POINT of VIEW

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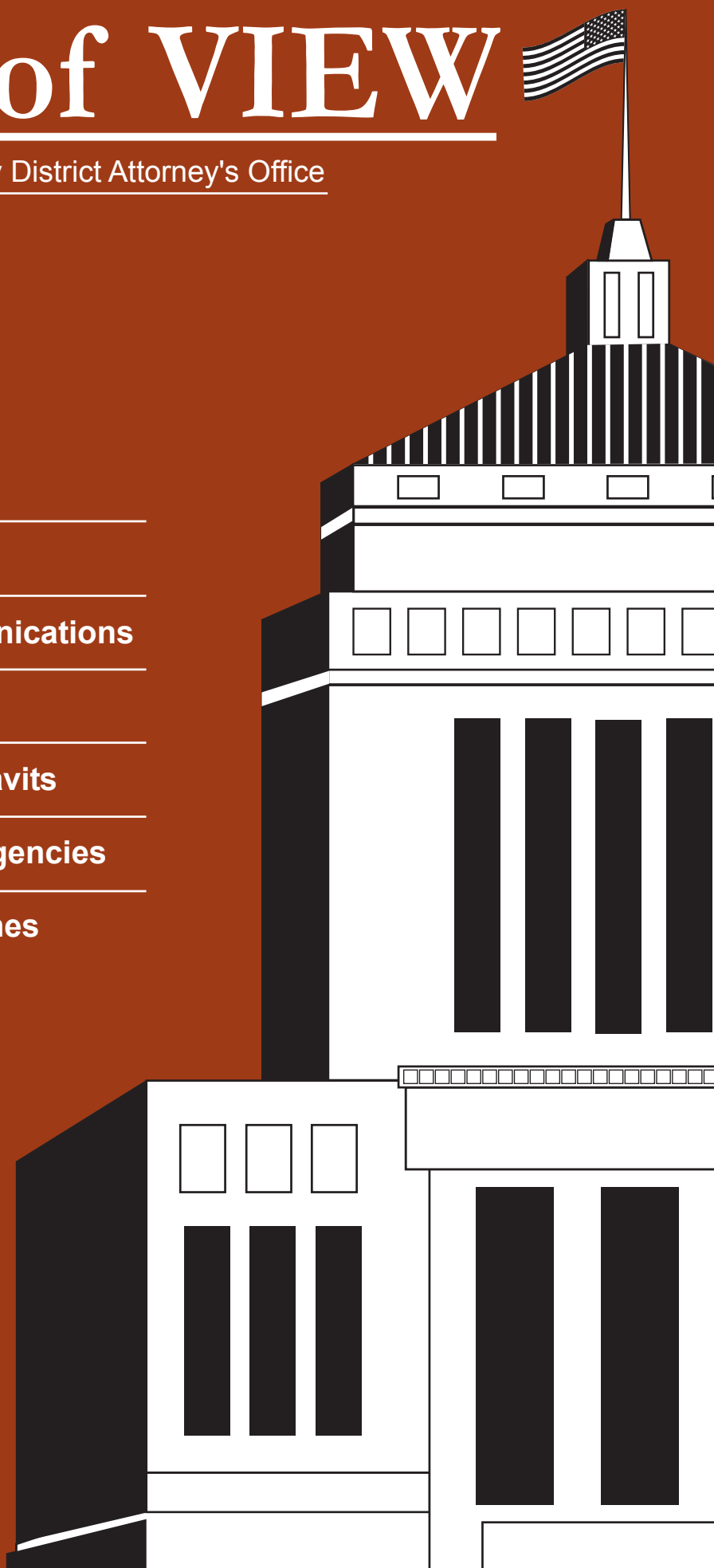
In this issue



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This edition of Point of View
is dedicated to the memory of
Michael Foley
of the Alameda County Sheriff's Office
who was killed in the line of duty
on February 23, 2017

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RECENT CASES

Informant Disclosure

"Once an informant is known, the drug traffickers are quick to retaliate. Dead men tell no tales."[1]

Hardly anyone has anything nice to say about informants. They are commonly known as "snitches," "rats," "weasels," and much worse. They are also called "targets" because, as the Court of Appeal observed in a drug case, "It does not take a lively imagination to realize that, in view of the violence found in the world of the narcotic pusher and user, disclosure might constitute a death warrant for the informer."[2]

While the use of informants has been called "dirty business,"[3] it is also a necessary and productive business because informants play "a vital part of society's defensive arsenal."[4] "Without informants," said the Ninth Circuit, "law enforcement authorities would be unable to penetrate and destroy organized crime syndicates, drug trafficking cartels, bank frauds, telephone solicitation scams, public corruption, terrorist gangs, money launderers, espionage rings, and the likes."[5]

Most informants would not, however, provide this information unless they could be certain that their identities would be kept secret. As the Supreme Court pointed out, an informant "will usually condition his cooperation on an assurance of anonymity—to protect himself and his family from harm."[6] For this reason, the law gives officers a right—a "privilege"—to refuse to disclose an informant's identity to anyone.[7] Officers may also refuse to disclose information that would even *tend* to reveal an informant's identity. Thus, in *People v. Seibel* the court explained that the privilege "protects not only the informant's name but also those portions of communication from and about the informant which would tend to reveal his or her identity. Events may be as revealing as the informant's name."[8]

Although the nondisclosure privilege is absolute, a defendant may file a motion known as a Motion to Disclose an Informant or MDI. The name of the motion is, however, misleading because virtually all defendants who file these motions are not actually interested in learning the informant's identity, as if the informant would make a great witness for the defense. Instead, their objective is to get the charges against them dropped. And this can happen if a court rules the informant is a "material witness" for the defense and if, as is usually the case, the investigating officer invokes the privilege and refuses to identity him.

Later in this article, we will discuss when an informant will be deemed a material witness and the unique procedure the courts utilize in making this determination. But first it is necessary to explain when, or under what circumstances, an informer will qualify as a protected "confidential informant."

Who Are "Confidential" Informants?

An informant will be protected by the nondisclosure privilege only if he is deemed a "confidential informant" or CI. And an informant will be deemed a CI if the following circumstances existed:

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[1] *Roviaro v. United States* (1957) 353 U.S. 53, 67 (dis. opn. of Clark, J.).
[2] *People v. Pacheco* (1972) 27 Cal.App.3d 70, 80. Also see *People v. Seibel* (1990) 219 Cal.App.3d 1279, 1289 ["And in the big-time drug business, to inform is to sign one's death warrant."].
[3] *On Lee v. United States* (1952) 343 U.S 747, 757.
[4] *McCray v. Illinois* (1967) 386 U.S. 300, 307.
[5] *U.S. v. Bernal-Obeso* (9th Cir. 1993) 989 F.2d 331, 335.
[6] *McCray v. Illinois* (1967) 386 U.S. 300, 308-309. Also see *People v. Pacheco* (1972) 27 Cal.App.3d 70, 81 ["The vast majority of information concerning crime received by police authorities, comes from informants who would not give such information if they could not be promised concealment of their identity."].
[7] See Pen. Code § 964; Evid. Code § 1041(a)(2).
[8] (1990) 219 Cal.App.3d 1279, 1289. Also see *Roviaro v. United States* (1957) 353 U.S. 53, 60.

(1) **INFORMATION ABOUT CRIMINAL ACTIVITY**: The informant must have provided information that pertained to criminal activity.[9]

(2) **INFORMATION GIVEN TO LAW ENFORCEMENT**: The informant must have provided the information to a law enforcement officer or to someone who he knew would pass it along to an officer.[10]

(3) **INFORMATION GIVEN "IN CONFIDENCE"**: The informant must have provided the information "in confidence."

To say the information must have been given "in confidence" does not mean the informant must have intended that his information would be kept confidential; e.g., that it would not be used in a search warrant affidavit or communicated to other officers. Nor does it mean the informant must have requested anonymity. Instead, information is deemed given "in confidence" if, as is almost always the case, disclosure of the informant's identity would place him (and oftentimes his family) in danger.[11] Although confidential information includes tips from people via secret witness programs,[12] it does not apply to crime victims and witnesses who meet with officers and freely provide information about a crime. As the Court of Appeal explained, "The requirement of confidence eliminates from the ambit of the privilege most eyewitnesses who simply provide information to authorities upon being interviewed."[13]

Note that some CIs are called "confidential *reliable* informants" or CRIs. This simply means the informant has a history or track record for providing accurate information, which means that his information is presumptively reliable. In the context of informant disclosure, however, it doesn't matter whether the informant was a CI or CRI as they are both protected.

Who Are "Material" Witnesses?

A CI will be deemed a material witness if the defendant proves there is a "reasonable possibility" that the CI "could give evidence on the issue of guilt which might result in defendant's exoneration."[14] In other words, a CI becomes a material witness if the informant's testimony would be "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause,"[15] or if the CI could "rebut a material element of the prosecution's case and thereby prove his innocence."[16]

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[9] See Evid. Code § 1041(a) [the information must have purported "to disclose a violation of the law"].

[10] See Evid. Code § 1041(b); *People v. Guereca* (1987) 189 Cal.App.3d 884, 889 [a person was not an informant when he didn't know that the person he was talking with was an officer].

[11] Also see Evid. Code § 1041(a)(2) and *People v. Otte* (1989) 214 Cal.App.4th 1522, 1532 ["the test of confidentiality in the instant case is not whether the particular informant demanded that his identity not be disclosed, or was in physical danger, but whether the investigation is of such a type that disclosure would cause the public interest [in effective law enforcement] to suffer."].

[12] See *People v. Callen* (1987) 194 Cal.App.3d 558, 563; *People v. Maury* (2003) 30 Cal.4th 342, 386 ["The promise of anonymity is offered [by anonymous witness programs] only for the purpose of inducing reluctant informers to provide information which assists in this primary purpose. The inducement derives from the protection from publicity or retaliation that the informer receives by remaining anonymous."].

[13] *People v. Lanfrey* (1988) 204 Cal.App.3d 491, 498.

[14] *Roviaro v. United States* (1957) 353 U.S. 53, 60-61. Also see *People v. Bradley* (2017) 7 Cal.App.5th 607, 624 ["If the trial court determines there is not a reasonable possibility the informant's evidence on the issue of guilt might exonerate the defendant, disclosure is denied."]; *People v. Lawley* (2002) 27 Cal.4th 102, 159-160 [an informant is a material witness if there is a "reasonable possibility that he or she could give evidence on the issue of guilt that might exonerate the defendant."]; *People v. Long* (1974) 42 Cal.App.3d 751, 757 [an informant is material if his "testimony might, when taken together with other evidence, tend to raise a reasonable doubt . . . which would result in the defendant's exoneration."]; Evid. Code § 1042(d) [an informant is a material witness if there is a "reasonable possibility that nondisclosure might deprive the defendant of a fair trial."].

[15] *Roviaro v. United States* (1957) 353 U.S. 53, 60-61.

[16] *Williams v. Superior Court* (1974) 38 Cal.App.3d 412, 419.

Accomplices and eyewitnesses

By their very nature, accomplices and eyewitnesses to a crime would likely have been in a position to provide information as to what the defendant said and did during or immediately before or after. Accordingly, a CI will usually be deemed a material witness if he participated in, or eyewitnessed, the crime with which the defendant was charged.[17] As the court observed in *Williams v. Superior Court*, "Where the evidence indicates that the informer was an actual participant in the crime alleged, or was a nonparticipating eyewitness to that offense, ipso facto it is held he would be a material witness."[18] There is, however, an exception to this rule: An accomplice or eyewitness cannot be a material witness if—as is often the case—the prosecution is able to prove that his testimony could have only harmed the defendant.[19]

CIs with "inside" information

A CI who was not an accomplice or eyewitness to a crime may nevertheless be deemed a material witness if he had been in a position—before or after the crime occurred—to have seen or heard something that might prove the defendant was not guilty.[20] This type of material witness is fairly common in drug-related crimes.

In many cases, however, even an informant with "inside" information will not be deemed a material witness if there was a lengthy time lapse between what he saw or heard and the commission of the crime. This is because the circumstances that existed when the CI made his observations may have little or no relevance in proving the existence of circumstances that existed much later or earlier.

For example, in ruling that a confidential informant was not a material witness in constructive possession drug cases, the courts have noted the following:

- "[T]he informant's observations occurred at least five days prior to [the search]. We think it clear, then, that the proximity of the informant to the charged offense is not close, not recent, and that the nexus of the informant's relationship to the charged crime is minimal."[21]
- "[D]efense counsel did not explain how this informant, whose last contact with the defendant was before November 3 . . . would possibly be able to give evidence on defendant's reason for possessing marijuana on November 19."[22]
- "The affidavit states the informer saw marijuana in the apartment 11 days before the search, not that he was a percipient witness to the particular possession of contraband disclosed by the search."[23]

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[17] See *Roviaro v. United States* (1957) 353 U.S. 53, 64; *In re Benny S.* (1991) 230 Cal.App.3d 102, 108-9 ["Had appellant been charged with the sales of marijuana witnessed by the informant, then disclosure would have been required."]; *People v. Tolliver* (1975) 53 Cal.App.3d 1036, 1043 ["Obviously, the participant-informant presents the clear-cut example of an informant who is a material witness on the issue of guilt or innocence."]; *People v. Cheatham* (1971) 21 Cal.App.3d 675, 677-78 ["Since [the informant] was not only a witness to, but a direct participant in, the sale herein involved, it was obvious that she was a witness whose identity must be revealed."].

[18] (1974) 38 Cal.App.3d 412, 420.

[19] See *People v. Bradley* (2017) 7 Cal.App.5th 607, 627 [the informant's testimony "would not have benefited defendant. It would have harmed him."]; *People v. Alderrou* (1987) 191 Cal.App.3d 1074.

[20] See *People v. Hardeman* (1982) 137 Cal.App.3d 823, 828 ["The courts have indicated that the measure of the 'reasonable possibility' standard . . . is predicated upon the relative proximity of the informant to the offense charged."]; *People v. Lee* (1985) 164 Cal.App.3d 830, 836 ["A nonparticipant informant can be a material witness . . . even when such informant was not an eyewitness to the alleged criminal act."

[21] *People v. Fried* (1989) 214 Cal.App.3d 1309, 1316. **NOTE**: Time lapse was also a factor in a ruling that the CI was not a material witness in the following cases: *People v. Hardeman* (1982) 137 Cal.App.3d 823, 829 [8 days]; *People v. Martin* (1969) 2 Cal.App.3d 121, 127 [3 days]; *People v. Duval* (1990) 221 Cal.App.3d 1105, 1114 ["several days"]; *People v. Alvarez* (1977) 73 Cal.App.3d 401, 408 [within past seven days]; *People v. Hambarian* (1973) 31 Cal.App.3d 643 [5 days].

[22] *People v. Otte* (1989) 214 Cal.App.3d 1522, 1536.

[23] *People v. Sewell* (1970) 3 Cal.App.3d 1035, 1039.

Not "Material" Witnesses

While it is important to know what types of CIs are likely to be material witnesses, it is just as important to know which types almost never qualify. As we will now discuss, there are three types: (1) CI's who only provided information to establish probable cause, (2) "mere informants," and (3) CIs with information not specific to the crime charged.

Informants who attack a search warrant

An informant is not a material witness if his only purpose was to attack the validity of a search warrant by, for example, testifying that he did not furnish information that was attributed to him.[24] As the California Supreme Court explained, "It has long been the rule in California that the identity of an informant who has supplied probable cause for the issuance of a search warrant need not be disclosed where such disclosure is sought merely to aid in attacking probable cause."[25]

The reason that disclosure is not required is that a judge who reviews an affidavit may, if he or she deems it necessary, require that the informant appear to answer questions as to what he saw or heard. As the court said in *People v. Navarro*, "Because the magistrate will issue a warrant only upon a showing of probable cause, and has the power to question the informant if he sees fit, there is adequate protection against police abuse."[26] More important, if the defendant has reason to believe the affiant lied about the existence of the CI or the nature of the information he provided, there are other kinds of motions he can file.[27]

"Mere informants"

A "mere informant" or "fingerpointer" is a CI who merely notified officers that a certain person was currently engaging in some criminal activity and, as the result, officers launched an investigation which eventually led to the seizure of incriminating evidence.[28] As the California Supreme Court explained, "'A mere informer has a limited role. When such a person is truly an informant he simply points the finger of suspicion toward a person who has violated the law. He puts the wheels in motion which cause the defendant to be suspected and perhaps arrested, but he plays no part in the criminal act with which the defendant is later charged."[29] Thus, if the CI is a mere informant "the possibility that he could give evidence which might exonerate the defendant is even more speculative and, hence, may become an unreasonable possibility."[30]

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[24] See *People v. Hardeman* (1982) 137 Cal.App.3d 823, 830; Evid. Code § 1042(b); *People v. Navarro* (2006) 138 Cal.App.4th 146, 176 ["If the informant was not a material witness on the issue of guilt and the defendant seeks to learn his identity in order to challenge a facially valid search warrant based on information provided by the informant, the informant's identity need not be disclosed."]; *People v. Martinez* (2005) 132 Cal.App.4th 233, 240 ["[C]ourts are not required to disclose the identity of an informant who has supplied probable cause for the issuance of a search warrant where such disclosure is sought merely to aid in attacking probable cause."].

[25] *People v. Hobbs* (1994) 7 Cal.App.4th 948, 959

[26] (2006) 138 Cal.App.4th 146, 176

[27] **NOTE**: These are known as Motions to Traverse or *Franks* Motions. They are essentially motions to suppress evidence obtained by means of a search warrant on grounds that the affiant or other officer intentionally or recklessly misrepresented or distorted the facts upon which probable cause was based. See *Franks v. Delaware* (1978) 438 U.S. 154; *People v. Luttenberger* (1990) 50 Cal.3d 1, 9.

[28] See *People v. Blouin* (1978) 80 Cal.App.3d 269, 287 ["[The informant] simply triggered an investigation by reporting a suspicious situation . . . Defendant's participation in the crime itself was revealed by subsequent police investigation without resort to further information from the informant."]; *People v. McCoy* (1970) 13 Cal.App.3d 6, 12 ["The informant's function, in informing the police of his observations, was limited to pointing the finger of suspicion at those persons residing at the ranch and furnishing the requisite information for the issuance of the search warrant."]; *People v. Hobbs* (1994) 7 Cal.App.4th 948, 959; *People v. Seibel* (1990) 219 Cal.App.3d 1279, 1288-89.

[29] *People v. Garcia* (1967) 67 Cal.2d 830, 836.

[30] *Williams v. Superior Court* (1974) 38 Cal.App.3d 412, 420. Also see *People v. Hardeman* (1982) 137 Cal.App.3d 823, 828-29 ["If the informer is not a percipient witness to the events which are the basis of the arrest, it is highly unlikely that he can provide information relevant to the guilt or innocence"].

Information not specific to charged crime

Even if an informant possessed information pertaining to a crime, he will not be deemed a material witness if his information did not pertain to the crime with which the defendant was charged.[31] This typically becomes an issue in drug cases.

STRAIGHT POSSESSION: If the defendant was charged with straight possession of drugs found in his possession as the result of a tip from the CI, the informant will seldom be deemed a material witness because the crime of straight possession is completed at the moment an officer discovers the drugs; and it is unlikely that information given to an officer by an informant would be exculpatory as to a crime that had not yet been committed.[32] For example, in ruling that a CI was not a material witness to a charge of straight possession, the courts have noted the following:

- The drugs were "found in the pocket of the jacket appellant was wearing."[33]
- The defendant threw a heroin-filled balloon from his car during a pursuit instigated by information from informant.[34]
- "The defendant was carrying in his hand a blue plastic bag containing heroin, which he dropped when confronted by the police."[35]

POSSESSION WITH INTENT: In cases where the defendant was charged with possession with intent to distribute, the likelihood that the informant will be deemed material to prove a lack of intent will often depend on how prosecutors will attempt to prove his intent. For example, a CI's testmony would likely be irrelevant if proof of intent will be based on an admission or, as frequently happens, on circumstances that existed when officers seized the drugs, such as the quantity of drugs, the manner in which they were packaged, and the presence of sales paraphernalia.[36]

Thus, in rejecting defense arguments that a confidential informant was a material witness as to the defendant's intent to sell, the courts have said the following:

- "[T]he large quantity of narcotics found in the defendant's apartment raised an inference that defendant intended to sell them."[37]
- Possession for sale was established by "the quantity of cocaine found in appellant's possession combined with the scales, cutting compound, and other apparatus and supplies he also possessed which are typically associated with cocaine intended for sale rather than for person use."[38]

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[31] See *People v. Alderrou* (1987)191 Cal.App.3d 1074, 1081 ["it is important to bear in mind what offense appellant was found to have committed"].

[32] See *People v. Borunda* (1976) 58 Cal.App.3d 368, 375 ["Furthermore, heroin was found not only at [defendant's home] but also in defendant's shirt pocket. There is no possibility the informant could give testimony exonerating defendant of possession of that heroin."]; *People v. Acuna* (1973) 35 Cal.App.3d 987, 991 ["on [defendant's] person in his pants pocket were three balloons of heroin"]; *People v. Rogers* (1976) 54 Cal.App.3d 508, 518-19 ["Defendant was charged with possession for sale based on his personal possession of heroin when arrested; neither the informant nor Linda could have furnished relevant information."]; *People v. Flemmings* (1973) 34 Cal.App.3d 63, 68 ["[T]he evidence showed that defendant was carrying in his hand a blue plastic bag containing heroin, which he dropped when confronted by the police."].

[33] *In re Benny S.* (1991) 230 Cal.App.3d 102, 108-9. Also see *People v. Borunda* (1976) 58 Cal.App.3d 368, 375 ["There is no possibility the informant could give testimony exonerating defendant of possession of that heroin."]; *People v. Acuna* (1973) 35 Cal.App.3d 987, 991 ["defendant was in the apartment and on his person in his pants pocket were three balloons of heroin which he had for the purpose of sale. Such evidence establishes every element of the offense of possession for sale of a narcotic"].

[34] *People v. Garcia* (1970) 13 Cal.App.3d 486, 490.

[35] *People v. Flemmings* (1973) 34 Cal.App.3d 63, 68.

[36] See *People v. Aguilera* (1976) 61 Cal.App.3d 863, 870, fn.7 ["the charge was based on a commercial quantity, commercially packaged, which she held in her own hand"]; *In re Benny S.* (1991) 230 Cal.App.3d 102, 108-9 [officers "found several baggies, each containing a green leafy substance resembling marijuana"].

[37] *People v. Goliday* (1973) 8 Cal.3d 771, 783-84.

[38] *People v. Alderrou* (1987) 191 Cal.App.3d 1074, 1081.

- "[D]efendant's guilt of possession for sale of that marijuana was established based on the quantity involved and independent of anything the informant might testify."[39]

On the other hand, the CI will almost certainly be deemed a material if intent is based on a sale that the CI witnessed or participated in.[40] Also see "Accomplices and eyewitnesses," above.

CONSTRUCTIVE POSSESSION CASES: If the defendant was charged with constructive possession of drugs (i.e., officers did not find the drugs in his physical possession[41]), he may claim that he lacked dominion and control over the drugs or the place or thing in which they were found, and that the CI could help him prove it. In such cases, the deciding factor is often whether the evidence of constructive possession was strong or weak.

For example, any of the following circumstances might make it difficult for the defendant to convince a judge that the CI was material: the defendant admitted that he possessed the drugs,[42] the drugs were found in the defendant's home,[43] the drugs were in a safe or locked place or room that was accessible solely by the defendant,[44] the defendant attempted to delay the search,[45] defendant's ID was found with the drugs,[46] the defendant was under the influence of drugs of the type that officers found,[47] the informant said the only person he saw in possession of the drugs was the defendant, or the defendant was captured on video in possession of the drugs.[48]

A CI might, however, be deemed a material witness if there was a reasonable likelihood that someone else on the premises recently had sole possession of the contraband. As the Court of Appeal explained:

> Where possession of contraband is among the elements of the crime charged and it is imputed to the defendant by reason of the location at which the contraband is discovered by the police, and where such discovery stems in whole or part from an informer's very recent observation of contraband on those same premises, the Supreme Court has compelled disclosure of the informer's identity if the evidence shows that persons other than the defendant were on the premises when the informer observed the contraband and that the defendant was not then present or may not have been present.[49]

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[39] *People v. Borunda* (1976) 58 Cal.App.3d 368, 376

[40] See *People v. Dimitrov* (1995) 33 Cal.App.4th 18, 30-31; *People v. Lee* (1985) 164 Cal.App.3d 830, 836.

[41] See CALCRIM 2304. **NOTE**: Constructive possession is possession "imputed to the defendant by reason of the location at which the contraband is discovered." *Williams v. Superior Court* (1974) 38 Cal.App.3d 412, 423.

[42] See *People v. Alvarez* (1977) 73 Cal.App.3d 401, 406; *People v. Alderrou* (1987) 191 Cal.App.3d 1074, 1077.

[43] See *People v. Thompson* (1979) 89 Cal.App.3d 425, 433.

[44] See *People v. Alderrou* (1987) 191 Cal.App.3d 1074, 1081 ["Defendant's possession, dominion and control of these narcotics was proved rather conclusively by the fact they were found in a safe opened with a key taken from a case containing his papers and only his papers."]; *People v. Green* (1981) 117 Cal.App.3d 199, 208 ["the key seized from defendant's belt opened the door to the storeroom."]; *People v. Galante* (1983) 143 Cal.App.3d 709, 711 ["[A]ppellant had the key to the locked cabinet [in which cocaine was found] in his possession when arrested"].

[45] See *People v. Thompson* (1979) 89 Cal.App.3d 425, 433.

[46] See *People v. Lizarraga* (1990) 219 Cal.App.3d 476, 479. Also see *People v. Green* (1981) 117 Cal.App.3d 199, 208 [the drugs were "accompanied by a business card bearing defendant's name and occupation"].

[47] See *People v. Thomas* (1975) 45 Cal.App.3d 749, 755.

[48] See *People v. Hardeman* (1982) 137 Cal.App.3d 823, 829 [the informant said the sales "which he observed were conducted by a single individual, the respondent, and not in a joint manner."]; *People v. Thomas* (1975) 45 Cal.App.3d 749, 754 ["[T]he informant told the police that he was present at the residence of defendant and saw high grade heroin in defendant's possession there."]; *People v. Hardeman* (1982) 137 Cal.App.3d 823, 829 [the only person informant saw selling drugs was the defendant]; *US v. Henderson* (9th Cir. 2001) 241 F.3d 638, 646 [defendant was positively identified by witnesses, plus he was captured in mid-holdup by a bank surveillance camera].

[49] *Williams v. Superior Court* (1974) 38 Cal.App.3d 412, 423.

For example, in *Williams v. Superior Court*[50] the CI said he had seen Williams and Anderson selling and packaging heroin in Anderson's home shortly before officers entered to execute a search warrant. In arguing that the informant was a material witness, Williams argued "it is reasonably possible that the informer might testify that [Williams] was merely present when the informer was at the residence; the informer's testimony might show that the heroin was sold, packaged, and controlled solely by Anderson during this period; and, from such testimony, the trier of fact might infer that petitioner had no control or right to control the heroin later found in her dresser, and that she herself had no intent to sell contraband." The court agreed.

In other cases, the courts have cited the following circumstances as establishing a reasonable possibility that the CI was a material witness:

- People other than the defendant were named in the affidavit as the sellers which was "consistent with the claim of defendant at trial that he was a visitor at the apartment."[51]
- The drugs were found in the defendant's purse at her apartment, but there was another suspect in the apartment and defendant claimed the other suspect put the drugs in her purse.[52]
- Defendant was in jail shortly before the drugs were discovered and, while she was in jail, the informant had seen other people in the apartment.[53]

Proof of guilt may also be deemed weak if there was reason to believe the defendant was merely a visitor at the location, or that another resident possessed it.[54] However, a CI does not become a material witness merely because the defendant claimed the CI could help prove he did not have *sole* possession of drugs or other contraband,[55] or because he contends (with no proof) that the drugs had been planted.[56]

Court Procedure

The first step in the MDI procedure is the filing by the defense of a written motion to disclose an informant.[57] The court will then schedule a hearing in open court in which the defendant has the burden of presenting "some evidence"[58] (speculation is not "evidence"[59]) that demonstrates a "reasonable possibility" that the CI's testimony could help exonerate the defendant.[60] Such evidence usually consists of information contained in police reports and search warrant affidavits from which the existence of the CI and the nature of his testimony may be inferred.[61]

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[50] (1974) 38 Cal.App.3d 412, 422.
[51] *People v. Garcia* (1967) 67 Cal.2d 830, 839. Compare *People v. Alvarez* (1977) 73 Cal.App.3d 401, 407.
[52] *People v. Coleman* (1977) 72 Cal.App.3d 287.
[53] *Honore v. Superior Court* (1969) 70 Cal.2d 162, 168-69.
[54] See *People v. Long* (1974) 42 Cal.App.3d 751, 755; *Honore v. Superior Court* (1969) 70 Cal.2d 162, 168-69; *People v. Ingram* (1978) 87 Cal.App.3d 832, 837; *In re Tracy J.* (1979) 94 Cal.App.3d 472, 477-78.
[55] See *People v. Hambarian* (1973) 31 Cal.App.3d 643, 659; *People v. Green* (1981) 117 Cal.App.3d 199, 208.
[56] See *People v. Alvarez* (1977) 73 Cal.App.3d 401, 406.
[57] See Evid. Code § 1042(d); *People v. Alderrou* (1987) 191 Cal.App.3d 1074, 1079; *People v. Rios* (1977) 74 Cal.App.3d 833.
[58] See *People v. Lawley* (2002) 27 Cal.4th 102, 159; *Davis v. Superior Court* (2010) 186 Cal.App.4th 1272, 1277.
[59] See *People v. Tolliver* (1975) 53 Cal.App.3d 1036, 1044; *People v. Galante* (1983) 143 Cal.App.3d 709, 711 ["[The defendant's attorney], not feeling constrained by any consideration for reality, posited various mutually inconsistent hypotheses that might, theoretically, explain how a person could conceivably find himself in appellant's position without necessarily being guilty of the offense charged. It was never once suggested, however, that there was a basis in fact for any of these musings nor that appellant himself claimed that any of them were true."]; *People v. Alderrou* (1987) 191 Cal.App.3d 1074, 1083 ["Indeed one would have to engage in wild speculation about convoluted improbable plots to come up with a scenario which would produce testimony from his confidential informant tending to exonerate this appellant of this offense."]; *In re Robert B.* (1985) 172 Cal.App.3d 763, 770 ["bare, unsupported speculation"].
[60] *In re Tracy J.* (1979) 94 Cal.App.3d 472, 477 ["defendant must demonstrate a "reasonable possibility"].
[61] See *People v. Alvarez* (1977) 73 Cal.App.3d 401, 406; *People v. Tolliver* (1975) 53 Cal.App.3d 1036, 1044; *People v. Otte* (1989) 214 Cal.App.3d 1522, 1536 ["[Defendant] may rely upon reasonable inferences from the People's evidence"].

While the term "reasonable possibility" has "vague and almost limitless perimeters,"[62] it must reach "at least a low plateau of reasonable possibility."[63] In the following cases, the courts explained why the defense failed to meet this burden of proof.

In *In re Robert B.* the court pointed out that "Robert presented only the bare, unsupported speculation that the informer may have been able to offer exonerating testimony, but failed to provide any evidentiary basis for raising this mere speculation to the 'reasonable possibility' which would entitle him to disclosure."[64] In *People v. Otte* the defendant claimed that the CI could help prove that the he did not possess the marijuana for sale. The court responded, "[Y]et defense counsel did not explain how this informant, whose last contact with the defendant was before November 3, and who did not even know the defendant's full name or address, would possibly be able to give evidence on defendant's reason for possessing marijuana on November 19, 1987."[65]

In *People v. Galante* officers obtained a warrant to search the defendant's home based on information from a CI, and the search netted a large quantity of cocaine in a locked file cabinet in the defendant's bedroom. They also found a key to the cabinet in the defendant's pocket. The defendant's attorney filed an MDI in which he floated "various mutually inconsistent hypotheses" by which the CI might be able to explain how the key happened to find its way into his client's pocket. In denying the motion, the court said that the defendant's attorney, "not feeling constrained by any consideration for reality, posited various mutually inconsistent hypotheses that might, theoretically, explain how a person could conceivably find himself in appellant's position without necessarily being guilty of the offense charged. It was never once suggested, however, that there was a basis in fact for any of these musings nor that appellant himself claimed that any of them were true."[66] Finally, in *U.S. v. Henderson* a bank robbery suspect claimed he had been framed, and that the CI could help him prove it. But because he was unable to explain how the bank's surveillance cameras happened to show him in the process of robbing the bank, the court ruled that an *in camera* hearing was unnecessary.[66]

Three other things should be noted. First, a defendant does not meet his burden by filing a declaration by his attorney based on "information and belief."[68] Second, the defendant is not required to file a personal declaration in support of his motion.[69] Third, the defense is not required to disclose defense theories or trial strategies.[70]

If the defendant meets his burden

If the court rules the defense met its burden, the prosecution will will have six options:

(1) **REQUEST AN IN CAMERA HEARING**: If the CI is available and willing to testify at an *in camera* hearing, the best option is to ask the judge to convene an *in camera* hearing. If prosecutors make such a request, it must be granted.[71] See "In Camera Hearings," below.

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[62] *People v. Hardeman* (1982) 137 Cal.App.3d 823, 828.

[63] *People v. Tolliver* (1975) 53 Cal.App.3d 1036, 1044. Also see *People v. Alderrou* (1987) 191 Cal.App.3d 1074, 1083 ["Indeed one would have to engage in wild speculation about convoluted improbable plots to come up with a scenario which would produce testimony from his confidential informant tending to exonerate this appellant of this offense."]; *People v. Green* (1981) 117 Cal.App.3d 199, 208 ["[D]efendant's showing must encompass more than speculation."]; *People v. Fried* (1989) 214 Cal.App.3d 1309, 1315 ["The assertion that the informant may have been on the premises shortly before the search and planted the contraband . . . was supported by nothing more than counsels' 'information and belief.'"].

[64] (1985) 172 Cal.App.3d 763, 770.

[65] (1989) 214 Cal.App.3d 1522, 1536.

[66] (1983) 143 Cal.App.3d 709, 711.

[67] (9th Cir. 2001) 241 F.3d 638.

[68] See *People v. Oppel* (1990) 222 Cal.App.3d 1146, 1153; *People v. Fried* (1989) 214 Cal.App.3d 1309, 1315.

[69] See *People v. Tolliver* (1975) 53 Cal.App.3d 1036, 1044.

[70] See *People v. Tolliver* (1975) 53 Cal.App.3d 1036, 1048 ["a specific articulation of a defense is not required"].

[71] See Evid. Code § 1042(d); *People v. Reel* (1979) 100 Cal.App.3d 415, 420.

(2) **DISMISS CHARGES**: Dismiss the charges against the defendant.
(3) **REFUSE TO DISCLOSE**: Refuse to disclose the CI's identity, in which case the charges against the defendant will ordinarily be dismissed.[72]
(4) **REDUCE CHARGE**: If the CI is deemed a material witness only as to one element of the crime (e.g., intent to sell) disclosure will not be required if prosecutors charge the defendant with a crime that does not include that element; e.g., straight possession.[73] Also see "Complying With Disclosure Orders," below.
(5) **DISCLOSE**: Disclose the CI's identity.
(6) **APPEAL**: Appeal the judge's ruling that the CI is a material witness. However, an immediate appeal may not be a good option because, if prosecutors do so without first requesting an *in camera* hearing, and if they lose the appeal, the court must impose sanctions; e.g., dismissal.[74]

In Camera Hearings

The most effective way of proving that a CI is not a material witness is to have him appear before a judge at an *in camera* hearing and, after being sworn,[75] tell the judge what he knows. The term *"in camera"* means "[i]n the judge's private chambers, not in open court."[76] Consequently, the only people who are usually present are the judge, CI, prosecutor, investigating officer, and a court reporter. Although most *in camera* hearings are conducted in the judge's chambers, they may be conducted at a secret location if necessary to make sure no one will see the CI at the courthouse. As the California Supreme Court explained, "[P]recautions must be taken to protect [the informant's] identity, including the holding of the *in camera* hearing at a place other than the courthouse if deemed necessary to guarantee the informant's anonymity."[77]

A good discussion of the *in camera* procedure was provided by the court in *People v. Aguilera*:

> Since the crucial question as to disclosure is whether the informant could give testimony on the issue of guilt which would exonerate the defendant, the [*in camera* procedure] is highly advantageous and provides a method of eliminating the "guessing game" qualities which have often attended these determinations. It allows the prosecutor to produce the informant *in camera* so that the court can determine just what the informant knows, and whether his testimony would be material on the issue of guilt. If his testimony at the *in camera* hearing shows that there is no reasonable possibility the informant could aid the defense, the public interest in nondisclosure of his identity can be preserved without any infringement on the defendant's right to a fair trial.[78]

While the CI will usually testify at the hearing, it is not a requirement; i.e., prosecutors may present testimony from any person who can help prove that the CI is not a material witness.[79] As a practical matter, however, the CI's testimony is almost always necessary because the whole purpose of an *in camera* hearing is to eliminate the "guessing game" that necessarily results when prosecutors rely on circumstantial evidence to prove what the CI saw and heard. As Judge Jefferson warned prosecutors:

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[72] See *Roviaro v. United States* (1957) 353 U.S. 53, 61; *People v. Lawley* (2002) 27 Cal.4th 102, 159.
[73] See *People v. Lamb* (1972) 24 Cal.App.3d 378, 382 ["[T]here was ample and admissible evidence of possession. The most that the informer could have done for defendant would have been to cast doubt on the defendant's status as a seller. Under those circumstances, the interests of justice are best served by reducing the judgment [to straight possession]."]; *People v. Borunda* (1976) 58 Cal.App.3d 368, 375.
[74] See *People v. Viramontes* (1978) 85 Cal.App.3d 585, 593. Compare *In re Tracy J.* (1979) 94 Cal.App.3d 472, 478.
[75] See *People v. Gooch* (1983) 139 Cal.App.3d 342, 345; *People v. Lee* (1985) 164 Cal.App.3d 830, 834.
[76] See *The New Shorter Oxford English Dictionary* (4th ed. 1993) p. 1333. ALSO SEE: *Blacks Law Dict.* (4th ed. 1951) p. 892 ["*In camera*": "In chambers, private. A cause is said to be heard *in camera* either when the hearing is had before the judge in his private room or when all spectators are excluded from the courtroom."].
[77] *People v. Hobbs* (1994) 7 Cal.4th 948, 973.
[78] 61 Cal.App.3d 863, 868-69.
[79] See *People v. Dimitrov* (1995) 33 Cal.App.4th 18, 29-30.

> [I]f an *in camera* hearing is held and the prosecutor does not produce the informer to testify, the prosecutor gambles on whether the evidence presented will satisfy the trial judge that the informer could *not* possibly give exonerating evidence. ¶ Experience indicates that only in the rare case are police officers or others able to offer competent evidence to obviate the necessity of the informer appearing and testifying.[80]

Those "rare cases" seem to be limited to situations in which the testifying officers could prove (1) that the CI was a "mere informant" or "fingerpointer," and (2) the defendant's guilt was based solely on circumstances that existed after the CI provided his information. For example, if the CI provided a tip that the defendant was selling drugs and, based on that tip, officers detained the defendant and discovered evidence during a pat search, it is likely that the CI would not be needed; i.e., that officer who discovered the drugs could prove he was not a material witness. Similarly, as noted earlier, if the defendant was charged with possession for sale, the CI's testimony would probably not be needed if the defendant's intent to sell was based on circumstances that existed at the time he was detained; e.g., intent based on the quantity of the drugs in his possession or the manner in which they were packaged.

On the other hand, the CI's testimony will likely be needed if there was a legitimate factual dispute that he could help resolve. For example, in *People v. Coleman*[81] the CI said he had seen Coleman and Dukes selling heroin inside Coleman's apartment. A few hours later, officers went there without the CI and, when Dukes opened the door, they seized heroin and sales paraphernalia in plain view.

The trial court ordered an *in camera* hearing to determine, among other things, whether the CI could testify that it was Dukes, not Coleman, who was running the heroin operation. But because the CI refused to testify, the prosecutor's only witness was the investigating officer who simply offered his opinion that the CI did not see or hearing anything that would help the defendant. Such testimony, said the court, was insufficient because it "does not begin to eliminate the guesswork involved in speculating what the informer's testimony would be if he were called to testify."

Complying With Disclosure Orders

In those rare cases in which officers elect to comply with the court's disclosure order, they will be required to disclose the CI's name, his address, and any other "pertinent information which might assist the defense to locate him."[82] And if officers do not have such information they must undertake "reasonable efforts" to obtain it.[83] In discussing this "reasonable effort" standard, the California Supreme Court explained:

> The "reasonable effort" required will, of course, depend on the facts of each case. If the informer has a regular abode and place of employment, simply obtaining his address and phone number may suffice; if he is a transient, or conceals his address, the law enforcement agency probably should make some arrangements for maintaining close communication with him.[84]

Officers may, however, avoid having to disclose the CI's address if they make him available to meet privately with defense counsel.[85] But this option should be used very selectively, if at all. POV

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[80] 2 Jefferson, *Evid. Benchbook* (2d ed. 1982) p. 1576. Also see *People v. Alderrou* (1987) 191 Cal.App.3d 1074, 1079, fn.1.
[81] (1977) 72 Cal.App.3d 287.
[82] *Eleazer v. Superior Court* (1970) 1 Cal.3d 847, 851. Also see *People v. Goliday* (1973) 8 Cal.3d 771.
[83] *Eleazer v. Superior Court* (1970) 1 Cal.3d 847, 851.
[84] *Eleazer v. Superior Court* (1970) 1 Cal.3d 847, 851. Also see *People v. Cheatham* (1971) 21 Cal.App.3d 675, 678, fn.3 [police efforts to keep track of the informant were sufficient, especially because "they were rendered fruitless by [the informant's] deceptive statements to the police and to the refusal of her friends to cooperate in locating her."]; *People v. Goliday* (1973) 8 Cal.3d 771, 782 ["The police must undertake reasonable efforts to obtain information by which the defense may locate such an informer."].
[85] See *People v. Rios* (1977) 74 Cal.App.3d 833.

Knock-Notice

Before the Sheriff may break the party's house, he ought to signify the cause of his coming, and make request to open doors. Semayne's Case (1604)[1]

The knock-notice rule has been irritating law enforcement officers for over 400 years. And their complaint is well-founded: If officers have a legal right to enter a house to execute a search warrant or arrest someone, why must they engage in what is arguably a "meaningless formality?"[2] And a dangerous one, too. As the Court of Appeal observed, "[T]he delay caused by [knock-notice] might give a forewarned occupant exactly the opportunity necessary to arm himself, causing injury to officers and bystanders."[3] Knock-notice is also notorious for giving suspects an opportunity to destroy evidence, especially drugs.

But there is another side to the argument; specifically, knock-notice may help prevent a violent response by the occupants. As the California Supreme Court pointed out, "[F]ew actions are as likely to evoke violent response from a householder as unannounced entry by a person whose identity and purpose are unknown to the householder."[4] Thus, the Court of Appeal noted that while "[o]ne particular officer may be willing to risk the chance of sudden violence," the rule "is also directed toward the protection of his fellow officers."[5]

So it appears that the people on both sides of the door have valid concerns and vital interests at stake. How can they be resolved? In the past, many courts ignored the problem and simply ruled that knock-notice was strictly required under the Fourth Amendment.[6] In 1995, however, the Supreme Court rejected this idea, concluding that the Fourth Amendment requires only that officers enter in a "reasonable" manner, which may or may not require an announcement.[7] Thus, in addition to knock-notice, the reasonableness of a forcible entry might also depend on the manner in which officers entered, the time of day or night they entered, whether they damaged the premises, and whether they saw or heard anything before entering that reasonably indicated that full compliance with the knock-notice rule would be counterproductive. Other circumstances include the seriousness of the crime under investigation, the nature and destructibility of the evidence being sought, how the occupants responded to searches and police encounters in the past, the size and layout of the premises, and the existence of any extraordinary security measures.

We will discuss these circumstances later in this article, plus the controversial rule that officers may not enter unless they are refused entry. But first, it is necessary to explain what officers must do to comply with the knock-notice procedure.

Knock-Notice Procedure

If knock-notice is required, officers may comply fully or substantially with the procedure we will now discuss. Substantial compliance occurs when officers take action that achieves the objective of the rule but does not constitute full compliance.[8]

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[1] Court of King's Bench (1604) 5 Coke Rep 91. Paraphrased.
[2] See *People v. Gonzalez* (1989) 211 Cal.App.3d 1043, 1049; *People v. Tacy* (1987) 195 Cal.App.3d 1402, 1421.
[3] *People v. Gonzalez* (1989) 211 Cal.App.3d 1043, 1049.
[4] *Greven v. Superior Court* (1969) 71 Cal.2d 287, 293.
[5] *People v. Webb* (1973) Cal.App.3d 460, 466.
[6] See, for example, *People v. Abdon* (1972) 30 Cal.App.3d 972, 977.
[7] See *Wilson v. Arkansas* (1995) 514 U.S. 927, 934; *People v. Mays* (1998) 67 Cal.App.4th 969, 973.
[8] See *People v. Peterson* (1973) 9 Cal.3d 717, 723. **NOTE**: For some reason, Penal Code §§ 844 and 1531 specify somewhat different procedures. Specifically, if the objective was to make an arrest, officers must demand admittance but they need not wait for a refusal. Because the Supreme Court has ruled that the constitutionality of forced entries no longer depends on technical compliance but on overall reasonableness, the fact that officers demanded or failed to demand admittance and the fact that they waited or failed to wait for a refusal would be relevant but not necessarily mandatory.

(1) **KNOCK**: Although it is called the "knock-notice" rule, there is no requirement that officers actually knock on the door or ring the doorbell. Instead, they must take action that is reasonably likely to alert the occupants of their presence, which also provides some assurance that the occupants will hear the officers' announcement.[9] Substantial compliance also results when it is apparent that one or more of the occupants saw the officers arrive.[10] As the Ninth Circuit observed, "[O]ne cannot 'announce' a presence that is already known."[11]

(2) **ANNOUNCE AUTHORITY**: Officers must also announce their authority by, for example, yelling "Police officers."[12] But this requirement may also be satisfied if at least one of the officers was in uniform and was visible to the occupants.[13]

(3) **ANNOUNCE PURPOSE**: Officers are not required to engage in an explanation of their purpose. Instead, they are simply required to declare it; e.g., "search warrant," "parole search," "probation search," "arrest warrant."[14] This requirement may also be excused altogether if the officers' purpose was reasonably apparent.[15] As the Court of Appeal explained in *People v. Mayer*, "[S]trict compliance with [the knock-notice statute] is excused where the entering officers reasonably believe the purpose of entry is already known to the occupants."[16] For example, it would seem to be reasonable to infer that the occupants were aware that the officers intended to conduct a search or make an arrest if, immediately after they announced their authority, they heard an occupant running, or if an occupant attempted to shut the door on them.[17]

(4) **WAIT FOR REFUSAL**: In the absence of exigent circumstances, officers must do one more thing before entering: wait until they were admitted or until it reasonably appeared that the occupants did not intend to admit them.[18] This is an especially controversial requirement because the occupants have no legal right to refuse entry. In addition, it is notoriously difficult for officers to determine the point at which a "refusal" had actually occurred. In any event, the courts have attempted to resolve these issues by ruling that a refusal can occur by either affirmative conduct or inaction.

Refusals by affirmative conduct

An immediate entry will ordinarily be permitted if it reasonably appeared that an occupant saw the officers and heard their announcement yet did not respond immediately or if he started to escape.[19] The most common types of refusal by affirmative conduct are when officers hear sounds from inside the house that indicate the occupants are attempting to destroy evidence or flee. See "When Compliance Is Not Required" (Destruction of evidence, and Flight, below).

Refusals by inaction

The most common type of refusal is a refusal by inaction, which occurs when officers are not admitted into the premises within a reasonable time after they announced their authority and purpose.[20] As the Ninth Circuit observed, "The refusal of admittance contemplated by the [knock-notice] statute will rarely be affirmative, but will oftentimes be present only by implication."[21] For example, in

[9] See *Duke v. Superior Court* (1969) 1 Cal.3d 314, 319; *People v. Mays* (1998) 67 Cal.App.4th 969, 973.
[10] See *People v. Brownlee* (1977) 74 Cal.App.3d 921, 929; *People v. Franco* (1986) 183 Cal.App.3d 1089, 1094, fn.5.
[11] *U.S. v. Peterson* (9th Cir. 2003) 353 F.3d 1045, 1049.
[12] See Pen. Code §§ 844, 1531; *People v. Maita* (1984) 157 Cal.App.3d 309, 322.
[13] See *Richards v. Wisconsin* (1997) 520 U.S. 385, 395-96; *People v. Lopez* (1969) 269 Cal.App.2d 461, 469.
[14] See *People v. Mayer* (1987) 188 Cal.App.3d 1101, 1115.
[15] See: *Miller v. United States* (1958) 357 U.S. 301, 310; *People v. Franco* (1986) 183 Cal.App.3d 1089, 1094.
[16] (1987) 188 Cal.App.3d 1101, 1112.
[17] See *People v. Mayer* (1987) 188 Cal.App.3d 1101, 1112; *People v. Vasquez* (1969) 1 Cal.App.3d 769, 775.
[18] See Pen. Code §§ 844, 1531; *People v. Alaniz* (1986) 182 Cal.App.3d 903, 906, fn.2.
[19] See *People v. Gallo* (1981) 127 Cal.App.3d 828, 838-39; *People v. Hobbs* (1987) 192 Cal.App.3d 959, 963-66.
[20] See *People v. Peterson* (1973) 9 Cal.3d 717, 723; *People v. Hobbs* (1987) 192 Cal.App.3d 959, 964;
[21] *McClure v. U.S.* (9th Cir. 1964) 332 F.2d 19, 22.

People v. Montenegro[22] the defendant looked out a window, saw the officers at the front door, then mouthed the words, "Okay, okay." When he did not promptly open the door, the officers demanded entry. Still no response, so "within seconds" the officers broke in. The court ruled that Montenegro's "failure to comply in these circumstances justified entry," adding that "the amount of time [the officers waited] is irrelevant because Montenegro acknowledged their presence" but did nothing. On the other hand, a delay will not justify an expedited entry if officers were aware of circumstances that justified the delay; e.g., officers saw that the occupant was asleep on a sofa.[23]

What's a "reasonable" time? As would be expected, there is no minimum wait time.[24] Instead, it all depends on the totality of circumstances.[21] Thus, the Supreme Court acknowledged that "[w]hen the knock-and-announce rule does apply, it is not easy to determine precisely what officers must do. How many seconds' wait are too few?"[26] In making this determination, the following circumstances are frequently noted.

SIZE AND LAYOUT: The larger the structure, the longer it might take the occupants to answer the door (and vice versa).[27] As the Supreme Court explained, the required wait time "will vary with the size of the establishment, perhaps five seconds to open a motel room door, or several minutes to move through a townhouse."[28]

TIME OF DAY: A delay late at night should be expected if it reasonably appeared the occupants had been asleep. Conversely, a delay might be more suspicious in the daytime or early evening.[29]

DESTRUCTIBLE EVIDENCE INSIDE: In determining whether a delay constituted an implied refusal, officers may consider the nature of the evidence they are authorized to search for and seize. For example, if a warrant authorizes a search for drugs, documents, or anything else that could be disposed of quickly, a short delay might be viewed with more concern than if officers were searching for, say, a stolen piano. Furthermore, in cases where officers are looking for destructible evidence, they need only wait for the amount of time they estimate it would take an occupant to dispose of the evidence; i.e., they do not need to wait for the amount of time it would take to reach the front door. As the Supreme Court explained in *United States v. Banks*, "[W]hat matters is the opportunity to get rid of cocaine, which a prudent dealer will keep near a commode or kitchen sink."[30]

When Compliance is Not Required

There are several situations in which officers are not required to comply fully or even partially with the knock-notice procedure. This does not mean that officers should never attempt to comply under these circumstances. It just means that if these circumstances existed and officers concluded that, under the existing circumstances, they need to make an immediate entry, they may do so.

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[22] (1985) 173 Cal.App.3d 983, 989.
[23] See *People v. Abdon* (1972) 30 Cal.App.3d 972, 978; *People v. Gonzales* (1989) 211 Cal.App.3d 1043.
[24] See *People v. Hobbs* (1987) 192 Cal.App.3d 959, 964; *People v. Trujillo* (1990) 217 Cal.App.3d 1219, 1225.
[25] See *United States v. Banks* (2003) 540 U.S. 31, 36; *People v. Neer* (1986) 177 Cal.App.3d 991, 996; *U.S. v. Chavez-Miranda* (9th Cir. 2002) 306 F.3d 973, 980 ["There is no established time that the police must wait; instead, the time lapse must be reasonable considering the particular circumstances of the situation."].
[26] *Hudson v. Michigan* (2006) 547 U.S. 586, 590. Also see *People v. Byers* (2017) __ Cal.App.5th __ [2017 WL 7238923].
[27] See *People v. Hoag* (2000) 83 Cal.App.4th 1198, 1212; *People v. Drews* (1989) 208 Cal.App.3d 1317, 1328; *U.S. v. Chavez-Miranda* (9th Cir. 2002) 306 F.3d 973, 980.
[28] *United States v. Banks* (2003) 540 U.S. 31, 40.
[29] See *Greven v. Superior Court* (1969) 71 Cal.3d 287, 295 [although officers waited ten to 15 seconds before forcing entry, the house was large and the warrant was executed at 1 A.M. when most people are asleep].
[30] *United States v. Banks* (2003) 540 U.S. 31, 40. Also see *Richards v. Wisconsin* (1997) 520 U.S. 385, 396; *People v. Martinez* (2005) 132 Cal.App.4th 233 ["15 to 20 seconds does not seem an unrealistic guess about the time someone would need to get in a position to rid his quarters of cocaine"].

No-knock warrants

When executing a search or arrest warrant, officers may make a no-knock entry if it was authorized by the judge who issued the warrant. Consequently, if the affiant reasonably believed that a no-knock entry was necessary, he may request the judge to authorize it on the warrant if the affidavit contained facts constituting "reasonable suspicion"[31] that (1) compliance would provide the occupants with time to arm themselves or otherwise engage in violent resistance, (2) compliance would provide the occupants with time to destroy evidence, or (3) compliance would serve no useful purpose; e.g., the premises were abandoned.[32] But even if the judge grants no-knock authorization, officers must not make an unannounced entry if they become aware that circumstances had changed and, as the result, there was no need for an immediate entry.[33]

On the other hand, if the judge refuses to grant the officers' request, they may nevertheless make a no-knock entry if, as the result of changed circumstances, they reasonably believed it was necessary. As the Supreme Court explained, "[A] magistrate's decision not to authorize no-knock entry should not be interpreted to remove the officers' authority to exercise independent judgment concerning the wisdom of a no-knock entry at the time the warrant is being executed."[34]

Exigent circumstances

Officers may also dispense with the knock-notice procedure if, upon arrival, they became aware of facts that constituted "reasonable suspicion" that compliance would be dangerous or would result in the destruction of evidence. As the Supreme Court explained, there are "many situations in which it is not necessary to knock and announce," such as "when circumstances present a threat of physical violence, or if there is reason to believe that evidence would likely be destroyed if advance notice were given, or if knocking and announcing would be futile."[35] Specifically, there are three types of exigent circumstances that will justify noncompliance: (1) imminent danger to officers or others, (2) imminent destruction of evidence, and (3) futility.

DANGER: Compliance with the knock-notice requirements is excused if officers reasonably believed they or someone else would be harmed unless they made an immediate entry.[36] In the words of the Supreme Court, "[I]f circumstances support a reasonable suspicion of exigency when the officers arrive at the door, they may go straight in."[37] The following are some examples:

- Entry to arrest an armed prison escapee who vowed he would "not do federal time."[38]
- Entry to arrest a suspect in the murder of a police officer.[39]
- Search warrant for drugs; suspect had previously "expressed his willingness to use firearms against the police" and was known to have access to firearms.[40]
- Search warrant for drugs; suspect's apartment was protected by a steel door; officers knew there was a loaded handgun and a "large amount" of crack cocaine inside the apartment.[41]
- Search warrant on meth lab; the house "was equipped with security cameras and flood

[31] See *United States v. Ramirez* (1998) 523 U.S. 65, 73; *Richards v. Wisconsin* (1997) 520 U.S. 385, 394 ["This showing [for reasonable suspicion] is not high"].
[32] See *Richards v. Wisconsin* (1997) 520 U.S. 385, 394; *United States v. Banks* (2003) 540 U.S. 31, 37, fn.3.
[33] See *U.S. v. Spry* (7th Cir. 1999) 190 F.3d 829, 833.
[34] *Richards v. Wisconsin* (1997) 520 U.S. 385, 395-96, fn.7. Also see *United States v. Banks* (2003) 540 U.S. 31, 36-37
[35] *Hudson v. Michigan* (2006) 547 U.S. 586, 589-90 [quoting from *Richards v. Wisconsin* (1997) 520 U.S. 385, 394].
[36] See *Brigham City v. Stuart* (2006) 547 U.S. 398, 406-7; *People v. Galan* (1985) 163 Cal.App.3d 786, 795.
[37] *United States v. Banks* (2003) 540 U.S. 31, 37.
[38] *United States v. Ramirez* (1998) 523 U.S. 65, 71.
[39] *People v. Gilbert* (1965) 63 Cal.2d 690, 707.
[40] *U.S. v. Turner* (9th Cir. 1991) 926 F.2d 883, 887.
[41] *U.S. v. Stowe* (7th Cir. 1996) 100 F.3d 494, 499.

lights. Windows were papered over, suggesting that the occupants of the home were concerned with protecting their illegal methamphetamine laboratory."[42]

- There was probable cause that the house contained explosives; as the uniformed SWAT team was assembling outside, one of the occupants opened the door, saw them, and immediately closed the door.[43]
- Officers went to the suspect's home to arrest him for rape; the rapist had been armed with a knife. As officers arrived, they saw a gun in a car parked nearby. When they got to the door they "heard what sounded like running footsteps."[44]

DESTRUCTION OF EVIDENCE: If officers were executing a search warrant or were securing the premises pending issuance of a warrant, an expedited entry would be permitted if they reasonably believed there was destructible evidence on the premises that would be destroyed if they delayed making entry. This is especially likely to occur in drug cases.[45] Nevertheless, officers must have been aware of circumstances indicating an imminent threat to the evidence; i.e. they cannot assume that all entries into drug houses will automatically warrant a no-knock entry.[46]

The following are some examples of no-knock entries in drug cases have been deemed reasonably necessary:

- When officers knocked, the defendant "cracked" open the door, saw a uniformed officer, then slammed the door shut.[47]
- When an officer announced his authority and purpose, two people inside a "heavily barricaded" drug house started running through the house.[48]
- Upon announcing, officers heard "very fast movements toward the rear of the apartment."[49]
- The suspect was a felon operating under an alias, his apartment had been fortified by a steel door, there was a loaded handgun and a "large amount" of cocaine inside the apartment.[50]
- Officers knew that the defendant had "an extensive arrest record including arrests for possession and sale of heroin"; his house was a "virtual fortress"; when officers arrived and identified themselves, the defendant attempted to close a gate to prevent their entry.[51]

FLIGHT: Compliance with the knock-notice procedure would not be required if officers reasonably believed that the occupants had started to flee. Here are two examples:

- FBI agents had probable cause to believe a fugitive who was wanted for several violent offenses involving guns was inside a motel room; before they entered, a friend of the fugitive who was arrested outside the room yelled "Run!"[52]

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[42] *U.S. v. Combs* (9th Cir. 2005) 394 F.3d 739, 745.
[43] *U.S. v. Peterson* (9th Cir. 2003) 353 F.3d 1045, 1049-50.
[44] *People v. Tribble* (1971) 4 Cal.3d 826, 833.
[45] See *United States v. Banks* (2003) 540 U.S. 31, 40 ["[W]hat matters is the opportunity to get rid of cocaine, which a prudent dealer will keep near a commode or kitchen sink."]; *Richards v. Wisconsin* (1997) 520 U.S. 385, 394.
[46] See *Richards v. Wisconsin* (1997) 520 U.S. 385, 388; *People v. Neer* (1986) 177 Cal.App.3d 991, 995.
[47] *Richards v. Wisconsin* (1997) 520 U.S. 385, 395. Also see *People v. Martinez* (2005) 132 Cal.App.4th 233 ["15 to 20 seconds does not seem an unrealistic guess about the time someone would need to get in a position to rid his quarters of cocaine"].
[48] *People v. Mayer* (1987) 188 Cal.App.3d 1101, 1112.
[49] *People v. Temple* (1969) 276 Cal.App.2d 402, 413. Also see *People v. Pacheco* (1972) 27 Cal.App.3d 70, 78 ["[D]efendant got off the couch and started toward the rear of the apartment."]; *McClure v. U.S.* (9th Cir. 1964) 332 F.2d 19, 22 ["footsteps running in the wrong direction"].
[50] *U.S. v. Stowe* (7th Cir. 1996) 100 F.3d 494, 499.
[51] *People v. Thompson* (1979) 89 Cal.App.3d 425.
[52] *U.S. v. Reilly* (9th Cir. 2000) 224 F.3d 986. Also see *People v. Tribble* (1971) 4 Cal.3d 826, 833.

- Officers in hot pursuit of a burglary suspect chased him into a house.[53]

FUTILITY: Finally, compliance is not required if doing so would be futile or otherwise serve no useful purpose.[54] For example, knocking and announcing would be excused if officers reasonably believed that no one was inside the premises.[55] "Where no one is present," said the Court of Appeal, "officers executing a search warrant . . . may make forcible entry without giving notice of their authority or purpose."[56]

Tricks and ruses

Officers who have a warrant need not comply with the knock-notice procedure if an occupant consented to their entry—even if the officers lied about who they were or what they wanted. This is because the objective of giving notice of an imminent entry would have been achieved when the occupant consented to their entry. Thus, the Court of Appeal said, "Officers who reasonably employ a ruse to obtain consent to enter a dwelling do not violate [the knock-notice statutes], even if they fail to announce their [true] identity and purposes before entering."[57] The following are examples:

- An officer wearing a Post Office uniform went to the suspect's house to execute a search warrant (the other officers hid outside). When one of the suspects answered the door, the officer said he had a special delivery letter for the other suspect and was told, "Sure, come on in."[58]
- Officers went to the suspect's house to conduct a probation search. An undercover officer knocked on the door and told the suspect's roommate, "It's Jim, and I want to talk to Gail" who was an occupant and suspect. When the officer saw Gail standing behind her roommate, he identified himself and entered.[59]
- The suspect's wife admitted an undercover officer after he said he was a carpet salesman sent by the welfare office to recarpet the house.[60]
- A drug dealer admitted an undercover officer after the office told him that "Pete" had sent him to buy drugs.[61]

Suppression of Evidence

As noted earlier, the Supreme Court has ruled that a failure to comply with the knock-notice procedure does not constitute a violation of the Fourth Amendment. Consequently, a failure to comply will not result in the suppression of evidence if the officers' entry was otherwise reasonable. Suppression is also inappropriate if officers had a legal right to enter, in which case the evidence would have been discovered inevitably. As the Supreme Court explained in a search warrant case, regardless whether or not the officers complied with the knock-notice requirements, "the police would have executed the warrant they had obtained, and would have discovered the gun and drugs inside the house."[62]

This does not mean, however, that officers should not attempt to comply when feasible. Remember that one of the main objectives of the knock-notice rule is to reduce the chances of a violent confrontation when the occupants of a home do not know the identity and intentions of the people who are demanding admittance. POV

[53] *People v. Patino* (1979) 95 Cal.App.3d 11, 21.
[54] See *Richards v. Wisconsin* (1997) 520 U.S. 385, 394; *United States v. Banks* (2003) 540 U.S. 31, 37, fn.3.
[55] See *Wilson v. Arkansas* (1995) 514 U.S. 927, 935; *Hart v. Superior Court* (1971) 21 Cal.App.3d3 496, 504.
[56] *People v. Ford* (1975) 54 Cal.App.3d 149, 154.
[57] *People v. Kasinger* (1976) 57 Cal.App.3d 975, 978.
[58] *People v. Rudin* (1978) 77 Cal.App.3d 139. Also see *People v. Thompson* (1979) 89 Cal.App.3d 425, 432.
[59] *People v. Constancio* (1974) 42 Cal.App.3d 533, 546.
[60] *People v. Veloz* (1971) 22 Cal.App.3d 499.
[61] *People v. Evans* (1980) 108 Cal.App.3d 193, 196.
[62] *Hudson v. Michigan* (2006) 547 U.S. 586, 592. Also see *People v. Byers* (2016) 6 Cal.App.5th 856.

Intercepting Prisoner Communications

"Careful, they've got these phones bugged."[1]

Jails and prisons monitor and record prisoners' telephone calls and visitor conversations. That's not a secret. Although the wires, microphones, and recording equipment are not visible, they are there—and the prisoners know it. As the Court of Appeal observed, "[I]n the jailhouse the age-old truism still obtains: 'Walls have ears.'"[2]

Moreover, thanks to digital recording technology, jails and prisons can now record, store, and quickly retrieve virtually everything that is said over inmate telephones and in visiting rooms. Here are just some of the interesting tidbits that officers—and jurors—have overheard:

- I'm in for murder. Get rid of the gun.
- We did it, but I didn't pull the trigger.
- Hit Signe.
- Jump the accountant when he's alone and if one of you has a gun, so much the better.[3]

The question arises: Why do prisoners say such things when they know they are or might be overheard? Well, some think that even though they had been warned, it's just a scare tactic to impede their criminal activities. There are also inmates who think they can outwit officers by speaking in code. An example of such cunning is found in *U.S. v. Willoughby* where a jail inmate figured that his plot to murder a prosecution witness would go undetected if he simply omitted the witness's name: "We need somebody to kill *the person*. Cornel will have his man do it but Cornel's man don't know what *the person* looks like."[4]

The practical value of acquiring gems such as these often depends on whether the recordings will be admissible in court. And this, in turn, depends on whether the officers complied with certain restrictions on prisoner surveillance that are imposed by federal and state law. What are those restrictions? We will discuss them at length in this article, but first there are eight basic rules that should be noted:

ATTORNEY CONVERSATIONS: Conversations between a prisoner and his attorney may *never* be monitored.[5]

VISITORS PRIVACY RIGHTS: If the monitoring of a conversation did not violate the prisoner's privacy rights, it did not violate the other party's privacy rights.[6]

RECORDING VS. MONITORING CONVERSATIONS: If it is lawful to monitor a prisoner's conversation, it is lawful to record it.[7]

TIME-SERVERS VS. PRETRIAL DETAINEES: In jails, it does not matter that the prisoner was a pretrial detainee, as opposed to a time-server or sentenced prisoner.[8] Although the U.S. Supreme Court has ruled that restrictions on pre-trial detainees must not be punitive in nature,[9] this limitation has no bearing on the interception of their communications because the objective is institutional security and public safety, not punishment.

NO "LEAST INTRUSIVE MEANS" REQUIREMENT: Jail and prison officials are not required to implement the least intrusive means of intercepting communications.[10]

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[1] *People v. Santos* (1972) 26 Cal.App.3d 397, 400.
[2] *Ahmad A. v. Superior Court* (1989) 215 Cal.App.3d 528, 536 [quoting from *Don Quixote* by Cervantes, (1615)].
[3] Examples from *People v. Santos* (1972) 26 Cal.App.3d 397, 400; *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1191; *Ahmad A. v. Superior Court* (1989) 215 Cal.App.3d 528, 531; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1004; *People v. Phillips* (1985) 41 Cal.3d 29, 82, fn.32. Some quotes paraphrased.
[4] (2nd Cir. 1988) 860 F.2d 15, 18. Paraphrased. Emphasis added.
[5] See *Lanza v. New York* (1962) 370 U.S. 139, 144; Pen. Code § 636.
[6] See *Thornburgh v. Abbott* (1989) 490 U.S. 101, 110, fn.9; *U.S. v. Willoughby* (2nd Cir. 1988) 860 F.2d 15, 22.
[7] See *United States v. White* (1971) 401 U.S. 745, 751; *United States v. Caceres* (1979) 440 U.S. 741, 750.
[8] See *Bell v. Wolfish* (1979) 441 U.S. 520, 546; *People v. Davis* (2005) 36 Cal.4th 510, 527.
[9] *Bell v. Wolfish* (1979) 441 U.S. 520, 535.
[10] See *Turner v. Safley* (1987) 482 U.S. 78, 89; *Thornburgh v. Abbott* (1989) 490 U.S. 401, 411.

RECORDING REQUESTED BY PROSECUTOR: If the interception served a legitimate penological interest (discussed below), it is immaterial that it was conducted at the request of a prosecutor.[11]

MIRANDA DOES NOT APPLY: *Miranda* does not apply if the prisoner was speaking with a friend, relative, or an undercover officer. As the Supreme Court explained, "Conversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*."[12]

Conversations In Police Facilities

Officers may monitor conversations between prisoners and others (except attorneys) that occur in police interview rooms, police cars, and other places in which the prisoner cannot reasonably expect privacy.[13] In other words, prisoners do not have greater expectation of privacy in police facilities than they do in jails and prisons. As the Court of Appeal observed in *O'Laskey v. Sortino,* "[A] person under arrest, in police custody in a patrol car, whose statements to his cohort are recorded has no reasonable expectation of privacy where it was unlikely he thought he was being placed in the police car for a sight-seeing tour of the city."[14]

Conversations In Jails and Prisons

Under Federal and California law, the interception of inmate conversations by means of wiretapping or bugging is permitted if it was "reasonably related to a legitimate penological interest."[15] Said the Supreme Court, "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[16] The term "legitimate penological interest" is significant because it is so broad. It covers, to be sure, any monitoring for the purpose of gathering information about criminal activities inside the facility, such as plans to assault or murder inmates or correctional officers, plans to carry out gang activities, smuggle drugs or weapons, and directing criminal activities in other jails and prisons.

Legitimate penological interests also include the prevention of crime outside the facility and the apprehension of the perpetrators. The idea that taxpayer-financed jails and prisons have no legitimate interest in protecting people on the outside from the criminal activities of their inmates might have been fashionable in the '60's and '70's, but not today. Thus, the California Supreme Court, after reviewing the checkered history of the law pertaining to the privacy rights of inmates, determined that the term "legitimate penological interest" covers both the security of the facility and the investigation of crimes that occur both inside and outside the facility.[17] As the court explained, "California law now permits law enforcement officers to monitor and record unprivileged communications between inmates and their visitors to gather evidence of crime."

Conversations With Visitors

Conversations between prisoners and visitors that occur in jails and prisons may be monitored without court authorization or consent because, in addition to the institutional security objectives, the parties to such conversations cannot reasonably expect that their communications will be private.[18] As the Fifth Circuit put it, "[O]ne who expects privacy under the circumstances of prison visiting is, if not acting foolish, exceptionally naive."[19]

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[11] See *People v. Loyd* (2002) 27 Cal.4th 997; *People v. Kelly* (2002) 103 Cal.App.4th 853, 859.
[12] *Illinois v. Perkins* (1990) 496 U.S. 292, 296. Also see *Arizona v. Mauro* (1987) 481 U.S. 520, 526.
[13] See *People v. Loyd* (2002) 27 Cal.4th 997, 1009, fn.14; *People v. Davis* (2005) 36 Cal.4th 510.
[14] (1990) 224 Cal.App.3d 241, 248.
[15] See *Thornburgh v. Abbott* (1989) 490 U.S. 401, 409; Pen. Code § 2600.
[16] *Turner v. Safley* (1987) 482 U.S. 78, 89.
[17] *People v. Loyd* (2002) 27 Cal.4th 997, 1009. Also see *People v. Riel* (2000) 22 Cal.4th 1153, 1184.
[18] See *Lanza v. New York* (1962) 370 U.S. 139, 143; Pen. Code §§ 631(b)(3), 632(e)(3), 632.7(b)(3).
[19] *U.S. v. Harrelson* (5th Cir. 1985) 754 F.2d 1153, 1169.

It should be noted, however, that there are some older California cases in which the courts had ruled that warrantless monitoring of visitor conversations would violate California's privacy law if officers expressly (or sometimes even impliedly) informed the parties that their conversation would be private.[20] Because these rulings were based on the concept of reasonable privacy expectations in jails and prisons—instead of the current standard of "legitimate penological interests"—it is questionable whether they are still valid. We say this because it seems to us that if officers had a legitimate penological interest in monitoring a prisoner's conversation with a visitor, such monitoring should be lawful regardless of any privacy expectations—reasonable or unreasonable—that the parties might have harbored. But even if there is some validity to these earlier cases, officers can simply avoid this issue by not saying anything that would cause the parties to believe that their conversation would not be monitored.

Telephone conversations

For the same penological reasons that jails and prisons may monitor inmate-visitor conversations, they may monitor telephone conversations with people on the outside. Although such monitoring constitutes "wiretapping" under federal and California law, a wiretap order is not required because virtually all such wiretapping falls within one or both of these exceptions to the wiretap law: (1) routine monitoring, or (2) consent.

ROUTINE MONITORING: The "routine monitoring" exception applies if all conversations are monitored or, presumably, if the monitoring was conducted at random, meaning it was not conducted in conjunction with a particular criminal investigation or because the prisoner was singled out.[21]

CONSENT: Most wiretapping is based on consent by one or both of the parties.[22] Although such consent is sometimes given expressly (e.g., inmate signed a consent form), most consent is implied when an inmate chooses to speak on the phone after having been given notice that his calls may be monitored. As the Court of Appeal explained, "So long as a prisoner is given meaningful notice that his telephone calls over prison phones are subject to monitoring, his decision to engage in conversations over those phones constitutes implied consent."[23] Or, in the words of the Second Circuit:

> In the prison setting, when the institution has advised inmates that their telephone calls will be monitored and has prominently posted a notice that their use of institutional telephones constitutes consent to this monitoring, the inmates' use of those telephones constitutes implied consent to the monitoring within the meaning of [the federal wiretap statute].[24]

The question, then, is what type of notice is sufficient? The most common method is to post signs notifying prisoners that their calls may be monitored or that their act of speaking on the phone constitutes implied consent to listen in.[25] As the Court of Appeal explained, "So long as a prisoner is given meaningful notice that his telephone calls over prison phones are subject to monitoring, his decision to engage in conversations over those phones constitutes implied consent."[26] For example, in *U.S. v. Amen* the court ruled that a federal convict impliedly consented to having his telephone calls monitored because each phone used by prisoners contained the following notice*: "The Bureau of*

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[20] See, for example, *De Lancie v. Superior Court* (1982) 31 Cal.3d 865; *People v. Hammons* (1991) 235 Cal.App.3d3 1710.
[21] See *Bunnell v. Superior Court* (1994) 21 Cal.App.4th 1811, 1821-22. Also see *People v. Windham* 145 Cal.App.4th 881.
[22] See *People v. Kelley* (2002) 103 Cal.App.4th 853, 858; *People v. Windham* (2006) 145 Cal.App.4th 881, 886.
[23] See *People v. Kelly* (2002) 103 Cal.App.4th 853, 858; *People v. Windham* 145 Cal.App.4th 881, 886
[24] *U.S. v. Willoughby* (2nd Cir. 1988) 860 F.2d 15, 19-20.
[25] See *People v. Windham* (2006) 145 Cal.App.4th 881, 886 ["Every federal circuit court to address the issue has concluded that [the federal wiretap statute] is not violated when a jail or prison routinely monitors and records outgoing calls placed by inmates on the institution's telephones and the inmates are put on notice of the recording policy."]; *U.S. v. Mejia* (2nd Cir. 2011) 655 F.3d 126, 133 ["where an inmate is aware that his or her calls are being recorded, those calls are not protected by a privilege"]; *U.S. v. Workman* (2nd Cir. 1996) 80 F.3d 688, 693.
[26] *People v. Kelley* (2002) 103 Cal.App.4th 853, 858

Prisons reserves authority to monitor conversations on this telephone. Your use of institutional telephones constitutes consent to this monitoring. A properly placed telephone call to an attorney is not monitored."[27] Notice may also be given by means of a recorded message that is played automatically when a prisoner makes a telephone call.

Although such notice is sufficient, it sometimes happens that inmates will say something over the phone that further demonstrates their knowledge of the monitoring, and can be used as additional proof that the inmate consented to the monitoring. Here are some examples:

- I can't hardly talk on this phone, 'cause you know they got it screened.
- I didn't want to mention the name on the phone or nothin'.
- Don't think this conversation ain't being recorded.
- [They] got this phone tapped so I gotta be careful.[28]

Such knowledge may also be demonstrated if the parties to the conversation used code or spoke in a cryptic manner. For example, in *People v. Edelbacher* the court noted that an inmate who was instructing a visitor to kill a prosecution witness "used veiled allusions and awkward circumlocutions to refer to the intended murder and the manner in which he wanted it carried out."[29]

Note that while some courts have questioned whether an inmate's act of speaking on the phone after being given notice of monitoring constitutes consent or is mere acquiescence,[30] to our knowledge no court has seriously considered this idea.[31]

Searching Abandoned Phones

Although California's Electronic Communications Privacy Act ordinarily requires a search warrant to search the contents of cell phones,[32] there is an exception that applies to jails and prisons. Specifically, Penal Code section 1546.1(c)(7) states that a warrant is not required "if the device is seized from an inmate's possession or found in an area of a correctional facility or a secure area of a local detention facility where inmates have access, and the device is not in the possession of an individual," and the device is not known or believed to be the possession of an authorized visitor."

Reading Prisoner Mail

Inmate mail to or from anyone who is not an attorney may be opened and read because it serves a legitimate penological interest.[33] For example, the Supreme Court has pointed out that correctional institutions "have a legitimate interest in knowing whether inmates are sending encoded letters or letters concerning escape plans or criminal activity inside or outside the facility."[34] Accordingly, the Court of Appeal noted in *People v. Harris,* "Except where the communication is a confidential one addressed to an attorney, court or public official, a prisoner has no expectation of privacy with respect to letters posted by him."[35] Note, however, that mail *from* an attorney may be opened for the limited purpose of making sure it does not contain contraband.[36] But the correspondence may not be read and the prisoner must have been present when the envelope was opened and the contents were inspected.[37] POV

[27] (2nd Cir. 1987) 831 F.2d 373, 379.
[28] See *People v. Miranda* (1987) 44 Cal.3d 57, 84; *People v. Leonard* (2007) 40 Cal.4th 1370, 1403.
[29] (1989) 47 Cal.3d 983, 1004.
[30] See, for example, *U.S. v. Daniels* (7C 1990) 902 F.2d 1238, 1245 ["But knowledge and consent are not synonyms."].
[31] See, for example, *U.S. v. Footman* (1st Cir. 2000) 215 F.3d 145, 154-55; *U.S. v. Amen* (2nd Cir. 1987) 831 F.2d 373, 379.
[32] See Pen. Code § 1546.1.
[33] See *Thornburgh v. Abbott* (1989) 490 U.S. 101.
[34] See *Turner v. Safely* (1987) 482 U.S. 78, 91; *People v. McCaslin* (1986) 178 Cal.App.3d 1, 7.
[35] (2000) 83 Cal.App.4th 371, 374.
[36] See Pen. Code § 2600(b); 15 Cal. Admin. Code § 3144.
[37] See 15 Cal. Admin. Code § 3144; *Procunier v. Martinez* (1974) 416 U.S. 396, 413.

Recent Cases

People v. Superior Court (Corbett)

(2017) 8 Cal.App.5th 670

Issues

(1) Did an officer violate *Miranda*? (2) Did the defendant voluntarily consent to a search of his home? (3) If the consent was involuntary, was the search nevertheless lawful because the officer had probable cause for a warrant? (4) If the search was illegal, was the evidence nevertheless admissible under the "inevitable discovery" rule?

Facts

At 6:35 A.M, LAPD received a 911 call from actress Sandra Bullock who said that a man wearing dark clothing had broken into her home and was still inside somewhere. As the responding officers entered the front door, they saw Joshua Corbett walking down a staircase. He was wearing dark clothing, and the officers arrested him. At that point, Corbett called out to Bullock saying, "Sandy, I'm sorry. Please don't press charges." Based on evidence in Corbett's possession, it appeared that he had been stalking Bullock.

The next day, three LAPD detectives and a psychologist went to the jail to interview Corbett. After *Mirandizing* him, a detective asked, "So do you want to talk about what happened with Sandy?" Corbett responded, "Not really. I don't want to talk about it. No." The detective replied, "You don't want to help us understand why you were there?" Again, Corbett said "I don't want to talk about it." After the detective continued to urge Corbett to talk to him, Corbett said, "I did what I did. And I deserve to be punished for it. . . . I shouldn't have pushed the issue. I don't want to talk about it." Although Corbett did not respond to the detective's further requests to talk about the incident, at one point he "denied intending to hurt Bullock and said he was devastated that he had made her cry."

Having learned that eight firearms were registered to Corbett, the detective asked him for consent to search his home for the weapons.[1] It appears the detective thought that Corbett lived with his parents because at one point he said it would be unpleasant for his parents if officers had to get a search warrant and "go there with a pry bar and a battering ram and disrupt your mother and father's life to get your guns." Eventually, Corbett consented to a search and he also explained how he had entered Bullock's home and what he did while he was inside.

Officers then searched Corbett's house based on his consent and seized seven firearms, including a machine gun and an assault weapon. Corbett was charged with 24 counts related to the firearms, plus stalking and burglary. Prior to trial, Corbett filed a motion to suppress his statements and the weapons. The motion was granted and the DA's office appealed.

Discussion

At the outset, it should be noted that Corbett did not contend that he was unlawfully arrested or that anything the officers found during a search incident to arrest was obtained in violation of the Fourth Amendment. Instead, he only sought the suppression of the statements he made during the interrogation and the weapons found in his home.

It is unnecessary to delve into the *Miranda* issue because Corbett obviously invoked his right to remain silent and, just as obviously, the detective continued to question him. Consequently, the DA acknowledged that any statements he made were properly suppressed. The DA also conceded that Corbett did not voluntarily consent to the search of his home. Although the court did not discuss the consent issue at length, it essentially ruled that Corbett's consent was involuntary because the detective's refusal to honor his invocation would have caused a reasonable person in Corbett's posi-

[1] **NOTE**: The detective was aware that Corbett had been served with an Emergency Protective Order shortly after his arrest and that Corbett was required per the EPO to surrender all of his firearms. This did not, however, provide the detective with grounds to search Corbett's home for the weapons without a warrant or consent.

tion to believe that his constitutional rights were meaningless. As the trial judge explained, "It wasn't close, frankly, to being consent" because "the officers overcame the defendant's willingness to resist" and, furthermore, Corbett "kept asserting his rights and they just kept on talking to him. And my feeling was at some point this man, in those conditions, on that date, probably did not think too much of his constitutional rights anymore."[2]

The DA did, however, argue that, even though Corbett's consent was invalid, the weapons were admissible under the so-called "inevitable discovery" rule. Under this rule, evidence and statements obtained unlawfully will be admissible if they would have been acquired inevitably by lawful means. The Supreme Court's important case of *Nix v. Williams*[3] illustrates how this works.

Officers in Iowa had just arrested Williams on charges that he had kidnapped and murdered a ten-year old girl. Although the girl's body had not yet been discovered, officers believed it had been left in a particular rural area. In fact, about 200 volunteers were currently searching for the body in that area. Although Williams had not been *Mirandized*, an officer questioned him about the location of the body and Williams eventually disclosed it. At that point, the officers temporarily called off the search until they could make sure the body was located there. They confirmed it a few hours later.

On appeal, Williams argued that the body and forensic evidence resulting from its discovery should have been suppressed because it was obtained in violation of *Miranda*. Despite the obvious *Miranda* violation, the Supreme Court ruled the evidence was admissible because the body would have been discovered inevitably by the search team. This was because the searchers were near the body and, based on maps they were using, it was inevitable that they would cover the spot where the body was located. Said the Court, "[I]t is clear that the search parties were approaching the actual location of the body, and we are satisfied, along with three courts earlier, that the volunteer search teams would have resumed the search had Williams not earlier led the police to the body and the body inevitably would have been found." Consequently, the Court ruled that "if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury."

Back to *Corbett*, the court observed that "[t]his is not a case like *Nix*" where "the use of legitimate investigatory tactics [the search by volunteers] had brought police to the brink of discovering the illegally obtained evidence when the misconduct occurred." Moreover, said the court, if the inevitable discovery rule applied in cases like *Corbett*, officers would never need a search warrant if (1) they had probable cause to search a house, and (2) the crime was sufficiently serious that it was inevitable that they would have sought and obtained a warrant if they had taken the time to do so. In another case in which this same argument was made, the Ninth Circuit responded that "to excuse the failure to obtain a warrant merely because the officers had probable cause and could have inevitably obtained a warrant would completely obviate the warrant requirement of the fourth amendment."[4]

Consequently, the court ruled that the weapons inside Corbett's home were properly suppressed.

People v. Villa-Gomez

(2017) __ Cal.App.5th __ [2017 WL 930816]

Issue

If a sheriff's deputy asks a prisoner about his gang membership during the booking process, are his responses admissible to prove his gang affiliation as to a crime he committed later?

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[2] **NOTE**: We think Corbett's consent would also have been deemed involuntary because of the detective's threat that if he was forced to get a warrant to search his parents' home, he would enter with a pry bar and battering ram. See *Parrish v. Civil Service Commission* (1967) 66 Cal.2d 260, 270-5 [consent based on threat]; *U.S. v. Soriano* (9th Cir. 2003) 361 F.3d 494 502 [threat].

[3] (1984) 467 U.S. 431. Also see *Murray v. United States* (1988) 487 U.S. 533, 539; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1040.

[4] *U.S. v. Echegoyen* (9th Cir. 1986) 799 F.2d 1271, 1280, fn.7.

Facts

Villa-Gomez was booked into the Yuba County Jail on an immigration hold. During booking, a sheriff's deputy asked if he was a member of a gang and, if so, which one. He said he was a Norteño. A few hours later, he assaulted another prisoner who had supposedly disrespected the Norteños. As the result, he was charged with felony assault with an allegation that he committed the crime for the benefit of a criminal street gang, which made him eligible for a three-year sentence enhancement.[5]

At Villa-Gomez's trial, the prosecution was able to prove that the crime was gang-related based, at least in part, on Villa-Gomez's statement during booking that he was a Norteño. He was found guilty of assault, and the gang enhancement was affirmed. As the result of the enhancement, he was sentenced to an additional three years in prison.

Discussion

On appeal, Villa-Gomez argued that his admission that he was a Norteño should have been suppressed because it was obtained in violation of *Miranda*. The court disagreed.

It is settled that officers must obtain a *Miranda* waiver before questioning a suspect who is in custody if the question was "reasonably likely to elicit an incriminating response."[6] There is, however, an exception to this rule known as the "routine booking" exception by which a waiver is not required if the question was asked as a matter of routine to obtain basic identifying data or biographical information for the booking or pretrial services process,[7] or for a jail administrative purpose.[8] In addition, there is a *Miranda* exception known as the "public safety" exception which applies if the answer to the question was necessary to protect a member of the public—or the prisoner himself—from harm.[9]

At first glance, it would appear that asking a prisoner if he was a member of a street gang (and, if so, which one) would fall within both exceptions. The routine booking exception would seemingly apply because a suspect's street gang affiliation is as much a part of his biographical data as his occupation. (In fact, in many cases they are the same thing.) Second, such a question would seemingly fit within the public safety exception because deputies need to know the prisoner's affiliation to make sure he is not housed with rival gang members.

Nevertheless, in 2015 the California Supreme Court ruled in *People v. Elizalde* that the answers to booking questions about gang membership must be suppressed if (1) the arrestee had not waived his *Miranda* rights, and (2) the arrestee was being booked for a crime that carried a gang enhancement. The court reasoned that, because the answer to such a question would necessarily incriminate the arrestee, the questioned constituted "interrogation" under *Miranda*.[10]

The court in *Villa-Gomez* ruled, however, that *Elizalde* did not apply when, as here, the arrestee was being booked on a crime for which his gang affiliation could not subject him to additional punishment. It follows, said the court, that an arrestee's answers to routine gang questions during booking are admissible to prove gang affiliation as to any crime he committed thereafter because the answer was not reasonably likely to incriminate him at the time the question was asked. As the court observed, nothing the *Elizalde* court wrote suggests its holding should apply to crimes that have not yet been committed at the time of the inquiry, and we decline to extend *Miranda* and [its definition of 'interrogation'] that far." Accordingly, the court ruled the trial court was correct in its ruling that Villa-Gomez's response was admissible.

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[5] Pen. Code § 186.22(b)(1).
[6] *Rhode Island v. Innis* (1980) 446 U.S. 291, 301.
[7] See *Pennsylvania v. Muniz* (1990) 496 U.S. 582, 601; *People v. Farnam* (2002) 28 Cal.4th 107, 180.
[8] See *People v. Gomez* (2011) 192 Cal.App.4th 609, 634.
[9] See *People v. Stevenson* (1996) 51 Cal.4th 1234; *People v. Jones* (1979) 96 Cal.App.3d 820, 827-28.
[10] **NOTE**: When we reported on *Elizalde* we questioned whether it was correctly decided. We still do. That is because the sole purpose of the exclusionary rule is to deter police misconduct. See *Herring v. United States* (2009) 555 U.S. 135, 144. And yet, the court in *Elizalde* acknowledged the deputy's act of asking the question about gang affiliation did not constitute misconduct. Said the court, "To be clear, it is permissible to ask arrestees questions about gang affiliation during the booking process."

U.S. v. Perkins

(9th Cir. 2017) __ F.3d __ [2017 WL 957205]

Issues

(1) Was a search warrant affidavit intentionally or recklessly misleading? (2) If so, did probable cause exist despite the misleading information? (3) If a warrant to search for child pornography was based on a photo, must the photo be included with the affidavit?

Facts

Charles Perkins was stopped at the Toronto International Airport by agents with the Canadian Border Services Agency. The reason for the stop was that Perkins was a registered sex offender, although he had committed the sex-related crimes 20 years earlier. The agents then searched his laptop and found a photographic image they believed constituted child pornography. So they arrested Perkins and took him to jail. The next day, a constable who specialized in child exploitation investigations obtained a warrant to search the laptop and, other than the one photo, found nothing incriminating. Furthermore, after reviewing the photo, he determined it did not qualify as pornographic under Canadian law.

Although Perkins was released, a report of the arrest was forwarded to an agent of the U.S. Department of Homeland Security in Washington state who believed the photo constituted pornography under U.S. law. So he obtained a warrant to search Perkins' home, including his electronic devices, for child pornography. During the search, agents found some and arrested him.

Although the DHS agent's affidavit contained much of the information gathered by the Canadian agent, there were certain discrepancies and omissions. First, although the DSH agent mentioned that the arresting officers thought the photo was pornographic, he omitted the fact that the constable—who specialized in child exploitation cases—determined it was not. Second, he did not mention that Canada declined to prosecute Perkins. Third, the DHS agents description of the image as pornographic was exaggerated. Fourth, the DHS agent's affidavit did not include a copy of the photo.

Perkins filed a motion to suppress the pornographic images on grounds that the DHS agent's affidavit was fatally inaccurate. The trial court denied the motion and Perkins was convicted. He appealed to the Ninth Circuit.

Discussion

Evidence obtained during the execution of a search warrant will be suppressed if (1) the affiant intentionally or recklessly misrepresented or distorted the facts upon which probable cause was based, and (2) the errors and omissions were necessary to establish probable cause.[11] Perkins argued that both of these circumstances existed and, therefore, his motion to suppress should have been granted. The court agreed.

As to the first issue, the court ruled that the DHS agent's description of the contents of the photo was misleading, citing a federal rule that "[d]etails about the placement and prominence of genitalia is highly relevant to determining whether an image is lascivious."[12] Specifically, the agent said the girl's genital area was "clearly visible" when, in fact, only a "small portion" could be seen and, according to the court, it was a "minor aspect" of the photo. As the court noted, "Because of the [camera] angle, her head and torso predominate the image and cast a shadow on the genital area, which is pictured in the far bottom right-hand corner." Thus, the court ruled that the agent "omitted relevant information from the affidavit that resulted in the misleading impression that the [photo] was unequivocally child pornography."

The court also ruled it was misleading for the DHS agent to state that the arresting officers thought the photo was pornographic but omit the fact that the constable—who specialized in these types of cases—did not. It was also significant that the affiant failed to mention that Canada declined to prosecute Perkins even though the Canadian and U.S. definitions of

[11] See *Franks v. Delaware* (1978) 438 U.S. 154; *People v. Luttenberger* (1990) 50 Cal.3d 1, 9.
[12] *U.S. v. Overton* (9th Cir. 2009) 573 F.3d 679, 686.

pornography are quite similar, at least as to the crime with which Perkins was prosecuted. In fact, the court ruled that, because there was no "meaningful difference" between the two definitions, the DSH agent's testimony that the laws are "extremely different" was "not plausible."

Finally, the court ruled that the DHS agent's failure to include a copy of the photo with the affidavit was a significant omission. Although the agent testified that it was the "general practice" of the federal courts in the Western District of Washington not to include photos with affidavits in pornography cases, the court ruled that a photo is required when, as here, the pornographic nature of the photo was not apparent.[13]

Consequently, the court concluded that "[b]y providing an incomplete and misleading recitation of the facts and withholding images, [the agent] effectively usurped the magistrate's duty to conduct an independent evaluation of probable cause." Moreover, the court said the DHS agent's misrepresentations and omissions "reveal a clear, intentional pattern" of selectively including information bearing on probable cause, "while omitting information that did not."

As noted, even if a court finds that a affidavit was intentionally or recklessly misleading, suppression is not required if probable cause still existed after the errors and omissions were corrected. The court ruled, however, that a corrected version of the affidavit would not have established probable cause because it would have been based solely on Perkins' prior convictions which had occurred 20-years earlier.[14] Said the court, "In short, a warrant application explaining that an individual with two 20-year old convictions was in legal possession of two non-pornographic images while traveling through Canada is insufficient to support probable cause to search his home computers in Washington for child pornography." Consequently, the court ruled that Perkins' motion to suppress should have been granted, and it vacated his conviction.

Ames v. King County

(9th Cir. 2017) 846 F.3d 340

Issue

Did a sheriff's deputy act reasonably when she forcibly detained a woman who was interfering in a medical emergency?

Facts

At about 6:30 P.M., Tonja Ames called 911 in King County, Washington and reported that, upon arriving home from work, she discovered her 22-year old son "incoherent" and "slumped over on the couch drooling." She also reported that she discovered what appeared to be a suicide note. When a fire department ambulance crew and a sheriff's deputy arrived, they started to enter but Ames told the deputy he had to stay outside. Because the scene was insecure due to the reported suicide attempt, the deputy told the firefighters to exit the house and told Ames, "If I can't enter the home, then you get no service." Ames then "panicked" and, with the help of neighbors, carried Ames' unconscious son to her truck so that she could drive him to a hospital. The deputy radioed her sergeant and explained the situation and was told to stop them from leaving so that the firefighters could treat the victim immediately.

By this time, however, Ames was already inside her truck and was just starting to drive off. So the deputy reached in and grasped her hair, which caused Ames to stop. The deputy was then able to take Ames to the ground where the deputy "pushed her knee into Ames's back" while trying to handcuff her left hand. But because Ames's right hand was pinned under her body, the deputy could not reach it and, apparently thinking the Ames was continuing to resist, "slammed Ames's head into the ground three times," at which point the deputy was able to grab Ames's right hand and handcuff her. Ames's son was then transported to a hospital and survived an apparent drug overdose.

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[13] Also see *U.S. v. Brunette* (1st Cir. 2001) 256 F.3d 14, 19 ["ordinarily a magistrate judge must view an image in order to determine whether it depicts the lascivious exhibition of a child's genitals"].

[14] See *U.S. v. Falso* (2nd Cir. 2008) 544 F.3d 110, 123.

Ames was not charged, but she sued the deputy, claiming, among other things, that she had used excessive force and had unlawfully arrested her. A trial judge ruled that the deputy was entitled to qualified immunity on some charges but not others. The judge then stayed the case so that the deputy could appeal his ruling to the Ninth Circuit.

Discussion

An officer may receive qualified immunity in a civil suit if she can prove her conduct did not violate the plaintiff's "clearly established" constitutional rights. And under clearly established law, the deputy would have been entitled to qualified immunity only if (1) she reasonably believed that Ames posed a threat *to her* and, (2) she used only the amount of force that was reasonably necessary.

The problem was that Ames did not pose a threat to the deputy, at least at first. Instead, the person at risk was her son. Did this mean that the deputy was not entitled to qualified immunitiy? No, said the court, because the ultimate test was whether the deputy's conduct was reasonable under the circumstances, and that the "[p]roper application" of this test requires that courts consider (1) the "severity of the crime at issue," and (2) "whether the suspect poses an immediate threat to the safety of the officers or others."

Although Ames's initial crime (obstructing) was not severe, the court ruled that in cases where the person at risk was someone other than the suspect, "the better analytical approach" is to "focus our inquiry not on Ames's misdemeanor crime of obstruction but instead on the serious—indeed, life-threatening—situation that was unfolding at the time." Applying this test, the court concluded that "Ames was prolonging a dire medical emergency through her disregard of [the deputy's] lawful commands, and her actions risked severe consequences." Consequently, the court concluded that Ames's son's "urgent need for life-saving emergency medical care and the need to protect the first responders and other motorists from potential harm—outweighed any intrusion on Ames's Fourth Amendment rights."

As noted, the second issue was whether the deputy utilized a reasonable amount of force. Although the amount of force she used was significant ("three head slams and use [of] her knee to pin Ames to the ground"), the court ruled that this did not outweigh the severity of the imminent harm to Ames's son. As the court pointed out, the deputy was "the lone law enforcement officer at the scene" and that she "needed to act quickly to disable the clearly panicked mother from leaving with her gravely ill son and enable the aid crew immediately to treat [her son]." Accordingly, the court ruled that the level of force that the deputy employed" did not rise to the level of a constitutional violation under these circumstances."

U.S. v. Paxton et al.

(7th Cir. 2017) 848 F.3d 803

Issue

Did a group of arrestees reasonably believe that their conversation in the back of a police transport van would be private?

Facts

An undercover agent with a Chicago PD-ATF task force recruited the five defendants in this case to rob a fictitious member of the Mexican drug cartel. Although the court did not discuss the details of the sting, it explained that its objective was to arrest the men for conspiracy if they freely took part in planning the holdup. The men did so and were about to commit the robbery when members of the task force arrested them.

The agents figured that the men would probably make incriminating statements if they were transported to jail together in a police van so, after arresting them, they loaded them all into a police transport van that had been wired for sound and video. The court described the vehicle as a Ford E350 cargo van that had "three compartments separated by metal dividing walls with small (and thick) plexiglass viewing windows." During the trip, one of the men warned the others that the van was "probably bugged," but the men nevertheless engaged in a whispered conversation in which they made several incriminating statements—all of which were duly recorded.

Before trial, the defendants filed motions to suppress their statements, claiming they had a reason-

able expectation of privacy in the van and therefore the warrantless recording of their statements constituted a violation of the Fourth Amendment. This argument was based, in part, on testimony from the van driver who said that, although he could usually overhear his passengers if they talked in a normal level, he could not hear the defendants. Thus they argued that the combination of their whispering plus the physical layout of the van provided them with a reasonable expectation of conversational privacy. The trial judge bought this specious argument and ordered the defendants' statements suppressed. The U.S. Attorney appealed to the Seventh Circuit.

Discussion

A violation of the Fourth Amendment can occur only if officers intruded into an area or space in which the defendant could reasonably expect privacy.[15] Consequently, the federal and state courts throughout the country have routinely ruled that officers do not violate the Fourth Amendment when they secretly record the conversations of arrestees inside police *cars*.[16] Nevertheless, the defendants argued that they could expect privacy in a transport van because the "unique compartmentalization of the vehicle's interior" seemingly prevented the van driver from overhearing them.

The court acknowledged that the "enclosed nature of the detainee compartment in a van like the one used to transport the defendants in this case may cause a detainee to think that he cannot be overheard." Nevertheless, said the court, any such expectation of privacy would be unreasonable because "[t]he fact that the interior of the van was divided by walls into separate, fully enclosed compartments in no way altered the essential nature of the vehicle" as a "mobile jail cell"—not "a sanctuary for private conversation." Consequently, the court reversed the trial judge and ruled that "[r]egardless of the particular layout, a police vehicle that is readily identifiable by its markings as such, and which is being used to transport detainees in restraints, does not support an objectively reasonable expectation of conversational privacy."[17]

U.S. v. Wright

(7th Cir. 2016) 838 F.3d 880

Issue

Did a suspect's domestic partner have authority to consent to a search of the suspect's computer?

Facts

A detective with the Urbana Police Department in Illinois received an incident report that the victim of a domestic violence incident had notified the responding officers that the suspect, her partner Talon Wright, was a pedophile. The detective contacted the woman, Leslie Hamilton, and arranged for her to meet with him at police headquarters.

At the meeting, Hamilton said she thought that Wright might be a pedophile because he would use his cell phone to visit a website called "Jailbait," and also because he had mentioned seeing a video on the family's home computer that she thought had a "disturbing title." Based on this information, and his knowledge that the "Jailbait" website featured pornographic images of underage girls, the detective obtained Hamilton's consent to search the couple's apartment, including their computers.

When they entered the living room, the detective saw a desktop computer that was connected to a flat-screen TV. Hamilton explained that Wright owned the computer but it was "kind of a family computer" and that she and her children used it to watch movies, play games, check the children's grades, and store work-related documents." The detective hooked up his laptop to the desktop computer, conducted a "preview" search, and found images of child pornography. He then obtained Hamilton's permission to seize the computer for an off-site forensic examination. The examination revealed additional pornographic images and a video of Wright engaging in sexually explicit conduct with a minor.

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[15] See *Katz v. United States* (1967) 389 U.S. 347, 252; *U.S. v. Jacobsen* (1984) 466 U.S. 109, 113.
[16] See, for example, *People v. Loyd* (2002) 27 Cal.4th 997, 1009, fn.14; *O'Laskey v. Sortino* (1990) 224 Cal.App.3d 241, 248.
[17] Also see *People v. Neely* (1999) 70 Cal.App.4th 767, 790.

After the forensic search, the detective again met with Hamilton and learned that she and Wright both had children from previous relationships and the children lived in the apartment. She added that she was the lessee of the apartment, that she and Wright had been engaged in a "tumultuous on-and-off relationship for the last two years and had broken up several days earlier." Currently, Wright was living with his mother, and Hamilton and her children were soon going to live elsewhere.

Hamilton said she thought the computer was password protected and that, although she did not know the password, her children did. (The forensic analysis of the computer revealed it was not password protected.) The computer's browser history showed that it was frequently used to visit kid-friendly websites, online videos relating to women's and mother's issues, and the homepage for the children's school.

Wright was arrested and filed a motion to suppress the computer images on grounds that Hamilton did not have the authority to consent to a search of his computer. The court denied the motion, and Wright appealed to the Seventh Circuit.

Discussion

The Supreme Court has ruled that a suspect's spouse, roommate, parent, or other third party may consent to a search of property owned or controlled by the suspect if the consenting person had "common authority" over it,[18] or if officers reasonably believed she did.[19] Although common authority may be based on any relevant circumstance, it is almost always based on one or more of the following:

OWNERSHIP: A person will ordinarily have common authority over any place or thing she owns, even if there were co-owners.[20]

USE: A third party's active use of the place or thing indicates he had common authority over it.[21]

ACCESS OR CONTROL: Even if the consenting person did not own or use a place or thing, she may have common authority if she had a right to joint access or control.[22]

Wright argued that, although Hamilton had common authority over the apartment, she did not have common authority over the computer that he owned exclusively. The court disagreed, pointing out that, even though the computer was owned by Wright, "it functioned as a family computer" and, furthermore, Wright left the computer in the apartment when he went to stay with his mother, thus "leaving Hamilton with unrestricted access to and control over it in his absence."

The court also rejected Wright's argument that Hamilton's common authority terminated when he moved out of the apartment. Said the court, "But the end of a romantic relationship doesn't automatically mean that common authority over shared property has been revoked."

The business about the password. however, muddied things up because, as a general rule, a person who cannot access a computer will not have common authority over it.[23] As the court explained, "[I]gnorance of a computer password may demonstrate lack of authority under some circumstances. Like a lock on a briefcase or storage trunk, password protection on a computer demonstrates the owner's affirmative intent to limit access to its contents." In this case, however, it turned out the computer was not password protected and that, even if it were, said, the court, it would not have mattered because Hamilton's children knew the password and this "strongly suggests that Wright made no attempt to keep it from her."

Consequently, the court ruled that "[t]hese facts easily establish that Hamilton exercised common authority over the computer" and that Wright's motion to suppress was properly denied. POV

[18] See *Illinois v. Rodriguez* (1990) 497 U.S. 177, 179.
[19] See *Georgia v. Randolph* (2006) 547 U.S. 103, 122; *Illinois v. Rodriguez* (1990) 497 U.S. 177, 185.
[20] See *Georgia v. Randolph* (2006) 547 U.S. 103, 114.
[21] See *Frazier v. Cupp* (1969) 394 U.S. 731, 740; *People v. Catlin* (2001) 26 Cal.4th 81, 163.
[22] See *Fernandez v. California* (2014) __ U.S. __ [134 S.Ct.1126, 1133; *People v. Schmeck* (2005) 37 Cal.4th 240, 281 [the consenting person "had access to defendant's personal effects sufficient to endow her with authority to consent to the search"].
[23] Compare *U.S. v. Tosti* (9th Cir. 2013) 733 F.3d 816, 824; *U.S. v. Thomas* (11th Cir. 2016) 818 F.3d 1230, 1241

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