> See *United States v. De Hernandez* (1985) 473 U.S. 531, 543; *People v. Gallardo* (2005) 130 Cal.App.4th 234, 238.

<sup>11</sup> *U.S. v. Hernandez* (11th Cir. 2005) 418 F.3d 1206, 1212, fn.7. Also see *U.S. v. Harrison* (2nd Cir. 2010) 606 F.3d 42, 45 [no requirement to terminate "at the earliest possible moment"].

<sup>12</sup> *Illinois v. Caballes* (2005) 543 U.S. 405, 407.

<sup>13</sup> *Rodriguez v. United States* (2015) \_\_ US \_\_ [135 S.Ct. 1609, 1611].

Applying these principles to the facts, the court ruled that the initial detention of Espino was not unduly extended because, in addition to the traffic violation, the officer had reason to investigate Espino's compliance with his sex offender registration requirements, the report from a reliable informant that he was selling drugs and weapons, and his furtive movements to his pockets.

**HANDCUFFING:** Next, Espino argued that his detention became a de facto arrest when he was handcuffed. Because it is settled that officers may handcuff detainees if they reasonably believed the precaution was necessary,<sup>14</sup> the issue was whether the officers had such a reasonable belief.

Some circumstances indicated they did not. As the court pointed out, Espino made no physical threats, he was "peaceful and compliant at all times," and he was also outnumbered by officers three-to-one. But there were two other circumstances that were overriding. First, an officer had felt a small, hard object in Espino's pocket during the pat search, and it felt like a rock of cocaine. Second, an officer had received a reliable tip that Espino was selling drugs. Consequently, the court ruled that these circumstances provided the officers with probable cause to arrest Espino and, therefore, they had a legal right to handcuff him.

**PROBABLE CAUSE VANISHES:** Sometimes probable cause to arrest will disappear even before the arrestee is placed in a patrol car. And that happened here when the officers discovered that the suspected rock of cocaine in Espino's pocket was actually a diamond. While it might be interesting to know why Espino was carrying a diamond in his pocket, it really didn't matter because it is not illegal to do so. What was important was that probable cause no longer existed when Espino consented to the search of his car. And because he was still handcuffed when he consented, he was under an illegal de facto arrest. As the court explained, the officers had a duty to remove the handcuffs "within a reasonable amount

of time" after they determined that Espino posed no threat to them and that they no longer had probable cause to arrest him. As the result, the court ruled the search was unlawful and the evidence in Espino's car should have been suppressed.

## U.S. v. Torres

(9th Cir. 2016) \_\_ F.3d \_\_ [2016 WL 3770517]

### Issues

(1) Did officers have sufficient reason to impound the vehicle of an arrestee and conduct an inventory search? (2) Was the search of the engine compartment excessive in its scope?

### Facts

An anonymous caller phoned 911 in Las Vegas and said he had just seen a man pulling the hair of a female passenger while they were driving down a street. The caller said the driver had just pulled into the parking lot of a certain apartment complex and he provided a description of the car.

The first officer on the scene saw a car matching that description in the parking lot. A man was sitting behind the steering wheel and a woman was sitting on the front passenger's seat. The officer also noticed that the car was parked so that it blocked an entrance for emergency vehicles and was also blocking in two legally parked cars. The officer walked up to the driver's side and spoke with the man, later identified as Jimmy Torres. There was alcohol on Torres' breath and the officer subsequently arrested him after he failed two field sobriety tests. A

For the following reasons, the officer decided to impound the vehicle: (1) Torres was going to jail, (2) his car was blocking emergency vehicles and two parked cars, (3) his passenger did not have a driver's license, (4) the name of the vehicle's registered owner could not be determined via the computer, and (5) neither Torres nor his passenger lived in the apartment complex.

<sup>14</sup> See *People v. Celis* (2004) 33 Cal.4th 667, 675 ["[S]topping a suspect at gunpoint, handcuffing him, and making him sit on the ground for a short period, as occurred here, do not convert a detention into an arrest."]; *People v. Osborne* (2009) 175 Cal.App.4th 1052, 1062 ["[A] police officer may handcuff a detainee without converting the detention into an arrest if the handcuffing is brief and reasonably necessary under the circumstances"]; *In re Carlos M.* (1990) 220 Cal.App.3d 372,385 ["The fact that a defendant is handcuffed while being detained does not, by itself, transform a detention into an arrest."].

Las Vegas Metropolitan Police (LVMP) regulations required that officers who impound a vehicle conduct an inventory search of its contents, including the engine, battery, and radiator. Accordingly, the officer searched the car's engine compartment, unlatched the air filter, and discovered a semi-automatic handgun. After Torres' motion to suppress the gun was denied, he pled guilty to federal weapons charges.

## Discussion

The requirements for impounding and searching a vehicle are fairly standard. First, the towing must have been reasonably necessary under the circumstances, and (2) the search must have been conducted in accordance with departmental policy or standard practices.

**THE IMPOUND:** LVMP regulations require that officers impound a vehicle if, among other things, (1) the registered owner is not in the vehicle and cannot respond within 30 minutes or so, (2) there is no licensed driver in the car, and (3) it is parked illegally. These requirements were met because Torres was not the registered owner, the passenger did not have a valid license, and the vehicle was not legally parked. In addition, the car's registration had lapsed and, said the court, "the evidence suggests that there was no information available to the officers on the scene that clearly identified [the passenger] as the registered owner." Accordingly, the court ruled the impound was lawful because, as it explained, "Once a vehicle has been legally impounded, the police may conduct an inventory search without a warrant."

**SCOPE OF THE SEARCH:** Officers with authority to conduct an inventory search may search any part of the vehicle that department regulations required or permitted them to search, or was searched as a matter of standard practice. As the California Supreme Court explained, "the record must at least indicate that police were following some 'standardized criteria' or 'established routine' when they elected to open the containers."<sup>15</sup>

Per LVMP regulations, officers are required to search, among other things, "all containers." While an air filter is not a common container, the court ruled the search was reasonable in its scope because the "all containers" requirement "plainly contemplates that inventory searches of impounded vehicles will encompass closed spaces." Furthermore, the court ruled that the search of the air filter was lawful because the officers testified that "their standard practice when inspecting the engine cabin is to search the air filter compartment" and also because the "air filter compartment was obviously large enough to hold a firearm."

Accordingly, the court ruled that impoundment and search were lawful because they were conducted in accordance with LVMP policy and the officer's own established routine.<sup>16</sup>

## U.S. v. Thomas

(11th Cir. 2016) 818 F.3d 1230

### Issues

(1) Did the defendant's wife have common authority over computers that she and her husband used in the family home? (2) Were officers required to wake up her husband and obtain his consent before searching the computers?

### Facts

At about 11 A.M., while her husband was still sleeping, Caroline Olausen got up and went to their family home-office where she turned on the monitor for their HP computer and clicked the "restore previous internet session" button. The result was that about ten websites popped up, some of them containing child pornography. She immediately notified the Largo Police Department in Florida where she lived. When a detective arrived, Olausen told him that her husband, Eric Thomas had been using the computer the previous night while she was away from the home. She also explained that she and Thomas both knew the password to the computer, that Thomas was the primary user, and that

<sup>15</sup> *People v. Williams* (1999) 20 Cal.4th 119, 127.

<sup>16</sup> See *Florida v. Wells* (1990) 495 U.S. 1, 4 [search conducted in accordance with "standardized criteria or established routine"].

he was “normally compulsive about properly shutting down the computers, using pop-up ware and spam filters, and deleting his Internet cookies.” Olausen then consented to a search of the computer and two others; the detective did not seek the consent of Thomas, who was still sleeping.

While another detective was conducting a forensic scan of a Dell computer, Thomas woke up and started walking toward the home-office. An officer intercepted him and told him to wait in the living room where he was met by another detective who sought his consent to search the computers. At first, Thomas agreed. But then he said he wanted to talk to Olausen first. When Olausen said she did not want to talk with him, he said he wanted to talk to a lawyer. The detectives interpreted this as a revocation of his consent, so they discontinued the search, seized the computers and, two days later, obtained a warrant to search them. During the warranted search, they found 860 images of child pornography. Thomas’s motion to suppress the images was denied and he appealed to the Eleventh Circuit.

## Discussion

Thomas argued that all of the evidence should have been suppressed because the officers were aware that he was sleeping in the house and they were therefore required to awaken him and obtain his consent even though Olausen had already consented. Specifically, Thomas contended that (1) his wife did not have the authority to consent to searches of computers that were used primarily by him; and (2) the officers were required to awaken him and obtain his consent because they knew that he was asleep in his bedroom,

**SPOUSE’S AUTHORITY TO CONSENT:** A suspect’s spouse may ordinarily consent to a search of the family home and the property inside if, as is usually

the case, the spouses have “common authority” over the premises.<sup>17</sup> Because common authority exists if the consenting spouse was a joint owner or user of the property,<sup>18</sup> it seemed apparent that Olausen had common authority over the computers. But Thomas argued that because he was the primary user, Olausen lacked common authority over them, and that the officers knew it and therefore they violated his Fourth Amendment rights when they searched it without his consent.

Although there is a legal presumption that each spouse has common authority over the family home and its contents,<sup>19</sup> it is a rebuttable presumption which, according to Thomas, was effectively rebutted by the fact that he was the primary user and that he had taken steps to delete his Internet history. The court disagreed:

The fact that Thomas was the primary user of the computer, worked from the family home, and typically deleted his Internet history, used pop-up-ware and spam filters, and usually fully shut down the HP computer (although he did not on the night in question) were insufficient to show that Olausen lacked the requisite common authority to provide consent. Despite Thomas’s security measures, Olausen had joint access and control over the computer for most purposes, and Thomas did not isolate his Internet use in a manner that prevented Olausen from accessing it all together.

The court added that it was “particularly significant that Thomas did not protect his Internet history from Olausen by maintaining a separate login name and password or by encrypting his files.”<sup>20</sup>

**DUTY TO OBTAIN THOMAS’S CONSENT:** As noted, Thomas also argued that Olausen’s consent was ineffective because the officers had a duty to wake him up so he could veto it. This argument was based

<sup>17</sup> See *Illinois v. Rodriguez* (1990) 497 U.S. 177, 179; *United States v. Matlock* (1974) 415 U.S. 164, 170.

<sup>18</sup> See *Georgia v. Randolph* (2006) 547 U.S. 103, 114; *Frazier v. Cupp* (1969) 394 U.S. 731, 740.

<sup>19</sup> See *People v. Duren* (1973) 9 Cal.3d 218, 241 [“[S]ince a wife normally exercises as much control over the property in the home as the husband, police officers may reasonably assume that she can properly consent to a search thereof.”].

<sup>20</sup> **NOTE:** The affidavit in support of the warrant was based solely on information obtained from the HP computer before Thomas objected to the search. Thus, the information obtained during the warranted searches would also have been admissible under the Independent Source Rule. See *Murray v. United States* (1988) 487 U.S. 533, 542; *Segura v. United States* (1984) 468 U.S. 796, 814 [“None of the information on which the warrant was secured was derived from or related in any way to the initial entry into petitioners’ apartment”].

on the Supreme Court's decision in *Georgia v. Randolph*<sup>21</sup> in which the Court ruled that if one spouse consents to a search of the family home, the other spouse can override it if (1) the purpose of the search was to obtain evidence against the nonconsenting spouse, (2) the nonconsenting spouse informed officers that he objected to the search, and (3) the objection was made in the officers' presence when they sought to enter or search.

Although the first requirement was satisfied, and although the second was arguably satisfied when Thomas refused to consent until he talked with a lawyer, the third requirement was clearly not satisfied because Thomas was asleep when Olausen consented and, therefore, he did not object to the search in the officers' presence *when they sought consent* from Olausen. Moreover, the Supreme Court in *Randolph* expressly refused to dispense with the "in the presence" requirement, saying that the nonconsenting suspect "loses out" if he was merely "nearby but not invited to take part in the threshold colloquy."<sup>22</sup>

Consequently, the court ruled that, pursuant to *Randolph*, Thomas's attempted veto was unsuccessful, and it affirmed his conviction.

## U.S. v. Contreras

(7th Cir. 2016) 820 F.3d 255

### Issue

Did exigent circumstances justify a warrantless entry into a residential garage to recover drugs?

### Facts

DEA agents and Chicago police followed a suspected drug trafficker named Soto as he drove from his home to a nearby dumpster into which he discarded several items. When he left, officers inspected the dumpster and found several drug trafficking-related items, such as aluminum foil molded into a brick-shape about the size of a kilo of cocaine. As Soto drove away from the dumpster, other officers followed him as he went to the home of Luis Contreras where he drove directly into Contreras's two-car garage and closed the door. The officers

staked out the home, and one of them took up a position facing the garage door.

After a short while, the door opened completely and the officer had a "very clear" view of Soto and Contreras exchanging something that, according to the officer, "indicated the passing of money or drugs." Soto then walked to his van, which was also parked inside the garage, and he removed an orange shoebox with tape around the outside. The box was not, however, entirely secured with tape. As Soto was walking with the box toward Contreras, it "buckled" and fell to the ground, at which point "a rectangular white object wrapped in plastic fell out." The officer testified that "he recognized the object as a kilogram of narcotics. Officers then rushed into the garage, arrested both men and seized the contents of the shoebox, which was five kilograms of cocaine.

Officers *Mirandized* Contreras who waived his rights and admitted that there was also 2.5 kilograms of cocaine in one of the closets. The officers seized all of the cocaine, and Contreras was indicted for, among other things, conspiracy to possess and distribute 500 or more grams. When his motion to suppress the evidence was denied, he plead guilty to the conspiracy charge.

### Discussion

Contreras argued that the evidence should have been suppressed because (1) the officer violated his right to privacy when he looked into the garage, (2) the subsequent warrantless entry into the garage was unlawful because there were no exigent circumstances, and (3) his confession was involuntary because he was traumatized by the sudden arrival of the officers.

The first and third arguments were frivolous. As for Contreras's right to privacy, the court ruled that he didn't have one because he and Soto "conducted their drug transaction in an attached garage with the door wide open—in essence with one whole wall of the house removed by their choice and displaying their drug transaction in plain view." As for Contreras's confession, the court disposed of his claim that he was traumatized by pointing out, among other things, that by the time he confessed

<sup>21</sup> (2006) 547 U.S. 103.

<sup>22</sup> *Georgia v. Randolph* (2006) 547 U.S. 103, 121.

“the heat of the situation de-escalated quickly” and Contreras’s handcuffs had been removed.

The more important issue was whether the warrantless entry into the garage was lawful under the exigent circumstances exception to the warrant requirement. Per this exception, a warrantless entry is permitted if the need for police action—it’s urgency—outweighed its intrusiveness.<sup>23</sup> As the Supreme Court explained, “[W]e balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable.”<sup>24</sup> Here, the warrantless entry served two legitimate law enforcement interests: (1) taking into custody two men who had just engaged in what looked to be a hand-to-hand, multi-kilogram cocaine transaction, and (2) preventing the men from destroying the kilogram that had just fallen to the floor. Because these were both significant law enforcement interests, and because Contreras’s right to privacy became nonexistent when the garage door opened, the court ruled that exigent circumstances did, in fact, exist. Accordingly, it affirmed his conviction.

## U.S. v. Bohannon

(2nd Cir. 2016) \_\_ F.3d \_\_ [2016 WL 3067993]

### Issues

(1) If officers entered the home of third party for the purpose of serving an arrest warrant on a visitor, whose Fourth Amendment rights were violated if they did not have a search warrant? The arrestee’s? The third party’s? Both? (2) Did officers have sufficient reason to believe that the arrestee was inside the home they entered?

### Facts

Following a two year investigation into the drug and firearms activities of a criminal gang in Bridgeport, Connecticut, FBI agents obtained warrants to arrest more than a dozen of its members. The warrants were executed simultaneously at 6 A.M. One of the gang members was Jonathan Bohannon,

and the agents intended to arrest him at his home located on Crestview Drive. But shortly before 6 A.M. they developed reason to believe he was currently in the apartment of his girlfriend, Shonsai Dickson. This belief was based on the following:

- (1) Bohannon’s car was not parked anywhere in the vicinity of Crestview Drive, but it *was* parked in front of Dixon’s apartment.
- (2) When Bohannon’s cell phone was last used—at 2:38 A.M.—it was located in a cell phone sector that did not include Crestview Drive.<sup>25</sup> It was, however, located in a sector that included Dickson’s apartment.
- (3) In the course of the investigation, the agents learned that the gang sold drugs out of Dixon’s apartment which was the only residence in that cell sector that was linked to Bohannon.

Based on this new information, the agents were redirected to Dixon’s apartment which they entered pursuant to the arrest warrant and took Bohannon into custody. They also conducted a protective sweep during which they found bags of crack cocaine in plain view, plus a scale, firearms and ammunition. Bohannon was subsequently charged with federal drug and weapons crimes. Before trial, however, he filed a motion to suppress the evidence, and the motion was granted for reasons we will explain in the Discussion. The government appealed.

### Discussion

Bohannon argued that his motion to suppress was properly granted for two reasons: (1) the agents violated the so-called *Steagald* rule when they entered Dixon’s apartment without a search warrant, and (2) they lacked sufficient reason to believe that Bohannon was in the apartment when they entered.

**THE STEAGALD RULE:** In 1980, the Supreme Court in *Payton v. New York*<sup>26</sup> ruled that the issuance of an arrest warrant gives officers the authority to enter the arrestee’s home without a warrant for the purpose of arresting him. One year later, the Court ruled in *Steagald v. United States*<sup>27</sup> that if officers want to

<sup>23</sup> See *Brigham City v. Stuart* (2006) 547 U.S. 398, 404; *Illinois v. Lidster* (2004) 540 U.S. 419, 426.

<sup>24</sup> *Illinois v. McArthur* (2001) 531 U.S. 326, 331.

<sup>25</sup> **NOTE:** The agents had a warrant authorizing them to monitor Bohannon’s cell phone activities.

<sup>26</sup> (1980) 445 U.S. 573.

<sup>27</sup> (1981) 451 U.S. 204.

make the arrest inside the home of a third party, such as the arrestee's friends or relatives, they must have a search warrant. Applying these rules to the facts of the case, the trial court ruled that the absence of a search warrant rendered the agents' entry illegal as to Bohannon, and thus it ordered the suppression of the evidence found inside.

On appeal to the Second Circuit, the court acknowledged that Bohannon was a third party and that the agents did not have a search warrant, and therefore the entry constituted a violation of *Steagald*. But the court pointed out that the only people whose Fourth Amendment rights are implicated as the result of a *Steagald* violation are the people who lived in the home that the officers entered without a search warrant. And because Bohannon was merely an overnight guest, the agents' failure to obtain a search warrant did not violate *his* Fourth Amendment rights. (It should be noted that if the agents had arrested Dixon for possessing the cocaine, the evidence would not have been admissible against her because the entry would have violated her Fourth Amendment rights.<sup>28</sup>)

**REASON TO BELIEVE BOHANNON WAS INSIDE:** Although the entry into Dixon's apartment did not violate Bohannon's *Steagald* rights, the agents were still obligated to comply with one requirement that is imposed by *Payton*. Specifically, whenever officers make a nonconsensual and non-exigent entry into any home to execute an arrest warrant they must have "reason to believe" that the arrestee was currently inside the home.

There is, however, some uncertainty as to whether the "reason to believe" standard of proof is the equivalent of probable cause or whether it is a lower standard, like reasonable suspicion. While the Ninth Circuit and some other federal courts have ruled that it means probable cause, the California Court of Appeal has ruled that only reasonable suspicion is required,<sup>28</sup> and that was essentially the standard employed by the court in *Bohannon*. It then ruled that the facts listed above pertaining to the location of Bohannon's car and the timing of his cell phone

use satisfied this standard and, accordingly, it vacated the trial court's suppression order.

## U.S. v. Henry

(1st Cir. 2016) \_\_ F.3d \_\_ [2016 WL 3361730]

### Issues

(1) Did an officer have sufficient grounds to patdown a jacket near a suspected sex trafficker? (2) Did the officer have probable cause to reach inside the jacket? (3) Did officers have probable cause to seize the suspect's cell phones?

### Facts

The Department of Homeland Security (DHS) notified police officers in Portland, Maine that a woman, about 19-years old, was being held against her will at an unknown motel in Portland. DHS also said the woman (identified herein as A.H.) had previously been a victim of sex trafficking, and may have been transported from Michigan to New York for the purpose of prostitution. Checking the guest registries for Portland-area motels, an officer noticed that Paul Henry was currently registered at a motel that was linked to prostitution. This caught his attention for several reasons. First, Henry had been identified as a person involved in drug and sex trafficking in the Portland area. Second, Henry had an "extensive" criminal history in New York for drug trafficking, weapons crimes, and resisting arrest. Third, Portland officers had previously identified Henry as the man who had driven a 15-year old girl out of state for purposes of prostitution. So, three officers went to Henry's hotel to speak with him.

Immediately after knocking and announcing, the officers heard "the sounds of a flushing toilet, running water [and] people moving about." Seconds later, Henry opened the door and allowed the officers to enter. One of the officers noticed that a light in the bathroom was on and he heard the sounds of movement and running water inside. When asked who was in the bathroom, Henry responded, "My girl." The officers asked the woman to step outside

<sup>28</sup> See *Steagald v. United States* (1981) 451 U.S. 204, 219; *People v. Dyke* (1990) 224 Cal.App.3d 648, 658.

<sup>29</sup> *People v. Downey* (2011) 198 Cal.App.4th 652, 662.

and she complied. Based on a photo they had received from DHS, they recognized her as A.H. At this point, an officer asked her to step into the hallway so he could speak with her. This prompted Henry to yell at her that she didn't have to talk to the officers or answer any of their questions.

While the officer and A.H. were talking in the hallway, the officers inside noticed that Henry was becoming "increasingly excited," that he kept glancing at a jacket hanging on a clothes rack, and there was a "visible bulge" from under one of the jacket pockets. Thinking it might have been a weapon, an officer patted it down and felt what he immediately recognized as a "large amount of cash [\$12,000] wrapped in plastic." He removed it.

The officer also saw two cell phones in plain view. When asked about them, Henry said he used one of them to take pictures." The officer was aware that people involved in sex trafficking often use cell phones to set up "dates," communicate with prostitutes, and take pictures of prostitutes to post on websites. Meanwhile, A.H. was telling the officer in the hallway that she met Henry a couple of days earlier in New York, that he treated her "okay" but that she did not want to stay with him any longer.

Based on the above, an officer obtained warrants to search the motel room, plus Henry's car, and the cell phones. Displayed on one of the phones were videos of Henry having sex with the 15-year old runaway. As the result, Henry was arrested and charged with sexual exploitation of children. When his motion to suppress the money and videos was denied, he pled guilty and was sentenced to 180 months in prison.

## Discussion

On appeal, Henry argued that the money should have been suppressed because the patdown of his jacket, and the seizure of the money and cell phones were illegal. The court disagreed.

**PATting DOWN THE JACKET:** Henry objected to the patdown of his jacket because he was not wearing it at the time, and also because he was about eight feet away from it and, thus, a weapon inside would not

have constituted an immediate threat. The court responded that these circumstances do "not necessarily mean the jacket fell outside the vicinity within which [the officer] could perform a pat-down if he had reasonable suspicion that the jacket may contain a weapon." It then ruled that the officer did, in fact, have reasonable suspicion based on, among other things, evidence that Henry was involved in sex trafficking, his link to the disappearance of the runaway, the sounds when the officers knocked and announced, and Henry's yelling at A.H. not to answer the officer's questions.

**SEIZING THE MONEY:** Pursuant to the "plain feel" rule, an officer who is conducting a patdown may seize a felt object if he had probable cause to believe it was evidence.<sup>30</sup> Although Henry claimed the officer lacked probable cause, the court disagreed for the reasons mentioned above plus the fact that it felt like an especially large amount of cash.

**SEIZING THE CELL PHONES:** Pursuant to the "plain view" rule, officers do not need a warrant to seize evidence they saw if (1) they had a legal right to be at the location from which they initially saw it;<sup>31</sup> and (2), upon discovering it, but before they seized it, they had probable cause to believe it was evidence of a crime.<sup>32</sup> Because Henry had consented to the officers' entry, the only issue was whether, at the time they seized the cell phones, the officers had probable cause to believe the phones constituted evidence of a crime. Like the other issues, this was a fairly easy call because, among other things, (1) there was a lot of evidence that Henry was involved in sex-trafficking; (2) Henry said he used the phones to take photos, and the officers knew that smart phones are frequently used by sex traffickers to take photographs of their victims and to "facilitate prostitution"; and (3) Henry was unable to provide much information about "his girl" A.H.. Accordingly the court ruled that this information "was enough for [the officer] to have probable cause to believe that the phones likely had evidentiary value." For these reasons, the court ruled that Henry's motion to suppress was properly denied.

POV

<sup>30</sup> See *Minnesota v. Dickerson* (1993) 508 U.S. 366, 378; *People v. Holt* (1989) 212 Cal.App.3d 1200, 1204.

<sup>31</sup> See *Horton v. California* (1990) 496 U.S. 128, 136.

<sup>32</sup> See *Arizona v. Hicks* (1987) 480 U.S. 321.

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