POINT of VIEW

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This edition of Point of View
is dedicated to the memory of
Deputy Danny Oliver
Sacramento County Sheriff's Department
Investigator Michael Davis Jr.
Placer County Sheriff's Office
who were killed in the line of duty
on October 24, 2014

Contents

Probable Cause To Search

"There may be probable cause to search without probable cause to arrest, and vice-versa."[1]

While there are many similarities between probable cause to search and probable cause to arrest—and even though each of them frequently triggers the other[2]—they are entirely separate determinations with significantly different requirements. As the Sixth Circuit observed, "The two determinations are measured by similar objective standards but contain different inquiries."[3] The essential difference is that probable cause to arrest requires a link between the crime and the suspect, while probable cause to search requires a link between the evidence and the place to be searched."Mere evidence of a suspect's guilt," said the California Supreme Court, "provides no cause to search his residence."[4]

How can officers establish the necessary link between certain evidence and a particular location? As we will discuss in this article, it requires proof of three things: (1) that the evidence exists, (2) that it was once located at the place to be searched, and (3) it is still there.[5] As the Supreme Court explained:

> The critical element in a reasonable search is that there is reasonable cause to believe that the specific "things" to be searched for and seized are located on the property to which entry is sought.[6]

In some cases, all three requirements can be satisfied easily if an officer, informant, victim, or witness saw the evidence in the location and the search occurred immediately or so quickly thereafter that it was reasonable to believe it was still there. This commonly occurs when an officer stops a car and sees a gun or drugs in the passenger compartment.[7]

But the situation becomes much more complicated if no reliable source had seen the evidence or knew its current whereabouts. That's because it will be necessary for officers to establish probable cause by means of circumstantial proof, reasonable inference, or both. The question, then, is what must officers do—while writing a search warrant affidavit or testifying at a suppression hearing—to establish probable cause in this manner? There are essentially two things: (1) set forth the facts upon which the conclusion was based, and (2) provide the court with reasons to believe the conclusion is sound.

The Evidence Exists

It probably sounds obvious, but it is something that is frequently overlooked with dire consequences: probable cause to search for certain evidence requires proof that the evidence exists. As the court noted in *Fitzgerald v. City of Los Angeles*, "[P]olice may not conduct a search based on probable cause to believe a crime has been committed when no physical evidence exists for that crime."[8] This requirement can, of course, be easily satisfied by direct observation of the evidence by an officer, reliable informant, victim, or witness. Otherwise, officers must rely on logical inference which is usually based on the nature of the crime under investigation or a reliable source who saw, heard, or smelled something—at the crime scene or anywhere else—that sufficiently signified the existence of the evidence.

Inference based on nature of crime

When officers have probable cause to believe that a certain crime was committed they may usually infer

[1] *U.S. v. Rodgers* (9th Cir. 2011) 656 F.3d 1023, 1029.
[2] *People v. Gorrostieta* (1993) 19 Cal.App.4th 71, 85 ["there is "no discernable distinction between probable cause to believe a person is carrying narcotics and probable cause to arrest for carrying narcotics"].
[3] *Green v. Reeves* (6th Cir. 1996) 80 F.3d 1101, 1106.
[4] *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1206.
[5] See *Florida v. Harris* (2013) __ U.S. __ [133 S.Ct. 1050, 1055]; *People v. Frank* (1985) 38 Cal.3d 711, 727 ["the standard of probable cause is whether the affidavit [1] states facts [2] that make it substantially probable [3] that there is specific property [4] lawfully subject to seizure [5] presently located [6] in the particular place for which the warrant is sought"].
[6] *Zurcher v. Stanford Daily* (1978) 436 U.S. 547, 556 [Edited].
[7] See *California v. Carney* (1985) 471 U.S. 386, 395.
[8] (C.D. Cal. 2007) 485 F.Supp.2d 1137, 1149.

the existence of items that are commonly used to commit or facilitate such a crime; i.e., the "instrumentalities" of the crime. As the Court of Appeal explained, "[R]easonable inferences may be indulged as to the presence of articles known to be usually accessory to or employed in the commission of a specific crime."[9] For example, the courts have ruled that officers who have proved that a certain crime was committed might reasonably infer the existence of the following:

EVIDENCE OF DRUG TRAFFICKING: If there is probable cause to believe that a suspect was trafficking in illegal drugs, it follows that he uses the types of things that most drug traffickers use, such as scales, packaging materials, and "business" records. For example, in *U.S. v. Riley* the court ruled that officers reasonably inferred the existence of drug sales paraphernalia inside the defendant's storage locker because the defendant had "negotiated for the acquisition of, and accepted delivery of large quantities of narcotics."[10] Similarly, if there was probable cause to believe that a drug lab was operational in a certain place, officers may reasonably infer that the place contains the types of laboratory equipment, chemicals, and supplies that are commonly used in such labs.[11] Finally, having probable cause to believe that a suspect was cultivating marijuana, it may be reasonable to infer the existence of equipment that is necessary to grow marijuana.[12]

INCRIMINATING BUSINESS RECORDS: If there is reason to believe that certain premises are being used in conjunction with a criminal conspiracy or other ongoing crime, it is usually reasonable to infer the existence of records that such criminal enterprises usually keep; e.g., e.g., pay-and-owe sheets, "trick books." See "Existence of records based on common practice," below.

WORKPLACE VIOLENCE: As an example of more complex reasoning, the California Supreme Court ruled that, because officers had probable cause to believe that the defendant shot and killed fellow employees at his workplace, they could reasonably infer the existence of "weapons and explosives, photographs and documents" related to the business, and documents "concerning his employment at [the business]."[13]

Existence based on close association

The existence of some types of evidence may be based solely or partly on the discovery of another item or condition at the crime scene, in the suspect's possession, or elsewhere, if the two items are closely associated. In other words, if A and B are usually found together, and if officers found A, it may be reasonable to believe that B exists

DRUG CASES: Establishing probable cause by means of association is commonly used in drug cases where the following combinations of items and conditions are closely associated.

DRUG PACKAGING > DRUGS: Officers may reasonably believe there are drugs inside a container based on its unusual characteristics; e.g., tiny baggies,[14] "rectangular kilogram size packages,"[15] "small intricately folded papers" ("bindles"),[16] "translucent condoms containing a powdery substance and tied off at the ends."[17] Thus, in *Texas v. Brown* the Supreme Court noted that "the distinctive character of the balloon itself spoke volumes as to its contents—particularly to the trained eye of the officer."[18] However, containers commonly used for a legitimate purpose may not satisfy this requirement; e.g., film canisters.[19]

DRUGS FOR SALE > SALES PARAPHERNALIA: See "Inference based on nature of crime," above.

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[9] *People v. Senkir* (1972) 26 Cal.App.3d 411, 421. Also see *U.S. v. Spilotro* (9th Cir. 1986) 800 F.2d 959, 964.
[10] (2nd Cir. 1990) 906 F.2d 841, 84. Also see *People v. Sloss* (1973) 34 Cal.App.3d 74, 82-83.
[11] See *People v. McNabb* (1991) 228 Cal.App.3d 462, 46.
[12] See *People v. Senkir* (1972) 26 Cal.App.3d 411, 420-21; *People v. Vermouth* (1974) 42 Cal.App.3d 353, 362.
[13] See *People v. Farley* (2009) 46 Cal.4th 1053, 1099.
[14] See *People v. Nonnette* (1990) 221 Cal.App.3d 659, 666.
[15] See *People v. Rodriguez-Fernandez* (1991) 235 Cal.App.3d 543, 546-47. Also see *People v. Arango* (1993) 12 Cal.App.4th 450, 455.
[16] See *People v. Clayton* (1970) 13 Cal.App.3d 335, 337-38.
[17] See *People v. Parra* (1973) 30 Cal.App.3d 729, 735.
[18] (1983) 460 U.S. 730, 743. Also see *United States. v. Jacobsen* (1984) 466 U.S. 109, 121.
[19] See *People v. Holt* (1989) 212 Cal.App.3d 1200, 1205; *People v. Valdez* (1987) 196 Cal.App.3d 799, 806-7.

DRUGS FOR SALE > WEAPONS: Because drug sales and weapons are closely associated, it is usually reasonable to infer that weapons are on the premises where drugs are produced or sold.[20] "Illegal drugs and guns," said the court in *People v. Simpson*, "are a lot like sharks and remoras. And just as a diver who spots a remora is well-advised to be on the lookout for sharks, an officer investigating cocaine and marijuana sales would be foolish not to worry about weapons."[21]

DRUG USE PARAPHERNALIA > DRUGS: If officers find paraphernalia that is closely associated with a certain drugs, it is usually reasonable to believe that such drugs are nearby. For example, in *Wyoming v. Houghton* the Supreme Court ruled that, because officers saw a hypodermic syringe in the driver's shirt pocket, they reasonably believed there were injectable drugs in the vehicle.[22]

DRUG ODOR > DRUGS: A distinctive odor of drugs emanating from a place or container (whether detected by an officer or K9[23]) may establish probable cause to search for that type of drug.[24] As the Court of Appeal observed, "Odors may constitute probable cause if the magistrate finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify [drugs]."[25]

NON-DRUG CASES: Inferences based on close association may also be employed in other crimes.

WOUND OR INJURY > DEVICE THAT CAUSED IT: The existence of a particular type of murder or assault weapon may be based on the cause of death or injury. For example, in *People v. Schilling,* the court ruled that the existence of a "medium caliber handgun" could be inferred from the autopsy results;[26] and in *People v. Frank* the court ruled that the existence of pliers, rope, and pieces of flesh was proven by the condition of the victim's body.[27]

CRIME IN REMOTE AREA > MAPS: If the crime under investigation occurred in a remote location, it may be reasonable to infer that the perpetrator had maps or diagrams of the area. For example, in *People v. Carpenter*, because a series of murders occurred near remote hiking trails in Marin County (the "Trailside Murders"), it was reasonable to believe that the perpetrator possessed maps, books, and schedules pertaining to hiking in the area.[28]

AMMUNITION > FIREARMS: If officers saw ammunition in the suspect's car, it may be reasonable to infer there was a firearm in the passenger compartment.[29]

ALCOHOL ODOR > OPEN CONTAINER: Officers who smell fresh beer in the passenger compartment of a car may infer there is also an open container.[30]

Existence based on physiology or physics

Officers may infer the existence of trace evidence at certain crime scenes based on human physiology and basic physics. For example, it is usually reasonable to infer that fingerprints and DNA will be left at crime scenes where the perpetrator likely touched something. Similarly, at the scene of a shooting it is usually reasonable to infer there will be trace blood spatters, powder burns, and gunshot residue.[31]

Existence of data from common practice

The existence of certain data and documents may be based on inferences as to what types of records people, businesses, and agencies ordinarily possess, such as the following:

INDICIA: Probable cause to search for indicia in homes, cars, and businesses is commonly based solely on reasonable inference because, although officers seldom know exactly what indicia they will find, they can be fairly certain that they will find something. "[C]ommon experience tells us," said the Court of

[20] See *People v. Glaser* (1995) 11 Cal.4th 354, 367; *People v. Thurman* (1989) 209 Cal.App.3d 817, 822.
[21] (1998) 65 Cal.App.4th 854, 862.
[22] (1999) 526 U.S. 295.
[23] See *Illinois v. Caballes* (2005) 543 U.S. 405, 410; *People v. Stillwell* (2011) 197 Cal.App.4th 996, 1005-1006.
[24] See *United States v. Johns* (1985) 469 U.S. 478, 482; *People v. Waxler* (2014) 224 Cal.App.4th 712, 719.
[25] *People v. Benjamin* (1999) 77 Cal.App.4th 264, 273.
[26] (1987) 188 Cal.App.3d 1021, 1026, 1030.
[27] (1985) 38 Cal.3d 711, 722.
[28] (1999) 21 Cal.4th 1016, 1043. Also see *U.S. v. Wong* (9th Cir. 2003) 334 F.3d 831, 836.
[29] See *People v. DeCosse* (1986) 183 Cal.App.3d 404, 411; *U.S. v. Doward* (1st Cir. 1994) 41 F.3d 789, 793.
[30] See *People v. Molina* (1994) 25 Cal.App.4th 1038, 1042; *People v. Evans* (1973) 34 Cal.App.3d 175; Veh. Code §§ 23222-23226.
[31] See *People v. Schilling* (1987) 188 Cal.App.3d 1021, 1031; *People v. Superior Court (Nasmeh)* (2007) 151 Cal.App.4th 85, 101.

Appeal that houses and vehicles ordinarily contain evidence establishing the identities of those occupying or using them."[32]

RECORDS FOR LEGITIMATE BUSINESSES: If there is probable cause to seize or copy the records of a legitimate business, the existence of certain records may be based on common business practices; e.g., accounting and incorporation records, names and addresses of owners, suppliers, and customers.[33]

GOVERNMENT RECORDS: The existence of certain government records can also be inferred based on common practices of the governmental agency. For example, it is obviously reasonable to infer that a suspect's DMV records contain his photo, physical description, and current address.

"DELETED" COMPUTER FILES: Because "deleted" computer files are not necessarily deleted from a computer's hard drive, officers may ordinarily infer that they continued to exist, at least until is becomes reasonably likely that they had been overwritten.[34]

Where there's some, there's probably more

This is one of the most common inferences as to the existence and whereabouts of contraband: When officers are searching a home, business, or vehicle and they find contraband (usually drugs, illegal weapons, or stolen property) they can usually infer there is more of it nearby. Thus, in ruling that officers had probable cause to search, the courts have noted the following:

DRUGS

- We find that a person of ordinary caution would conscientiously entertain a strong suspicion that even if defendant makes only personal use of the marijuana found in his day planner, he might stash additional quantities for future use in other parts of the vehicle, including the trunk."[35]
- "Numerous cases have upheld search warrants on the theory that one who sells narcotics may have more at his residence or place of operations."[36]
- "We have all handled enough narcotics cases and thus gained knowledge of the habits of peddlers, that we may perhaps reasonably suspect that such a person who deals a small amount of merchandise from his home, has more where it came from."[37]
- "It requires no perspicacious intellect to reason the person smoking one marijuana cigarette may well want another and will carry sufficient marijuana to satisfy his appetite of the moment."[38]

ILLEGAL WEAPONS AND EXPLOSIVES

- "[G]iven Bowen's possession of one illegal gun, his gang membership, his willingness to use the gun to kill someone, and his concern about the police, a reasonable officer could conclude that there would be additional illegal guns."[39]
- "[T]he presence of one weapon may justifiably arouse concern that there may be more in the vicinity."[40]
- "[H]aving already arrested appellant for possession of one weapon, the deputy could have reasonably suspected the vehicle would contain other weapons."[41]
- When the deputy "found the loaded shotgun, probable cause to search the rest of the van was created."[42]

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[32] *People v. Rogers* (1986) 187 Cal.App.3d 1001, 1009. Also see *U.S. v. Crews* (9th Cir. 2007) 502 F.3d 1130, 1137.
[33] See *People v. Tuadles* (1992) 7 Cal.App.4th 1777, 1782, 1785; *People v. McEwen* (1966) 244 Cal.App.2d 534, 536; *U.S. v. Spilotro* (8th Cir. 1986) 800 F.2d 959, 964.
[34] See *U.S. v. Valley* (7th Cir. 2014) 755 F.3d 581, 586 ["This court has discussed the persistence of digital storage, noting that in only the 'exceptional case' will a delay between the electronic transfer of an image and a search of the computer "destroy probable cause to believe that a search of the computer will turn up the evidence sought." Citation omitted.]; *U.S. v. Seiver* (7th Cir. 2012) 692 F.3d 774, 776 ["And since a deleted file is not overwritten at all at once, it may be possible to reconstruct it from the bits of data composing it (called 'slack data'), which are still retrievable because they have not yet been overwritten"].
[35] *People v. Dey* (2000) 84 Cal.App.4th 1318, 1322.
[36] *People v. Superior Court (Marcil)* (1972) 27 Cal.App.3d 404, 413.
[37] *People v. Golden* (1971) 20 Cal.App.3d 211, 218-19 (dis. opn. of Kaus. J.).
[38] *People v. Brocks* (1981) 124 Cal.App.3d 959, 963.
[39] *Messerschmidt v. Millender* (2012) __ U.S. __ [132 S.Ct. 1235, 1246].
[40] *U.S. v. Christian* (D.C. Cir. 1999), 187 F.3d 663, 669.
[41] See *People v. Carrillo* (1995) 37 Cal.App.4th 1662, 1669; *People v. Nicholson* (1989) 207 Cal.App.3d 707, 712.
[42] *People v. Benites* (1992) 9 Cal.App.4th 309, 328.

STOLEN PROPERTY

- "[Having] probable cause that the automobile contained stolen property and dangerous weapons, the officers were reasonably justified in continuing their search for other property that might have been stolen or other dangerous instrumentalities."[43]
- Probable cause to search the suspects' motel room was based on probable cause that they "were participants in a wide scheme of credit card fraud" and, when arrested earlier, they were carrying "numerous counterfeit credit and identification cards, large amounts of cash [suggesting] that additional items of that sort existed elsewhere."[44]
- Having found $21,000 in cash in the suspect's car, and having probable cause to believe it was loot from a robbery, officers could search for more.[45]
- "The presence of some stolen property in [the home] reasonably could have suggested to the magistrate judge that other contraband was not far away."[46]

The "boilerplate" problem

Before moving on, a word about a related subject known as "boilerplate." In the context of probable cause to search, the term "boilerplate" means a list of evidence—usually lengthy—that officers copied verbatim or otherwise lifted from other search warrants for the same or similar crime.[47] The problem with boilerplate is that, unless the list is carefully edited, it will usually include evidence whose existence has not been established in the affidavit. For example, in *People v. Holmsen*[48] an officer obtained a warrant to search Holmsen's house for cocaine and "papers showing or tending to show the trafficking of cocaine." Although the officer had probable cause to search for cocaine, the court suppressed all of the papers they found because the affidavit contained nothing to indicate that Holmsen was involved in any sort of conspiracy.

A more egregious example is found in *People v. Frank* in which the California Supreme Court ruled that a search warrant was overbroad because "nowhere in all these 24 pages [of the affidavit] was there alleged one single fact that gave probable cause to believe that any of the boilerplate allegations of the warrant were true."[49] As we will discuss later, however, there are some situations in which boilerplate may be appropriate.

Location of the Evidence

In addition to proving the evidence exists, officers must prove there is a fair probability that it was manufactured or transported to the place to be searched. This, too, can be established by direct proof, as when an officer or other reliable source saw the evidence in the location. But, lacking an eyewitness, officers will need to invoke the "nexus" rule.

The "nexus" rule

The "nexus" rule essentially says that probable cause to believe that evidence was taken to or produced at a certain place can be established by means of a "nexus"—meaning a sufficient link or connection—between the sought-after evidence and the place or thing to be searched.[50] And, as the Ninth Circuit explained, such a nexus may be established by direct proof or reasonable inference:

> The required nexus between the items to be seized and the place to be searched rests not only on direct observation, but on the type of crime, the nature of [the evidence], the extent of the suspects' opportunity for concealment, and normal inferences as to where a criminal would be likely to hide [the evidence].[51]

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[43] *People v. Stafford* (1973) 29 Cal.App.3d 940, 948.
[44] *U.S. v. Holzman* (8th Cir. 1989) 871 F.2d 1496, 1506.
[45] *People v. Evans* (1973) 34 Cal.App.3d 175, 180.
[46] *U.S. v. Jones* (3d Cir. 1993) 994 F.2d 1051, 1057.
[47] See *U.S. v. Ribeiro* (1st Cir. 2005) 397 F.3d 43, 51; *Cassady v. Goering* (10th Cir. 2009) 567 F.3d 628, 636, fn.5.
[48] (1985) 173 Cal.App.3d 1045.
[49] (1985) 38 Cal.3d 711, 728.
[50] See *People v. Garcia* (2003) 111 Cal.App.4th 715, 721 ["The affidavit must establish a nexus between the criminal activities and the place to be searched."]; *U.S. v. Fernandez* (8th Cir. 2004) 388 F.3d 1199, 1254 ["[W]e require only a reasonable nexus between the activities supporting probable cause and the location to be searched."].
[51] *U.S. v. Gann* (9th Cir. 1984) 732 F.2d 714, 722. Also see *Johnson v. Walton* (8th Cir. 2009) 558 F.3d 1106, 1111.

THE NEED FOR SPECIFICS: To establish the required nexus, officers must set forth in an affidavit or in testimony at a suppression hearing exactly what circumstances they relied upon in satisfying this requirement. An example of a failure to do so is found in *People v. Hernandez* [52] in which two confidential informants made controlled purchases of drugs from a man named Chavelo. After the first sale, Chavelo drove to a vacant house on Balboa Street where he parked his car. After the second sale, he parked another car behind a house at 610 Orange Drive. Over the next several days, officers saw both cars parked behind the house on Orange Drive and, based on this information, they obtained a warrant to search the house.

The search netted some heroin and sales paraphernalia, but the only person in the house was Hernandez. So the officers arrested him and he was later convicted after his motion to suppress was denied. On appeal, Hernandez argued that the evidence should have been suppressed because there was an insufficient connection between Chavelo's drug business and the house on Orange Drive. The court agreed, saying that the officers "failed to establish a nexus between the criminal activities and the residence. No information was presented that Chavelo owned the vehicles, lived at the 610 Orange Drive residence, received mail or phone calls at the residence, or was seen carrying packages to and from it."

SEARCHING MULTIPLE LOCATIONS FOR ONE ITEM: It has been argued that a warrant to search two or more places for the same item is necessarily invalid because it is impossible for the evidence to be located in two places at the same time. The courts have, however, consistently rejected these arguments, ruling that multiple locations may be searched so long as there is a fair probability that the evidence was taken to, or manufactured in, each place. As the Ninth Circuit put it, officers "need not confine themselves to chance by choosing only one location for a search."[53]

For example, in *People v. Easley*[54] the defendant, a contract killer, murdered two people in Modesto after binding them with wire. Having developed probable cause to arrest him for the murders, officers obtained a warrant to search for a pair of wire cutters in four places: the house in which he lived just before the murders, the apartment he rented four days later, and both of his cars. The cutters were found in one of the cars. On appeal, Easley argued that the evidence should have been suppressed because "authorization to search four different places demonstrates that the affiant did not know where the sought-after property was located." The California Supreme Court rejected the argument, saying, "There is no logical inconsistency in the conclusion that an affidavit establishes probable cause to believe that evidence of a crime will be in any one of a suspect's homes or vehicles." What matters, said the court, is whether it was reasonable to look for the evidence in each location.

SEARCHING A THIRD PERSON'S PROPERTY: If officers have probable cause to search a certain home or business, it does not matter that the owner or occupant is not a suspect in the crime under investigation.[55] As the Supreme Court observed, "[T]he State's interest in enforcing the criminal law and recovering evidence is the same whether the third party is culpable or not."[56] For example, if officers have probable cause to believe that a murder weapon is inside a residence, it is immaterial that the residence belongs to an innocent friend or relative of the suspect.

Circumstantial proof

As noted earlier, in the absence of direct proof as to where the evidence was taken or produced, officers may rely on reasonable inference (discussed in the following section) or circumstantial proof. In this context, circumstantial proof consists of information that tends to—but does not directly—indicate where the evidence was taken or produced. The following are examples of such circumstantial proof:

CRIMINAL FRONTS AND HIDEOUTS: If officers have proof that the perpetrators used a certain location as a front for their criminal activities—such as a home or business—it will ordinarily be reasonable to be-

[52] (1994) 30 Cal.App.4th 919. Also see *Alexander v. Superior Court* (1973) 9 Cal.3d 387, 391; *People v. Garcia* (2003) 111 Cal.App.4th 715, 722.
[53] *U.S. v. Hillyard* (9th Cir. 1982) 677 F.2d 1336, 1339.
[54] (1983) 34 Cal.3d 858.
[55] See *U.S. v. Harris* (10th Cir. 2013) 735 F.3d 1187, 1191-92.
[56] *Zurcher v. Stanford Daily* (1978) 436 U.S. 547, 555.

lieve that the fruits and instrumentalities of the crimes were taken there.[57] The following are some examples of information that established such a likelihood:

- A drug dealer repeatedly went in and out of the home or business just before or after he sold drugs to an undercover officer.[58]
- A drug dealer "went directly from the apartment to the bar, where the deal was consummated."[59]
- After fleeing from officers, a suspect in a murder drove directly to a certain auto shop that had been the front for illegal activity in the past; the officers knew that violent criminals sometimes use places like auto shops to hide incriminating evidence.[60]
- Narcotics officers saw a drug dealer visit a certain apartment on two occasions during the progress of negotiations for the sale of drugs.[61]
- Even though a numbers operator usually took his bets in a bar, it was reasonable to believe that evidence of the crime was also inside his home because he had taken some numbers-related phone calls there.[62]

STORAGE LOCKERS: It may be reasonable to believe that a suspect had taken evidence of the crime to a storage locker, especially if he had rented it shortly before or after the crime. For example, in *People v. Farley*[63] the court ruled it was reasonable to believe that evidence pertaining to the murder of several people at a business would be found in a storage locker rented by the suspect three days before the killings. Said the court, "[I]n light of the circumstance that any items stored in the locker were placed there sometime during the three days preceding the shootings, a magistrate reasonably could conclude there was probable cause to believe incriminating evidence would be found in the storage locker."

CARS USED AS INSTRUMENTALITIES: If the perpetrator used a vehicle to transport contraband or otherwise used it as an instrumentality of a crime, it may be reasonable to believe that contraband or other evidence is kept there. For example, in *People v. McNabb* the court ruled it was reasonable to believe that chemicals would be found in the suspect's vehicle because he had used it to transport equipment and chemicals to a clandestine lab.[64] Similarly, in *U.S. v. Smith* the court ruled that it was reasonable to believe that drugs would be found in the suspect's car because officers obtained reliable information that he "owned a number of vehicles, transported drugs in vehicles, and sold drugs out of vehicles."[65]

COMPUTERS: If officers have proof that evidence such as child pornography or any other incriminating graphics or data were downloaded to a certain computer, they will ordinarily have probable cause to believe the data was stored there.[66]

For example, in *People v. Ulloa*[67] officers obtained a warrant to search the home computer of a child molesting suspect based on information that he "had been communicating with the [victim] through AOL's instant messaging service." In ruling that this information established a sufficient link between the messages and the suspect's computer, the court said the officers "could reasonably conclude that examination of defendant's computer would either confirm or dispel the allegations of a relationship between defendant and the minor."

Similarly, in *U.S. v. Cartier*[68] the court ruled that FBI agents had probable cause to search the defendant's home computer for child pornography because they received information from a law enforcement officer in Spain that child pornography originating in Spain had been downloaded to that computer.

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[57] See *Chambers v. Maroney* (1970) 399 U.S. 42, 47-48; *People v. Watson* (1979) 89 Cal.App.3d 376, 384-85.
[58] See *Segura v. United States* (1984) 468 U.S. 796, 810-11. Also see *People v. Fernandez* (1989) 212 Cal.App.3d 984, 989.
[59] *People v. Hernandez* (1974) 43 Cal.App.3d 581, 585.
[60] *U.S. v. Harris* (10th Cir. 2013) 735 F.3d 1187.
[61] *People v. Dickinson* (1974) 43 Cal.App.3d 1034, 1037.
[62] *U.S. v. Martinez* (8th Cir. 1979) 588 F.2d 1277.
[63] (2009) 46 Cal.4th 1053, 1100.
[64] (1991) 228 Cal.App.3d 462, 469.
[65] (6th Cir. 2007) 510 F.3d 641, 649. Also see *U.S. v. Archibald* (6th Cir. 2012) 685 F.3d 553, 558.
[66] See *U.S. v. Vosburgh* (3d Cir. 2010) 602 F.3d 512, 527; *U.S. v. Haymond* (10th Cir. 2012) 672 F.3d 948, 959.
[67] (2002) 101 Cal.App.4th 1000, 1006.
[68] (8th Cir. 2008) 543 F.3d 442.

Reasonable inference (Likely hiding places)

Even if officers cannot directly or circumstantially link the sought-after evidence to a certain place, they may nevertheless establish probable cause to search the place based on a reasonable inference; i.e., that it was likely that he had taken it there.[69] As the Court of Appeal explained:

> The connection between the items to be seized and the place to be searched need not rest on direct observation. It may be inferred from the type of crime involved, the nature of the item, and the normal inferences as to where a criminal might likely hide incriminating evidence.[70]

As we will now discuss, the most common inference is that the evidence is located in the suspect's home.

THE SUSPECT'S HOME: Unless there was reason to believe otherwise, it is usually reasonable for officers to infer that, based on their training and experience,[71] the perpetrator of a crime took the evidence to his home.[72] That is because most homes are fairly secure and readily accessible to the owners.[73]

Such an inference may be invoked when the evidence consists of the fruits or instrumentalities of a crime (such as robbery, burglary, or murder) or contraband (such as drugs, illegal weapons, or stolen property). Thus, in *People v. Koch* the Court of Appeal explained that "the total circumstances surrounding an arrest or other criminal conduct can, without more, support a magistrate's probable cause finding that the culprit's home is a logical place to search for specific contraband."[74] Likewise, in a drug case the D.C. Circuit pointed out, "For the vast majority of drug dealers the most convenient location to secure items is the home. After all, drug dealers don't tend to work out of office buildings."[75]

SUSPECT'S CAR: A suspect's vehicle may also be a logical location because cars are convenient, fairly secure, and mobile. Thus, in *People v. Dumas*[76] the California Supreme Court ruled that officers reasonably believed that stolen bonds would be found inside the suspect's car because "we cannot disregard the likelihood that person who holds stolen property he wishes to sell will attempt to conceal it in a place under his control that is nearby and apparently secure." For example, in *U.S. v. Brown*[77] an officer found a fake driver's license and credit card in the passenger compartment of a car he had stopped. The names on both documents were the same, so he figured the suspect was an identity thief and that he was using the cards to buy things. Where might those things be? "Everyone knows," said the court, "that drivers who lawfully purchase items at stores often place their purchases in the trunks of their cars. Nothing in common experience suggests that criminals act any differently."

PERSONAL CONTAINERS: If there is probable cause to believe that a suspect had evidence in his possession, it usually reasonable to believe it is located in one or more personal containers in his possession if the evidence was small enough to be concealed inside them; e.g., a handgun, drugs.[78]

SUSPECT'S COMPUTER: If there is probable cause to search for information or graphics in the suspect's possession, it is usually reasonable to infer that at least some of it is stored on his computer or other digital storage device.[79]

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[69] *U.S. v. Lucarz* (9th Cir. 1970) 430 F.2d 1051, 1055.
[70] *People v. Miller* (1978) 85 Cal.App.3d 194, 201. Also see *People v. Sandlin* (1991) 230 Cal.App.3d 1310, 1315.
[71] See *People v. Cleland* (1990) 225 Cal.App.3d 388, 392-93; *U.S. v. Orozco* (7th Cir. 2009) 576 F.3d 745, 750.
[72] See *People v. Pressey* (2002) 102 Cal.App.4th 1178, 1185 ["evidence of drug dealing, by itself, can furnish probable cause to search the dealer's residence"]; *People v. Thuss* (2003) 107 Cal.App.4th 221, 235; *People v. Superior Court (Marcil)* (1972) 27 Cal.App.3d 404, 414 ["Numerous cases have upheld search warrants on the theory that one who sells narcotics may have more at his residence or place or operations."]; *U.S. v. Sanchez* (10th Cir. 2009) 555 F.3d 910, 914 ["we think it merely common sense that a drug supplier will keep evidence of his crimes at his home."].
[73] See *People v. Superior Court (Brown)* (1975) 49 Cal.App.3d 160, 167; *People v. Garcia* (2003) 111 Cal.App.4th 715, 721.
[74] (1989) 209 Cal.App.3d 770, 779. Also see *People v. Carrington* (2009) 47 Cal.4th 145, 163; *People v. Schilling* (1987) 188 Cal.App.3d 1021, 1030; *People v. Koch* (1989) 209 Cal.App.3d 770, 780; *U.S. v. Chavez-Miranda* (8th Cir. 2002) 306 F.3d 973, 978.
[75] *U.S. v. Spencer* (D.C. Cir. 2008) 530 F.3d 1003, 100.
[76] (1973) 9 Cal.3d 871, 855.
[77] (D.C. Cir. 2004) 374 F.3d 1326, 1329.
[78] See *New Jersey v. T.L.O.* (1985) 469 U.S. 325, 345-46; *In re Joseph G.* (1995) 32 Cal.App.4th 1735, 1741-42.
[79] See *U.S. v. Gomez-Soto* (8th Cir. 1984) 723 F.2d 649, 655; *U.S. v. Lucas* (8th Cir. 1991) 932 F.2d 1210, 1216.

SUSPECT'S STORAGE LOCKER: Depending on the nature of the crime, it may be reasonable to infer that the suspect is storing evidence in his storage locker. "A storage locker," said the Second Circuit, "is surely a location where drugs held for distribution or items purchased with drug proceeds might reasonably be stored."[80] This is especially true if an earlier search of the suspect's home was not productive.

SUSPECT'S BUSINESS: If the evidence consists of documents pertaining to the suspect's business, it is reasonable to infer they will be found at his office.[81]

GETAWAY CARS: If officers stopped a getaway car shortly after the crime occurred, they may infer that the fruits and instrumentalities of the crime are still inside.[82]

PROCESS OF ELIMINATION: If officers have determined that evidence for which probable cause exists is not located in the most likely place, it may be reasonable to infer that it is located in the next logical location.[83]

The Evidence is Still There

In addition to establishing a fair probability that the evidence exists and that it was once located at a certain place, officers must prove it is probably still there.[84] As the court observed in *U.S. v. Freeman*, "Although probable cause may exist at one point to believe that evidence will be found in a given place, the passage of time may render the original information insufficient to establish probable cause at the later time."[85]

This is seldom an issue if the search occurred quickly after the evidence was discovered (e.g., inside a stopped car), or if the suspect was in jail and had no access to the evidence, or if officers had secured the location while they sought a search warrant. Instead, it is ordinarily limited to cases in which the officers, having probable cause to search a certain place, reasonably believed it was necessary to delay the search until an ongoing investigation had been completed. In such cases, the defendant may claim the affidavit no longer established probable cause because it was based on information that was too old or "stale." As the Court of Appeal observed, "The general rule is that information that is remote in time may be deemed to be stale and therefore unreliable."[86] Similarly, the D.C. Circuit noted that, "Everything else being equal, dated information is less likely to show probable cause than fresh evidence."[87]

Nevertheless, there are several other circumstances that may make it reasonable to believe the evidence had not been moved despite the passage of time—even weeks or months. That is because some kinds of evidence will ordinarily be kept at one place for relatively long periods, and also because officers may reasonably belive that the suspect was not in a hurry to dispose of it. As the Maryland Court of Appeals articulated this idea:

> The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock: the character of the crime (chance encounter in the night or regenerating conspiracy?), of the criminal (nomadic or entrenched?), of the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), of the place to be searched (mere criminal forum of convenience or secure operational base?), etc.[88]

Nature of crime

When a suspect is engaged in ongoing criminal activity at a certain location, it will often be reasonable to infer that the instrumentalities of the crime, and sometimes its fruits, will be stored thereh for a fairly long time.[89] "As is only logical," said the Tenth Circuit, "ongoing and continuous activity makes the

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[80] *U.S. v. Riley* (2nd Cir. 1990) 906 F.2d 841, 845.
[81] See *People v. Farley* (2009) 46 Cal.4th 1053, 1101; *U.S. v. Word* (6th Cir. 1986) 806 F.2d 658, 662.
[82] See *Chambers v. Maroney* (1970) 399 U.S. 42, 47-48; *People v. Chavers* (1983) 33 Cal.3d 462, 467.
[83] See *People v. Dumas* (1973) 9 Cal.3d 871, 885; *People v. Carrillo* (1995) 37 Cal.App.4th 1662, 1669.
[84] See *People v. Cooks* (1983) 141 Cal.App.3d 224, 298; *People v. Mesa* (1975) 14 Cal.3d 466, 470.
[85] *U.S. v. Freeman* (5th Cir. 1982) 685 F.2d 942, 951 [edited].
[86] *People v. Gibson* (2001) 90 Cal.App.4th 371, 380. Also see *People v. McDaniels* (1994) 21 Cal.App.4th 1560, 1564.
[87] *U.S. v. Johnson* (D.C. Cir. 2006) 437 F.3d 69, 72
[88] *Andresen v. State* (1975) 24 Md.App. 128, 172.
[89] See *People v. Hulland* (2003) 110 Cal.App.4th 1646, 1652; *People v. Jones* (2013) 217 Cal.App.4th 735, 741.

passage of time less critical."[90] Crimes falling into the "ongoing" category include serial murders and other crime sprees,[91] drug trafficking,[92] identity theft,[93] business and consumer fraud,[94] production of child pornography,[95] and stalking.[96]

The nature of the evidence

Even if the information was not "fresh," it may be reasonable to infer that the evidence has not been moved based on the nature of the evidence. This is because some kinds of evidence will probably remain in one place for weeks, months, and even years; while others will normally be gone in a matter of hours. Again, this idea was skillfully expressed by the Maryland Court of Appeals:

> The observation of a half-smoked marijuana cigarette in an ashtray at a cocktail party may well be stale the day after the cleaning lady has been in; the observation of the burial of a corpse in a cellar may well not be stale three decades later. The hare and the tortoise do not disappear at the same rate of speed.[97]

The following are examples of evidence that will usually remain in one place for substantially longer than a "half-smoked" joint.

FIREARMS: Although it is possible that a criminal will quickly dispose of a firearm used in the commission of a crime, it is considered just as likely that he will retain the firearm because of its inherent value and usefulness.[98]

INSTRUMENTALITIES OF THE CRIME: It may be reasonable to believe that the perpetrator of a crime will retain other items that he had used to commit or facilitate a crime, such as keys to burglarized stores,[99] gloves used by a burglar,[100] clothing and masks worn during a robbery,[101] explosives,[102] incendiary materials used in arson,[103] handcuffs or duct tape used to bind victims,[104] records and email pertaining to an illegal business.[105]

STOLEN PROPERTY: Unlike small amounts of drugs that are usually used up quickly, stolen property may be kept for long periods because it may be difficult to fence or it might have enduring usefulness to the thief; e.g., large amount of money taken in bank robbery.[106]

BUSINESS RECORDS: Legitimate businesses almost always keep records of some sort, and they may keep them for a fairly long time.[107] In fact, the Court of Appeal observed that business and professional records "presumably would be retained unaltered for periods of several years."[108]

CHILD PORNOGRAPHY: People who download or otherwise obtain child pornography are notorious for considering it a valuable possession, and are therefore likely to keep it for a long time, often many years.[109] Thus, the Sixth Circuit noted that "the same time limitations that have been applied to more fleeting crimes do not control the staleness inquiry for child pornography."[110] POV

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[90] *U.S. v. Roach* (10th Cir. 2009) 582 F.3d 1192, 1201.
[91] See *People v. Cooks* (1983) 141 Cal.App.3d 224, 298; *People v. Miller* (1978) 85 Cal.App.3d 194, 204.
[92] See *United States v. Russell* (1973) 411 U.S. 423, 432; *People v. Wilson* (1986) 182 Cal.App.3d 742, 755.
[93] See *People v. Stipo* (2011) 195 Cal.App.4th 664, 672-73.
[94] See *People v. Hepner* (1994) 21 Cal.App.4th 761, 782-83; *U.S. v. Snow* (10th Cir. 1990) 919 F.2d 1458, 1460/
[95] See *U.S. v. Schesso* (8th Cir. 2013) 730 F.3d 1040, 1047; *U.S. v. Darr* (8th Cir. 2011) 661 F.3d 375, 378.
[96] See *Wood v. Emmerson* (2007) 155 Cal.App.4th 1506, 1522.
[97] *Andresen v. State* (1975) 24 Md.App. 128, 172.
[98] See *People v. Bryant* (2014) __ Cal.4th __ [2014 WL 4197804]; *People v. Kraft* (2000) 23 Cal.4th 978, 1049.
[99] See *People v. Carrington* (2009) 47 Cal.4th 145, 163-64.
[100] See *People v. Gee* (1982) 130 Cal.App.3d 174, 182.
[101] *People v. Miller* (1978) 85 Cal.App.3d 194, 204; *U.S. v. Gann* (9th Cir. 1984) 732 F.2d 714, 722.
[102] See *People v. Barnum* (1980) 113 Cal.App.3d 340, 346.
[103] See *U.S. v. Aljabari* (7th Cir. 2010) 626 F.3d 940.
[104] See *People v. Webb* (1993) 6 Cal.4th 494, 521; *U.S. v. Laury* (5th Cir. 1993) 985 F.2d 1293, 1314.
[105] See *U.S. v. Feliz* (1st Cir. 1999) 182 F.3d 82, 87-88; *People v. Ulloa* (2002) 101 Cal.App.4th 1000, 1007.
[106] See *Chambers v. Maroney* (1970) 399 U.S. 42, 47-48; *People v. Gee* (1982) 130 Cal.App.3d 174, 182.
[107] See *Andresen v. Maryland* (1976) 427 U.S. 463, 478, fn.9; *U.S. v. Nguyen* (8th Cir. 2008) 526 F.3d 1129, 1134.
[108] *McKirdy v. Superior Court* (1982) 138 Cal.App.3d 12, 26.
[109] See *U.S. v. Vosburgh* (3d Cir. 2010) 602 F.3d 512, 528; *U.S. v. Pappas* (7th Cir. 2010) 592 F.3d 799, 803.
[110] *U.S. v. Paull* (6th Cir. 2009) 551 F.3d 516, 522.

Plain View

"It is well established that under certain circumstances the police may seize evidence in plain view without a warrant."[1]

There is general agreement that the plain view rule is fairly simple to understand and apply. Even the words "plain view" seem to to saying, "If it's visible, it's seizable!" Of course, it is not that simple, but it's not very complicated either. Specifically, evidence is deemed in plain view—and can therefore be seized without a warrant—if the following circumstances existed:

(1) **Lawful vantage point**: The officers' initial viewing of the evidence must have been "lawful."

(2) **Probable cause**: Before seizing the evidence, officers must have had probable cause to believe it was, in fact, evidence of a crime

(3) **Lawful access**: Officers must have had a legal right to enter the place in which the evidence was located.

If these circumstances exist, the officers' act of observing the evidence does not constitute a "search" because no one can reasonably expect privacy in something that is so readily exposed; and their act of seizing the evidence is lawful because the plain view rule constitutes an exception to the warrant requirement.[2] As the United States Supreme Court explained, "The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable."[3]

Lawful Vantage Point

The requirement that the officers' initial observation of the evidence must have been "lawful" is satisfied if the officers did not violate the suspect's Fourth Amendment rights by getting into the position from which they saw it.[4] "The plain view doctrine," said the Supreme Court, "is grounded on the proposition that once police are lawfully in a position to observe an item first-hand, its owner's privacy interest in that item is lost."[5]

Before we discuss the types of places from which an observation is apt to be legal, it should be noted an observation does not become an unlawful search merely because officers had to make some effort to see the evidence, so long as the effort was reasonably foreseeable. Thus, it is unimportant that officers could not initially see the evidence without using a common visual aid (such as a flashlight or binoculars),[6] or without bending down or elevating themselves somewhat. Thus, the D.C. Circuit explained, "That a policeman may have to crane his neck, or bend over, or squat, does not render the [plain view] doctrine inapplicable, so long as what he saw would have been visible to any curious passerby."[7] Similarly, the Court of Appeal ruled that merely looking over the five-foot fence from a neighbor's yard "disclosed no more than what was in plain view."[8]

In contrast, the courts have ruled that officers "searched" a high-rise apartment when they could only see the evidence inside by using high-power

[1] *Coolidge v. New Hampshire* (1971) 403 U.S. 443, 465.

[2] See *People v. Kilpatrick* (1980) 105 Cal.App.3d 401, 408; *People v. Albritton* (1982) 138 Cal.App.3d 79, 85, fn.1.

[3] *Payton v. New York* (1980) 445 U.S. 573, 587.

[4] See *Minnesota v. Dickerson* (1993) 508 U.S. 366, 375 ["The rationale of the plain-view doctrine is that if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no 'search'"]; *Washington v. Chrisman* (1982) 455 U.S. 1, 5-6 ["The 'plain view' exception to the Fourth Amendment warrant requirement permits a law enforcement officer to seize what clearly is incriminating evidence or contraband when it is discovered in a place where the officer has a right to be."]; *People v. Bradford* (1997) 15 Cal.4th 1229, 1295.

[5] *Illinois v. Andreas* (1983) 463 U.S. 765, 771.

[6] See *On Lee v. United States* (1952) 343 U.S. 747, 754; *Texas v. Brown* (1983) 460 U.S. 730, 740; *People v. Superior Court (Mata)* (1970) 3 Cal.App.3d 636, 639; *People v. St. Amour* (1980) 104 Cal.App.3d 886, 893 ["So long as the object which is viewed is perceptible to the naked eye … the government may use technological aid of whatever type without infringing on the person's Fourth Amendment rights."].

[7] *James v. U.S.* (D.C. Cir. 1969) 418 F.2d 1150, 1151.

[8] *People v. Superior Court (Stroud)* (1974) 37 Cal.App.3d 836, 839.

binoculars from a hilltop about 250 yards away,[9] or when officers "had to squeeze into a narrow area between the neighbor's garage and defendant's fence" and that area was almost blocked by foliage.[10]

OBSERVATION FROM PUBLIC PLACE: The most obvious example of a lawful vantage point is a place that is accessible to the general public.[11] Thus, the Supreme Court pointed out that "the police may see what may be seen from a public vantage point where they have a right to be,"[12] and that officers "cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public."[13]

OBSERVATION DURING DETENTION OR ARREST: An observation that occurred in the course of a detention is lawful if officers had sufficient grounds for the detention or arrest and it was reasonable in its scope and intensity.[14] For example, in *People v. Sandoval*[15] the Court of Appeal ruled that an officer, having made a lawful car stop, lawfully observed drugs and paraphernalia in the passenger compartment because "the officer clearly had a right to be in the position to have that view."

OBSERVATION DURING PAT SEARCH: In a variation of the plain view rule (i.e., the "plain feel" rule), officers who feel evidence while conducting a pat search are deemed to be in a lawful vantage point if they had grounds for the search.[16] In such cases, said the Third Circuit, the "proper question" is whether the officer detected the evidence "in a manner consistent with a routine frisk."[17] Or, in the words of the Supreme Court, a lawful pat search must "be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer."[18]

OBSERVATION WHILE EXECUTING A SEARCH WARRANT: Officers who are executing search warrants often find evidence that was not listed in the warrant. When this happens, the discovery will be deemed lawful under the plain view rule if they found the evidence while looking in places or things in which any of the listed evidence might have been found. For example, in *Skelton v. Superior Court*[19] officers in La Palma were searching for a wedding ring and carving set which were taken in a burglary. While searching for these items, they also found some watches and rings that matched the descriptions of items taken in related burglaries. On appeal, the California Supreme Court ruled the unlisted evidence was lawfully discovered because "the warrant mandated a search for and seizure of several small and easily secreted items" and therefore "the officers had the authority to conduct an intensive search of the entire house."

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[9] *People v. Arno* (1979) 90 Cal.App.3d 505. Also see *People v. Henderson* (1990) 220 Cal.App.3d 1632, 1649.

[10] *People v. Fly* (1973) 34 Cal.App.3d 665, 667. Also see *Pate v. Municipal Court* (1970) 11 Cal.App.3d 721, 724 [officer climbed over a fence onto a trellis, then walked along the trellis for a considerable distance]; *Jacobs v. Superior Court* (1973) 36 Cal.App.3d 489 [the officer had to step onto a small planter area between the building and the parking lot]; *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 636 [officer had to traverse some bushes that constituted a "significant hindrance"].

[11] See *Katz v. United States* (1967) 389 U.S. 347, 351 ["What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."]; *Florida v. Riley* (1989) 488 U.S. 445, 449-50 ["Thus the police, like the public, would have been free to inspect the backyard garden from the street if their view had been unobstructed."]; *People v. Deutsch* (1996) 44 Cal.App.4th 1224, 1229 ["Information or activities which are exposed to public view cannot be characterized as something in which a person has a subjective expectation of privacy."].

[12] *Florida v. Riley* (1989) 488 U.S. 445, 449.

[13] *California v. Greenwood* (1988) 486 U.S. 35, 41.

[14] See *United States v. Hensley* (1985) 469 U.S. 221, 235; *Texas v. Brown* (1983) 460 U.S. 730, 737, 739; *People v. DeCosse* (1986) 183 Cal.App.3d 404, 410 ["Standing where he had a right to be, the officer was lawfully entitled to observe, in plain sight, the opened alcoholic beverage container."].

[15] (1985) 164 Cal.App.3d 958.

[16] See *People v. Avila* (1997) 58 Cal.App.4th 1069, 1075 ["However, if contraband is found while performing a permissible *Terry* search, the officer cannot be expected to ignore that contraband."]; *People v. Armenta* (1968) 268 Cal.App.2d 248, 253 ["The officer was not required to blind himself to the heroin simply because it was disconnected from the initial purpose of the search."]; *People v. Garcia* (1969) 274 Cal.App.2d 100, 106-7 ["[T]he manner of conducting an otherwise justified precautionary search is of vital importance."].

[17] *U.S. v. Yamba* (3rd Cir. 2007) 506 F.3d 251, 259.

[18] *Terry v. Ohio* (1968) 392 U.S. 1 29.

[19] (1969) 1 Cal.3d 144. Also see *Horton v. California* (1990) 496 U.S. 128, 142.

Similarly, in *U.S. v. Smith*,[20] officers in Tampa obtained a warrant to search the home of Smith's mother for drugs and indicia. In the course of the search, they opened Smith's lockbox and found child pornography. In ruling that the pornography was discovered lawfully, the court said, "It was through the lawful execution of the warrant that the officers came across the photographs at issue here."

In contrast, in *People v. Albritton*[21] narcotics officers in Bakersfield obtained a warrant to search the defendant's home for drugs and indicia. A detective assigned to the auto theft detail learned about the warrant and decided to "go along for the ride" because the defendant was also a suspected car thief. When the officers arrived, the detective "immediately separated himself from the others and went to the garage" where he checked the VIN numbers on several cars and learned that four were stolen. On appeal, prosecutors argued that the detective's initial viewing of the VIN numbers was lawful, and therefore the plain view rule applied. But the court disagreed, ruling the detective's observation of the VIN numbers was unlawful because none of the evidence listed in the search warrant could reasonably have been found in the areas in which the VIN numbers were located.

OBSERVATION DURING WARRANTLESS ENTRY: In a similar vein, officers may seize evidence inside a residence if (1) they were lawfully on the premises (e.g., exigent circumstances, consentual entry, execution of an arrest warrant), and (2) they discovered the evidence while they were carrying out their lawful duties. For example, if the officers' entry into a living room was consensual (e.g., a knock and talk), and if they saw drugs in the room, their observation would be deemed lawful because they had been invited into that room. But if they saw the evidence by opening a container in the living room or while wandering into another room, the observations would be unlawful.

A good example of such an unlawful observation is found in *Arizona v. Hicks*[22] in which officers had entered Hicks' apartment without a warrant because someone in his apartment had fired a shot through the floor, injuring an occupant in the apartment below. While looking around, one of the officers noticed an expensive audio system which he thought might have been stolen because the apartment was otherwise "squalid." The officer then confirmed his suspicion by picking up a component, writing down the serial number, and running it through a police database. Although the U.S. Supreme Court ruled that the entry into the apartment was lawful, it ruled that the serial number was not in plain view because the officer could not have seen it without doing something (picking up the component) that went beyond the objective of the entry, which was to apprehend the shooter and look for any other injured people.

OBSERVATION DURING ENTRY INTO YARDS: As with warrantless entries into residences, warrantless entries into a suspect's front, back, or side yards may fall within an exception to the warrant requirement (e.g., exigent circumstances, consent), in which case their observations would be lawful. In the absence of a warrant, officers may still walk to the front door via normal access routes, then knock or otherwise announce their presence. But if no one answers the door within a reasonable time, any observations they make may be illegal if they loitered on the property or explored the grounds. As the Supreme Court explained, officers are impliedly authorized "to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave."[23]

For example, in *People v. Edelbacher*[24] the defendant shot and killed his estranged wife in Fresno County, then drove to his home in Madera County. A sheriff's deputy who was investigating the murder drove to Madera and, while standing on Edelbacher's driveway, saw shoeprints that looked just like the shoeprints that had been found at the murder scene. Consequently, officers took photos of the shoeprints and prosecutors used them against Edelbacher at his

[20] (11th Cir. 2006) 459 F.3d 1276.
[21] (1982) 138 Cal.App.3d 79.
[22] (1987) 480 U.S. 321.
[23] *Florida v. Jardines* (2013) __ U.S. __ [133 S.Ct. 1409, 1415].
[24] (1989) 47 Cal.3d 983.

trial. On appeal, he argued that the discovery was unlawful because the deputy had been standing on his private property. It didn't matter, said the California Supreme Court, because the prints "were apparently visible on the normal route used by visitors approaching the front doors of the residences and there is no indication of solid fencing or visible efforts to establish a zone of privacy."

OBSERVATION FROM ADJACENT PROPERTY: An observation of evidence in a suspect's yard or other private property is not unlawful if it was made from a neighbor's property, even if the officers were technically trespassing.[25] This is because it was the neighbor who was intruded upon—not the suspect. As the Court of Appeal observed, "[A] search does not violate the Fourth Amendment simply because police officers trespassed onto a neighbor's property when making their observations."[26]

OBSERVATION DURING COMPUTER SEARCH: Officers who are executing a warrant to search a computer will often discover unlisted data or evidence of some other crime. When this happens the discovery will be deemed lawful under the plain view rule if the file in which the evidence was found could have contained any of the data or graphics listed in the warrant. In most cases, that means every file must be read because, as the Ninth Circuit pointed out in *U.S. v. Comprehensive Drug Testing, Inc.*, unless officers read every file they would have "no way of knowing which or how many illicit files there might be or where they might be stored."[27]

Probable Cause

The second requirement for a plain view seizure is that the officers—at or before the moment they seized the evidence—must have had probable cause to believe the item was, in fact, evidence of a crime.[28] And like the other forms of proof, probable cause to seize an item in plain view may be based on direct or circumstantial proof. Examples of direct proof would include an officer's observation of a weapon that is illegal to possess,[29] a weapon used in a crime,[30] readily-identifiable drugs or drug paraphernalia,[31] readily-identifiable child pornography,[32] or property that had been reported stolen.[33]

As we will now discuss, circumstantial proof typically consists of an officer's observation of something that, based on his training and experience, appears to be seizable evidence.

INSTRUMENTALITIES OF A CRIME: Probable cause is often based on an officer's knowledge of a link between the item and a certain crime or a type of crime. The following are examples of such a link:

- A man suspected of having just robbed a bank had a large amount of cash protruding from his wallet.[34]

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[25] See *Dillon v. Superior Court* (1972) 7 Cal.3d 305, 311 [officer's observation of a marijuana garden in a fenced-in backyard was lawful where the officer viewed the garden from the second floor of the house next door whose owner had consented to the entry]; *People v. Shaw* (2002) 97 Cal.App.4th 833 [with permission of a neighbor, officers standing behind a fence looked into the common area of defendant's apartment]; *People v. Smith* (1986) 180 Cal.App.3d 72, 83-84 ["The fence surrounding Smith's (marijuana) garden was only five feet high and allowed people outside to see the activities occurring inside the garden."].

[26] *People v. Claeys* (2002) 97 Cal.App.4th 55, 59.

[27] (9th Cir. 2010) 621 F.3d 1162, 1171. Also see *U.S. v. Schesso* (9th Cir. 2013) 730 F.3d 1040, 1046.

[28] (7th Cir. 2010) 592 F.3d 779, 785. Also see *U.S. v. Stabile* (3rd Cir. 2011) 633 F.3d 219, 239 ["Detective Vanadia's decision to highlight and view the contents of the Kazvid folder was objectively reasonable because criminals can easily alter file names and file extensions to conceal contraband."].

[29] See *Arizona v. Hicks* (1987) 480 U.S. 321, 326; *People v. Stokes* (1990) 224 Cal.App.3d 715, 719. **NOTE**: In *Coolidge v. New Hampshire* (1971) 403 U.S. 443, 466 a plurality of the Supreme Court said that officers may not seize evidence in plain view unless it was "immediately apparent" that the item was evidence of a crime. Subsequently, the Court observed that the term "immediately apparent" was "very likely an unhappy choice of words, since it can be taken to imply that an unduly high degree of certainty as to the incriminatory character of evidence is necessary for an application of the 'plain view' doctrine." *Texas v. Brown* (1983) 460 U.S. 730, 741. The Court then ruled that only probable cause is required. At p. 742. Also see *Minnesota v. Dickerson* (1993) 508 U.S. 366, 375; *People v. Clark* (1989) 212 Cal.App.3d 1233, 1238.

[30] *Texas v. Brown* (1983) 460 U.S. 730, 742. Also see *People v. Stokes* (1990) 224 Cal.App.3d 715, 719.

[31] See *People v. McNeal* (1979) 90 CA3 830, 841 [nunchucks].

[32] *Horton v. California* (1990) 496 U.S. 128, 131 [stun gun used in robbery]; *People v. Bradford* (1997) 15 Cal.4th 1229, 1296.

[33] See *People v. Nickles* (1970) 9 Cal.App.3d 986, 994; *People v. LeBlank* (1997) 60 Cal.App.4th 157, 165.

[34] See *U.S. v. Benoit* (10th Cir.2013) 713 F.3d 1, 11.

- A suspect in an armed robbery or shooting possessed firearms, ammunition, shell casings;[35] clothing that matched those of the perpetrator;[36] a mask (the perpetrator wore one);[37] a handcuff key (the victim had been handcuffed).[38]
- A murder suspect possessed bailing wire (bailing wire had been used to bind the victims).[39]
- A murder suspect possessed "cut-off panty hose" (the officer knew that the murderers had worn masks and that cut-off panty hose are used as masks).[40]
- A man who had solicited the murder of his estranged wife possessed a hand-drawn diagram of his wife's home and lighting system.[41]
- A burglary suspect possessed pillow cases filled with "large, bulky" items[42] or burglary tools.[43]
- A suspected drug dealer possessed "a bundle of small, plastic baggies";[44] a "big stack or wad of bills";[45] firearms.[46]

STOLEN PROPERTY: Circumstantial evidence that property was stolen may consist of the condition of the property, such as obliterated serial numbers, clipped wires, and pry marks. For example, in *People v. Gorak*[47] the court ruled that officers had probable cause to seize an air compressor in plain view in the back seat of the defendant's car mainly because "the electrical lines and air lines appeared to have been broken off" and water was leaking out of a broken line. Similarly, in *People v. Stokes*[48] two Hayward police officers in an unmarked car were driving through a mobile home park that was occupied mainly by senior citizens. As they turned a corner, they saw Stokes standing in the middle of the street, holding a vido recorder. The officers recognized Stokes as a local burglar, they noticed that he kept looking around and appeared to be nervous, that he was carrying a screwdriver, and that several homes in the park had recently been burglarized. Although the officers had no direct evidence that the recorder had been stolen, the court ruled that the circumstantial evidence was quite sufficient.

Other circumstantial evidence that may suffice include the presence of store merchandise tags or anti-shoplifting devices that are usually removed when retail goods are sold; or the presence of an inordinate amount of property, especially the type of property that is frequently stolen, such as TVs, cell phones, tablets, firearms, and jewelry.[49]

POSSESSION OF DRUGS, PARAPHERNALIA: Officers frequently develop probable cause to seize a container in the possession of a drug user or trafficker based entirely on circumstantial evidence that it contained drugs, paraphernalia, or evidence of sales.[50] As the court observed in *People v. Holt*, "Courts have

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[35] See *Colorado v. Bannister* (1980) 449 U.S. 1, 2; *Christians v. Chester* (1990) 218 Cal.App.3d 273, 275.
[36] *U.S. v. Muhammad* (8th Cir. 2010) 604 F.3d 1022, 1027-28.
[37] See *People v. Rico* (1979) 97 Cal.App.3d 124, 133; *People v. Superior Court (Orozco)* (1981) 121 CA3 395, 404,
[38] *Warden v. Hayden* (1967) 387 U.S. 294.
[39] *People v. Jardine* (1981) 116 Cal.App.3d 907, 913.
[40] *Horton v. California* (1990) 496 U.S. 128, 130-1, 142.
[41] *People v. Easley* (1983) 34 Cal.3d 858, 872.
[42] *People v. Hill* (1974) 12 Cal.3d 731, 763.
[43] *People v. Miley* (1984) 158 Cal.App.3d 25, 35-36.
[44] *People v. Vasquez* (1983) 138 Cal.App.3d 995, 999-1000.
[45] *People v. Koelzer* (1963) 222 Cal.App.3d 20, 25; *People v. Mack* (1977) 66 Cal.App.3d 839, 859.
[46] *People v. Taylor* (1975) 46 Cal.App.3d 513, 518.
[47] (1987) 196 Cal.App.3d 1032.
[49] (1990) 224 Cal.App.3d 715.
[49] See *In re Donald L.* (1978) 81 Cal.App.3d 770, 775 [the officer "could have reasonably believed that the assorted objects of jewelry, including women's jewelry, were probably stolen"]; *In re Curtis T.* (1989) 214 Cal.App.3d 1391, 1398; *People v. Sedillo* (1982) 135 Cal.App.3d 616, 623; *People v. Williams* (1988) 198 Cal.App.3d 873, 890; *People v. McGraw* (1981) 119 Cal.App.3d 582, 603; *People v. Atkins* (1982) 128 Cal.App.3d 564, 570; *People v. Garcia* (1981) 121 Cal.App.3d 239, 246; *People v. Superior Court (Thomas)* (1970) 9 Cal.App.3d 203, 210; *People v. Jennings* (1965) 231 Cal.App.2d 744.
[50] See *Texas v. Brown* (1983) 460 U.S. 730, 743 ["[T]he distinctive character of the balloon itself spoke volumes as to its contents—particularly to the trained eye of the officer."]; *United States v. Jacobsen* (1984) 466 U.S. 109, 121 ["it was just like a balloon the distinctive character of which spoke volumes as to its contents"]; *People v. Nonnette* (1990) 221 Cal.App3d 659, 666 [bundle of tiny baggies of the type used for drugs]; *People v. Chapman* (1990) 224 Cal.App.3d 253, 257 ["Probable cause to believe a container holds contraband may be adequately afforded by its shape, design, and the manner in which it is carried."].

recognized certain containers as distinctive drug carrying devices which may be seized upon observation: heroin balloons, paper bindles and marijuana smelling brick-shaped packages."[51]

Probable cause may also be based on how the object felt; i.e., "plain feel."[52] For example, in *People v. Lee*[53] an Oakland police officer was pat searching a suspected drug dealer when he felt "a clump of small resilient objects" which he believed (correctly) were heroin-filled balloons. In ruling that the officer's seizure of the balloons was lawful under the "plain feel" rule, the court noted that he "recognized the feel of such balloons from at least 100 other occasions on which he had pat-searched people and felt what were later determined to be heroin-filled balloons. As he described it, the feel is unmistakable."

Lawful Access

Finally, even if officers could see the evidence and had probable cause to believe it was seizable, they may not enter the suspect's home or other place in which he had a reasonable expectation of privacy unless they had a legal right to enter; e.g., a vehicle in which the evidence was located.[54] Thus, in discussing the plain view rule, the Supreme Court explained that "not only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself."[55] Or, as Justice Grodin observed in *People v. Superior Court (Spielman),* "Seeing something in plain view does not, of course, dispose, ipso facto, of the problem of crossing constitutionally protected thresholds. Those who thoughtlessly overapply the plain view doctrine to every situation where there is a visual open view have not yet learned the simple lesson long since mastered by old hands at the burlesque houses, 'You can't touch everything you can see.'"[56] Note that officers will always have lawful access to evidence located in a public place or a vehicle located in a public place.[57] In addition, they may enter a residence and seize evidence observed from the outside if they were aware that a resident was subject to a parole or probation search or if they reasonably believed the evidence would be destroyed if they delayed seizing it.

For example, in *People v. Ortiz*[58] an officer happened to be walking by the open door of a hotel room when he saw a woman inside, and she was "counting out tinfoil bindles and placing them on a table." Having probable cause to believe the bindles contained heroin, the officer went inside, seized the bindles, and arrested the woman and the other occupants. In ruling that the officer had lawful access to the evidence, the court pointed out that, because he was initially only three to six feet away from the woman, he reasonably believed that she had seen him and it is "common knowledge that those who possess drugs often attempt to destroy the evidence when they are observed by law enforcement officers." Consequently, the court ruled that the officer had a legal right to enter because "it was reasonable for [him] to believe the contraband he saw in front of defendant and the woman was in imminent danger of being destroyed. POV

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[51] 212 Cal.App.3d 1200, 1205.

[52] See *People v. Dibb* (1995) 37 Cal.App.4th 832, 836-37 ["The critical question is not whether [the officer] could identify the object as contraband based on only the 'plain feel' of the object, but whether the totality of circumstances made it immediately apparent to [the officer] when he first felt the lump that the object was contraband."]; *People v. Chavers* (1983) 33 Cal.3d 462, 471 ["[T]he knowledge [gained by the officer through sense of touch] was as meaningful and accurate as if the container had been transparent and he had seen the gun within the container."].

[53] (1987) 194 Cal.App.3d 975.

[54] See *Texas v. Brown* (1983) 460 U.S. 730, 738 ["[P]lain view provides grounds for seizure of an item when an officer's access to an object has some prior justification under the Fourth Amendment."]; *United States v. Ross* (1982) 456 U.S. 798, 809; *People v. Ortiz* (1995) 32 Cal.App.4th 286, 291 ["Before Officer Forsythe could enter the hotel room to arrest defendant and seize the tinfoil bindles containing heroin, he needed to have a lawful right of access to defendant and the heroin."]; *U.S. v. Davis* (4th Cir. 2012) 690 F.3d 226, 234 ["the lawful access requirement is intended to clarify that police may not enter a premises to make a warrantless seizure, even if they could otherwise see (from a lawful vantage point) that there was contraband in plain sight"].

[55] *Horton v. California* (1990) 496 U.S. 128, 137.

[56] (1980) 102 Cal.App.3d 342, 348, fn.1 (conc. opn. Grodin, J.).

[57] See *United States v. Ross* (1982) 456 U.S. 798, 809; *People v. Superior Court* (*Nasmeh)* (2007) 151 Cal.App.4th 85, 100.

[58] (1995) 32 Cal.App.4th 286.

Recent Cases

People v. McCurdy

(2014) 59 Cal.4th 1063

Issues

Did the defendant invoke his *Miranda* rights while being questioned about the murder of a child? If so, did he then reinitiate questioning?

Facts

McCurdy, a U.S. Navy seaman, kidnapped and murdered eight year old Maria Piceno in Lemoor. Her body was found about two weeks later in a creek near Bakersfield. Two days later, McCurdy's ship was deployed to the Pacific and he was aboard. In the course of the investigation, officers identified McCurdy as the prime suspect and learned that he was now at sea near Japan. So four investigators were sent to the ship to interview him. When they arrived, McCurdy's commanding officer ordered that he be escorted to an interview room. Because this was an order, it was apparently undisputed that McCurdy was now "in custody" for *Miranda* purposes.

The investigators began by engaging McCurdy in some small talk about his decision to join the Navy, hobbies, upbringing, and so forth. They then *Mirandized* him and McCurdy acknowledged that he understood his rights. Although he was not asked to expressly waive his rights, he impliedly did so when he voluntarily submitted to questioning.[1]

The subsequent interview was quite lengthy as it was conducted on and off over four days. But for our purposes, it is only necessary to discuss four things that happened:

- After McCurdy was *Mirandized* and was told the purpose of the interview, he said "They always tell you to get a lawyer." An investigator responded by saying that's "up to you" but that "it was important for him to help with [Maria's] disappearance." McCurdy began answering the investigators' questions.
- When asked if he had been molested when he was a child, McCurdy responded, "I want a lawyer." But about 20 seconds later, as the investigators were starting to leave the room, McCurdy spontaneously said, "I don't know if you guys got any other suspects," and "I want to help you guys, but I don't want to incriminate myself." The investigators resumed the interview and McCurdy continued to answer their questions.
- The investigators confronted McCurdy with a pornographic videotape that officers had recovered in his storage unit in Lemoor. After admitting he had rented it near the time Maria was abducted, he said, "I can't talk no more." But the investigators interpreted this to mean he just needed more water (he had previously asked for some). One of the investigators gave him a glass of water and McCurdy responded by asking why they thought he had rented a video on that day. The questioning continued.
- In response to a question about his childhood, McCurdy said, "I'd rather not say." He repeated this four times as the investigators continued to ask him about his childhood. After that, the questioning continued.

After the interview, McCurdy was arrested, removed from the ship and transported to the United States. Before trial, he argued that all of his statements should be suppressed because he had clearly invoked his *Miranda* rights at various times, but the investigators had continued to question him. For reasons we will discuss below, the court granted the motion as to some statements but not others. (This was probably not a major setback for the prosecution because the suppressed statements were apparently not incriminating.) In any event, the prosecution proceeded to trial with the evidence it had and the jury found McCurdy guilty with special circumstances. The judge sentenced him to death.

[1] See *Berghuis v. Thompkins* (2010) 560 U.S. 370, 382; *People v. Nelson* (2012) 53 Cal.4th 367, 375 ["Although he did not expressly waive his *Miranda* rights, he did so implicitly by willingly answering questions after acknowledging that he understood those rights."].

Discussion

On appeal to the California Supreme Court, McCurdy argued that all of his statements to the investigators should have been suppressed because, among other things, he began the interview by invoking his *Miranda* right to counsel and also invoked his rights several times thereafter. Consequently, the main issue on appeal was whether any of McCurdy's remarks clearly and ambiguously demonstrated an intent to immediately invoke the right to remain silent, the right to counsel, or both.[2]

PRE-WAIVER SMALL TALK: McCurdy argued that the investigators' pre-waiver small talk violated *Miranda* because it constituted "interrogation," and that it also constituted illegal "softening up." The court quickly disposed of both arguments. First, it ruled there was no "interrogation" because interrogation occurs only if the officers' words were reasonably likely to elicit an incriminating response,[3] and that the investigators' small talk obviously did not fall into this category.

Second, the term "softening up" has never been defined but it arguably results if officers are about to interrogate a suspect who has indicated he does not intend to waive his rights, and then the officers engaged him in a lengthy pre-waiver conversation for the purpose of causing him to believe it would be advantageous to talk; e.g., they disparaged the victim to make it appear they were on his "side."[4] But the court ruled that the officers here did nothing of this sort and that the their pre-waiver remarks appeared to be merely an attempt "to establish a rapport with defendant."

"THEY ALWAYS TELL YOU TO GET A LAWYER": This comment, which came after McCurdy had been *Mirandized*, was plainly not an unambiguous invocation because, as the court explained, "A reasonable officer in these circumstances would understand that defendant was expressing the abstract idea an attorney might be in his best interest, but he did not actually request one."

"I WANT A LAWYER": Although this remark was plainly an invocation of the *Miranda* right to counsel, officers are permitted to continue to question a suspect who invoked if the questioning was initiated by the suspect and both of the following circumstances: (1) the suspect's decision to initiate questioning was made freely, not as a result of badgering or coercion;[5] and (2) it reasonably appeared that the suspect wanted to open up a general discussion about the crime, as opposed to merely discussing unrelated matters or "routine incidents of the custodial relationship."[6] The court then ruled that both of these requirements were met when, as the investigators were starting to leave the room, McCurdy stopped them by saying, "I don't know if you guys got any other suspects." Said the court, "[D]efendant's statement about other suspects could fairly be said to represent a desire to start a generalized discussion about the officers' investigation."

McCurdy also contended that the investigators were required to re-*Mirandize* him before continuing the interview because his remark about wanting an attorney had somehow "undermined" his earlier implied *Miranda* waiver. The court summarily rejected the argument.

"I CAN'T TALK NO MORE": As noted, when McCurdy was asked about the rented pornographic videotape, he replied "I can't talk no more." Although this remark could be deemed an invocation if viewed in the abstract, one of the investigators testified that he interpreted it as merely a request for more water since McCurdy had been having problems with his voice. The court ruled that this interpretation was reasonable, especially since McCurdy freely responded to the question about the videotape immediately after he was given water.

"I'D RATHER NOT SAY": Finally, when McCurdy was asked about his childhood, he responded, "I'd rather not say" and then made similar remarks four times as the officers continued to question him about his childhood. But the trial court had ruled that these

[2] See *Davis v. United States* (1994) 512 U.S. 452, 459 ["But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning."].
[3] See *Rhode Island v. Innis* (1980) 446 U.S. 291, 301.
[4] See *People v. Scott* (2011) 52 Cal.4th 452, 478; *People v. Honeycutt* (1977) 20 Cal.3d 150.
[5] See *People v. Davis* (2009) 46 Cal.4th 539, 596; *People v. McClary* (1977) 20 Cal.3d 218, 226.
[6] *Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1045. Also see *People v. Thompson* (1990) 50 Cal.3d 134.

words constituted an unambiguous invocation and accordingly prohibited the prosecution from using any of his subsequent remarks in its case-in-chief. Thus, the *Miranda* violation was harmless because it could not have affected the jury's verdict. McCurdy's conviction and death sentence were affirmed.

In re J.G.

(2014) 228 Cal.App.4th 402

Issue

Did a contact between an officer and a 15-year old boy become an illegal de facto detention?

Facts

At about 8:45 P.M. a uniformed Daly City police officer noticed a 15-year old boy (identified herein as J.G.) walk across a street toward J.G.'s brother. J.G. was carrying a backpack. The officer decided to engage the brothers in a consensual encounter "because he stopped and talked to people all the time on his beat." The officer's first question to J.G. was whether he was willing to speak with him, and he said yes. After some "casual conversation," the officer asked the boys "what they were up to." J.G. said they were going to a party. At about this time, another officer in a patrol car arrived and stood about five to seven feet away to "monitor" the brothers.

The first officer then asked the brothers if they "had anything illegal" in their possession; both said no and consented to a search which was unproductive. About then, two additional officers arrived in a patrol car but their purpose was not to back up the other officers. Instead, one of them was returning a rifle he had borrowed from the backup officer. And after handing the rifle to him, the three of them began speaking together while the first officer spoke with the brothers.

The asked the boys if they would sit on the curb, and they said yes. He then asked J.G. if there was anything illegal in his backpack and he said no. J.G. then consented to a search of the backpack in which the officer found a semiautomatic handgun. J.G. was arrested. After J.G.'s motion to suppress the gun was denied, the court affirmed the petition that J.G. had possessed a firearm.

Discussion

J.G. argued that the initial consensual encounter had been transformed into an illegal detention by the time the officer obtained consent to search the backpack. Accordingly, he contended that the handgun should have been suppressed because it was the fruit of an unlawful detention. The court agreed.

Officers may, of course, seek to engage anyone in a conversation, and their encounter will be deemed consensual if the circumstances were such that a reasonable innocent person in the suspect's position would have believed he was free "to decline the officers' requests or otherwise terminate the encounter."[7] If not, the encounter becomes a de facto detention which is illegal if, as here, the officer lacked grounds to detain the suspect. Consequently, the issue before the court was whether or not, at the moment the officer found the gun, a reasonable innocent person in J.G.'s position would have believed he was free to terminate the encounter.

Although the officer did not tell the brothers that they were not free to leave, the court ruled that four things occurred that, taken together, could have caused them to believe so. First, the officer who initiated the contact began by asking the brothers if they had "anything illegal" in their possession which, in the court's view, "clearly conveyed to the brothers that he suspected them of unlawful activity." Second, the officer asked the brothers if they would sit on the curb. Third, the arrival of three additional officers rendered the encounter "increasingly intrusive." Fourth, one of the additional officers "displayed" a firearm by handing the rifle to the backup officer.

For these reasons, the court ruled that "the ensuing search of the backpack violated the Fourth Amendment, and the juvenile court's denial of J.G.'s motion to suppress was therefore improper."

Comment

There are some things about this opinion that should be noted. First, the court thought it significant that "a weapon had been displayed." But ordinarily, when a court uses such a term it means that an officer pointed a gun at the suspect or at least kept it at his side for immediate use. But, as noted, that did not

[7] *Florida v. Bostick* (1991) 501 U.S. 429, 436. Also see *Brendlin v. California* (2007) 551 U.S. 249, 256-57; *Florida v. Royer* (1983) 460 U.S. 491, 519, fn.4; *United States v. Drayton* (2002) 536 U.S. 194, 202.

happen here. Instead, one of the two newly-arriving officers handed the rifle to the second officer, and all three of them began talking amongst themselves while the first officer spoke with the brothers. We think this situation was so dissimilar to the usual "display" of a firearm that the court should have made some allowance for this difference.

Second, the court ruled that the first officer "clearly conveyed" to the brothers that he suspected them of illegal conduct because he asked if they had anything illegal in their possession. But it is difficult to understand how merely "asking" such a question would constitute the functional equivalent of an accusation. In fact, the very nature of the question demonstrates that the officer did not know the answer and therefore his words could not have reasonably been interpreted as an accusation.

On the other hand, there was substantial precedent for the court's ruling that the contact became "increasingly intrusive" as the result of the arrival of three additional officers and two patrol cars.[8] Granted, it appears the three additional officers were merely talking between themselves and were not keeping a watchful eye on the brothers. Still, suspects cannot ordinarily be expected to appreciate such nuances.

Finally, the court discussed at length the fact that J.G. was only 15-years old, and that there is some authority for requiring courts to take the age of the suspect into account in determining how a reasonable innocent person would view the situation.[9] Nevertheless, the court declined to address the issue because it thought that, under these circumstances, even an adult would have believed he had been detained.

In conclusion, we think the court made two important points. First, officers who have contacted a suspect must keep in mind that the number and behavior of any backup officers may be highly relevant circumstances. Second, the age of the suspect may be a relevant circumstance in determining whether he reasonably believed he could terminate the encounter.

People v. Lujano

(2014) 229 Cal.App.4th 175

Issue

Did officers have sufficient reason to believe that a home was being burglarized so as to justify a warrantless entry?

Facts

One afternoon, two Riverside police officers were driving by a house when they saw a man in the driveway stripping copper wire from an air conditioner. The officers contacted the man, Albert Vargas, who said he was stripping the wire because the air conditioner was broken. Vargas also said he did not live in the house, and that the owner was "Rick" but he did not know Rick's last name.

Having observed that a side door to the house was ajar, and having heard Vargas's somewhat suspicious story, the officers thought that the house was being burglarized. So one of them went to the door, "leaned inside," identified himself as a police officer, and ordered everyone inside to exit. The defendant, Ricardo Lujano responded and was ordered to walk outside backwards. As he did so, the officer "put hands on him" which apparently meant he pulled Lujano's hands behind his back and ordered him to keep them there. Lujano consented to a search of his person and the officer found a bag of methamphetamine. The officer then obtained Lujano's consent to search the house and, while searching a bedroom, he found a handgun and several other things that had been used nine days earlier in the armed robbery of a liquor store in Riverside. At some point, it was determined that Lujano was, in fact, living in the house (which belonged to his mother) and that the bedroom was his.

Lujano was charged with armed robbery, possession of a firearm by a felon, and possession of methamphetamine. Before trial, he filed a motion to suppress the evidence, but the motion was denied. He was subsequently convicted of the robbery and both of the possession crimes.

[8] See, for example, *United States v. Mendenhall* (1980) 446 U.S. 544, 554 ["the threatening presence of several officers" is relevant]; *In re Manuel G.* (1997) 16 Cal.4th 805, 821 [the "presence of several officers" is a factor]; *U.S. v. Washington* (9th Cir. 2004) 387 F.3d 1060, 1068 [suspect "was confronted by six officers" who were "around" him]. But also see *U.S. v. Jones* (10th Cir. 2012) 701 F.3d 1300, 1314 ["while there were three officers on the scene … the officers' presence was nonthreatening"].

[9] See *J.D.B. v. North Carolina* (2011) __ U.S. __ [131 S.Ct. 2394].

Discussion

On appeal, Lujano argued that all of the evidence found inside the house should have been suppressed for two reasons: (1) the officers had illegally entered his home when they walked onto the driveway, and (2) he was detained the moment the officer ordered him to exit and the officer lacked grounds to detain him. The court agreed with one of the arguments but rejected the other.

THE ENTRY ONTO THE DRIVEWAY: As noted, Lujano contended that the officers' act of approaching Vargas in the driveway constituted an unlawful search of Lujano's house. The Supreme Court has, in fact, ruled that the driveway of a home is within the curtilage of the house, and therefore a nonconsensual entry onto a driveway is technically a search. But it also ruled that officers are impliedly authorized to walk onto a driveway if a reasonable visitor might have done so to reach the front door or otherwise contact the occupants.[10] Accordingly, the court in *Lujano* ruled that the officers' entry onto the driveway to speak with Vargas did not constitute an illegal search because they "exercised no more than the same license to intrude as a reasonably respectful citizen—any door-to-door salesman would reasonably have taken the same approach to the house."

THE DETENTION OF LUJANO: After hearing Vargas's story, the officers suspected he had stolen the air conditioner while burglarizing the house and that he had an accomplice (probably because air conditioners are heavy and bulky). So one of the officers yelled inside and ordered everyone to exit, and this led to the detention of Lujano which, in turn, led to the discovery of the evidence linking him to the holdup. The court acknowledged that the officers might have had grounds to detain Lujano if the detention had occurred outside the house. But it ruled that the detention had actually occurred inside because, said the court, it is "the location of the arrested person, and not the arresting agents" that determines whether an occupant had been seized. The question, then, was whether the detention was legal.

The court ruled that when officers outside a suspect's home effectively detain the suspect who is inside, they must have more than reasonable suspicion—they must have both probable cause to arrest or search plus probable cause to believe there are exigent circumstances that necessitate an immediate entry. In the words of the court, "[T]o fall within the exigent circumstances exception to the warrant requirement, an arrest or detention within a home or dwelling must be supported by both probable cause and the existence of exigent circumstances.[11] The court ruled that the officers had neither.

Specifically, the court ruled that, while the officers might have reasonably believed that Vargas was "engaged in some sort of illegal activity," they had "no specific, articulable facts particular to [Lujano] suggesting that he might be involved in criminal activity." As the court pointed out, the officer who detained Lujano "never observed defendant doing anything suspicious, say, rifling through drawers. There is no evidence defendant acted aggressively or menacingly toward [the officer], or tried to flee. Rather, defendant made his presence known when commanded to do so, and obeyed all police instructions after that point." For these reasons, the court ordered the suppression of all evidence in the house that linked Lujano to the robbery.

Comment

What should the officer have done? Although some officers will probably disagree, the court said he should have requested—not ordered—Lujano to exit, then question him to determine if Vargas was telling the truth. Said the court, "Nothing in the record suggests that it was reasonably necessary for [the officer] to do what he did—immediately detain everyone on the premises, and sort things out later—rather than engaging in even the most minimal inquiry as to defendant's identity, or verifying Vargas's story before intruding into the house and detaining defendant." (A very similar issue was presented in *U.S. v. Nora*. See our report on pages 23-25.)

[10] *Florida v. Jardines* (2013) __ U.S. __ [133 S.Ct. 1409, 1415 ["This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters."]. Also see *Carroll v. Carman* (2014) __ U.S. __ [135 S.Ct. 348].

[11] Also see *Murdock v. Stout* (9th Cir.1995) 54 F.3d 1437, 1441; *U.S. v. Alaimalo* (9th Cir. 2002) 313 F.3d 1188, 1193.

People v. Jones

(2014) __ Cal.App.4th __ [2014 WL 6682649]

Issue

If officers arrest a DUI suspect who refuses to take a breath test, may they order a forcible blood draw if they learn that he is on parole, searchable probation, or subject to postrelease supervision under California's new realignment system?

Facts

Shortly before midnight, Fairfield police officers were dispatched to an injury accident involving two cars. When they arrived they saw that the airbag on one of the cars, a Toyota, had been deployed and they learned from witnesses that the driver fled on foot, last seen walking in the direction of Air Base Parkway. A few minutes later, officers spotted Bobby Jones walking on that street about 400 yards from the crash site. He was disheveled, smelled of alcohol, had bloodshot eyes and an unsteady gate. He told the officers that he was on probation, so they ran a records check and learned that he was actually on Postrelease Commuity Supervision (PRCS) and was therefore subject to a warrantless search. So they searched him and found airbag deployment powder on his clothing and keys to the Toyota in his pants pocket. They then *Mirandized* him and he admitted he had been the driver.

The officers then advised him of the requirement that he submit to a blood or breath test. He said he would not take a blood test so they drove him to the police station for a breath test. But when they arrived, he said he wouldn't take one of these either. So the officers drove him to nearby hospital where, against Jones's wishes, they had a phlebotomist draw a sample of Jones's blood. It tested at 0.25% and Jones was subsequently charged with, among other things, causing bodily injury while driving under the influence. Before trial, he filed a motion to suppress the test results, but the motion was denied. (He apparently did not contest the legality of the searches that resulted in the discovery of the airbag powder or the keys to the Toyota.) Jones then pled no contest and was sentenced to five years in prison.

Discussion

Under California's Criminal Justice Realignment Act of 2011, people who have been convicted of certain low-level felonies may be permitted to serve their prison sentences in a local county jail. Then, upon release, they will be supervised for up to three years by a probation officer. Even though the person was neither confined in a state prison nor supervised by a parole officer, his status is "akin to a state prison commitment; it is not a grant of probation or a conditional sentence."[12] As the court in *Jones* explained, the PRCS program "does not change any terms of a defendant's sentence, but merely modifies the agency that will supervise the defendant after release from prison." Significantly, convicts who are released on PRCS are automatically subject to the same search conditions as parolees; i.e., the convict, his residence and possessions "shall be subject to search at any time of the day or night, with or without a warrant, by an agent of the supervising county agency or by a peace officer."

The issue on appeal was whether a PRCS search condition impliedly authorizes officers to take a blood sample when a convict is arrested for DUI, or whether a search warrant is required. Jones argued that a warrant was necessary because the act of drawing blood from a person is a more significant intrusion than the usual type of search to which parolees are subject. The court disagreed, pointing out that "[t]he drawing of blood is sufficiently routine that it is one of the procedures to which every California driver implicitly consents as a condition of operating a motor vehicle in this state."[13]

In addition, the court noted that the purpose of a search condition is "to deter the commission of crimes and to protect the public," and that both of these purposes are served in cases where, as here, the postrelease convict has been arrested for DUI. Consequently, the court ruled that "Jones's mandatory PRCS search and seizure condition authorized the blood draw without the necessity of a warrant and offends no interest the Fourth Amendment is intended to protect." Jones's conviction was therefore affirmed.

[12] *People v. Fandinola* (2013) 221 Cal.App.4th 1415, 1422.
[13] Citing Veh. Code § 23612(a)(1)(A).

Comment

Four things should be noted about this issue. First, although the court's ruling technically applies only to PRCS searches, the court indicated that its ruling should also apply also to blood draws of parolees and probationers who are subject to a search condition; i.e., that a blood draw "falls within the scope of a search-and-seizure condition of parole, probation, or PRCS." Second, like parole and probation searches, a PRCS search will be ruled illegal if officers were unaware that the convict was on postrelease supervision or if the search was "arbitrary, capricious, or harassing."[14] Third, as the result of the Supreme Court's ruling in *Missouri v. McNeely*,[15] a warrant would still be required to draw blood from a DUI arrestee who was not subject to a search condition. Fourth, it goes without saying (but we'll say it anyway) that such blood draws must be conducted by a medical professional in accordance with "accepted medical practices."[16]

U.S. v. Nora

(9th Cir. 2014) 765 F.3d 1049

Issue

Did exigent circumstances justify a warrantless entry into a home to apprehend a feeing suspect who was armed?

Facts

Two uniformed LAPD officers were patrolling a neighborhood in the South Central area when they saw three men standing on the sidewalk in front of a house. The officers decided to contact the men but, as they approached, two of them stepped onto the front porch of the house. The two were later identified as Johnny Nora and Andre Davis. While standing on the sidewalk, the officers attempted to engage the men in a "casual conversation," but Nora suddenly "spun toward the front door" and "rushed" into the house, ignoring the officers' command to stop. As Nora spun around, they could see that he was holding a blue-steel semiautomatic handgun in his right hand.

Additional officers soon arrived, the house was surrounded, and everyone in the house was ordered to exit. Nora complied and was arrested for possessing a loaded firearm in a public place.[17] Officers then ran his criminal history and learned that he was a convicted felon. They also learned that he lived in the house, so they sought a warrant to search the premises based on their observations outside the house, statements made by Nora after he exited, and the discovery of marijuana and cash in Nora's possession when he was searched incident to the arrest. A judge issued the warrant and, in the course of the search, officers found heroin, methamphetamine, cocaine, four semiautomatic handguns, and over $9,000 in cash. Nora's motion to suppress the evidence was denied and he pled guilty to possessing cocaine base with intent to distribute. He was sentenced to ten years in prison.

Discussion

On appeal to the Ninth Circuit, Nora argued that the evidence discovered in his house should have been suppressed for the following reasons.

PROBABLE CAUSE TO ARREST: Nora's first argument was that the officers lacked probable cause to arrest him for possessing a "loaded" handgun in a "public" place because he was on his private property when he was arrested and the officers had no way of knowing that the gun was loaded. The court disagreed.

As for being on private property, it pointed out that the officers first saw Nora standing on a public sidewalk then, moments later, they saw him standing on the porch holding a gun. Said the court, "Given the short interval during which the officers lost sight of Nora, they had reasonable grounds to believe that the firearm they saw him holding on the porch had been in his hand just moments earlier on the sidewalk as well." The court also ruled the officers had probable cause to believe the handgun was loaded because semi-automatic handguns are "principally used for self-defense and protection" and these objectives can usually be served only if the gun was loaded.

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[14] See *Samson v. California* (2006) 547 U.S. 843, 856; *People v. Schmitz* (2012) 55 Cal.4th 909, 916.
[15] (2013) __ U.S. __ [133 S.Ct. 1552]. **NOTE**: The court in *Jones* also ruled that *McNeely* may not be applied retroactively.
[16] *Schmerber v. California* (1966) 384 U.S. 757, 772.
[17] Pen. Code § 25850(a).

ARREST INSIDE THE HOUSE: Nora next argued that the officers, by ordering him to exit the house, had effectively arrested him *inside* the house; and it was therefore an illegal arrest because the United States Supreme Court ruled in *Payton v. New York* that an entry into a suspect's home for the purpose of arresting him requires exigent circumstances.[18] The government argued that there were exigent circumstance; i.e., Nora was holding a deadly weapon. But the court summarily rejected the argument, saying that possession of a loaded firearm in a public place does not "present the kind of immediate threat to the safety of officers or others necessary to justify a disregard of the warrant requirement."

THE SEARCH WARRANT: As noted, the officers did not physically enter Nora's house until they had obtained a search warrant. So Nora argued that, because the Ninth Circuit had ruled that the arrest inside his house was unlawful, the warrant was invalid because its probable cause was based on evidence seized as the result of the unlawful arrest. The court agreed and ruled that "the entire warrant was invalid and all evidence seized pursuant to it must be suppressed."

Comment

There are four glaring problems with the Ninth Circuit's rulings. First, it is incomprehensible that a court could rule that a suspect who is fleeing from officers does not present an immediate threat to them and others when, holding a semi-automatic handgun, he runs into a house and shuts the door. Not only would the suspect have a clear shot at anyone who opened the door and many people out on the street, in most cases it would be reasonable for the officers to believe that he had fled into the home of strangers whose lives were now in jeopardy. Nevertheless, based on its extensive training and experience in such matters, the court in *Nora* concluded that no one was in danger because Nora did not actually point his gun at the officers, plus, he did not actually threaten to kill them. Here are the court's words: "True, the officers saw Nora in possession of a handgun. But Nora never aimed the weapon at the officers or anyone else, and the officers had no evidence that he had used or threatened to use it." These remarks were foolish and irresponsible.

Second, the court failed to understand that the officer's entry into the house was justified by a second exigent circumstance: "hot pursuit." Specifically, the Supreme Court has ruled that a warrantless entry into a home is permitted under the "hot pursuit" exception if the following circumstances existed: (1) the officers had probable cause to arrest the suspect; (2) the arrest was "set in motion" in a public place or, as in *Nora*, the front porch or threshold;[19] and (3) the suspect responded by running inside. As the Supreme Court summarized the rule in *United States v. Santana*. "[A] suspect may not defeat an arrest which has been set in motion in a public place by the expedient of escaping to a private place."[20]

The Ninth Circuit attempted to distinguish *Santana* by saying it didn't apply because Nora was wanted for merely a misdemeanor. But the Supreme Court in *Stanton v. Sims* expressly rejected the argument that the "hot pursuit" exception applies only to felonies.[21] In fact, the Court pointed out that the California rule—in which the seriousness of the underlying crime "is of no significance"[22]—was consistent with its most recent ruling on the matter.

Third, the court in *Nora* ignored the Supreme Court's ruling in *New York v. Harris* that the only remedy for a violation of *Payton* is the suppression of evidence that was found *inside* the house—not evidence that was obtained from the arrestee after he had been removed from the premises. Just listen to the clarity of the Supreme Court's ruling In *Harris*: "[W]here the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of *Payton*."[23]

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[18] (1980) 445 U.S. 573. Also see *People v. Ramey* (1976) 16 Cal.3d 263.

[19] See *Illinois v. McArthur* (2001) 531 U.S. 326, 335 ["This Court has held that a person standing in the doorway of a house is 'in a public place,' and hence subject to arrest without a warrant permitting entry of the home."]; *People v. Superior Court (Quinn)* (1978) 83 Cal.3d 609, 615-16; *U.S. v. Whitten* (9th Cir. 1983) 706 F.2d 1000, 1015.

[20] (1976) 427 U.S. 38, 43. Edited.

[21] (2013) __ US __ [134 S.Ct. 3, 6].

[22] *People v. Lloyd* (1989) 216 Cal.App.3d 1425, 1430.

[23] (1990) 495 U.S. 14, 21. Also see *People v. Marquez* (1992) 1 Cal.4th 553, 569; *U.S. v. Crawford* (9th Cir. 2004) 372 F.3d 1048.

Fourth, the court completely lost it when it said that a suspect who is ordered to exit his home has a right to "collect himself" before he steps outside. Here are the court's actual words: "When the police unreasonably intrude upon [the privacy of a home] by ordering a suspect to exit his home at gunpoint, the suspect's opportunity to collect himself before venturing out in public is certainly diminished, if not eliminated altogether." Are we to believe that arrestees who are holed up in their homes now have a constitutional right to relax a while before surrendering? Maybe watch SportsCenter? Drink a beer? Play a video game? The court doesn't say, and it really doesn't matter because the whole idea that arrestees have such a right is laughable.

For these reasons, we expect that *Nora* will be viewed as a legal aberration or worse.

U.S. v. Andino

(2nd Cir. 2014) 768 F.3d 94

Issues

(1) Could DEA agents lawfully search a house if, although they had consent from a resident who was in jail, the resident who opened the door refused to admit them? (2) Apart from consent, did an exigent circumstance justify the warrantless entry? (3) If so, did the exigent circumstance also allow the agents to enter the kitchen and second floor?

Facts

In the course of a DEA investigation, agents in Buffalo, New York arrested Anderson Montanez who later gave them written consent to search his home. Montanez informed the agents that he shared the house with his girlfriend, Yvette Andino, that he had hidden "a couple" of ounces of cocaine in a book bag, and that Andino could show them where it was located. DEA agents and Buffalo police officers arrived at the house at about 11 P.M. and surrounded it.

When agents walked to the front door, they discovered there was an outer and an inner door. After they knocked on the outer door, Andino opened the inner door and an agent identified himself and informed her that Montanez had consented to a search of the premises for his cocaine. Andino asked to see a copy of the consent form but when she saw it she slammed the door shut and ran into the kitchen. The agents then heard the sounds of running water and the opening and closing of kitchen drawers. Since Andino was obviously flushing the cocaine, agents forcibly entered and arrested her as she was walking from the kitchen into the living room. They then went into the kitchen, turned off the faucet and seized a baggie of cocaine in the sink. Then, while conducting a protective sweep of the second floor, they saw the book bag and seized it.

Andino and Montanez were charged with, among other things, conspiracy to distribute cocaine. Before trial, they filed a motion to suppress the cocaine in the sink on the grounds that the agents' warrantless entry into the house was not justified by exigent circumstances or consent; and, even if it were, the exigency ended when the agents arrested Andino. The district court summarily denied Montanez's motion because he had consented to the search. (Montanez did not appeal this ruling.) But the district court granted Andino's motion as follows: It ruled that the agents' entry into the house was lawful because they reasonably believed that Andino was in the process of destroying evidence. But it also ruled that the agents' entries into the kitchen and the second floor were unlawful because Andino had already been arrested and was therefore unable to destroy anything. The government appealed to the Second Circuit.

Discussion

At the outset, it should be noted that the government did not challenge the district court's ruling that the agents did not have sufficient grounds to conduct a protective sweep of the second floor. That was probably because they had no reason to believe that anyone but Andino was on the premises.[24] Consequently, the only issues on appeal were the legality of the warrantless entry into the house and the entry into the kitchen.

ENTRY INTO HOME: CONSENT: Although Montanez consented to the search of the house, Andino did not. And while officers are not required to seek consent

[24] See *Maryland v. Buie* (1990) 494 U.S. 325, 327; *People v. Werner* (2012) 207 Cal.App.4th 1195, 1209.

from all residents before they enter,[25] the United States Supreme Court ruled in *Georgia v. Randolph* that, if one resident of a house consents to an entry or search but another refuses, the consent is invalid if the following circumstances existed: (1) the non-consenting resident affirmatively informed officers that he objected to the search, and (2) this objection was made in the officers' presence when they sought to enter or search.[26] Because Andino expressly refused to consent (by slamming the door) and because she did so when the agents announced their purpose, the court ruled that, as to Andino only, the agents' entry into the house could not be based on Montanez's consent.

ENTRY INTO HOME: EXIGENT CIRCUMSTANCES: The question, then, was whether the agents' warrantless entry into the house was justified by exigent circumstances. Officers may, of course, enter a home without a warrant if they reasonably believed there was destructible evidence on the premises that would be destroyed if they waited for a warrant. As the Supreme Court explained, "[T]o prevent the imminent destruction of evidence has long been recognized as a sufficient justification for a warrantless search."[27]

In light of this rule, the Second Circuit reversed the trial court and ruled that the agents' entry into Andino's home was, in fact, justified by exigent circumstances because, (1) based on information from Montanez, the agents reasonably believed there was cocaine on the premises; and (2) after the agents identified themselves and notified Adino that Montanez had consented to a search of the premises, she slammed the door shut, ran from the door, turned on a faucet and started opening and closing the kitchen drawers. Said the court, "These are classic sounds indicating destruction of evidence."

ENTRY INTO KITCHEN: EXIGENT CIRCUMSTANCES: Andino argued that, even if the agents' entry into the house was lawful, they could not enter the kitchen because she had been arrested in the living room by then and, therefore, she had no ability to destroy anything in the kitchen. Although the district court bought this argument, the Second Circuit rejected it mainly because the agents could hear the faucet running, and this indicated that some evidence was still being flushed. Therefore, said the court, "the officers' entry into the kitchen after physically securing Andino was justified by continuing exigent circumstances." And because the cocaine was in plain view when the agents turned off the faucet, the court ruled that the district court erred by suppressing the evidence.

Harris v. O'Hare

(2nd Cir. 2014) 770 F.3d 224

CASE SUMMARY: Two police officers on patrol in a high-crime area of Hartford, Connecticut arrested George Hemmingway, a known gang member, after they saw him drop a container of heroin. After he was handcuffed, Hemmingway told the officers that they could find "some guns" under the driver's seat of a grey Nissan located in the rear yard of 207 Enfield St. Two other officers were notified and they immediately went to the address but apparently saw no Nissans on the property. Nevertheless, they opened a front gate and started walking toward the back yard while holding their service weapons in a "two-handed grip." Just then, one of the officers saw the homeowner's Saint Bernard dog, Seven, in the side yard. As the officer approached, Seven took "a few steps toward him" then growled. The officer believed the dog was chasing him so he shot him three times, killing him. To make matters worse, the homeowner's 12-year old daughter witnessed the shooting.

On the child's behalf, the homeowner sued the officers in federal court. Before trial, the judge ruled there was sufficient evidence of exigent circumstances and therefore the officers were entitled to qualified immunity. Consequently, the jury found that the officers were not liable. The Second Circuit reversed, ruling that the mere presence of handguns on a person's private property does not constitute an exigent circumstance. Said the court, "We decline to extend the exigent circumstances exception to occasions in which the only claimed urgency is the alleged presence of a firearm."

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[25] See *Georgia v. Randolph* (2006) 547 U.S. 103, 122; *U.S. v. Lopez* (2nd Cir. 2008) 547 F.3d 397, 400.
[26] See *Fernandez v. California* (2014) __ U.S. __ [134 S.Ct. 1126, 1136]; *Georgia v. Randolph* (2006) 547 U.S. 103, 106.
[27] *Kentucky v. King* (2011) __ U.S. __ [131 S.Ct. 1849, 1856]. Also see *Missouri v. McNeely* (2013) __ U.S. __ [133 S.Ct. 1552, 1559].

Sessoms v. Grounds

(9th Cir. 2014) 768 F.3d 882

CASE SUMMARY: In an en banc decision, the Ninth Circuit ruled that an incarcerated murder suspect named Sessoms invoked his *Miranda* right to counsel when he asked Sacramento police detectives, "There wouldn't be any possible way that I could have a lawyer—a lawyer present while we do this? ... Yeah, that's what my dad asked me to ask you guys .... uh, give me a lawyer." The case came to the Ninth Circuit from the California Court of Appeal which had ruled that these remarks did not constitute an invocation because they were ambiguous. Specifically, the court noted that the first remark was merely a question and the second question was an explanation of what his father had told him to do. Thus, neither remark demonstrated that Sessoms, himself, wanted to have an attorney present.

The Ninth Circuit ruled, however, that the Court of Appeal's decision was based on such a hypertechnical reading of Sessom's words that the ruling constituted "an unreasonable application of Supreme Court precedent." Accordingly, it ruled that Sessom's subsequent incriminating statements should have been suppressed. (A close case.)

Proposition 47 and its impact on criminal investigations

On November 4, 2014, California voters passed Proposition 47 which went into effect immediately. Virtually all of the pre-election discussion about the initiative centered on its provision that certain non-violent felonies and wobblers would automatically be converted into crimes that could only be prosecuted as misdemeanors unless the arrestee had certain priors. The most notable of these crimes were drug possession for personal use and various theft offenses when the value of the loss was less than $950. The initiative may, however, have had some unintended consequences to the law pertaining to search and seizure. Although it will be up to the courts to determine the scope of these changes, if any, here are some thoughts.

THE "IN-THE-PRESENCE" RULE: Subject to certain exceptions, officers may make warrantless arrests for most misdemeanors only if they had probable cause to believe the crime had been committed "in their presence."[28] This means that officers are statutorily prohibited from making warrantless arrests for crimes that were converted to straight misdemeanors by Proposition 47 unless the crime was committed in their presence or the crime was exempt from this requirement.[29]

POST-ARREST PROCEDURE: Because Proposition 47 converted certain felonies and wobblers into cite-and-release misdemeanors, some arrestees who would have been transported to jail in the past must now be released after they sign a promise to appear.[30] These crimes include straight possession of drugs (see Health and Safety Code sections 11350, 11377, and 11377) and the new shoplifting statute (Penal Code section 459.5). Prop 47 did not, however, affect those statutes that authorize officers to book people who have been arrested for certain misdemeanors. See this endnote for a partial list.[31]

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[28] See *Carroll v. United States* (1925) 267 U.S. 132, 156-57 ["The usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony, and that he may only arrest without a warrant one guilty of a misdemeanor if committed in his presence."]; Veh. Code § 40300.5; Pen. Code § 836(a)(1).

[29] **NOTE**: Misdemeanors that are exempt from this requirement include domestic violence, gun possession, and most DUIs. See Penal Code § 836(a); Veh. Code § 40300.5.

[30] See Pen. Code §§ 853.6.

[31] **NOTE**: A person arrested for a misdemeanor may be taken into custody for any of the reasons below. See Pen. Code §§ 827.1, 853.6(i); Veh. Code §§ 40302, 40303(b). **Warrant arrests:** •Arrest for domestic violence or a violation of a protective court order involving domestic violence." •Arrest for a crime of violence, a crime involving a firearm, resisting arrest, or furnishing false information to a peace officer. •Arrestee is charged with another crime for which he is ineligible for release. **Warrantless arrests:** •Arrest for violation of Veh. Code §§ 23152. •Arrest for domestic violence or violation of a protective court order involving domestic violence. •It is reasonably likely that the offense would continue. •Theft of a firearm valued at $950 or more. • It is reasonably likely the safety of persons or property would be jeopardized by immediate release. •Arrestee unable to provide satisfactory ID (also see Veh. Code § 40302(a)). •Arrestee needed medical care or was so intoxicated that he could have posed a danger to himself or others. • Arrestee refused to sign a promise to appear. •Arrestee had outstanding warrants. • Arrest for violation of any of the following Vehicle Code sections: 2800, 10852, 10853, 14601, 14601.1, 14601.2, 20002, 20003, 21200.5, 21461.5, 23103, 23104, 23109, 23152, 23332, 40303.

The question arises: Must cite-and-release arrestees be cited *at the scene of the arrest*, or may officers transport them to a jail or police station for booking, then cite them out from there? Technically, the Penal Code permits officers to do choose either.[32] But it seems they should have a good reason for taking the arrestee into custody, and most of the good reasons are contained in the Penal and Vehicle code sections listed in footnote 31. It also appears that these arrestees must be released promptly after the booking procedure has been completed. This would mean, for example, that they could not be held for interrogation or for inclusion in a lineup (unless they consented to it), and they must not be housed in the general population of the facility.

SEARCHES INCIDENT TO ARREST: It does not appear that Proposition 47 will affect the longstanding rule that officers may, as an incident to a custodial arrest, search the arrestee's clothing and property in his immediate possession.[33] In other words, if officers decided to book an arrestee who was releasable per Proposition 47, they would still be permitted to conduct a search incident to the arrest before placing him in a police vehicle for transport.

BOOKING SEARCHES: Another longstanding rule is that, upon arrival at the jail, but before the arrestee had been placed in a booking cell, officers may conduct a pre-booking search.[34] Again, this rule should not be affected by Proposition 47 because pre-booking searches are necessary whenever an arrestee is taken to a secure area of a jail or police station—even if only for booking. But such a pre-booking search must be limited to a search for weapons and contraband—not, for example, a strip search.[35]

VEHICLE SEARCHES: The United States Supreme Court has ruled that officers may search a vehicle without a warrant if they have probable cause to believe there is evidence inside.[36] Accordingly, even if a misdemeanor arrestee will be cited and released at the scene, officers may search his car if they have probable cause to believe it contains evidence of a felony or misdemeanor. Similarly, if officers decide to book the suspect, they would be permitted to conduct a vehicle inventory search if the search and impound were reasonably necessary; e.g., to protect the unattended vehicle from theft or vandalism or to inventory its contents.[37]

SEARCH WARRANTS: Although most search warrants are issued when the crime under investigation was a felony, Proposition 47 will not change the rule that warrants may also be issued in certain misdemeanor cases. (See this footnote for a partial list.[38]). It should be noted that the Penal Code authorizes judges to issue warrants for drugs, stolen property, and other contraband in misdemeanor cases if the contraband was possessed "with the intent to use [it] as a means of committing a public offense."[39] How can officers prove such intent? It apparently doesn't matter because the Court of Appeal in *Dunn v. Municipal Court* ruled that proof of intent is unnecessary because it is "the possession itself [that] is the public offense."[40] It is therefore arguable that judges could issue warrants for drugs or other contraband in straight misdemeanor cases. POV

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[32] See Pen. Code §§ 853.6(a)(1); *People v. Superior Court (Murray)* (1973) 30 Cal.App.3d 257, 264.
[33] See *United States v. Robinson* (1973) 414 U.S. 218; *Knowles v. Iowa* (1998) 525 US 113; Pen. Code § 827.1(h). Also see *Atwater v. City of Lago Vista* (2001) 532 U.S. 318, 354.
[34] See Pen. Code § 4030(e); *People v. Panfili* (1983) 145 Cal.App.3d 387, 393-94.
[35] See Pen. Code § 4030(e).
[36] See *United States v. Ross* (1982) 456 U.S. 798, 809 ["[A vehicle] search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained."]; *People v. Carpenter* (1997) 15 Cal.4th 312, 365.
[37] See *Halajian v. D&B Towing* (2012) 209 Cal.App.4th 1, 15 [community caretaking exception applied to towing of unregistered vehicle in convenience store parking lot]; *People v. Shafrir* (2010) 183 Cal.App.4th 1238, 1247 ["[T]he ultimate determination is properly whether a decision to impound or remove a vehicle, pursuant to the community caretaking function, was reasonable under all the circumstances."].
[38] **NOTE**: Per Pen. Code § 1524(a), a judge may issue a warrant to search for evidence in misdemeanor cases as follows: DUI blood draws, vehicle tracking warrants, there is stolen property of any value on the premises, there is evidence that was delivered to the premises for the purpose of concealing it, cell phone and internet records, evidence of sexual exploitation of a child or child pornography, home of a 5150; home of domestic violence arrestee, home subject to "no firearms" order.
[39] Penal Code section 1524(a)(3)
[40] (1963) 220 Cal.App.2d 858, 874.

The Changing Times

Alameda County District Attorney's Office

New prosecutors: **Colleen Clark**, **Angelina Clay**, **Brian Loftus**, **Brooke Perkins**, and **Chris Vaccarezza**. Retired inspector **Frank Sabatini** died on May 7, 2014 at the age of 83. Frank was with the DA's Office for ten years; before that, he was a Berkeley police officer.

Alameda County Sheriff's Office

The following deputies have retired: Capt. **Erik Gulseth** (26 years), **Daniel Camozzi** (15 years), **James McDonnell** (14 years), and **Von Wissmiller** (11 years). New deputies: **Blayne Evans**, **Craig Maria**, and **Justin Mendiola**. **Joseph Delgado** was appointed Sheriff's Deputy II.

BART Police Department

Thomas Henderson was promoted to sergeant. The following officers have retired: **Alfredo Zamora** (28 years), **Imran Mirdad** (13 years), **Eugene Cunningham** (7 years), **Deborah Erdy** (5 years), and **Michael Kalagayan** (6 years). Lateral appointments: Sgt. **Gwendolyn Brady**, **Jonathan Smith**, **Bradford Wilson**, **Gary Clark**, and **Steven Dexheimer**. New officer: **Christopher Calhoun**. Sgt. **Anisa McNack** transferred from Patrol to Internal Affairs. New dispatcher: **Brett Phillips**.

Berkeley Police Department

Sgt. **Jen Louis** was promoted to lieutenant. **Rashawn Cummings** was promoted to sergeant. **Monique Frost** was promoted to communication center manager. The following officers have retired: Lt. **Matt Morizono** (29 years), **Matt Meredith** (30 years), **John Ettare** (12 years), Parking enforcement officers **Jerry Cook** (20 years), and **Carl Boscoe** (8 years). The following officers have resigned: **Stephen Link**, **Juan Carlos Perez**, and **Jeremy Snyder**. Lateral appointments: **Brian Hartley**, **Donovan Edwards**, and **Corey Shedoudy**. New dispatchers: **Sheryll Confreros**, **Marguerite Cervantes**, **Amelia Hickey**, **Chris Oliver**, and **Justin Walker**. New community service officers: **Anna Bolla** and **Leon McDaniels**. Retired Berkeley PD inspector **Frank Sabatini** passed away on May 7, 2014. Inspector Sabatini served with BPD from 1956 to 1982 followed by ten years at the Alameda County District Attorney's Office.

East Bay Regional Parks Police Department

Sgt. **Alan Love** was promoted to lieutenant and Officer **Benjamin Guzman** was promoted to sergeant. Lt. **Jon King** lateraled to Moraga PD after 29 years of service. Property & Evidence Specialist **Larry Kiefer** left to work for Livermore PD, after a total of 32 years of service, (18 years sworn). Recruit Officer **Ashley Lundin** is currently attending the 152nd ACSO Academy. **Heather DeQuincy** was hired as the police operations secretary.

Emeryville Police Department

Former Emeryville police sergeant **Randy Souza** passed away from illness on September 16th, 2014. He was 64 years old. Randy was a lateral officer from Piedmont police. He worked various assignments at EPD but will be best remembered for his years as the Traffic Sergeant and his easy-going nature. He was remembered by family and friends at Transfiguration Catholic Church in Castro Valley. We wish his family well in his passing.

Fremont Police Department

Sergeants **Michael Tegner**, **Patrick Epps**, and **Steve Pace** have been promoted to lieutenant. The following officers have retired: Sgt. **Jeff Swadener** (29 years), **Joseph Geibig** (26 years), and **Paul Singleton** (26 years). New Officers: **Eric Rose**, **Ryan Higgins**, **Grant Goepp**, **Jorge Navas**,**Thomas Latimer**, and **Brian Hughes**.

Hayward Police Department

Capt. **Darryl McAllister** was appointed police chief of Union City. Lt. **Jason Martinez** was promoted to captain. Officers **Heather Linteo**, **John Racette**, and **Jose Banuelos** were promoted to sergeant. New officers: **Jason Gillett**, **Steven Kawada**, **Joshua Gould**, **Jonathan McLeod**, **George Correia**, **Jenna Vernon**, **Ezekiel Wheeler**, **Armando Diaz**, **Daniel Noble**, **Gabrielle Wright**, **Erik Dadej**, **Jesus Uribe**,

and **Adam Vonnegut**. Insp. **Fraser Ritchie** retired after 27 years of service.

Retired Hayward Police Chief **Mike Manick** passed away on December 7, 2014. Chief Manick had a long and successful career in law enforcement beginning as a police officer with the City of Novato in 1967. He was promoted to the rank of sergeant and then left Novato PD to accept a position as police lieutenant with the City of Tiburon, and in 1972 became the city's chief of police. In 1977 Chief Manick took over the Arcata Police Department, serving as their chief of police until 1981, when he accepted the chief's position with the Union City PD. Chief Manick served at Union City until January of 1987 when he accepted a position as Hayward Police Department's eighth chief of police, following Chief Plummer's election as sheriff. Chief Manick served Hayward PD well, leading us through one of the most difficult events in our department's history, the murder of Officer Benjamin Worcester. Chief Manick retired in June of 1989 after suffering a disabling heart attack.

NEWARK POLICE DEPARTMENT

Det. **Dan Anderson** retired after over 28 years of service. Transfers: Detective **Jeff Revay** from Special Enforcement Team to Major Crimes Task Force; Sgt. **David Lee** and **Randy Ramos** from Patrol to Special Enforcement Team. Lateral appointment: **Natasha Stone** (ACSO).

OAKLAND POLICE DEPARTMENT

Lt. **Donna Hoppenhauer** was promoted to captain. The following sergeants were promoted to lieutenant: **Jill Encinias**, **Bobby Hookfin**, and **Steven Nowak**. The following officers were promoted to sergeant: **Michael Land**, **Wilbert Fleming**, **Robert Trevino**, **Mega Lee**, **Sammy Kim**, **Anwawn Jones**, and **Richard Coglio**.

The following officers have retired: Sgt. **Jack Doolittle** (22 years), Sgt. **Derwin Longmire** (29 years), **Iram Padilla** (26 years), and **Bradley Chun** (22 years). The following officers have taken disability retirements: Capt. **Anthony Rachal** (27 years), **Vy Le** (16 years), **Sam Miller, Jr.** (17 years), **Michael Sivila** (18 years), **Michael Igualdo** (17 years). New officers: **Miguel Ugarte**, **Abel Alcantar-Belloso**, **Jason Amarant**, **Pavel Del Monte**, **Louis Forneris III**, and **Colin Gardner**.

PIEDMONT POLICE DEPARTMENT

San Jose police lieutenant **Jeremy Bowers** was appointed captain of Piedmont PD. Capt. **Scott Wyatt** retired after 35 years in law enforcement (27 years at Sausalito PD and 8 years at Piedmont PD). New officer: **Stephen Hill**.

SAN LEANDRO POLICE DEPARTMENT

Officers **Nicholas Corti** and **Anthony Morgan** were promoted to sergeant. The following officers have retired: Capt. **Greg Lemmon** (28 years), Sgt. **Ann O'Callaghan** (25 years), and **Catherine Pickard** (23 years). New officers: **Diljeet Sekhon**, **William Kambic**, **Alexander Ying**, and **Mitchell Moschetti**. New police recruits: **Stephen Barnes**, **Christopher Barris**, and **Zachary Sampson**. **Michelle Ratto-Branchaud**, **Melissa Graham**, and **Danielle Fowler** were promoted to Senior Public Safety Dispatcher. New dispatchers: **Katie Green**, **Julia Jacobo**, **Christi Colon**, **Anna Warren**, **Taylor Reading**, and **Heather Solari**. **Jacquelyn Diaz** was appointed youth coordinator specialist. **Johanna Overton** was appointed police service aide.

UNION CITY POLICE DEPARTMENT

Deputy Chief **Darryl McAllister** was appointed chief of police. Chief McCallister, who was formerly a captain at Hayward PD, succeeds Chief **Brian Foley** who retired after 30 years of service to the department.

POV

War Stories

Out of gas and luck

One night, a man driving a stolen Kawasaki ZX 10 led CHP officers on a chase on Oakland's freeways, but they eventually called it off because it was becoming too dangerous. Although the CHP cars dropped back, a CHP helicopter kept following him. After a while, the driver exited the freeway and stopped at a gas station for a fillup. But when he saw the CHP helicopter overhead, he raced back to his motorcycle and sped off. Over the next 15 minutes or so, he stopped at three other gas stations, but each time he got spooked when he saw the helicopter. A short time later, the inevitable happened: he ran out of gas and was apprehended by CHP and OPD officers as the motorcycle sputtered to a stop.

We all have our priorities

Meanwhile, BART police officers were chasing two men in a stolen car when the driver pulled into a parking lot and slammed on the brakes. The passenger immediately bailed out but, as the officers shined their spotlights at the car, they saw that the driver was still inside—and he was frantically trying to attach an anti-theft device to the steering wheel. After arresting him, a perplexed officer asked why he was so desperate to secure the car. The man said, "'Cause I didn't want nobody takin' it."

Criminal's Rule #57: Take off your disguise after the heist

A man who robbed a Wells Fargo bank in Oakland wore a fake bushy brown beard, a necktie, and a fedora hat. Bank employees in the East Bay were notified to watch for such a person. A week later, employees at the Well Fargo branch in Lafayette spotted the man casing the bank, and he was wearing the same getup. So they called the police. Meanwhile, the suspect got spooked or something because he disappeared. Although he was gone when officers arrived, an Orinda officer who had been alerted to the situation was passing a Mercedes SUV when he happened to notice that the driver was wearing a fedora, a necktie, and a fake beard. Too much of a coincidence, he thought, so he stopped the car and quickly learned that he was the bank robber. When asked why he was still wearing the disguise, he said his girlfriend thinks it makes him look "distinguished."

Looking for new friends and relatives

Every week, the website for a police department in Maryland posts a photo of a wanted suspect, and it provides a space below the photo for viewers to post any information they have about him or his whereabouts. One week the featured criminal was a robber who decided to have some fun by posting the following under his photograph: "LMAO [i.e., laughing my ass off] all u cowards telling [expletive] can't catch me with these [expletive] help. Yall will never catch me." The man was caught a few hours later after the police received a bunch of phone calls from his friends and relatives who, not only identified him, but gladly provided his current whereabouts.

What goes around . . .

A bondage actress who was hurt while shooting and B&D movie in San Francisco sued the production company—Slave Labor Productions—because some of the ropes pinched the nerves in her arms, causing one arm to go numb for several weeks. The case went to binding arbitration (a pun, but true) and the production company argued that the woman wasn't hurt that bad. They also pointed out to the arbitrator that when you watch the movie you can hear her yelling "Give me more pain!" Still, the arbitrator awarded the woman $35,000, having decided that the folks at Slave Labor needed some pain, too.

A Maserati patrol car?

Residents of Braintree, Massachusetts started noticing that the city got a new patrol car—a Maserati? It was even painted black and white with a police shield on the doors. When a real officer stopped the Maserati, he noticed that the driver had changed the department's motto on the white doors from "Protect and Serve" to "Deceptions Punish and Enslave." He was arrested for impersonating a police officer and disrespecting of a police department's motto.

Would you cash a check from this guy?

Police in Bellevue, Washington busted the headquarters of an identity theft ring and found a bunch of fake ID cards. There is reason to believe that the one below was also a fake:

A new problem: Recreational drones

The pilot of an NYPD helicopter had to take evasive action when he spotted a drone heading directly toward it. Having avoided a mid-air collision, the pilot followed the drone to a house in Bushwick, N.Y. where officers later arrested the owner and operator of the drone. Police say drones are becoming a big problem in New York, especially because anyone can now buy them, but most people don't have a clue how to operate them.

Astonishing

A consulting firm hired by the NYPD announced the results of an expensive survey of residents that proved—beyond a shadow of the doubt—that the more times a person is stopped by an officer, the more their favorable view of local law enforcement plummets.

Never mind

In the recent case of *U.S. v. Carlos Sevilla-Oyola* the defendant, who had pleaded guilty to drug trafficking, argued that his 33 year prison sentence should be modified because it differed from the sentence that prosecutors had promised him. The court scrutinized the defendant's legal argument and agreed with him, ruling that instead of 33 years he should have been given life.

A refreshingly candid doper

Pleasanton police officers detained a man who had been standing in the street and yelling at passing motorists. Suspecting the man was under the influence of drugs, they asked if he was taking any medications. The man responded, "If you consider crystal meth a medication, then yes I am."

Retired but not off duty

Retired Livermore police lieutenant Scott Roberson was driving along Vasco Road when he saw a man walking away from a parked Honda. There was something suspicious about the guy, so Robertson notified LPD on his cell phone. When officers arrived they detained the suspect and discovered that he had just stolen the Honda. But their satisfaction increased substantially when, while conducting an inventory search of the car, they found a digital satellite receiver that had also just been stolen from an RV owned by retired LPD captain Scott Trudeau.

There goes the raise

Early one morning, CHP officers saw a car parked on the shoulder of I-880 in Oakland, so they stopped to see if the driver needed help. As they looked inside the car, they saw that the nude driver and his nude female passenger did not need any help at the moment. After speaking with the man, the officers realized he was drunk so they arrested him for DUI. According to the officers' report, "We arrested the subject for 23152(a) V.C., handcuffed him and assisted him into our patrol car. The subject then said, "Can't you give me a break. I know and you know that I'm drunk—but that was my boss's wife in there!"

The 24-hour War Story Hotline
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Now Shipping!
California Criminal Investigation
2015 Edition

We are now shipping the 19th annual edition of *California Criminal Investigation*. Briefly, *CCI*, is a reference manual in which we have organized and condensed the rules and principles that apply to criminal investigations in California. *CCI 2015* consists of 740 pages, including more than 3,600 endnotes with comments, examples, over 14,000 case citations, and essential quotes from most of these cases. The price is still $70. To order online or to obtain information about CCI Online, go to www.le.alcoda.org and click on "Publications." The following are the subjects for each chapter:

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1. Investigative Detentions
2. Special Needs Detentions
3. Traffic Stops
4. Investigative Contacts

Arrests
5. Arrests
6. Arrest Warrants
7. Post-Arrest Procedure
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Searches: Basic
9. Consent Searches
10. Pat Searches
11. Searches Incident to Arrest
12. *Ramey*: Entry to Arrest
13. Vehicle Searches
14. Probation and Parole Searches
15. Exigent Circumstances

Searches: Special
16. Computer Searches
17. Email, Voicemail Searches
18. Electronic Communications Metadata
19. Financial Records
20. Workplace Searches
21. Medical Records
22. Searches on School Grounds
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24. Booking Searches
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26. Search Warrants
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