Probation and Parole Searches

Parole is a risky business. Recidivism is high.[1]

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

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

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

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

The Basics

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

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

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

[1] *Latta v. Fitzharris* (9th Cir. 1975) 521 F.2d 246, 249.
[2] *Hudson v. Palmer* (1984) 468 U.S. 517, 526.
[3] Samuel Yochelson and Stanton Samenow, *The Criminal Personality* (Published by J. Aronson, 1976)
[4] See *United States v. Knights* (2001) 534 U.S. 112, 116 [a search clause is a "common California probation condition"].
[5] *People v. Constancio* (1974) 42 Cal.App.3d 533, 540.
[6] *In re Anthony S.* (1992) 4 Cal.App.4th 1000, 1002, fn.1.
[7] See *United States v. Knights* (2001) 534 U.S. 112, 116.
[8] See *People v. Schmitz* (2012) 55 Cal.4th 909, 920 ["a probationer who is subject to a search clause has explicitly consented to that condition"].
[9] See *People v. Schmitz* (2012) 55 Cal.4th 909, 916 ["every inmate eligible for release on parole is subject to search or seizure by a parole officer or other peace officer"].

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

Requirements

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

Significantly, there is one thing that is *not* required for these searches: Officers are not required to justify the search by proving they had probable cause, reasonable suspicion, or any other level of proof that the probationer or parolee had violated the law or the terms of his release.[12] This is because the main purpose of these searches is to give probationers and parolees an incentive to avoid drugs, weapons, and so forth. And one way to do this is to make them aware that they may be searched at any time for no reason whatsoever. As the California Supreme Court explained, "[T]he purpose of the search condition is to deter the commission of crimes and to protect the public, and the effectiveness of the deterrent is enhanced by the potential for random searches."[13] Regarding probation searches, it should be noted that a sentencing judge might require that officers possess at least a low level of proof that the probationer had committed some crime. But such a requirement is seldom imposed and it will not be implied.[14]

Knowledge of probation or parole status

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

Legitimate law enforcement purpose

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

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[10] See Pen. Code §§ 3450 et seq.
[11] *People v. Fandinola* (2013) 221 Cal.App.4th 1415, 1422 [PRCS is "akin to a state prison commitment; it is not a grant of probation or a conditional sentence."].
[12] See *People v. Bravo* (1987) 43 Cal.3d 600, 611; *People v. Douglas* (2015) 240 Cal.App.4th 855, 861.
[13] *People v. Reyes* (1998) 19 Cal.4th 743, 753.
[14] See *People v. Bravo* (1987) 43 Cal.3d 600, 607, fn.6 ["a reasonable-cause requirement will not be implied"].
[15] See *People v. Sanders* (2003) 31 Cal.4th 318, 333; *People v. Schmitz* (2012) 55 Cal.4th 909, 916.
[16] *People v. Robles* (2000) 23 Cal.4th 789, 797.
[17] See *People v. Robles* (2000) 23 Cal.4th 789, 797; *People v. Bravo* (1987) 43 Cal.3d 600, 611; *People v. Medina* (2007) 158 Cal.App.4th 1571, 1577 [search requires "rehabilitative, reformative or legitimate law enforcement purposes"].
[18] See *Samson v. California* (2006) 547 U.S. 843, 856; *People v. Bravo* (1987) 43 Cal.3d 600, 610; *People v. Schmitz* (2012) 55 Cal.4th 909, 916 [the search must not be "arbitrary, capricious, or harassing"].
[19] *People v. Zichwic* (2001) 94 Cal.App.4th 944, 951.

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

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

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

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

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

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

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[20] See *United States v. Knights* (2001) 534 U.S. 112, 117; *People v. Robles* (2000) 23 Cal.4th 789, 799; *People v. Lewis* (1999) 74 Cal.App.4th 662, 671.
[21] *People v. Mason* (1971) 5 Cal.3d 758, 763-64.
[22] See *People v. Bravo* (1987) 43 Cal.3d 600, 608.
[23] (1992) 4 Cal.App.4th 1000.
[24] See *People v. Reyes* (1998) 19 Cal.4th 743, 752; *People v. Woods* (1999) 21 Cal.4th 668, 675, 678; *U.S. v. Reyes* (2nd Cir. 2002) 283 F.3d 446, 463 ["[T]he objectives and duties of probation officers and law enforcement officers are unavoidably parallel and are frequently intertwined."].
[25] See *People v. Robles* (2000) 23 Cal.4th 789, 797; *U.S. v. Barner* (2nd Cir. 2012) 666 F.3d 79, 85; *In re Anthony S.* (1992) 4 Cal.App.4th 1000, 1004.
[26] (1995) 10 Cal.4th 764, 790.
[27] (2001) 534 U.S. 112.

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

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

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

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

SEARCH AFTER ARREST, SUMMARY PROBATION REVOCATION OR PAROLE HOLD: The terms of probation and parole, including search terms, remain in effect even if the probationer or parolee had been arrested, was being held on a parole hold, or if his probation was summarily revoked.[29] As the Ninth Circuit observed in *Latta v. Fitzharris,* a parole officer's interest in inspecting a parolee's home does not terminate upon his arrest, "if anything, it intensified."[30] Consequently, search conditions and other terms of probation and parole do not terminate until a court has held a hearing and, as the result, ordered the revocation of probation or parole.

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

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

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

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

[30] (9th Cir. Cir. 1975) 521 F.2d 246, 252.

[31] (2006) 140 Cal.App.4th 1147, 1152.

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

[33] (1993) 16 Cal.App.4th 1737, 1743.

[34] (2009) 170 Cal.App.4th 488, 494.

Scope of the Search

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

Scope of probation searches

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

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

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

"PROPERTY UNDER YOUR CONTROL": A probation search condition that includes authorization to search property under the probationer's control is tantamount to a four-way because "property under your control" includes his residence.[36]

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

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

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

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

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

[37] See *People v. Douglas* (2015) 240 Cal.App.4th 855, 863 ["probation search clauses are not worded uniformly"].

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

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

Scope of parole searches

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

Intensity of the Search

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

REASONABLY "THOROUGH" SEARCH: Searches of homes, vehicles and other places may be reasonably thorough because, as one court put it, a cursory search "is of little value."[42]

NO DAMAGE OR DESTRUCTION: The search must not be destructive.[43] "Excessive or unnecessary destruction of property in the course of a search," said the Supreme Court, "may violate the Fourth Amendment, even though the entry itself is lawful."[44] However, if officers have probable cause to believe that evidence is hidden in a place or thing that must be damaged to seize it, there is authority for doing so.[45]

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

SEARCHES BY K9S: Officers may use a trained dog (e.g., drug- or explosives-seeking) to help with the search. This is because a dog's sniffing does not materially increase the intensity of the search.[47]

Special Requirements

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

Searches of homes

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

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

[41] See *Johnson v. United States* (2000) 529 U.S. 694, 696-97.

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

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

[44] *United States v. Ramirez* (1998) 523 U.S. 65, 71.

[45] See *United States v. Ross* (1982) 456 U.S. 798, 818; *Dalia v. United States* (1979) 441 U.S. 238, 258.

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

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

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

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

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

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

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

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

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

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

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

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

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

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[49] (2011) 198 Cal.App.4th 652, 662.

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

[51] *U.S. v. Diaz* (9th Cir. Cir. 2007) 491 F.3d 1074, 1077.

[52] See, for example, *Washington v. Simpson* (8th Cir. 1986) 806 F.2d 192, 196.

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

[54] See *U.S. v. Franklin* (9th Cir. 2010) 603 F.3d 652, 657.

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

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

[57] See *U.S. v. Gay* (10th Cir. 2001) 240 F.3d 1222, 1227.

[58] See *Motley v. Parks* (9th Cir. en banc 2005) 432 F.3d 1072, 1082.

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

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

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

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

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

OBSERVATIONS BY OFFICERS, OTHERS: Officers, neighbors, or others repeatedly or recently saw the probationer or parolee on the premises.[74] It is especially significant that he was observed doing things that residents commonly do; e.g. taking out the garbage, chatting with neighbors, opening the door with a key.[75]

CAR PARKED OUTSIDE: A car that was owned or used by the probationer or parolee was regularly parked in the driveway, in front of the residence, or nearby.[76]

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

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

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[60] See, for example, *U.S. v. Edmonds* (3rd Cir. 1995) 52 F.3d 1236, 1247-48.
[61] See *People v. Fuller* (1983) 148 Cal.App.3d 257, 263; *U.S. v. Franklin* (9th Cir. 2010) 603 F.3d 652, 657.
[62] See *People v. Downey* (2011) 198 Cal.App.4th 652, 659 [officer testified that "utility bills were a very good source in finding out where someone lives because in his experience many probationers and parolees … did not know that police had access to utility bills"].
[63] See *People v. Icenogle* (1977) 71 Cal.App.3d 576, 581; *U.S. v. Terry* (2nd Cir. 1983) 702 F.2d 299, 319.
[64] See *U.S. v. Route* (5th Cir. 1997) 104 F.3d 59, 62, fn.1.
[65] See *People v. Jacobs* (1987) 43 Cal.3d 472, 478.
[66] See *U.S. v. Route* (5th Cir. 1997) 104 F.3d 59, 61, fn.1.
[67] See *People v. Boyd* (1990) 224 Cal.App.3d 736, 740; *U.S. v. Ayers* (9th Cir. 1991) 924 F.2d 1468, 1480.
[68] See *U.S. v. Manley* (2nd Cir. 1980) 632 F.2d 978, 983.
[69] See *Washington v. Simpson* (8th Cir. 1986) 806 F.2d 192, 196; *U.S. v. Clayton* (8th Cir. 2000) 210 F.3d 841, 842-43.
[70] See *U.S. v. Barrera* (5th Cir. 2006) 464 F.3d 496, 504.
[71] See *People v. Kanos* (1971) 14 Cal.App.3d 642, 645, 648; *People v. Ott* (1978) 84 Cal.App.3d 118, 126; *U.S. v. Ayers* (9th Cir. 1991) 924 F.2d 1468, 1479; *U.S. v. Mayer* (9th Cir. 2008) 530 F.3d 1099, 1104; *U.S. v. Lovelock* (2nd Cir. 1999) 170 F.3d 339, 344; *U.S. v. Thomas* (D.C. Cir 2005) 429 F.3d 282, 286; *U.S. v. Graham* (1st Cir. 2009) 553 F.3d 6, 13.
[72] See *People v. Alcorn* (1993) 15 Cal.App.4th 652, 655; *People v. Dyke* (1990) 224 Cal.App.3d 648, 659; *U.S. v. Franklin* (9th Cir. 2010) 603 F.3d 652, 656.
[73] See *U.S. v. Bohannon* (2nd Cir. 2016) __ F.3d __ [2016 WL 3067993].
[74] See *People v. Gibson* (2001) 90 Cal.App.4th 371, 381; *U.S. v. Risse* (8th Cir. 1996) 83 F.3d 212, 217.
[75] See *People v. Kanos* (1971) 14 Cal.App.3d 642, 648 [officers saw the suspect leaving the house at 7:30 A.M. with his wife and child]; *U.S. v. Harper* (9th Cir. 1991) 928 F.2d 894, 896.
[76] See *People v. Icenogle* (1977) 71 Cal.App.3d 576, 581; *U.S. v. Harper* (9th Cir. 1991) 928 F2 894, 896.
[77] See *People v. Mason* (1971) 5 Cal.3d 759, 763; *Hart v. Superior Court* (1971) 21 Cal.App.3d 496, 502.
[78] See *Wilson v. Arkansas* (1995) 514 U.S. 927, 934.
[79] (2005) 132 Cal.App.4th 747, 790.

PROTECTIVE SWEEPS: Upon entering the premises, officers may conduct a protective sweep to locate any people who might constitute a threat.[80]

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

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

- A jewelry box on a dresser in the bedroom of a female probationer.[87]
- A "gender neutral" handbag on a bed in a home occupied by a male parolee and his girlfriend.[88]
- A paper bag in the parolee's bedroom closet.[89]
- A stationery box in a drawer in the living room.[90]
- Trash under the kitchen sink.[91]
- The refrigerator in the kitchen.[92]

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

Searches of vehicles

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

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

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

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

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

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

[83] See *People v. Barbarick* (1985) 168 Cal.App.3d 731, 741.

[84] *People v. Robles* (2000) 23 Cal. 4th 789, 798

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

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

[87] See *Russi v. Superior Court* (1973) 33 Cal.App.3d 160.

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

[89] See *People v. Britton* (1984) 156 Cal.App.3d 689.

[90] See *Russi v. Superior Court* (1973) 33 Cal.App.3d 160.

[91] See *People v. Burgener* (1986) 41 Cal.3d 505.

[92] See *People v. Palmquist* (1981) 123 Cal.App.3d 1.

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

[94] See *People v. Schmitz* (2012) 55 Cal.4th 909, 913.

the probationer or parolee had the ability to exert control.[95]

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

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

Officers need not, however, "articulate specific facts indicating that the parolee has actually placed property or contraband in a particular location in the passenger compartment before searching that area." As discussed above, however, a search of a purse may be unlawful if the probationer or parolee was a male. Finally, it is unsettled whether officers may search closed compartments in the vehicle (e.g., glove box, console) if the probationer or parolee was merely a passenger.[99] Finally, officers may stop a car for the purpose of conducting a parole or probation search even though the person on parole or probation was only a passenger.[100]

Search of cell phones

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

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

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[95] See *People v. Schmitz* (2012) 55 Cal.4th 909, 913.
[96] See *People v. Schmitz* (2012) 55 Cal.4th 909, 926
[97] See *People v. Schmitz* (2012) 55 Cal.4th 909, 932; *People v. Baker* (2008) 164 Cal.App.4th 1152, 1160 ["Here, there is nothing to overcome the obvious presumption that the purse belonged to the sole female occupant of the vehicle"].
[98] See *People v. Schmitz* (2012) 55 Cal.4th 909, 926; *People v. Ermi* (2013) 216 Cal.App.4th 277, 281.
[99] See *People v. Schmitz* (2012) 55 Cal.4th 909, 926, fn16.
[100] See *In re William J.* (1985) 171 Cal.App.3d 72, 77.
[101] See Pen. Code §§ 1546(k), 1546.1(c)(3).
[102] **NOTE**: Assuming that's what "specific consent" means, it admittedly represents irrational legislative overreaching. After all, it would mean that officers may search the probationer's entire home and its contents—including documents and personal property—but not his cell phone. Why should a person's cell phone be entitled to more privacy than his home? This is a question the Legislature should be required to address.
[103] See *Riley v. California* (2014) __ U.S. __ [134 S.Ct. 2473, 2486].
[104] See *Riley v. California* (2014) __ U.S. __ [134 S.Ct. 2473, 2485].