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Point of View

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Notice of Change in Frequency of Publication

To help ensure that we can continue to publish Point of View for the law enforcement and legal communities, it has become necessary to reduce the frequency of publication from four times a year to three. Distribution will now occur in January, May, and September.

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Entry to Arrest
Ramey, Payton, and *Steagald*

An intrusion by the state into the privacy of the home for any purpose is one of the most awesome incursions of police power into the life of the individual.[1]

There was a time when officers who had developed probable cause to arrest someone would simply drive over to his house and arrest him. If they needed to break in, no problem. If they needed to search the premises for him, that was okay, too. And if they happened to see any evidence in plain view while they were looking around, they could seize it. This was, in fact, standard police practice in most states for around two hundred years and it was, to say the least, efficient. (It was also good for the environment because there was no paperwork.) But despite its efficiency and usefulness, it became illegal. What happened?

The immediate cause was a pair of landmark court decisions. The first was the California Supreme Court's 1976 decision in *People* v. *Ramey* in which the court ruled that entries into a person's home to arrest him were prohibited unless the officers had an arrest warrant.[2] Then, four years later, the U.S. Supreme Court in *Payton* v. *New York* essentially adopted the *Ramey* rule in its entirety and made it a constitutional requirement.[3]

But the underlying cause was that routine warrantless entries into homes to arrest a resident had become repugnant to the American people, especially since such intrusions had been common occurrences in Nazi Germany and were still the norm in many dictatorships and communist countries. The court in *Ramey* described it as "[t]he frightening experience of certain foreign nations with the unexpected invasion of private homes by uniformed authority to seize individuals therein, often in the dead of night."

While the decisions in *Ramey* and *Payton* were based in part of the need to protect the privacy interests of arrestees, there was equal—maybe even greater—concern about the impact of warrantless entries on innocent occupants, especially any children in the residence.[4] After all, such an intrusion into a home is a "frightening experience" to everyone there.[5]

These were the reasons that the courts in *Ramey* and *Payton* ruled that officers must ordinarily have an arrest warrant for a suspect in order to enter his home to take him into custody. But the Court in *Payton* announced two additional requirements: the officers must have had reason to believe that the arrestee currently lived in the residence, and they must have had reason to believe that he was inside when they made entry.

As the title of this article suggests, there is a third case that has a bearing on entries to arrest. That case is *Steagald* v. *United States*,[6] and it was announced by the U.S. Supreme Court just one year after it decided *Payton*. In *Steagald* the Court ruled that, while an arrest warrant was sufficient to enter the home of the arrestee, greater protections were necessary when officers needed to search for the arrestee in the home of a friend or relative. In these situations, said the Court, officers must have a special type of search warrant that has become known as a *Steagald* warrant.

Later in this article, we will explain exactly what officers must do to comply with *Ramey-Payton* and *Steagald*, how the courts enforce these rules, and the exceptions to the warrant requirement. But because the first issue that officers are apt to confront is whether compliance is, in fact, required, that is where we will start.

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[1] *People* v. *Ramey* (1976) 16 Cal.3d 263, 275.
[2] (1976) 16 Cal.3d 263.
[3] (1980) 445 U.S. 573.
[4] See *Minnesota* v. *Olson* (1990) 495 U.S. 91, 95.
[5] See *People* v. *Tillery* (1979) 99 Cal.App.3d 975, 978 ["The emphasis is on the intrusion, not on the residential status of the arrestee"].
[6] (1981) 451 U.S. 204.

When Compliance Is Required

Because *Ramey-Payton* and *Steagald* apply only if officers entered a "private" building for the purpose of making an arrest, compliance is required only if all of the following circumstances existed: (1) the location of the arrest was a home or other structure in which the occupants had a reasonable expectation of privacy, (2) the officers physically entered the structure, and (3) they entered with the intent to immediately arrest an occupant.

Private Buildings

At the top of the list of places in which most people can reasonably expect privacy are homes—whether detached houses, apartments, duplexes, or condominiums.[7] Thus, one of the Supreme Court's most-quoted observations is that "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."[8]

Ramey-Payton and *Steagald* are not, however, limited to homes and other residences.[9] Instead, as the court explained in *People* v. *Willis*, "for *Ramey* purposes, 'home' should be defined in terms as broad as necessary to protect the privacy interests at stake and, therefore, would include any premises in which the occupant had acquired a legitimate expectation of privacy."[10] Thus, the term includes such places as motel and hotel rooms, mobile homes, even sheds and tents that serve as residences.[11] It also covers those areas of businesses and other commercial structures in which the arrestee could reasonably expect privacy; e.g., his private office.[12] On the other hand, *Ramey-Payton* and *Steagald* would not apply if the arrest occurred in a place or area that was open to the public, such as a store, restaurant, or the reception area of an office.[13]

Physical entry

Since the sole concern of *Ramey-Payton* and *Steagald* is the intrusion into the structure,[14] they do not apply unless officers actually entered; i.e., crossed the threshold.

ARREST OUTSIDE THE DOORWAY: Officers do not violate *Ramey-Payton* or *Steagald* if they arrest the suspect anywhere outside the doorway; e.g., on the front porch.[15] Furthermore, officers may ask the arrestee to exit, then arrest him as he steps outside. For example, in *People* v. *Tillery* the court ruled that an officer did not violate *Ramey* when he arrested the defendant in the hallway of his apartment building after asking him to step out to talk. Said the court, "Once he stepped outside, it was lawful for the officer to arrest him."[16]

Officers may also trick or even order the arrestee to exit the premises—then arrest him as he does so. As for trickery, the Court of Appeal observed that "the use of a ruse to persuade a potential arrestee to leave a house, thereby subjecting himself to arrest

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[7] See *People* v. *Ramey* (1976) 16 Cal.3d 263; *Payton* v. *New York* (1980) 445 U.S. 573.
[8] *Payton* v. *New York* (1980) 445 U.S. 573, 590.
[9] See *People* v. *Lee* (1986) 186 Cal.App.3d 743, 746 [*Ramey* covers any structure of "private retreat"]; *U.S.* v. *Driver* (9th Cir. 1985) 776 F.2d 807, 809 ["The relevant question . . . is the individual's expectation of privacy."].
[10] (1980) 104 Cal.App.3d 433, 443.
[11] See *People* v. *Tillery* (1979) 99 Cal.App.3d 975, 979 ["The expectation of privacy against warrantless searches and seizures applies to tenancy of any kind, regardless of duration of the stay or nature of any consideration paid."]; *People* v. *Bennett* (1998) 17 Cal.4th 373, 384 [hotel room]; *People* v. *Superior Court (Arketa)* (1970) 10 Cal.App.3d 122 [shed in which a light was burning, the shed was about 25 yards from a house]; *People* v. *Bigham* (1975) 49 Cal.App.3d 73, 81 [converted garage]; *People* v. *Boyd* (1990) 224 Cal.App.3d 736, 744 [mobile home]; *People* v. *Watkins* (1994) 26 Cal.App.4th 19 [motel room].
[12] See *People* v. *Lee* (1986) 186 Cal.App.3d 743, 750 ["Lee had a reasonable expectation of privacy in his locked interior office, which was not accessible to the public without permission."]; *U.S.* v. *Driver* (9th Cir. 1985) 776 F.2d 807, 810 ["Mrs. Driver was not in an area exposed or visible to the public, but in an area of the warehouse with a reasonable expectation of privacy."]; *O'Rourke* v. *Hayes* (11th Cir. 2004) 378 F.3d 1201, 1206 [area was "off-limits to the general public"].
[13] See *United States* v. *Watson* (1976) 423 U.S. 411, 418, fn.6 [restaurant]; *People* v. *Lovett* (1978) 82 Cal.App.3d 527, 532 [a store]; *People* v. *Pompa* (1989) 212 Cal.App.3d 1308, 1311 [upholstery store open for business].
[14] See *New York* v. *Harris* (1990) 495 U.S. 14, 17; *Minnesota* v. *Olson* (1990) 495 U.S. 91, 95; *People* v. *McCarter* (1981) 117 Cal.App.3d 894, 908 ["It is the intrusion into, rather than the arrest in, the dwelling which offends constitutional standards under *Ramey*."]; *People* v. *Lewis* (1999) 74 Cal.App.4th 662, 672.
[15] See *Steagald* v. *United States* (1981) 451 U.S. 204, 221 [the arrestee "can be readily seized . . . after leaving"].
[16] (1979) 99 Cal.App.3d 975, 979-80. Also see *People* v. *Jackson* (1986) 187 Cal.App.3d 499, 505.

on the street where the concerns attendant to *Ramey* are not present is not necessarily precluded."[17] For example, in *People* v. *Porras*[18] an undercover narcotics officer, having developed probable cause to arrest Porras for drug trafficking, phoned him and identified himself as one of Porras's drug customers. He then warned him that some underhanded officers had forced him to reveal that Porras was his supplier and, in fact, a bunch of them were on their way to Porras's house now with a search warrant. The officer concluded by suggesting that Porras immediately "get rid of the dope."

Shortly thereafter, officers who were watching the house saw Porras stick his head out the door, look around, then advise someone inside that "the coast is clear." He then ran off with a tool box filled with drugs which the officers recovered after he tripped and dropped it. On appeal, the court ruled there was nothing illegal about the officers' trickery, noting that "[m]any cases have held that the mere fact that a suspect is led to incriminate himself by use of some ruse or stratagem does not make the evidence thus obtained inadmissible."

As noted, officers may also order the suspect to exit, then arrest him when he complies. This happened in *People* v. *Trudell*[19] in which Fremont officers arrested a rape suspect after he exited his house in response to a command by an officer using a loudspeaker. On appeal, he claimed the arrest violated *Ramey-Payton* because his decision to exit was not consensual. But the court ruled the validity of his consent did not matter because, "[g]iven that the police made no warrantless entry into appellant's residence," *Payton* and *Ramey* were "inapplicable."

"DOORWAY" ARRESTS: A "doorway" arrest occurs when officers, having probable cause to arrest a suspect, make the arrest as he is standing in his doorway.[20] Such an arrest is permissible because the Supreme Court ruled in *United States* v. *Santana* that a person who is standing in the doorway of a home is in a "public" place (i.e., "one step forward would have put her outside, one step backward would have put her in the vestibule").[21] The Court reasoned that Ms. Santana "was not merely visible to the public but was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house."

Note that if the arrestee runs inside after officers attempt to arrest him at the doorway (as occurred in *Santana*) officers may chase him inside. This subject is covered later in the section on the exigent circumstance exception to *Ramey-Payton* and *Steagald*.

ARRESTS JUST INSIDE THE DOORWAY: If the arrestee is standing just inside an open doorway, the question arises: Do officers violate *Ramey-Payton* or *Steagald* if they reach in and grab him? Unfortunately, this is a gray area. On the one hand, there is a case from the Eleventh Circuit in which the court announced a broad rule that any intrusion past the threshold violates *Payton*.[22] On the other hand, the Ninth Circuit has ruled that a violation would not result if (1) the arrestee voluntarily opened the door; (2) he opened it so widely that he was exposed to public view; and (3) he knew, or should have known, that the callers were officers; e.g., the officers identified themselves as they knocked.

In the Ninth Circuit case, *U.S.* v. *Vaneaton,*[23] several Portland police officers went to Vaneaton's motel room to arrest him for a series of burglaries. When they knocked on the door, Vaneaton "opened the curtains of a window, looked at the officers, and opened the door." As he was standing "just inside the

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[17] *In re Danny E.* (1981) 121 Cal.App.3d 44, 51. Also see *People* v. *Martino* (1985) 166 Cal.App.3d 777, 789 ["The cops are getting a search warrant. If you have any dope, you had better get it out of there."]; *U.S.* v. *Michaud* (9th Cir. 2001) 268 F.3d 728, 733.

[18] (1979) 99 Cal.App.3d 874.

[19] (1985) 173 Cal.App.3d 1221.

[20] See *People* v. *Watkins* (1994) 26 Cal.App.4th 19, 29.

[21] (1976) 427 U.S. 38. Also see *People* v. *Hampton* (1985) 164 Cal.App.3d 27, 36; *U.S.* v. *Whitten* (9th Cir. 1983) 706 F.2d 1000, 1015.

[22] *McClish* v. *Nugent* (11th Cir. 2007) 483 F.3d 1231, 1248.

[23] (9th Cir. 1995) 49 F.3d 1423. Compare *U.S.* v. *Johnson* (9th Cir. 1980) 626 F.2d 753, 757 ["[I]t cannot be said that Johnson voluntarily exposed himself to warrantless arrest by opening his door to agents who misrepresented their identities."]; *U.S.* v. *McCraw* (4th Cir. 1990) 920 F.2d 224, 229 ["By opening the door only halfway, Mathis did not voluntarily expose himself to the public to the same extent as the arrestee in *Santana*"]; *U.S.* v. *Edmondson* (11th Cir. 1986) 791 F.2d 1512 [entry unlawful because the suspect opened the door after an agent yelled, "FBI. Open the door"].

threshold," an officer arrested him and obtained his consent to search the room. The search produced a gun which Vaneaton argued should have been suppressed on grounds that, unlike Santana, he was standing *inside* the threshold. Even so, said the court, the arrest did not violate *Payton* because, "[w]hen Vaneaton saw [the officers] through the window, he voluntarily opened the door and exposed both himself and the immediate area to them."

Although the California Supreme Court has not directly addressed the issue, it seemed to indicate that it, too, would rule that a violation would not result if the arrestee voluntarily opened to door to officers who had identified themselves. Specifically, in *People* v. *Jacobs* the court indicated that a warrantless entry might not violate *Ramey-Payton* if, under the circumstances, it did not "undermine the statutory purposes of safeguarding the privacy of citizens in their homes and preventing unnecessary violent confrontations between startled householders and arresting officers."[24]

Entry to arrest

Because *Ramey-Payton* and *Steagald* apply only if officers entered with the intent to immediately arrest an occupant, neither would apply if officers entered for some other purpose, even though the entry culminated in an arrest.

ENTRY TO INTERVIEW: Apart from the fact that *Ramey-Payton* and *Steagald* do not pertain to most consensual entries (a subject we will discuss shortly), they are also inapplicable to situations in which officers were admitted for the purpose of interviewing a person about a crime for which he was a suspect. Thus, a violation would not occur if officers made the arrest after the suspect said or did something that provided them with probable cause. As the California Court of Appeal explained, "[I]f probable cause to arrest arises *after* the officers have been voluntarily permitted to enter a residence in connection with their investigative work, an arrest may then be effected within the premises without the officers being required to beat a hasty retreat to obtain a warrant."[25]

If, however, the officers had probable cause to arrest when they entered, a court might find that they intended to make an arrest (which, as we will also discuss later, would probably invalidate the consent) unless the court was satisfied that the officers had not yet made the decision to do so. In other words, it must appear that the evidence against the suspect was such that he might have been able to explain it away, or at least cause the officers to postpone making an arrest until they could investigate further.

For example, in *People* v. *Patterson*[26] an untested informant told LAPD narcotics officers that he had observed the manufacture and sale of PCP inside a certain house. While an officer listened in on an extension, the informant phoned the house and spoke with an unidentified woman who said he could pick up an ounce for $105. About ten minutes later, four officers arrived at the house and knocked on the door. A woman, Patterson, came to the door and, after being informed of the tip and the ruse phone call, told the officers, "I don't know anything about any angel dust. Come on in." As the officers entered, they saw some vials containing a crystalline substance, and they could smell a strong chemical odor that was associated with cooking PCP. At that point, they arrested Patterson, obtained her consent to search the premises, and seized additional evidence.

On appeal, Patterson argued that, because the officers had probable cause when they entered, they must have intended to arrest her. The court disagreed, pointing out that the informant did not name Patterson as the source, plus the officers were not certain that Patterson was the woman who spoke with the informant on the phone. It was, therefore, possible that Patterson could have provided information that undermined or negated probable cause. "There is nothing in the record," said the court, "to indicate that the police intended to arrest Patterson immediately following the entry or that they were not prepared to discuss the matter with Patterson first in order to permit her to explain away the basis of the officers' suspicions."

[24] (1987) 43 Cal.3d 472, 480-81. Edited.
[25] *In re Danny E.* (1981) 121 Cal.App.3d 44, 52. Also see *People* v. *Villa* (1981) 125 Cal.App.3d 872, 878.
[26] (1979) 94 Cal.App.3d 456.

ENTRY TO MAKE UNDERCOVER BUY: Undercover officers are often admitted into the homes of suspects to buy or sell drugs or other contraband. As the officers walk through the door, they may intend to arrest the suspect *if* the sale is made. Nevertheless, the restrictions imposed by *Ramey-Payton* and *Steagald* do not apply because (1) the intent to arrest was contingent on what happened after the officers entered, and (2) the entry was consensual. We will discuss the subject of undercover entries below in the section on the consent exception.

PROBATION SEARCH, SEARCH WARRANT: *Ramey-Payton* and *Steagald* do not apply if officers entered to conduct a probation or parole search, or to execute a search warrant.[27] Accordingly, a violation would not result if officers arrested an occupant after they found incriminating evidence and thereby developed probable cause to arrest. (As noted on the next page, such authorization to search also constitutes authorization to enter to arrest.)

EXIGENT CIRCUMSTANCES: If officers entered because they reasonably believed an immediate entry was necessary to save lives or prevent the destruction of evidence, they do not violate *Ramey-Payton* or *Steagald* if they arrested an occupant after having developed probable cause.[28] Also see "Exceptions" (Exigent Circumstances) on page 13.

How to Comply: Entering the Arrestee's Home

As we will now discuss, if *Ramey-Payton* apply, officers may enter a suspect's home to arrest him only if all of the following circumstances existed:

(1) **Authorization to enter**: The officers must have had a legal right to enter.

(2) **Arrestee's home**: The officers must have had reason to believe the arrestee lived in the house or that he otherwise owned or controlled it.

(3) **Arrestee now inside**: The officers must have reasonably believed the arrestee was inside.

Authorization to enter

Legal authorization to enter the suspect's home will exist if the officers were aware that a conventional or *Ramey* warrant for his arrest had been issued, or that a warrant to search the premises had been issued, or that a warrantless entry was authorized by the terms of the suspect's probation or parole.

CONVENTIONAL ARREST WARRANT: A conventional arrest warrant is issued by a judge who, based on the filing of a criminal complaint by prosecutors and supporting documents (e.g., witness statements, laboratory reports, police reports), determined that there is probable cause to arrest.[29] A conventional warrant may be based on either a felony or a misdemeanor.[30]

RAMEY WARRANT: A so-called *Ramey* warrant is an arrest warrant that is issued by a judge *before* a complaint has been filed by prosecutors. As the name implies, *Ramey* warrants were developed in response to the *Ramey* decision, the reason being that, until then, most arrest warrants were conventional; i.e., they were issued only after prosecutors were satisfied that they could establish the arrestee's guilt beyond a reasonable doubt. But in many cases, officers could not obtain such proof unless they were able to take the suspect into custody and, for example, interrogate him, place him in a lineup, monitor his phone calls or visitor conversations, or obtain his fingerprints or a DNA sample.

As prosecutors considered the situation, they concluded that, because the Fourth Amendment permits judges to issue search warrants based on nothing more than probable cause, there was no reason to impose a higher standard for arrest warrants. And the courts subsequently agreed, ruling that an arrest warrant need not also demonstrate that prosecutors had made the decision to charge the suspect with the crime. As the Court of Appeal explained in *People* v. *Case*:

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[27] See *Payton* v. *New York* (1980) 445 U.S. 573, 576 [restrictions apply only if officers enter "in order to make a routine felony arrest"].

[28] See *People* v. *Bacigalupo* (1991) 1 Cal.4th 103, 122 ["The [arrest] warrant requirement is excused when exigent circumstances require prompt action by the police to prevent imminent danger to life or to forestall the imminent escape of a suspect or destruction of evidence."].

[29] See *Steagald* v. *United States* (1981) 451 U.S. 204, 213 ["An arrest warrant is issued upon a showing that probable cause exists to believe that the subject of the warrant has committed an offense."].

[30] See Pen. Code § 813 [felony warrants], Pen. Code § 1427 [misdemeanor warrants].

> From a practical standpoint the use of the "*Ramey* Warrant" form was apparently to permit, prior to an arrest, judicial scrutiny of an officer's belief that he had probable cause to make the arrest without involving the prosecutor's discretion in determining whether to initiate criminal proceedings.[31]

Today, the procedure for obtaining *Ramey* warrants has been incorporated into the Penal Code which authorizes judges to issue them if officers comply with the following procedure:[32]

(1) PREPARE DECLARATION: The officer prepares a Declaration of Probable Cause which, like a search warrant affidavit, contains the facts upon which probable cause is based.

(2) PREPARE *RAMEY* WARRANT: The officer prepares the *Ramey* warrant, which is technically known as a "Warrant of Probable Cause for Arrest."[33] A sample *Ramey* warrant is shown on page 19.

(3) SUBMIT TO JUDGE: The officer submits the declaration and warrant to a judge for review. This may be done in person, by fax, or by email.[34]

(4) WARRANT ISSUED: If the judge finds there is probable cause, he or she will issue the warrant.

(5) FILE CERTIFICATE OF SERVICE: After the warrant is executed, officers must file a "Certificate of Service" with the court clerk.[35] Such a certificate must include the date and time of arrest, the location of arrest, and the location of the facility in which the arrestee is incarcerated.

It is important to note that, although *Ramey* warrants sometimes contain the arrestee's last known address or some other address at which he might be staying, this does not constitute authorization to enter the home at that address. The reason (as we will explain in more detail below in the section "Arrestee's house?") is that, regardless of the inclusion of an address on the warrant, a *Ramey* warrant constitutes authorization to enter only a home in which officers—at the moment they entered—had reason to believe the arrestee was living and is now present. Thus, unlike an address that appears on a search warrant, an address on a *Ramey* warrant has no legal significance; i.e., it serves only as an aid in locating the arrestee.[36] (A sample *Ramey* Warrant is shown on page 19. Officers and prosecutors may obtain a copy of this form in Microsoft Word format (which can be edited) by sending a request from a departmental email address to POV@acgov.org.)

SEARCH WARRANT: Because a search warrant authorizes officers to enter the listed premises, it satisfies the "legal authorization" requirement even if they intended only to make an arrest. As the court observed in *People* v. *McCarter*, "[N]o *Ramey* violation as to [the arrestee] could have occurred under the present facts since the police had judicial authorization to enter her home via a validly issued and executed search warrant."[37] (It is arguable that officers with a search warrant who intended only to make an arrest could enter even if they lacked reason to believe that the arrestee lived there or that he is now on the premises. We are, however, unaware of any cases in which this issue was raised.)

PROBATION OR PAROLE SEARCH CONDITION: Officers have legal authorization to enter the arrestee's home for the purpose of arresting him if they were legally authorized to search it without a warrant pursuant to the terms of probation or parole.[38]

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[31] (1980) 105 Cal.App.3d 826, 831 [Edited]. Also see *Godwin* v. *Superior Court* (2001) 90 Cal.App.4th 215, 225.

[32] Pen. Code § 817.

[33] See Pen. Code §§ 815, 815a, 816; *People* v. *McCraw* (1990) 226 Cal.App.3d 346, 349.

[34] See Pen. Code § 817(c)(2).

[35] See Pen. Code § 817(h).

[36] See *Wanger* v. *Bonner* (5th Cir. 1980) 621 F.2d 675, 682 [court rejects the argument that "the inclusion of an address for the person to be arrested in the warrant provided the deputies with a reasonable basis for the belief that the [arrestee] could be found within the premises"]; *U.S.* v. *Lauter* (2d Cir. 1995) 57 F.3d 212, 215 ["Any discrepancy between the address in the supporting affidavit and the address where Lauter was ultimately arrested is irrelevant because all an arrest warrant must do is identify the person sought."]; *U.S.* v. *Bervaldi* (11th Cir. 2000) 226 F.3d 1256, 1263 [insignificant "that the arrest warrant listed the 132nd Place address"].

[37] (1981) 117 Cal.App.3d 894, 908.

[38] See *People* v. *Palmquist* (1981) 123 Cal.App.3d 1, 15 ["Since the officers had authorization to enter the home to search, the arrest inside was of no constitutional significance."]; *People* v. *Lewis* (1999) 74 Cal.App.4th 662, 673 ["The parolee who could not stop entry into the home for a search can have no greater power to prevent an entry for an arrest. The intrusion for the latter purpose is virtually the same as for the former."].

OTHER ARREST WARRANTS: There are five other types of arrest warrants that provide officers with authorization to enter:

PROBATION VIOLATION WARRANT: Issued by a judge based on probable cause to believe that the arrestee has violated the terms of his probation.[39]

PAROLE VIOLATION WARRANT: A parole violation warrant (also known as a parolee-at-large or PAL warrant) is issued by the parole board based on probable cause to believe that the parolee absconded.[40]

INDICTMENT WARRANT: Issued by a judge on grounds that the arrestee was indicted by a grand jury.[41]

BENCH WARRANT: Issued by a judge when a defendant fails to appear in court.[42]

WITNESS FTA WARRANT: Issued by a judge for the arrest of a witness who failed to appear in court after being ordered to do so.[43]

Arrestee's house?

In addition to having legal authorization to enter the residence, officers must have reason to believe the arrestee is, in fact, living there.[44] In many cases, however, this requirement is difficult to satisfy, especially when the arrestee is a transient or when he knows he is wanted, in which case he may try to conceal his whereabouts or move around a lot, staying with friends and relatives, or moving in and out of motels.[45] To complicate matters even more, it is common for a suspect's friends to furnish officers with false leads as to his current residence.[46] Nevertheless, this requirement is strictly enforced by the courts and is frequently litigated.

"LIVES" = COMMON AUTHORITY: An arrestee will be deemed "living" in a home if he has "common authority" or some other "significant relationship" to it.[47] As the Eighth Circuit observed, when a person has common authority over a residence, "that dwelling can certainly be considered her 'home' for Fourth Amendment purposes."[48]

Although there is no easy definition of the term "common authority,"[49] the Supreme Court noted that people will ordinarily have it if they had "joint access or control for most purposes."[50] Thus, in discussing this subject in *U.S.* v. *Franklin,* the Ninth Circuit observed that "[r]esidential arrangements take many forms. A 'residence' does not have to be an old ancestral home, but it requires more than a sleepover at someone else's place. It is insufficient to show that the [arrestee] may have spent the night there occasionally."[51]

On the other hand, an arrestee may be deemed to be "living in" a residence in which he stays on a regular basis for any significant period. For example, in *Washington* v. *Simpson* the Eighth Circuit ruled that an arrestee "resided" in a house in which she stayed two to four nights per week, kept some of her personal belonging there, and had previously given that address as her residence when she was booked."[52]

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[39] See Pen. Code § 1203.2(a).
[40] See Pen. Code § 3060(a); *People* v. *Hunter* (2006) 140 Cal.App.4th 1147, 1153-54; *U.S.* v. *Harper* (9th Cir. 1991) 928 F.2d 894, 896; *U.S.* v. *Pelletier* (1st Cir. 2006) 469 F.3d 194, 200.
[41] See Pen. Code § 945.
[42] See Pen. Code §§ 978.5, 813(c), 853.8, 983; *Allison* v. *County of Ventura* (1977) 68 Cal.App.3d 689, 701-2; *U.S.* v. *Gooch* (9th Cir. 2007) 506 F.3d 1156, 1159; *U.S.* v. *Spencer* (2nd Cir. 1982) 684 F.2d 220, 222.
[43] See Code Civ. Proc. § 1993.
[44] See *Payton* v. *New York* (1980) 445 U.S. 573, 602-3 [officers must have "reason to believe the suspect is within" the residence].
[45] See *U.S.* v. *Gay* (10th Cir. 2001) 240 F.3d 1222, 1227 ["Indeed the officers may take into account the fact that a person involved in criminal activity may be attempting to conceal his whereabouts."]; *U.S. Magluta* (11th Cir. 1995) 44 F.3d 1530, 1538.
[46] See *Motley* v. *Parks* (9th Cir. en banc 2005) 432 F.3d 1072, 1082 ["It is not an unheard-of phenomenon that one resident will tell police that another resident is not at home, when the other resident actually is hiding under a bed when the police came to call."].
[47] See *Case* v. *Kitsap County Sheriff's Department* (9th Cir. 2001) 249 F.3d 921, 931; *Valdez* v. *McPheters* (10th Cir. 1999) 172 F.3d 1120, 1225; *U.S.* v. *Gay* (10th Cir. 2001) 240 F.3d 1222, 1226.
[48] *U.S.* v. *Risse* (8th Cir. 1996) 83 F.3d 212, 217.
[49] See *U.S.* v. *Nezaj* (S.D.N.Y. 1987) 666 F.Supp. 494, 500 ["The question of when a dwelling is someone's home can be a difficult factual and legal issue"].
[50] *United States* v. *Matlock* (1974) 415 U.S. 164, 171, fn.7.
[51] (9th Cir. 2010) 603 F.3d 652, 656. Also see *Perez* v. *Simpson* (9th Cir. 1989) 884 F.2d 1136, 1141 [arrestee did not reside in the house merely because "he spent the night there on occasion"].
[52] (8th Cir. 1986) 806 F.2d 192, 196.

It should be noted that a person may have common authority over two or more residences, or a residence that is owned by someone else.[53] Consequently, when this issue arose in *U.S.* v. *Risse* the court explained:

> [S]o long as [the arrestee] possesses common authority over, or some other significant relationship to, the Huntington Road residence, that dwelling can certainly be considered her "home" for Fourth Amendment purposes, even if the premises are owned by a third party and others are living there, and even if [the arrestee] concurrently maintains a residence elsewhere as well.[54]

"REASON TO BELIEVE": As noted, officers must have "reason to believe" that the arrestee currently lives in the residence. Unfortunately, when the United States Supreme Court announced the "reason to believe" standard in *Payton* v. *New York* it neglected to mention whether it means probable cause, reasonable suspicion, or some hybrid level of proof. Not surprisingly, the Court's failure has resulted in much confusion, and has required the lower courts to expend substantial resources in trying to resolve the matter.[55]

In any event, most courts have concluded that the term means reasonable suspicion,[56] while only one—the Ninth Circuit—has categorically ruled that it means probable cause.[57] Other courts that have been presented with the issue—including the California Supreme Court—have declined to rule on the issue in cases where it was unnecessary to do so since it was apparent that, even if probable cause were required, the officers had it.[58]

It would be pointless to try to resolve the matter here, except perhaps to note that, because the U.S. Supreme Court is quite familiar with the term "probable cause" (after all, it plays a central role in the text of the Fourth Amendment), and because the Court elected not to use it in *Payton*, there is a strong possibility that it had something else in mind.[59] As the District of Columbia Circuit aptly observed, "We think it more likely that the Supreme Court in *Payton* used a phrase other than 'probable cause' because it meant something other than 'probable cause.'"[60]

That being said, it doesn't seem to matter much whether the standard is reasonable suspicion or probable cause. This is because officers usually have sufficient information as to where arrestees live to

[53] See *Case* v. *Kitsap County Sheriff's Department* (9th Cir. 2001) 249 F.3d 921, 931 [officers reasonably believed that the arrestee lived at the house "at least part of the time"]; *U.S.* v. *Litteral* (9th Cir. 1990) 910 F.2d 547, 553 ["But if the suspect is a co-resident of the third party, then . . . *Payton* allows both arrest of the subject of the arrest warrant and use of the evidence found against the third party."]; *U.S.* v. *Junkman* (8th Cir. 1998) 160 F.3d 1191, 1194 ["As long as the officers reasonably believed Kent Junkman was a co-resident of the room, the entry into the room to arrest Kent Junkman was a reasonable one."].

[54] (8th Cir. 1996) 83 F.3d 212, 217.

[55] See *U.S.* v. *Diaz* (9th Cir. 2007) 491 F.3d 1074, 1077 ["The question of what constitutes an adequate 'reason to believe' has given difficulty to many courts, including the district court in the present case. The Supreme Court did not elaborate on the meaning of 'reason to believe' in *Payton* and has not done so since then."]; *U.S.* v. *Magluta* (11th Cir. 1995) 44 F.3d 1530, 1533 ["The 'reason to believe' standard was not defined in *Payton,* and since *Payton,* neither the Supreme Court, nor the courts of appeals have provided much illumination."].

[56] See *U.S.* v. *Lauter* (2nd Cir. 1995) 57 F.3d 212, 215; *U.S.* v. *Lovelock* (2nd Cir. 1999) 170 F.3d 339, 343; *U.S.* v. *Thomas* (D.C. Cir. 2005) 429 F.3d 282, 286; *U.S.* v. *Route* (5th Cir. 1997) 104 F.3d 59, 62; *U.S.* v. *Risse* (8th Cir. 1996) 83 F.3d 212, 216; *Valdez* v. *McPheters* (10th Cir. 1999) 172 F.3d 1220, 1224.

[57] *U.S.* v. *Gorman* (9th Cir. 2002) 314 F.3d 1105, 1111. Also see *Cuevas* v. *De Roco* (9th Cir. 2008) 531 F.3d 726, 736 [court notes the "inconsistency" between the Ninth Circuit and other circuits]; *U.S* v. *Harper* (9th Cir. 1991) 900 F.2d 213; *U.S.* v. *Diaz* (9th Cir. 2007) 491 F.3d 1074, 1077 ["The phrase 'reason to believe' is interchangeable with and conceptually identical to the phrases 'reasonable belief' and 'reasonable grounds for believing,' which frequently appear in our cases."]. Also see *People* v. *Downey* (2011) 198 Cal.App.4th 652, 661 ["The Ninth Circuit stands alone among the federal circuits in its interpretation of *Payton* as requiring probable cause."].

[58] See *People* v. *Jacobs* (1987) 43 Cal.3d 472, 479, fn.4 ["Whatever the quantum of probable cause required by the Fourth Amendment, the officers in this case did not have it"; but the court also noted that Pen. Code § 844 requires "reasonable grounds" which has been deemed the "substantial equivalent" of probable cause, at p. 479.]; *People* v. *White* (1986) 183 Cal.App.3d 1199, 1207 [California cases "leave open the question whether this means a full measure of probable cause or something less"].

[59] See *U.S.* v. *Magluta* (11th Cir. 1995) 44 F.3d 1530, 1534 ["The strongest support for a lesser burden than probable cause remains the text of *Payton,* and what we must assume was a conscious effort on the part of the Supreme Court in choosing the verbal formulation of 'reason to believe' over that of 'probable cause.'"].

[60] *U.S.* v. *Thomas* (D.C. Cir. 2005) 429 F.3d 282, 286. Also see *People* v. *Downey* (2011) 198 Cal.App.4th 652, 661.

satisfy the higher standard. In fact, we are unaware of any case decided on grounds that the officers had reasonable suspicion but not probable cause. As the Fifth Circuit observed, "The disagreement among the circuits has been more about semantics than substance."[61]

It is, however, clear that, in applying the "reason to believe" standard, the courts will consider the totality of circumstances known to the arresting officers; and they will analyze the circumstances by applying common sense, not hypertechnical analysis.[62] And although a single circumstance will sometimes suffice, in most cases it will take a combination of two or more. Finally, the significance of a particular circumstance will naturally depend on when it occurred. Thus, if the information concerning the arrestee's residence is old, officers will be required to prove that they had reason to believe he still lives there.[63]

RELEVANT CIRCUMSTANCES: Although the courts will consider the totality of circumstances in making a determination as to where the arrestee lives, the following are especially relevant:

LISTED ADDRESS: The address was listed as the arrestee's residence on one or more of the following: rental or lease agreement,[64] hotel or motel registration,[65] utility billing records,[66] telephone or internet records,[67] credit card application,[68] employment application,[69] post office records,[70] DMV records,[71] vehicle repair work order,[72] jail booking records,[73] bail bond application,[74] police or arrest report,[75] parole or probation records.[76]

INFORMATION FROM ARRESTEE OR OTHERS: The arrestee, a reliable informant, or a citizen informant notified officers that the arrestee was presently living at that address.[77] On this subject, two things should be noted. First, the significance of information from an untested informant will usually

[61] *U.S.* v. *Barrera* (5th Cir. 2006) 464 F.3d 496, 501, fn.5.
[62] See *U.S.* v. *Graham* (1st Cir. 2009) 553 F.3d 6, 14; *U.S.* v. *Bervaldi* (11th Cir. 2000) 226 F.3d 1256, 1263; *U.S.* v. *Lovelock* (2nd Cir. 1999) 170 F.3d 339, 344; *U.S.* v. *Gay* (10th Cir. 2001) 240 F.3d 1222, 1227.
[63] See *People* v. *Bennetto* (1974) 10 Cal.3d 695, 699-700; *U.S.* v. *Bervaldi* (11th Cir. 2000) 226 F.3d 1256, 1264.
[64] See *U.S.* v. *Edmonds* (3d Cir. 1995) 52 F.3d 1236, 1247-48 [arrestee "signed the lease and paid the rent"]; *U.S.* v. *Bennett* (11th Cir. 2009) 555 F.3d 962, 965 ["Bennett had recently delivered the rent for the apartment to the building's landlord"].
[65] See *People* v. *Fuller* (1983) 148 Cal.App.3d 257, 263 [hotel room was registered to suspect]; *U.S.* v. *Franklin* (9th Cir. 2010) 603 F.3d 652, 657 ["When the location in question is a motel room, however, especially one identified as having been rented by the person in question, establishing that location as the person's residence is much less difficult."].
[66] See *People* v. *Downey* (2011) 198 Cal.App.4th 652, 659 [officer testified that "utility bills were a very good source in finding out where someone lives because in his experience many probationers and parolees . . . did not know that police had access to utility bills"]; *U.S.* v. *Route* (5th Cir. 1997) 104 F.3d 59, 61, fn.1; *U.S.* v. *Romo-Corrales* (8th Cir. 2010) 592 F.3d 915.
[67] See *People* v. *Icenogle* (1977) 71 Cal.App.3d 576, 581; *U.S.* v. *Terry* (2nd Cir. 1983) 702 F.2d 299, 319.
[68] See *U.S.* v. *Route* (5th Cir. 1997) 104 F.3d 59, 62, fn.1.
[69] See *People* v. *Jacobs* (1987) 43 Cal.3d 472, 478.
[70] See *U.S.* v. *Route* (5th Cir. 1997) 104 F.3d 59, 61, fn.1; *U.S.* v. *Stinson* (D. Conn. 1994) 857 F.Supp. 1026, 1031.
[71] See *U.S.* v. *Route* (5th Cir. 1997) 104 F.3d 59, 62, fn.1; *People* v. *Boyd* (1990) 224 Cal.App.3d 736, 740; *U.S.* v. *Ayers* (9th Cir. 1991) 924 F.2d 1468, 1480.
[72] See *U.S.* v. *Manley* (2d Cir. 1980) 632 F.2d 978, 983.
[73] See *Washington* v. *Simpson* (8th Cir. 1986) 806 F.2d 192, 196; *U.S.* v. *Clayton* (8th Cir. 2000) 210 F.3d 841, 842-43.
[74] See *U.S.* v. *Barrera* (5th Cir. 2006) 464 F.3d 496, 504.
[75] See *People* v. *Ott* (1978) 84 Cal.App.3d 118, 126; *U.S.* v. *Graham* (1st Cir. 2009) 553 F.3d 6, 13; *U.S.* v. *Ayers* (9th Cir. 1991) 924 F.2d 1468, 1479.
[76] See *U.S.* v. *Lovelock* (2nd Cir. 1999) 170 F.3d 339, 344; *People* v. *Kanos* (1971) 14 Cal.App.3d 642, 645, 648; *U.S.* v. *Thomas* (D.C. Cir. 2005) 429 F.3d 282, 286; *U.S.* v. *Mayer* (9th Cir. 2008) 530 F.3d 1099, 1104; *U.S.* v. *Graham* (1st Cir. 2009) 553 F.3d 6, 13.
[77] See *People* v. *Dyke* (1990) 224 Cal.App.3d 648, 659 [motel desk clerk had reason to believe that the arrestee was staying with a guest]; *U.S.* v. *Risse* (8th Cir. 1996) 83 F.3d 212, 216-17; *People* v. *Alcorn* (1993) 15 Cal.App.4th 652, 655; *U.S.* v. *Junkman* (8th Cir. 1998) 160 F.3d 1191, 1192 [motel desk clerk ID'd the arrestee as a guest]; *U.S.* v. *De Parias* (11th Cir. 1986) 805 F.2d 1447, 1457 ["The apartment manager had informed the FBI agents that the De Pariases lived there"]; *U.S.* v. *Franklin* (9th Cir. 2010) 603 F.3d 652, 656 [an officer "previously received a tip that Franklin was living in the room from a credible informant"]; *U.S.* v. *Edmonds* (3d Cir. 1995) 52 F.3d 1236, 1248 [apartment manager notified agents that the arrestee had just been observed "exiting his apartment and departing the area"]; *U.S.* v. *Mayer* (9th Cir. 2008) 530 F.3d 1099, 1104 ["one of Mayer's Hansen Lane neighbors called Rauch to report that Mayer was residing at 103 Hansen Lane"]; *U.S.* v. *Graham* (1st Cir. 2009) 553 F.3d 6, 13 ["officers showed a picture of Graham to a person outside the apartment who pointed the officers towards the apartment"].

depend on whether there was some corroboration or other reason to believe the information was accurate.[78]

Second, officers are not required to accept information from a friend or relative that the arrestee lives or does not live in a certain residence. Thus, in *Motley* v. *Parks* the court noted that "Motley's statement that [the parolee] did not live at that address, coming from a less-than-disinterested source, did not undermine the information that officers previously had received from their advance briefing."[79]

DIRECT OBSERVATION: Officers, neighbors, landlords, or others had repeatedly or recently seen the arrestee on the premises.[80] It is especially relevant that the arrestee was observed doing things that residents commonly do; e.g. taking out the garbage, chatting with neighbors, leaving early in the morning, opening the door with a key.[81]

ARRESTEE'S CAR PARKED OUTSIDE: The arrestee's car (or a car he was using) was regularly parked in the driveway, in front of the residence, or nearby; e.g., "cars known to be driven by [the arrestee] were at the [residence],"[82] the apartment manager confirmed that the arrestee "used the black Ford Mustang then parked immediately in front of the apartment."[83]

Arrestee is now inside

Even if officers had reason to believe that the arrestee was living in a certain residence, they may not enter the premises unless they also had reason to believe that he was presently inside.[84] This requirement may be satisfied by direct or circumstantial evidence, so we will start with the most common examples of direct evidence:

SURVEILLANCE: Officers saw the arrestee enter but not exit.[85]

INFORMATION FROM OTHERS: A friend, relative, property manager, or other person provided officers with firsthand information that the arrestee was now inside; e.g., the person had just seen him inside.[86] Again, officers are not required to accept the word of a friend or relative of the arrestee as to his current whereabouts because, as the Ninth Circuit observed, "It is not an unheard-of phenomenon that one resident will tell police that another resident is not at home, when the other resident actually is hiding under a bed when the police came to call."[87]

INFORMATION FROM PERSON WHO ANSWERED THE DOOR: The person who answered the door said the arrestee was now inside.[88]

ARRESTEE ANSWERED THE PHONE: Officers phoned the residence, and the arrestee answered.[89]

[78] See *U.S.* v. *Mayer* (9th Cir. 2008) 530 F.3d 1099; *People* v. *Spratt* (1980) 104 Cal.App.3d 562, 568; *People* v. *Icenogle* (1977) 71 Cal.App.3d 576, 581.

[79] (9th Cir. en banc 2005) 432 F.3d 1072, 1082.

[80] See *People* v. *Gibson* (2001) 90 Cal.App.4th 371, 381; *U.S.* v. *Bervaldi* (11th Cir. 2000) 226 F.3d 1256, 1263; *People* v. *Kanos* (1971) 14 Cal.App.3d 642, 645, 648-49; *U.S.* v. *Risse* (8th Cir. 1996) 83 F.3d 212, 217; *U.S.* v. *Romo-Corrales* (8th Cir. 2010) 592 F.3d 915, 919; *People* v. *Ford* (1975) 54 Cal.App.3d 149, 156.

[81] See *U.S.* v. *Dally* (9th Cir. 1979) 606 F.2d 861; *People* v. *Kanos* (1971) 14 Cal.App.3d 642, 648 [officers saw the suspect leaving the house at 7:30 A.M. with his wife and child]; *U.S.* v. *Harper* (9th Cir. 1991) 928 F.2d 894, 896 ["the police observed David entering the home with his own key once or twice during a three day period"]; *People* v. *Icenogle* (1977) 71 Cal.App.3d 576, 582; *People* v. *Ford* (1975) 54 Cal.App.3d 149, 156.

[82] *U.S.* v. *Barrera* (5th Cir. 2006) 464 F.3d 496, 504. Also see *People* v. *Icenogle* (1977) 71 Cal.App.3d 576, 581; *U.S.* v. *Magluta* (11th Cir. 1995) 44 F.3d 1530, 1537-38; *U.S.* v. *Edmonds* (3d Cir. 1995) 52 F.3d 1236; *U.S.* v. *Harper* (9th Cir. 1991) 928 F.2d 894, 896; *U.S.* v. *Bervaldi* (11th Cir. 2000) 226 F.3d 1256, 1264; *People* v. *Boyd* (1990) 224 Cal.App.3d 736, 750.

[83] *U.S.* v. *Edmonds* (3d Cir. 1995) 52 F.3d 1236, 1248.

[84] See *Payton* v. *New York* (1980) 445 U.S. 573, 603; *People* v. *Alcorn* (1993) 15 Cal.App.4th 652, 655.

[85] See *People* v. *Ford* (1975) 54 Cal.App.3d 149, 156. *People* v. *Wader* (1993) 5 Cal.4th 610, 633 [an officer saw the suspect inside the house in the early morning hours; at about 2:30 A.M. the lights in the house were turned off; officers entered at 6:15 A.M.]; *U.S.* v. *Agnew* (3d Cir. 2005) 407 F.3d 193, 196, ["they saw him through the window"].

[86] See *U.S.* v. *Jackson* (7th Cir. 2009) 576 F.3d 465, 469; *People* v. *Jacobs* (1987) 43 Cal.3d 472, 479; *People* v. *Alcorn* (1993) 15 Cal.App.4th 652, 655; *People* v. *Superior Court (Dai-Re)* (1980) 104 Cal.App.3d 86, 89; *People* v. *Bacigalupo* (1991) 1 Cal.4th 103, 121; *U.S.* v. *Hardin* (6th Cir. 2009) 539 F.3d 404, 414; *People* v. *Manderscheid* (2002) 99 Cal.App.4th 355, 361-62; *People* v. *Marshall* (1968) 69 Cal.2d 51, 56; *People* v. *Dyke* (1990) 224 Cal.App.3d 648, 659.

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

[88] See *U.S.* v. *Clayton* (8th Cir. 2000) 210 F.3d 841, 844; *U.S.* v. *Taylor* (D.C. Cir. 2007) 497 F.3d 673, 679.

[89] See *Maryland* v. *Buie* (1990) 494 U.S. 325, 328; *Case* v. *Kitsap County Sheriff's Department* (9th Cir. 2001) 249 F.3d 921, 931.

As for circumstantial evidence, the following will help support an inference that the arrestee is now inside the residence:

SUSPICIOUS RESPONSE BY PERSON AT THE DOOR: The person who answered the door did not respond or was evasive when officers asked if the arrestee was inside.[90]

ARRESTEE'S CAR WAS PARKED OUTSIDE: The arrestee's car (or a car he was known to be using) was parked at or near the residence. As the court observed in *United States* v. *Magluta,* "The presence of a vehicle connected to a suspect is sufficient to create the inference that the suspect is at home."[91] It is, of course, also relevant that the hood over the engine compartment was relatively warm.[92]

ARRESTEE LIVED ALONE, PLUS SIGNS OF ACTIVITY: Officers reasonably believed that the suspect lived alone and there were indications that someone was inside; e.g., sounds of TV or radio, a "thud," lights on. Thus, the court in *U.S.* v. *Morehead* pointed out that the illuminated lights "could have reasonably led the officers to believe that [the arrestee] was inside."[93]

SUSPICIOUS RESPONSE TO KNOCKING: When officers knocked and announced, they heard sounds or saw activity inside the premises that reasonably indicated an occupant was trying to hide or avoid them; e.g., someone yelled "cops," then there was a "commotion in the room."[94]

WORK SCHEDULE, HABITS: Officers entered when the arrestee was usually at home based on his work schedule or habits. As the Eleventh Circuit observed, "[O]fficers may presume that a person is at home at certain times of the day—a presumption which can be rebutted by contrary evidence regarding the suspect's known schedule."[95]

Also note that the failure of anyone to respond to the officers' knock and announcement does not conclusively prove that the arrestee was not at home, especially if there were other circumstances that reasonably indicated he was present.[96]

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[90] See *People* v. *Dyke* (1990) 224 Cal.App.3d 648, 659 [the person who opened the door "appeared nervous and uncooperative"]. Compare *People* v. *Jacobs* (1987) 43 Cal.3d 472, 479 ["When they asked Gretchen if defendant was home, she told them he would be back in an hour. The evidence does not suggest that Gretchen's response or behavior further aroused the officers' suspicions."].

[91] (11th Cir. 1995) 44 F.3d 1530, 1538. Also see *People* v. *Williams* (1989) 48 Cal.3d 1112, 1139 ["The proximity of the [murder] victim's car clearly suggested defendant's presence in the apartment"]; *U.S.* v. *Morehead* (10th Cir. 1992) 959 F.2d 1489, 1496 ["[T]he presence of a car in the carport and a truck in front of the house gave the officers reason to believe [the arrestee] was on the premises."]; *U.S.* v. *Litteral* (9th Cir. 1990) 910 F.2d 547, 554 ["The informant told the agents that if Litteral's car was there, he would be there."]; *Valdez* v. *McPheters* (10th Cir. 1999) 172 F.3d 1120, 1225 ["The suspect's presence may be suggested by the presence of an automobile."]; *U.S.* v. *De Parias* (11th Cir. 1986) 805 F.2d 1447, 1457 ["The apartment manager had informed the FBI agents that the De Pariases lived there and that they were home if a certain car was parked in front of the apartment."]. Compare *People* v. *White* (1986) 183 Cal.App.3d 1199, 1209 ["[W]hen they arrived at the house they did not see any car fitting the victim's description anywhere in the vicinity."]; *People* v. *Jacobs* (1987) 43 Cal.3d 472, 479 ["Defendant's vehicles were nowhere in sight."].

[92] See *U.S.* v. *Boyd* (8th Cir. 1999) 180 F.3d 967, 978 ["the hood of Troup's black Volvo was still warm which confirmed the CI's statement that Troupe had just arrived"].

[93] (10th Cir. 1992) 959 F.2d 1489, 1496-97. Also see *U.S.* v. *Gay* (10th Cir. 2001) 240 F.3d 1222, 1227 [a "thud"]. Compare *People* v. *Bennetto* (1974) 10 Cal.3d 695, 700 ["the police heard no sounds during the short time they listened outside the apartment"].

[94] *U.S.* v. *Junkman* (8th Cir. 1998) 160 F.3d 1191, 1193. Also see *People* v. *Dyke* (1990) 224 Cal.App.3d 648, 659 [someone inside said "it's the fucking pigs"].

[95] *U.S.* v. *Magluta* (11th Cir. 1995) 44 F.3d 1530, 1535. Also see *U.S.* v. *Diaz* (9th Cir. 2007) 491 F.3d 1074, 1078 [the arrestee previously told officers that he was usually home during the day, and that he worked at home as a mechanic]; *U.S.* v. *Terry* (2d Cir. 1983) 702 F.2d 299, 319 ["[T]he agents arrived at the apartment at 8:45 A.M. on a Sunday morning, a time when they could reasonably believe that [the arrestee] would be home."]; *U.S.* v. *Edmonds* (3d Cir. 1995) 52 F.3d 1236, 1248 ["Normally a person who is currently living at an apartment returns there at some point to spend the night and does not leave prior to 6:45 A.M."]; *U.S.* v. *Lauter* (2d Cir. 1995) 57 F.3d 212, 215 [reliable informant said the arrestee was unemployed and usually slept late]; *Valdez* v. *McPheters* (10th Cir. 1999) 172 F.3d 1120, 1227 [officer was aware that the suspect "was unemployed, liked to stay out late drinking, sometimes abused drugs such as heroin and cocaine, and was suspected of having committed at least two nighttime burglaries"]. But also see *People* v. *Jacobs* (1987) 43 Cal.3d 472, 478-79 ["Although [the officer's] testimony supports an inference that [the unemployed] defendant *could* be home at 3:20 P.M. . . . it does not, without more, support a finding that the officers had reasonable grounds to believe defendant was in fact home."].

[96] See *U.S.* v. *Beck* (11th Cir. 1984) 729 F.2d 1329, 1332; *U.S.* v. *Edmonds* (3d Cir. 1995) 52 F.3d 1326, 1248; *Case* v. *Kitsap County Sheriff's Department* (9th Cir. 2001) 249 F.3d 921, 931.

Steagald Warrants: Entering a Third Party's Home

Until now, we have been discussing the requirements for entering the arrestee's home. But officers will often have reason to believe that the arrestee is temporarily staying elsewhere, such as the home of a friend or relative. This typically occurs when the arrestee does not have a permanent address or when he is staying away from his home because he knows that officers are looking for him.

Although officers may enter a third party's home to arrest a guest or visitor if they obtained consent from a resident or if there were exigent circumstances (discussed below), they may not enter merely because they had an arrest warrant. Instead, the Supreme Court ruled in *Steagald* v. *United States* that they must have a search warrant—commonly known as a *Steagald* warrant—that expressly authorizes a search of the premises for the arrestee.[97]

There are essentially two reasons for this requirement. First, a warrant helps protect the privacy interests of the people who live in the home because it cannot be issued unless a judge has determined there is, in fact, probable cause to believe that the arrestee is on the premises. Second, there would exist a "potential for abuse"[98] because officers with an arrest warrant would have carte blanche to forcibly enter any home in which the arrestee was reasonably believed to be temporarily located.

As we will now discuss, there are two types of *Steagald* warrants: conventional and anticipatory.

Conventional Steagald warrants

Conventional *Steagald* warrants can be issued only if there is both probable cause to search the premises for the arrestee, and probable cause to arrest him. Thus, the affidavit in support of a conventional *Steagald* warrant must establish the following:

PROBABLE CAUSE TO ARREST: There are two ways to establish probable cause to arrest the suspect:

(1) WARRANT OUTSTANDING: If an arrest warrant had already been issued, the affiant can simply attach a copy and incorporate it by reference; e.g., *"Attached hereto and incorporated by reference is a copy of the warrant for the arrest of [name of arrestee]. It is marked Exhibit A."*

(2) SET FORTH FACTS: If an arrest warrant had not yet been issued, probable cause to arrest can be established in two ways, depending on whether officers are seeking a conventional *Steagald* warrant or an anticipatory *Steagald* warrant.

STANDARD STEAGALD WARRANT: The affidavit must contain the facts upon which probable cause to arrest is based.

ANTICIPATORY STEAGALD WARRANT: If officers are seeking an anticipatory *Steagald* warrant (discussed below), the affidavit must contain the facts demonstrating that probable cause to arrest will exist when a triggering event occurs.

PROBABLE CAUSE TO SEARCH: To establish probable cause to search the premises for the arrestee, the affidavit must contain facts that establish a "fair probability" or "substantial chance"[99] of the following: (1) the arrestee was inside the residence when the warrant was issued, and (2) he would still be there when the warrant was executed. A sample *Steagald* Warrant is shown on page 20. (Officers and prosecutors may obtain a copy of this form in Microsoft Word format (which can be edited) by sending a request from a departmental email address to POV@acgov.org.)

Anticipatory Steagald warrants

If officers expect that it will be difficult to establish probable cause for a conventional *Steagald* warrant, they may be able to obtain an "anticipatory" *Steagald* warrant which will authorize them to enter the premises and search for the arrestee if and when a "triggering event" occurs; e.g., a completed sale of drugs. As the Fourth Circuit observed, "[M]ost anticipatory warrants subject their execution to some condition precedent—a so-called 'triggering condition'—which, when satisfied, becomes the final piece of evidence needed to establish probable cause."[100]

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[97] (1981) 451 U.S. 204, 216.
[98] *Steagald* v. *United States* (1981) 451 U.S. 204, 215.
[99] See *Illinois* v. *Gates* (1983) 462 U.S. 213, 238, 244, fn13.
[100] *U.S.* v. *Andrews* (4th Cir. 2009) 577 F.3d 231, 237. Edited.

To obtain an anticipatory warrant, the affiant must describe the triggering event in terms that are "explicit, clear, and narrowly drawn."[101] In addition, the affidavit must contain facts that establish the following:

(1) PROBABLE CAUSE TO ARREST: Probable cause to arrest the suspect will exist when the triggering event occurs.

(2) PROBABLE CAUSE FOR TRIGGERING EVENT: There is probable cause to believe the triggering event will occur,[102] and that it will occur before the warrant expires.[103]

(3) PROBABLE CAUSE TO SEARCH: There is probable cause to believe the arrestee will be inside the premises when the triggering event occurs.[104]

An example of an Anticipatory *Steagald* Warrant is shown on page 20.

Alternatives to Steagald warrants

Steagald warrants—whether conventional or anticipatory—are often impractical. Anticipatory warrants are problematic because it may be difficult to satisfy the triggering event requirement. And conventional warrants may not be feasible because it is often difficult to prove that the arrestee will still be inside the residence when officers arrive to execute the warrant. As the Justice Department noted in its argument in *Steagald*, "[P]ersons, as opposed to objects, are inherently mobile, and thus officers seeking to effect an arrest may be forced to return to the magistrate several times as the subject of the arrest warrant moves from place to place."[105]

In many cases, however, officers can avoid the need for a *Steagald* warrant if they can locate the arrestee inside his own home (in which case only an arrest warrant would be required) or if they can wait until he leaves the premises or is in a public place (in which case only probable cause would be required).[106] Also, as we will discuss next, officers may enter if they obtained consent or if there were exigent circumstances.

Exceptions

There are three exceptions to the rule that officers must have an arrest warrant or a *Steagald* search warrant to enter a residence to arrest an occupant: (1) exigent circumstances, (2) consent, and (3) "consent once removed."

Exigent circumstances

While there are many types of exigent circumstances that will justify a warrantless entry, there are essentially only four that are relevant in situations where officers enter with the intent to arrest an occupant: hot pursuits, fresh pursuits, armed standoffs, and evidence destruction.

HOT PURSUITS: In the context of *Ramey-Payton* and *Steagald*, a "hot" pursuit occurs when (1) officers attempt to arrest a suspect in a public place, and (2) he responds by fleeing into his home or other private structure. When this happens, as the Court of Appeal explained, officers may go in after him:

> As the term suggests, this exception dispenses with the warrant requirement when officers are chasing a suspect who is in active flight. The justification is that otherwise he might escape again while the police sit around waiting for the warrant to be issued.[107]

For example, in *United States* v. *Santana*[108] officers in Philadelphia went to Santana's home to arrest her shortly after she sold heroin to an undercover officer. As they pulled up, Santana was standing in the doorway to the house, but then quickly ran inside. The officers followed her and, in the course of making the arrest, they seized some heroin in plain view. On appeal, the Supreme Court ruled that the entry fell within the "hot pursuit" exception, explaining that "a suspect may not defeat an arrest which has been set in motion in a public place by the expedient of escaping to a private place." Note that an entry under the hot pursuit exception is permitted even though the arrestee was wanted for only a misdemeanor.[109]

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[101] *U.S.* v. *Penney* (6th Cir. 2009) 576 F.3d 297, 310.
[102] See *United States* v. *Grubbs* (2006) 547 U.S. 90, 96; *People* v. *Sousa* (1993) 18 Cal.App.4th 549, 559-60.
[103] See *Alvidres* v. *Superior Court* (1970) 12 Cal.App.3d 575, 581.
[104] See *United States* v. *Grubbs* (2006) 547 U.S. 90, 96; *People* v. *Sousa* (1993) 18 Cal.App.4th 549, 559.
[105] *Steagald* v. *United States* (1981) 451 U.S. 204, 220-21.
[106] See *Steagald* v. *United States* (1981) 451 U.S. 204, 221, fn.14.
[107] *People* v. *White* (1986) 183 Cal.App.3d 1199, 1203.
[108] (1976) 427 U.S. 38, 43.
[109] See *People* v. *Lloyd* (1989) 216 Cal.3d 1425, 1430.

FRESH PURSUITS: Unlike "hot" pursuits, "fresh" pursuits are not physical chases. Instead, they are better defined as investigative pursuits in the sense that officers are actively attempting to apprehend the perpetrator of a crime and, in doing so, are quickly responding to leads as to his whereabouts; and eventually they develop reason to believe that he is presently inside a certain home or other private structure. In such situations, officers may enter the premises under the "fresh pursuit" exception if the following circumstances existed:

(1) SERIOUS FELONY: The crime under investigation must have been a serious felony, usually a violent one.

(2) DILIGENCE: After the crime was committed, the officers must have been diligent in their attempt to apprehend the perpetrator.

(3) PROBABLE CAUSE: At some point in their investigation, the officers must have developed probable cause to arrest the suspect.

(4) SUSPECT LOCATED: The officers must have developed "reason to believe" that the perpetrator was inside the premises. (The "reason to believe" standard was covered earlier.)

(5) CIRCUMSTANTIAL EVIDENCE OF FLIGHT: The officers must have been aware of circumstances indicating the perpetrator was in active flight or soon would be; ė.g., he knew he had been identified by a witness or that an accomplice had been arrested.[110]

ARMED STANDOFFS: An armed standoff is loosely defined as a situation in which (1) officers have probable cause to arrest a person who is reasonably believed to be armed and dangerous, (2) the person is inside his home or other structure, and (3) he refuses to surrender. In these situations, officers may enter without a warrant for the purpose of arresting him. As the Ninth Circuit explained in *Fisher* v. *City of San Jose*:

> [D]uring such a standoff, once exigent circumstances justify the warrantless seizure of the suspect in his home, and so long as the police are actively engaged in completing his arrest, police need not obtain an arrest warrant before taking the suspect into full physical custody.[111]

DESTRUCTION OF EVIDENCE: Officers may also make a warrantless entry to arrest an occupant if they reasonably believed (1) there was evidence on the premises, and (2) the arrestee would destroy it if they waited for a warrant.[112] Note that, although the crime under investigation need not be "serious" or even a felony,[113] the courts may be less apt to find exigent circumstances if the evidence did not pertain to a serious crime.[114] Also, officers must be able to cite specific facts that reasonably indicated the evidence was about to be destroyed. For example, in *People* v. *Edwards* the court ruled that an officer's testimony that the arrestee "might destroy evidence" was insufficient because, said the court, "Those generalized misgivings present in every case do not constitute exigent circumstances."[115]

Consensual entry

Officers may, of course, enter a home if they had obtained voluntary consent to do so from a person who reasonably appeared to have had the authority to admit them. But such consent may be ineffective if the officers intended to immediately arrest the consenting person or other occupant but neglected to reveal their intentions. This is because such consent would not have been "knowing and intelligent," and also because an immediate arrest would have been beyond the scope and intensity of the consent.

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[110] See *Minnesota* v. *Olson* (1990) 495 U.S. 91, 100; *People* v. *Bacigalupo* (1991) 1 Cal.4th 103, 123; *People* v. *Escudero* (1979) 23 Cal.3d 800, 811; *People* v. *Lanfrey* (1988) 204 Cal.App.3d 491, 509; *People* v. *Williams* (1989) 48 Cal.3d 1112, 1139.

[111] (9th Cir. 2009) 558 F.3d 1069, 1071.

[112] See *Kentucky* v. *King* (2011) __ U.S. __ [2011 WL 1832821] ["to prevent the imminent destruction of evidence has long been recognized as a sufficient justification for a warrantless search"]; *United States* v. *Santana* (1976) 427 U.S. 38, 43 ["Once Santana saw the police, there was likewise a realistic expectation that any delay would result in destruction of evidence."]; *People* v. *Ramey* (1976) 16 Cal.3d 263, 276 ["exigent circumstances" exist if reasonably necessary to "forestall the . . . destruction of evidence"].

[113] See *Illinois* v. *McArthur* (2001) 531 U.S. 326, 331-32.

[114] See *People* v. *Thompson* (2006) 38 Cal.4th 811, 820-25; *People* v. *Hua* (2008) 158 Cal.App.4th 1027, 1035-36; *U.S.* v. *Johnson* (9th Cir. 2001) 256 F.3d 895, 908 [the fact the crime was a misdemeanor "does not definitely preclude a finding of exigent circumstances, [but] it weighs heavily against it"].

[115] (1981) 126 Cal.App.3d 447.

DETERMINING THE OFFICERS' INTENT: In determining the officers' intent, the courts are especially interested in the following circumstances: (1) whether they had probable cause to arrest an occupant when they obtained consent; and (2) whether they made the arrest immediately after entering. For example, consent that was given to officers who said they wanted to come inside to "talk" with a suspect will ordinarily be deemed invalid if they had probable cause to arrest him and immediately did so. As the Court of Appeal explained, "A right to enter for the purpose of talking with a suspect is not consent to enter and effect an arrest."[116]

On the other hand, if the officers had something less than probable cause, their entry may be deemed consensual if they made the arrest only after they saw or heard something that generated it. For example, in *People* v. *Villa*[117] a man raped and beat a woman who immediately reported the attack to Sacramento County sheriff's deputies. A deputy who overheard a description of the rapist on the sheriff's radio thought the attacker might have been Villa because he had been arrested about a month earlier for prowling in the victim's yard. So the deputy and others went to Villa's home, knocked on the door, and spoke with his mother. After explaining that they wanted to talk with her son about the attack, she consented to their entry and told them that Villa was sleeping in his bedroom. As they entered the bedroom, they saw that Villa was not sleeping; he was watching television. More importantly, he was wearing clothing that matched the clothing worn by the rapist, and he had scratch marks on his face. So the deputies arrested him.

Villa argued that his mothers' consent was ineffective because the deputies lied to her about their intentions. The Court of Appeal disagreed, saying "the evidence disclosed the entry was for the purpose of investigating the earlier incident. There was no evidence of subterfuge at the time consent to enter was given."

While the existence of probable cause is a strong indication that the officers intended to make an immediate arrest, in some cases they may have good reason to defer making the arrest until they had heard what the suspect had to say; e.g., his explanation of what had occurred. This might happen, for example, if the officers' probable cause was not so overwhelming that they would have disregarded the suspect's story in determining whether an immediate arrest was appropriate. Under such circumstances, an arrest may not invalidate the consent if officers made it clear that they wanted to enter for the purpose of talking with the suspect. As the court observed in *People* v. *Superior Court (Kenner)*:

> A person may willingly consent to admit police officers for the purpose of discussion, with the opportunity, thus suggested, of explaining away any suspicions, but not be willing to permit a warrantless and nonemergent entry that affords him no right to explanation or justification.[118]

OFFICERS' INTENT WAS REASONABLY APPARENT: Even if officers had probable cause and intended to make an immediate arrest, consent may be deemed knowing and intelligent if a court finds that they had effectively notified the consenting person of their intentions based on a reasonable interpretation of their stated purpose. As the Supreme Court explained, "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?"[119]

For example, in *People* v. *Newton*[120] LAPD officers, having developed probable cause to arrest Newton for rape, went to a house in which they thought he might be staying. When a woman answered the door, an officer asked if Newton lived there. The woman said no, claiming she had not seen him for several months. One of the officers then asked if they could "come in and look around." She replied, "Yes, come on in, but you are not going to find anything,

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[116] *In re Johnny V.* (1978) 85 Cal.App.3d 120, 130. Also see *People* v. *Williams* (1979) 93 Cal.App.3d 40, 57-58; *U.S.* v. *Johnson* (9th Cir. 1980) 626 F.2d 753.
[117] (1981) 125 Cal.App.3d 872.
[118] (1977) 73 Cal.App.3d 65, 69.
[119] *Florida* v. *Jimeno* (1991) 500 U.S. 248, 251.
[120] (1980) 107 Cal.App.3d 568. Also see *People* v. *Ford* (1979) 97 Cal.App.3d 744.

I am here by myself." As the officers entered one of the bedrooms, they found Newton watching TV and arrested him. Apparently, they also saw some evidence because Newton filed a motion to suppress, claiming his arrest violated *Ramey*. Specifically, he argued that the woman had given the officers consent to "look around," not arrest him. The motion was denied and, on appeal, the court ruled that the nature of the conversation between the woman and the officers at the front door would "lead the officers reasonably to believe that they had a consent to enter to find defendant for any purpose they desired, either to question him or to arrest him."

ENTRY TO ARREST FOR DOMESTIC VIOLENCE: In domestic violence cases, if one spouse consented to an entry for the purpose of arresting the other, officers may enter even though the other spouse objected. This is because the rule that prohibits an entry if one spouse objects—the rule of *Georgia* v. *Randolph*[121]—applies only when the objective of the officers' entry was to obtain evidence against the non-consenting spouse. Thus, it does not apply when the purpose was to arrest him or protect the consenting spouse.

Consent to undercover officers

Suspects will frequently consent to an entry by undercover officers for the purpose of engaging in some sort of illegal activity, such as selling drugs. If the suspect was immediately arrested, the analysis will depend on whether the arrest was made by the undercover officers themselves, or whether it was made by backup officers.

ARREST BY UNDERCOVER OFFICERS: When undercover officers obtain consent to enter from a suspect, they will necessarily have misrepresented their identities and purpose. Although such consent is therefore not technically "knowing and intelligent," it is nevertheless valid based on an overriding rule that criminals who admit strangers into their homes to commit or plan crimes are knowingly taking a chance that the strangers are officers or police informants. As the Ninth Circuit pointed out, "It is well-settled that undercover agents may misrepresent their identity to obtain consent to entry."[122] Consequently, even if the undercover officers had probable cause to arrest the suspect when they entered, and even if they fully intended to arrest him after the sale was completed, the entry does not violate *Ramey-Payton* or *Steagald* because it was consensual.

It should also be noted that, apart from the validity of the consent, *Ramey-Payton* and *Steagald* do not apply to most entries by undercover officers because, even if they arrested the suspect on the premises, their intent upon entering would ordinarily have been contingent on what happened inside. Thus, when this issue arose in *People* v. *Evans* the court found no violation because the officers "were inside with consent, with probable cause to arrest but with the intent to continue the investigation by effecting a purchase of [drugs]."[123]

ARREST BY BACKUP OFFICERS: Because it would be extremely dangerous for an undercover officer to arrest a suspect who had admitted him into his home (and it would be foolhardy for a police informant to make a citizens arrest), the courts developed a rule—known as "consent once removed"—by which backup officers may be permitted to forcibly enter to make the arrest.[124] While the term "consent once removed" suggests that the suspect's act of consenting to an entry by an undercover officer may somehow be conferred on the backup officers, in reality the rule is based on the theory that a suspect who admits someone into his home for a criminal purpose has assumed the "incremental risk" that officers would immediately enter to arrest him.[125]

This does not mean, however, that the arresting officers may enter whenever a suspect has allowed an undercover officer or police agent inside for a criminal purpose. Instead, such entries are permitted only if the following five circumstances existed:

(1) CONSENT: The undercover officer or police agent must have entered with the consent of someone with apparent authority to do so.

(2) PROBABLE CAUSE: Probable cause must have developed after the undercover officer entered.

[121] (2006) 547 U.S. 103, 108.
[122] *U.S.* v. *Bramble* (9th Cir. 1997) 103 F.3d 1475. 1478. Also see *Toubus* v. *Superior Court* (1981) 114 Cal.App.3d 378, 383.
[123] (1980) 108 Cal.App.3d 193, 196.
[124] See *Pearson* v. *Callahan* (2009) 555 U.S. 223, 244; *People* v. *Cespedes* (1987) 191 Cal.App.3d 768,771-73.
[125] *U.S.* v. *Paul* (7th Cir. 1986) 808 F.2d 645, 648. Also see *Toubus* v. *Superior Court* (1981) 114 Cal.App.3d 378, 384.

(3) NOTIFICATION: The undercover officer or police agent must have notified the backup officers by radio signal or other means that probable cause now existed.

(4) DILIGENCE: The notification must have been made without unnecessary delay after probable cause developed.

(5) ENTRY WHILE UNDERCOVER IS INSIDE: The backup officers must have entered while the undercover officer or police agent was on the premises, or at least so quickly after he stepped outside that there existed an implied right to reenter.[126]

One other thing: A suspect's attempt to withdraw "consent" (e.g., by trying to close the door on the arresting officers) is ineffective if they had probable cause to arrest.[127]

Entry and Search Procedure

Even when the officers' entry was authorized under *Ramey-Payton* or *Steagald*, there are certain restrictions on what they may do after they enter. For example, if the entry was consensual, they may do only those things that they reasonably believed the consenting person authorized them to do. If, however, the entry was based on the issuance of a conventional arrest warrant, a *Ramey* warrant, a *Steagald* warrant, exigent circumstances, or on "consent once removed," the required procedure is as follows:

POSSESSION OF ARREST WARRANT: Although it is "highly desirable" for officers to possess a copy of the warrant when they enter, this is not a requirement.[128]

KNOCK-NOTICE: If officers entered under the authority of a search or arrest warrant, they must comply with the knock-notice requirements unless there were exigent circumstances that justified an immediate entry. On the other hand, if the entry was based "consent once removed," compliance will ordinarily be excused because (1) an announcement would alert the arrestee that he had been "set up" by the undercover officer or police agent, who would then be in imminent danger;[129] and (2) when an undercover officer or police agent is already inside the residence, the purposes behind the knock-notice requirements would not be sufficiently served by compliance.[130]

SEARCH FOR THE ARRESTEE: If it is necessary to search the premises for the arrestee, officers may look in those places in which a person might be hiding.[131]

SEARCH INCIDENT TO ARREST: If officers arrest the suspect, they may, as an incident to the arrest, search those places and things to which he had immediate access when the search occurred.[132] Even if the suspect lacked immediate access, officers may inspect areas and things that were (1) "immediately adjoining the place of arrest," and (2) large enough to conceal a hiding person.[133]

ACCOMPANY ARRESTEE: If officers permit the arrestee to go into any other rooms (e.g., to obtain a wallet or jacket) they may accompany him and stay "literally at his elbow."[134]

PROTECTIVE SWEEP: Officers may conduct a protective sweep if they reasonably believed there was another person on the premises who posed a threat to them.[135]

Three other things should be noted about the required procedure. First, if the officers have probable cause to believe that an item they observed in plain view is evidence, they may seize it.[136] Second, if they decide to seek a search warrant after they have entered, they may secure the premises for a

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[126] See *People* v. *Cespedes* (1987) 191 Cal.App.3d 768, 774; *U.S.* v. *Bramble* (9th Cir. 1996) 103 F.3d 1475,1478; *O'Neil* v. *Louisville/Jefferson County Metro Government* (6th Cir. 2011) __ F.3d __ [2011 WL 5345409].

[127] See *U.S.* v. *Jachimko* (7th Cir. 1994) 19 F.3d 296, 299.

[128] See *Nunes* v. *Superior Court* (1980) 100 Cal.App.3d 915, 935-36; *Washington* v. *Simpson* (8th Cir. 1986) 806 F.2d 192, 196, fn.4.

[129] See *United States* v. *Banks* (2003) 540 U.S. 31, 37; *U.S.* v. *Pollard* (6th Cir. 2000) 215 F.3d 643, 646.

[130] See *People* v. *Toubus* (1981) 114 Cal.App.3d 378, 384.

[131] See *Maryland* v. *Buie* (1990) 494 U.S. 325, 330; *U.S.* v. *Harper* (9th Cir. 1991) 928 F.2d 894, 897.

[132] See *Arizona* v. *Gant* (2009) 556 U.S. 332; *People* v. *Arvizu* (1970) 12 Cal.App.3d 726, 729.

[133] *Maryland* v. *Buie* (1990) 494 U.S. 325, 333.

[134] *Washington* v. *Chrisman* (1982) 455 U.S. 1, 7. Also see *U.S.* v. *Roberts* (5th Cir. 2010) 612 F.3d 306, 310-11.

[135] See *Maryland* v. *Buie* (1990) 494 U.S. 325, 334; *People* v. *Dyke* (1990) 224 Cal.App.3d 648, 661-62.

[136] See *Arizona* v. *Hicks* (1987) 480 U.S. 321, 326-28; *Payton* v. *New York* (1980) 445 U.S. 573, 587.

reasonable period of time pending issuance of the warrant.[137] Third, if the entry was made under the authority of a *Ramey* warrant, they must file a "Certificate of Service" with the clerk of the issuing court within a reasonable time after the arrest.[138] (To obtain a copy of a certificate in Microsoft Word format (which can be edited), send a request from a departmental email address to POV@acgov.org.)

Suppression Rules

Because the sole purpose of *Ramey-Payton* and *Steagald* is to protect the reasonable privacy expectations of the occupants of homes and other protected structures, a violation will render the entry—and the fruits of the entry—unlawful. But it will not render the arrest unlawful. As the Court of Appeal explained, "[I]t is the unlawful *intrusion* into the dwelling which offends constitutional safeguards and which is therefore at the heart of the matter, rather than the arrest itself."[139]

Consequently, the admissibility of statements and other evidence obtained after officers made an entry in violation of *Ramey-Payton* or *Steagald* will depend on two things: (1) whether the evidence was the "fruit" of the entry; i.e., whether the officers obtained it while they were inside the building, and (2) whether the defendant had a reasonable expectation of privacy in the premises.

EVIDENCE OBTAINED IN THE ARRESTEE'S HOME: If officers entered the arrestee's home in violation of *Ramey-Payton*, their presence there is illegal. Consequently, any evidence and statements they obtained while inside will be suppressed.[140]

EVIDENCE OBTAINED AFTER EXITING: Evidence and statements obtained from the arrestee after he had been removed from the premises will not be suppressed so long as officers had probable cause to arrest.[141] This is because, as noted above, a violation of *Ramey-Payton* or *Steagald* renders the entry illegal—but not the arrest. As the Ninth Circuit explained in *U.S.* v. *Crawford*, "[T]he presence of probable cause to arrest has proved dispositive when deciding whether the exclusionary rule applies to evidence or statements obtained after the defendant is placed in custody."[142]

For example, in *New York* v. *Harris*[143] NYPD officers arrested Harris in his home in violation of *Payton*. While still inside the house, an officer obtained a *Miranda* waiver from Harris who essentially confessed. The officers then took him to a police station where, after again informing Harris of his *Miranda* rights, they resumed the questioning which produced a written incriminating statement. Although the trial court suppressed the statement obtained inside Harris's home because of the *Payton* violation, it admitted the written statement obtained at the police station.

The United States Supreme Court upheld the trial court's ruling, explaining that, "where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of *Payton*."

EVIDENCE OBTAINED IN A THIRD PARTY'S HOME: If officers entered the home of an arrestee's friend, relative, or other third party in violation of *Steagald*, any evidence they discovered inside the premises will be inadmissible against the third party.[144] It will, however, be admissible against the arrestee unless he had a reasonable expectation of privacy in the place or thing in which it was found.[145] POV

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[137] See *Illinois* v. *McArthur* (2001) 531 U.S. 326, 331-32.
[138] See Pen. Code § 817(h).
[139] *People* v. *Ford* (1979) 97 Cal.App.3d 744, 748.
[140] See *New York* v. *Harris* (1990) 495 U.S. 14, 20.
[141] See *People* v. *Marquez* (1992) 1 Cal.4th 553, 569 ["[T]he lack of an arrest warrant does not invalidate defendant's arrest or require suppression of statements he made at the police station."]; *People* v. *Watkins* (1994) 26 Cal.App.4th 19, 29; *In re Jessie L.* (1982) 131 Cal.App.3d 202, 214.
[142] (9th Cir. 2004) 372 F.3d 1048, 1056.
[143] (1990) 495 U.S. 14.
[144] See *Steagald* v. *United States* (1981) 451 U.S. 204, 219; *People* v. *Dyke* (1990) 224 Cal.App.3d 648, 658.
[145] See *U.S.* v. *McCarson* (D.C. Cir. 2008) 527 F.3d 170, 172; *U.S.* v. *Agnew* (3d Cir. 2005) 407 F.3d 193, 196. Compare *Minnesota* v. *Olson* (1990) 495 U.S. 91, 96-97 [overnight houseguest had a reasonable expectation of privacy].

SUPERIOR COURT OF CALIFORNIA

County of _____

ARREST WARRANT

Probable Cause Arrest Warrant
Ramey Warrant

The People of the State of California
To Any California Peace Officer: **Warrant No**. _____

Arrestee's name: *[Insert name]*, hereinafter "Arrestee."

Declarant's name and agency: *[Insert name and agency]*, hereinafter "Declarant."

Order: Proof by Declaration of Probable Cause having been made to me on this date by Declarant pursuant to Penal Code § 817, I find there is probable cause to believe that Arrestee committed the crime(s) listed below. You are therefore ordered to execute this warrant and bring Arrestee before any judge in this county pursuant to Penal Code §§ 821, 825, 826, and 848.

Crime(s): *[List crime(s)]*

Bail: ☐ No bail ☐ Bail is set at $_____.

Night service authorization [Required only for misdemeanor arrests] ☐ Good cause for night service having been established in the supporting Declaration of Probable Cause, this misdemeanor warrant may be executed at any hour of the day or night.

_____ _____
Date and time warrant issued Judge of the Superior Court

◆ Arrestee Information ◆

For identification purposes only

Name:

AKAs:

Last known address(es):

Sex: M F Race: Height: Weight: Color of hair: Color of eyes:

Scars, marks, tattoos:

Vehicle(s) linked to Arrestee:

Other identifying information:

SUPERIOR COURT OF CALIFORNIA

County of _____

SEARCH and ARREST WARRANT Steagald Warrant

The People of the State of California
To Any Peace Officer in _____ County **Warrant No. _____**

Name of arrestee: *[Insert name]*, hereinafter "Arrestee."
Premises to be searched: *[Insert address]*, hereinafter "Premises."
Affiant: *[Insert name and agency]*, hereinafter "Affiant."

Findings: Based on the affidavit sworn to and subscribed before me on this date (hereinafter "Affidavit"), I make the following findings in accordance with Penal Code § 1524(a)(6):

Probable cause to arrest: There is probable cause to arrest Arrestee for the following crime[s]: *[List crime(s)]*:

Basis of probable cause to arrest: Probable cause to arrest was established as follows:

☐ **Affidavit:** The facts are set forth in Affidavit.

☐ **Arrest warrant**: A warrant for the arrest of Arrestee has been issued and is outstanding.

Probable cause to search: There is probable cause to believe that Arrestee is now inside the Premises and will be there when this warrant is executed.

Orders: You are hereby ordered to search the Premises for Arrestee forthwith and, if located, place Arrestee under arrest for the crime[s] listed above and bring Arrestee before a magistrate in this county pursuant to Penal Code §§ 821, 825, 826, and 848.

Bail: ☐ No bail ☐ Bail is set at $_____

☐ **Night service**: Good cause for night service having been established in Affidavit, this warrant may be executed at any hour of the day or night.

_____ _____
Date and time issued Judge of the Superior Court

◆ Arrestee Information ◆

For identification purposes only

Name:

AKAs:

Last known address(es):

Sex: M F Race: Height: Weight: Color hair: Color eyes:

Scars, marks, tattoos:

Vehicle(s) linked to Arrestee:

Other information:

SUPERIOR COURT OF CALIFORNIA

County of _____

SEARCH and ARREST WARRANT Anticipatory Steagald Warrant

The People of the State of California
To Any Peace Officer in _____ County **Warrant No. _____**

Name of arrestee: *[Insert name]*, hereinafter "Arrestee."
Premises to be searched: *[Insert address]*, hereinafter "Premises."
Affiant: *[Insert name and agency]*, hereinafter "Affiant."

Findings: Based on the affidavit sworn to and subscribed before me on this date (hereinafter "Affidavit"), I make the following findings in accordance with Penal Code § 1524(a)(6):

Probable cause to arrest: Probable cause to arrest Arrestee for the following crime(s) will exist upon the occurrence of the Triggering Event described in Affidavit: *[List crime(s)*

Probable cause for triggering event: There is probable cause to believe the Triggering Event will occur.

Probable cause to search: There is probable cause to believe that Arrestee will be inside the Premises when the Triggering Event occurs.

Orders: Without undue delay after the Triggering Event occurs, you are ordered to search Premises for Arrestee and, if located, place Arrestee under arrest for the crime[s] listed above and bring Arrestee before a magistrate in this county pursuant to Penal Code §§ 821, 825, 826, and 848.

Bail: ☐ No bail ☐ Bail is set at $_____

☐ **Night service**: Good cause for night service will exist, and is therefore authorized, if the Triggering Event occurs at night.

_____ _____
Date and time issued Judge of the Superior Court

◆ Arrestee Information ◆

For identification purposes only

Name:

AKAs:

Last known address(es):

Sex: M F Race: Height: Weight: Color hair: Color eyes:

Scars, marks, tattoos:

Vehicle(s) linked to Arrestee:

Other information:

Recent Cases

Howes v. Fields

(2012) __ U.S. __ [2012 WL 538280]

Issue

Are state prison inmates automatically "in custody" for *Miranda* purposes?

Facts

While Randall Fields was serving time at a state prison in Michigan, sheriff's deputies began investigating allegations that, before being incarcerated, he had engaged in illegal sexual conduct with a young boy. In the course of the investigation, two deputies arranged to interview Fields in a conference room at the prison. He was not handcuffed. At the start of the interview, the deputies told Fields he "was free to leave and return to his cell." They did not seek a *Miranda* waiver.

The interview lasted between five and seven hours, and was sometimes accusatorial. At no time, however did Fields request return to his cell, even though he was reminded at one point that he could do so. He eventually confessed, and his confession was used against him at trial. He was convicted.

The Sixth Circuit, however, reversed the conviction, ruling that Fields' confession was obtained in violation of *Miranda* because the deputies neglected to obtain a waiver. The state appealed to the U.S. Supreme Court.

Discussion

Officers who are about to interrogate a suspect must obtain a *Miranda* waiver only if the suspect was "in custody." And a person is "in custody" only if a reasonable person in his position would have believed that he was not free to terminate the interview and leave.[1] In *Fields*, however, the Sixth Circuit announced an exception to this rule: Regardless of what a reasonable person would have believed, prison inmates are automatically "in custody" when they are "questioned about events that occurred outside the prison walls." The Supreme Court disagreed.

The Court observed that the term "custody," as used in *Miranda*, is a "term of art that specifies circumstances that are thought generally to present a serious danger of coercion." For example, the Court noted that a *Miranda* waiver will usually be required when "a person is arrested in his home or on the street and whisked to a police station for questioning" because such a "sharp and ominous" change in circumstances "may give rise to coercive pressures."

But the situation is much different when the person is serving time because, as the Court pointed out, "the ordinary restrictions of prison life, while no doubt unpleasant, are expected and familiar and thus do not involve the same inherently compelling pressures." In addition, prison inmates know that, regardless of what they say, they won't be walking out the prison gates when the interview is over, so they are "unlikely to be lured into speaking by a longing for prompt release."

Accordingly, the Court ruled that prison inmates are not automatically "in custody" for *Miranda* purposes. Instead, the determination depends on "all of the features of the interrogation." The Court then examined the circumstances surrounding the interrogation of Fields and noted that, although the interview was lengthy and somewhat accusatorial, there were several overriding circumstances. "Most important," said the Court, was that Fields "was told at the outset of the interrogation, and was reminded again thereafter, that he could leave and go back to his cell whenever he wanted." It was also important that Fields was not handcuffed. Thus, the Court ruled that Fields' confession was not obtained in violation of *Miranda* because he was not "in custody" when he was interviewed.

Comment

Three questions arise: (1) Does *Fields* apply to interviews with county jail inmates; i.e., are jail inmates automatically "in custody" or is their status also dependent on the totality of circumstances? (2) If they are not automatically in custody, does it matter that they were pre-trial detainees as opposed to time-servers? (3) Does it matter that they were questioned about a crime that occurred inside the facility. For the following reasons we think that, with one exception noted below, a waiver would not be required of *any* county jail inmate if he was not handcuffed, and if he was notified in no uncertain terms that he could end the interview and return to his cell whenever he wanted.

First, regardless of whether the interview occurred in a prison or jail, an inmate who was told he was free to terminate the interview and return to his cell would

[1] See *Thompson* v. *Keohane* (1995) 516 U.S. 99, 112.

not feel the degree of pressure that *Miranda* was designed to alleviate. Moreover, as noted earlier, the Court also said that this admonition was the "[m]ost important" of the relevant circumstances. If, however, the interview is lengthy (as in *Fields*), officers should periodically remind the suspect that he can terminate the interview at any time.

Second, an inmate who is interviewed in jail about a crime unrelated to the crime for which he was incarcerated would know that the officers who were interviewing him lack the power to release him. Third, the Court in *Fields* said that it "is not enough to tip the scale in the direction of custody" that the inmate was questioned about a crime that occurred in the facility.

Fourth, the California Court of Appeal ruled in *People* v. *Macklem* that a pre-trial detainee at a county jail was not "in custody" for *Miranda* purposes when he was questioned about a jailhouse assault.[2] And the court's analysis in *Macklem* was almost identical to that employed by the Supreme Court in *Fields*, including the *Macklem* court's observation that the defendant was not handcuffed and "was given the opportunity to leave the room if he requested to do so."

The only exception to the above would be a situation in which officers interviewed the inmate so soon after he was booked into the jail that he had not yet settled into a routine. This is because one of the central premises upon which *Fields* was based was that the coercive environment in a penal institution is significantly reduced when the "ordinary restrictions of prison life" are "expected and familiar" and thus "do not involve the same inherently compelling pressures" that are associated with an interview that occurs immediately after an arrest.

United States v. Jones

(2012) __ U.S. __ [2012 WL 17117]

Issues

Must officers obtain a search warrant to install a tracking device to a vehicle and then utilize the device to monitor the vehicle's whereabouts?

Facts

FBI agents and officers with the Metropolitan Police Department in Washington, D.C. suspected that Antoine Jones was a drug dealer. In the course of their investigation, they obtained a search warrant which authorized them to attach a GPS monitoring device to Jones' Jeep Grand Cherokee and track its movements for ten days. One day after the warrant expired, the officers installed the device to the undercarriage of the vehicle while it was parked in a public parking lot.

For the next 28 days, they used the transmissions from the GPS tracker to monitor Jones' travels, and these transmissions revealed that he had visited a "stash house" where officers had found $850,000 in cash, 97 kilograms of cocaine, and one kilogram of crack cocaine. This information was part of the evidence that was used against Jones at his trial, and he was found guilty of conspiracy to distribute drugs.

Discussion

On appeal to the United States Supreme Court, Jones argued that the installation and monitoring of the device constituted a "search." And because the officers had installed the device one day after the warrant expired, the search was unlawful.

Addressing only the legality of the installation, the Court ruled that an officer's act of attaching a device to a vehicle would constitute a "search" if the device permitted the officer to obtain information. It follows, said that Court, that because a GPS device reveals the vehicle's whereabouts, the officers had, in fact, "searched" Jones' vehicle when they installed it. Said the Court, "The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted."

Significantly, the Court did not rule that a warrant would be required to conduct such a "search." Instead, it simply affirmed the D.C. Circuit's ruling, but without explaining what parts of the ruling it approved other than to say that the "admission of the evidence obtained by warrantless use of the GPS device . . . violated the Fourth Amendment."

Comment

In 1991, the Supreme Court said, "We have noted the virtue of providing clear and unequivocal guidelines to the law enforcement profession."[3] Well, if it is truly "virtuous" for judges to provide officers with "clear and unequivocal guidelines," the Court's decision in *Jones* would fall into the category of "depraved." In fact, judging from the uncertainty as to what the Court actually ruled—even uncertainty among commentators, law professors, and journalists—its opinion not only lacked clarity, it was virtually incoherent.

[2] (2007) 149 Cal.App.4th 674, 696.

[3] *California* v. *Acevedo* (1991) 500 U.S. 565, 577

This was particularly troubling because the Court had previously ruled that neither the installation nor monitoring of a tracker would constitute a search so long as the vehicle was in a public place. As for monitoring, the Court simply stated that a "person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another."[4] As for the installation of a tracker, the Court ruled (on two occasions) that a technical trespass (such as occurred in *Jones*) has little bearing on Fourth Amendment privacy determinations. Here are the Court's words:

- "The existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated."[5]
- "[I]t does not follow that the right to exclude conferred by trespass law embodies a privacy interest also protected by the Fourth Amendment."[6]

But now the Court announces—without explanation—that a physical trespass is not actually "marginally relevant." In fact, it is pivotal when (as is almost always the case), the officers' objective was to obtain information.

Strangely, the Court did not explain why it had decided not to analyze the issues by subjecting the facts to traditional Fourth Amendment analysis; i.e., that the officers' actions would have constituted a search only if their intrusion under the Jeep and their monitoring of Jones' movements infringed on Jones' reasonable privacy expectations.[7] Such an analysis would have been helpful because the Court would have had to reaffirm or overturn its earlier decisions that people cannot reasonably expect that their travels on streets and highways will be private. The Court might also have addressed the issue of whether the use of sophisticated surveillance technology affects the privacy analysis, and whether, as the D.C. Circuit determined, it matters that the surveillance was conducted over a lengthy period of time.

In fairness, the Court did not completely ignore these issues. It said: "We may have to grapple with these vexing problems in some future case . . . but there is no reason for rushing forward to resolve them here." But isn't it the job of the United States Supreme Court to "grapple" with "vexing" constitutional problems that are causing widespread uncertainty in the courts?

Even more troubling was that the Court demeaned itself by dodging the complex technological and privacy issues presented in this case by resorting to 18th century trespassing law, citing cases from 1765 and 1886 as authority for its decision, and topping it off with a quote from a Lord Chancellor in old England (Lord Camden, 1714–1794) about "tread[ing] upon his neighbor's ground." Sadly, it appears the Supreme Court will be dragged kicking and screaming into the 21st century.

The Court's decision in *Jones* is, however, consistent with its current policy of providing little, if any, guidance as to how to analyze the complex privacy issues that result from the use of modern telecommunications technology. As we discussed in our Winter 2012 article on searches of email and other electronic communications, the Court had an opportunity to provide some direction in this area in 2010 but it not only ducked the issue, it advised the lower courts to do the same, saying, "The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear."[8] But there is nothing unclear about the role of this technology: it plays a *dominant* role. After all, millions of people rely on it daily—almost hourly—to obtain information and communicate with others.

Meanwhile, to no one's surprise, the fallout from the decision is causing serious problems for criminal investigators throughout the country. For example, according to reports in *The Wall Street Journal* and *USA Today*, the FBI has "turned off" over 3,000 GPS trackers in use while it attempts to figure out the potential implications of the decision. And a former FBI counterterrorism official was quoted as saying that, without GPS, "surveillance becomes hugely labor-intensive, especially in cases in which you need round-the-clock coverage. It's something that could strap the bureau."

Adding to the confusion, it was widely reported in the news media that the Court had ruled that officers must now have a warrant to install and monitor tracking devices on vehicles. That is wrong. In fact, the Court said that officers might not need a warrant at all if they had probable cause, or maybe even reasonable suspicion. But because the Government did not raise the issue below, the Court said "We have no occasion to consider this argument."

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[4] *United States* v. *Knotts* (1983) 460 U.S 276, 281.
[5] *United States* v. *Karo* (1984) 468 U.S. 705, 712-13.
[6] *Oliver* v. *United States* (1984) 466 U.S. 170, 183, fn.15.
[7] See *Maryland* v. *Macon* (1985) 472 U.S. 463, 469; *Katz* v. *United States* (1967) 389 U.S. 347, 353.
[8] *City of Ontario* v. *Quon* (2010) __ U.S. __ [130 S.Ct. 2619]. Also see *Rehberg* v. *Paulk* (11th Cir. 2010) 611 F.3d 828, 844 [*Quon* "shows a marked lack of clarity in what privacy expectations as to content of electronic communications are reasonable"].

Still, we recommend that officers seek a warrant if they have probable cause, at least until the lower courts have had an opportunity to address the issues that the Court avoided in *Jones*. In light of the concurring opinion in the case, it is especially important to seek a warrant if, as is usually the case, officers want to conduct such surveillance for more than a few days.

Note that such a warrant should ordinarily authorize officers to (1) install the device on the vehicle in a public place or in the driveway of the suspect's home, and (2) monitor the signals from the device without limitation for ten days; i.e. until the warrant expires. (While it is possible that a warrant could authorize monitoring for more than ten days, there is no express authority for it in California.) We have prepared a search warrant form that officers may find useful. To obtain a copy via email, send a request from a departmental email address to POV@acgov.org.

Second, there is nothing in *Jones* to suggest that officers would need a warrant to conduct "bait car" operations, or to install a GPS device on a car if the vehicle was subject to warrantless search per the terms of the owner's parole or probation, or if the device was launched during a pursuit; e.g. StarChase. Third, evidence obtained via a warrantless tracking device before *Jones* was decided should not be suppressed.[9]

Ryburn v. Huff

(2012) __ U.S. __ [2012 WL 171121]

Issue

Did exigent circumstances justify a warrantless entry by officers into the home of a teenager who was rumored to be planning to "shoot up" his school?

Facts[10]

The principal of a Catholic high school in Burbank notified officers that a rumor had been circulating that a student named Vincent Huff was going to "shoot up" the school. The principal, Sister Milner, explained that Vincent had been absent from school for the past two days, that some parents who had heard the rumor were so worried that they were keeping their children at home, and that she was "concerned about the threat and the safety of her students." The officers then spoke with some of Vincent's classmates who said that Vincent "was frequently subjected to bullying" and that he "was capable of carrying out the alleged threat." The officers, having been trained on "targeted school violence," were aware that bullying and absences from school "are common among perpetrators of school shootings." So they decided to go to Vincent's home and talk with him.

When they knocked, no one answered so they phoned the residence. Again, no one answered. So an officer called the cell phone of Vincent's mother, Maria. She answered the phone and admitted that she and Vincent were inside the house, but when the officer explained why he wanted to speak with her, she hung up.

About two minutes later, Ms. Huff and Vincent walked outside and stood on the front steps. When one of the officers explained that they wanted to "talk about some threats at the school," Vincent responded, "I can't believe you're here for that." Another officer asked Ms. Huff if they could come inside to talk about the matter, but she said no. The officer then asked if there were any guns in the house, at which point she "immediately turned around and ran into the house" followed by Vincent—and two officers. One of the officers later explained that he decided to enter "because of, again, the threat that he was going to blow up or shoot up the school. I wanted to make sure neither one of them could access any weapons from inside the house, and that's where they normally get the weapons from is from either their parents or relatives or friends." The officers left the house a few minutes later after satisfying themselves that the rumor was unfounded.

The Huffs sued the officers and the City of Burbank in federal court (seeking money damages), claiming that the officers' act of entering their living room without a warrant constituted a violation of the Fourth Amendment. Following a bench trial, the district court ruled the officers' entry was justified by exigent circumstances. The Huffs appealed to the Ninth Circuit.

In an opinion by Chief Judge Alex Kozinski and written by Algenon L. Marbley (a district court judge from Ohio on temporary assignment to the Ninth Circuit), the court reversed the district court, ruling that exigent circumstances did not exist because, in the opinion of the two judges, "any belief that the officers or other family members were in serious, imminent harm would have been objectively unreasonable." The officers and the City of Burbank appealed to the U.S. Supreme Court.

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[9] See *Davis* v. *United States* (2011) __ U.S. __ [2011 WL 2369583]; *Herring* v. *United States* (2009) 555 U.S. 135, 144.

[10] **NOTE**: Some of the facts were taken from the Court of Appeals decision in *Huff* v. *City of Burbank* (9th Cir. 2011) 632 F.3d 539.

Discussion

In a *per curiam* (unanimous) opinion, the Supreme Court ruled that Judges Kozinski and Marbley were quite wrong in their conclusion that the officers lacked sufficient reason to believe that an immediate entry was necessary. As the Court pointed out, "No decision of this Court has found a Fourth Amendment violation on facts even roughly comparable to those present in this case." It was also apparent that the Court was distressed by the arrogant manner in which the two judges purported to resolve the matter.

Of particular importance, the Court concluded that the judges, while claiming to have accepted the findings of the trial judge, had actually misrepresented (i.e., "changed") those findings "in several key respects." Specifically, they claimed that when Mrs. Huff was asked if there were any guns in the house, she "merely asserted her right to end her conversation with the officers and returned to her home." But that was not what happened. The district court determined that she "immediately turned around and ran into the house." And, as one of the officers testified, it was this unusual and highly suspicious action that precipitated the decision to enter.

The Supreme Court also ruled that, in addition to tinkering with the facts, Judges Kozinski and Marbley had announced a new rule of law that defied common sense. Specifically, the judges concluded that a person's actions (i.e., Mrs. Huff's running into the house) cannot be regarded as a matter of concern if such conduct was "lawful." But, as the Supreme Court observed, "It should go without saying that there are many circumstances in which lawful conduct may portend imminent violence."

There was more. The judges disregarded the Supreme Court's repeated instructions that the reasonableness of an officer's actions depends on an examination of the totality of circumstances.[11] As the Court pointed out, the judges "looked at each separate event in isolation and concluded that each, in itself, did not give cause for concern." The Court added that "it is a matter of common sense that a combination of events each of which is mundane when viewed in isolation may paint an alarming picture."

Finally, the Court reproached the judges for disregarding another basic rule: In determining whether exigent circumstances exist, judges must not engage in unrealistic second-guessing, especially when, as here, the officers were facing what reasonably appeared to be a life-and-death situation. As the Supreme Court put it, Judges Kozinski and Marbley, "far removed from the scene and with the opportunity to dissect the elements of the situation—confidently concluded that the officers really had no reason to fear for their safety or that of anyone else." In realty, said the Court, the officers reasonably concluded that such a threat existed based on the "rapidly unfolding chain of events that culminated with Mrs. Huff turning and running into the house after refusing to answer a question about guns."

Consequently, the Court ruled that the officers did not violate the Huff's Fourth Amendment rights when they entered their house, and it remanded the case to the Ninth Circuit with instructions to dismiss it.

People v. Nelson

(2012) __ Cal.4th __ [2012 WL 88552]

Issues

(1) In determining whether a remark by a juvenile constituted a *Miranda* invocation, must officers and judges apply the same test as is used when the suspect was an adult? (2) Does a juvenile's request to speak with a parent constitute a *Miranda* invocation? (3) Can waivers by juveniles be implied?

Facts

Late one night, 15-year old Samuel Nelson burglarized the home of a 72-year old woman in Orange County and startled her as she slept on the living room sofa. When she awakened, Nelson hit her over the head several times with a hammer, killing her.

Shortly after they began their investigation, sheriff's detectives began to suspect that Nelson was the killer, so they visited him at his home and obtained his consent to accompany them to the sheriff's station for questioning. After *Mirandizing* him and confirming that he understood his rights, the investigators began to question him. They did not seek an express waiver.

Nelson eventually admitted that he had burglarized the house, but denied killing the woman. As things progressed, the detectives asked if he would be willing to take a lie detector test and Nelson responded by asking if he could phone his mother to "let her know what's happening" and to ask her "what I should do." The investigators permitted him to call home, and he spoke to his grandmother who advised him not to take the test or "do anything" until his mother arrived, and that would take about ten minutes.

[11] See *Illinois* v. *Gates* (1983) 462 U.S. 213, 230-1; *United States* v. *Arvizu* (2002) 534 U.S. 266, 273.

The investigators then left Nelson alone in the interview room with pencil and paper, suggesting that he "do the right thing" and write down what had happened. But when they returned to the room, Nelson had written nothing, saying he wanted to be alone "until my family gets here." One of the investigators told Nelson that he was "real tired" of playing games and urged him to "take this opportunity to say what happened in his own words." They left him alone again, but this time Nelson wrote a statement in which he admitted killing the woman, saying that after he broke into her home he had "walked by her and she woke up. I freaked out and I hit her in the head several times."

Nelson was tried as an adult for murder and burglary after the trial court rejected his argument that his statement was obtained in violation of *Miranda*. Following a court trial, he was found guilty as charged. But in an unpublished 2-1 decision, the Court of Appeal reversed the murder conviction, ruling that Nelson's statement should have been suppressed.

Specifically, the court ruled that, in determining whether a remark by a juvenile constituted a *Miranda* invocation, the correct test is whether the juvenile subjectively intended to invoke; and not, as with adults, whether the objective circumstances would have reasonably demonstrated an intention to invoke. Applying its new subjective test, the court ruled that Nelson's "purpose when he first requested to speak with his mother was to secure her assistance to protect his *[Miranda]* rights." Consequently, the court ruled that Nelson's request constituted an invocation. The People appealed to the California Supreme Court.

Discussion

It is settled that a remark by an adult can constitute an invocation of the *Miranda* right to remain silent or the right to counsel only if it clearly and unambiguously constituted an invocation.[12] This is called an "objective" test because it depends solely on the facts known to the officers and how the facts would have been interpreted by a reasonable officer in the same situation. As noted, the Court of Appeal ruled that the courts must apply a different test—a "subjective" test—when the suspect is a juvenile; i.e., officers and judges must try to divine the juvenile's intent behind the remark. And because the court concluded that Nelson's request to speak with his mother demonstrated a subjective intent to invoke, it ruled that his statement should have been suppressed.

The Supreme Court rejected the court's new test, ruling that there is "no principled reason" for imposing different standards for juvenile and adult invocations, especially considering that the "interest in protecting lawful investigative activity is equally weighty in the adult and juvenile contexts." Said the court, "Because this standard is an objective one, the invocation determination does not call for an evaluation of the juvenile's state of mind or subjective desire."

REQUEST TO SPEAK WITH A PARENT: Having determined that a remark by a juvenile can constitute an invocation only if it was clear and unambiguous, the Supreme Court ruled that the Court of Appeal also erred when it ruled that Nelson's request to speak with his mother constituted an invocation. Said the court:

> Where, as here, a juvenile has made a valid waiver of his *Miranda* rights and has agreed to questioning, a postwaiver request for a parent is insufficient to halt questioning unless the circumstances are such that a reasonable officer would understand that the juvenile *is actually* invoking—as opposed to *might be* invoking . . . .

The court then reviewed the surrounding circumstances and determined that there were no objective circumstances that would have demonstrated to a reasonable officer that Nelson was invoking. Among other things, it pointed out that, "[a]fter waiving his *Miranda* rights, defendant was open and responsive to questioning on any topic," and that his stated purpose for wanting to talk to his mother was to let her "know what's happening" and "to ask her what he should do."

IMPLIED WAIVERS: As noted, Nelson did not expressly waive his *Miranda* rights; i.e., he was not asked the question, "Having these rights in mind, do you want to talk to us?" Instead, the officers advised him of his rights and began questioning him after determining that he understood them. Although the validity of implied waivers had been unsettled for many years, the U.S. Supreme Court ruled in 2010 that an implied waiver will suffice, and that a waiver will be implied if (1) the suspect was correctly advised of his rights, (2) he said he understood his rights, and (3) the waiver and subsequent questioning were not coerced.[13]

The court in *Nelson* ruled that these circumstances will also constitute a waiver by a juvenile and, accordingly, ruled that Nelson impliedly waived his rights "by willingly answering questions after acknowledging that he understood those rights." Accordingly, the Court reversed the dismissal of Nelson's murder conviction.

[12] See *Davis* v. *United States* (1994) 512 U.S. 452, 459; *People* v. *Nelson* (2012) 53 Cal.4th 367.

[13] *Berghuis* v. *Thompkins* (2010) __ U.S. __ [2010 WL 2160784]. Also see *People* v. *Johnson* (1969) 70 Cal.2d 541, 558.

People v. Tom

(2012) __ Cal.App.4th __ [2012 WL 899572]

Issue

Was a motorist who caused a fatal traffic accident "in custody" for *Miranda* purposes because he was required to remain at the scene?

Facts

At about 8 P.M. Richard Tom was driving his Mercedes E320 northbound on Woodside Road in Redwood City at a speed estimated by a SJPD accident reconstruction expert at 67 m.p.h. and possibly "much higher." The speed limit is 35. Meanwhile, Loraine Wong was driving her Nissan Maxima westbound on Santa Clara Avenue and was about to make a left turn onto Woodside. Seated in the back seat were Ms. Wong's two daughters, 10-year old Kendall and 8-year old Sydney.

After looking for approaching traffic and seeing none, Ms. Wong entered the intersection, at which point her car was broadsided by Mr. Tom's Mercedes. The result was "major, total damage" to the Maxima including a "massive intrusion" into the left rear passenger compartment where Sydney was sitting in a booster seat. She was killed. Kendall suffered major injuries. There was no evidence that Mr. Tom applied his brakes before the crash.

One of the first officers to arrive saw that paramedics were attending to Mr. Tom who was still sitting in his car. Sometime later, Mr. Tom exited his vehicle and walked around the scene with his girlfriend. Following that, he asked an officer if he could walk home because he lived "only a half-a-block away." The officer told him that "he had to stay at the scene because the investigation was still in progress." Sometime after that, Mr. Tom was observed sitting in another car at the scene; the car belonged to a friend who, as officers later learned, had just had dinner and drinks with Mr. Tom.

Sgt. Alan Bailey arrived on the scene and told another officer to place Mr. Tom in a patrol car and "ask" him if he would go to the station to give a statement and take a blood test. Mr. Tom agreed. During the trip, he was not handcuffed, and his girlfriend was allowed to accompany him. Shortly after they arrived, officers detected an odor of alcohol on Mr. Tom's breath and arrested him.

He was charged with, among other things, gross vehicular manslaughter while intoxicated. During his trial, the prosecutor was allowed to present evidence of Mr. Tom's "I don't care" attitude by eliciting testimony that he never inquired about the condition of Ms. Wong or her two daughters. He was convicted of vehicle manslaughter with gross negligence.

Discussion

Mr. Tom argued that the court erred by admitting testimony of his pre-arrest silence, claiming that he was "in custody" for *Miranda* purposes and, therefore, such testimony violated his Fifth Amendment right to remain silent.[14] The question, then, was essentially whether he was "in custody" at the crash scene.

It is settled that custody results if a suspect reasonably believed that he was under arrest or that his freedom had been restricted to the degree associated with an arrest.[15] Citing the following circumstances, the court then determined that Mr. Tom was in custody at some point before he was driven away:

- An officer told him he must remain at the scene.
- He "was held" at the scene for about 90 minutes.
- "[T]he atmosphere surrounding defendant's detention became increasingly coercive."
- He was asked to accompany officers to the police station for questioning.
- He sat in the back of a police car.
- He was not told that he was free to leave.

Having concluded that these circumstances rendered Mr. Tom "in custody" for *Miranda* purposes, the court ruled that the admission of testimony that he did not ask about the condition of Ms. Wong and her daughters violated his Fifth Amendment right to remain silent. For that reason it ordered that Mr. Tom's conviction be reversed.

Comment

To our knowledge, this is the first case in which a court ruled that a motorist who had been involved in a major traffic accident was "in custody" because he was required to remain at the scene. While there might be situations in which such a ruling would be appropriate, this is certainly not one of them.

At the outset, it is important to note that, although traffic violators and other detainees are not free to leave, they are not automatically in custody. This is because, unlike interrogations at police stations, detentions do not ordinarily occur behind closed doors and they are usually relatively brief and not coercive. As the United States Supreme Court noted in a DUI case, "The comparatively nonthreatening character of

[14] See *Griffin* v. *California* (1965) 380 U.S. 609; *Doyle* v. *Ohio* (1976) 426 U.S. 610.

[15] See *Yarborough* v. *Alvarado* (2004) 541 U.S. 652, 662 ; *People* v. *Stansbury* (1995) 9 Cal.4th 824, 830.

detentions of this sort explains the absence of any suggestion in our opinions that [detentions] are subject to the dictates of *Miranda*."[16]

As noted, the Court of Appeal explained that a significant reason for its decision was that Mr. Tom was "held at the scene" for about 90 minutes before he was transported to the police station. Although it is true that a 90-minute detention would hardly qualify as "brief," it is apparent that Mr. Tom was not being "held" throughout this period (if at all). For example, during some of that time he was being treated by paramedics, after which he walked around with his girlfriend. And after that, he sat inside a friend's car.

Furthermore, the abstract length of the detention is not a critical factor. Instead, the issue is whether the wait was reasonably necessary because of the surrounding circumstances. This is especially significant where, as here, the length of the detention was attributable to the actions of the suspect; i.e. he had caused an accident with one fatality and one serious injury.[17] Moreover, it is apparent that officers who have arrived at the scene of such an accident will have many things on their minds and many duties to perform, the *least* of which is to quickly question the driver who caused the accident so that he will not be inconvenienced any further. In fact, any motorist who caused such an accident would probably expect to be kept at the scene for a lengthy interview *after* the officers had attended to the victims and concluded their preliminary investigation. Furthermore, in the case of a fatal accident, the motorist would understand that such a preliminary investigation would ordinarily be somewhat lengthy. And yet, the court in *Tom* ignored these considerations and concluded that the officer's act of telling Mr. Tom that they "needed him to remain at the scene" would have generated such coercion—either alone or with the other listed circumstances—as to render Mr. Tom in custody. There is absolutely no legal precedent for such a conclusion.

The court also described the atmosphere at the scene as "increasingly coercive." But the facts do not support such a characterization. What, we ask, was coercive about permitting Mr. Tom to walk freely around the scene with his girlfriend? Was it coercive for the officers to allow him to sit for a while inside his friend's car? Was it improper for them to ask Mr. Tom to accompany them to the police station for questioning? The California Supreme Court definitively answered the latter question in another *Miranda* case, *People* v. *Stansbury,* when it ruled that merely asking the defendant "if he would come to the police station" would have conveyed to him that he "was not a suspect and was not in custody."[18]

Finally, the court thought it was significant that the officers neglected to tell Mr. Tom that he was "free to leave." But Mr. Tom was *not* free to leave—and for good reason: he had just caused a fatal accident and they needed to interview him *after* completing their other duties.[19]

It is possible that the court meant to fault the officers for not telling Mr. Tom that he could refuse their request to go to the police station. But it is undisputed that the officers "asked" him to accompany them to the station and that he agreed to do so. Thus, when this issue arose in a related Fourth Amendment context, the California Supreme Court observed that "when a person of normal intelligence" is asked to give his consent, he will "reasonably infer he has the option of withholding that consent if he chooses."[20]

The only circumstance that was arguably coercive was that an officer asked Tom to sit in a patrol car. But this hardly renders his status as "custodial" because (1) there is nothing in the case to indicate that Mr. Tom was *ordered* to sit in the car; (2) Mr. Tom was not handcuffed; and (3), as the court observed in *People* v. *Natale*, "A suspect's mere presence in a patrol car does not unambiguously state that the elements of an arrest have been satisfied."[21]

Because the court's ruling in this case constitutes an extreme and unwarranted expansion of *Miranda,* we expect that the Attorney General's Office will seek review by the California Supreme Court. POV

[16] *Berkemer* v. *McCarty* (1984) 468 US 420, 440.
[17] See *U.S.* v. *Sharpe* (1985) 470 U.S. 675, 687-68.
[18] (1995) 9 Cal.4th 824, 832.
[19] **NOTE**: The court said that its ruling was mandated by the U.S. Supreme Court's decision in *Berkemer* v. *McCarty* (1984) 468 U.S. 420, 440 in which the Court ruled that a man who was stopped for DUI was not "in custody" for *Miranda* purposes because the stop was "temporary and brief." The court, however, failed to consider two things: First, it ignored the fact that an officer's duties at the scene of a fatal automobile accident are much more demanding and time-consuming that those attendant to a simple DUI investigation. Second, the idea that a search or seizure is necessarily unlawful because it is unlike a search of seizure that the U.S. Supreme Court previously upheld has been repudiated by the Court. See *U.S.* v. *Knights* (2001) 534 U.S. 112, 117 [the Court used the term "dubious logic" to describe a ruling "that an opinion upholding the constitutionality of a particular search implicitly holds unconstitutional any search that is not like it"].

The Changing Times

Alameda County District Attorney's Office

Asst. DA **Charlette Green** retired after 29 years of service. Capt. **Lisa Foster** and Lt. **Cindy Hall** have retired. Both Lisa and Cindy were formerly with OPD and both served with the DA's Office for about 23 years. Asst. DA **Karen Meredith** was appointed head of the Hayward office. Insp. III **Craig Chew** graduated from the FBI National Academy. New prosecutors: **Peter McGuiness**, **Ashley Dodson**, **Keydon Levy**, and **Alex Hernandez**.

Former support staff member **Diane Leffler** died on January 11, 2012 after a lengthy battle with cancer.

Alameda County Sheriff's Office

Capt. **Dean Stavert** was promoted to division commander. Lt. **Thomas Madigan** was promoted to captain. The following sergeants were promoted to lieutenant: **Jason Arbuckle**, **Shawn Peterson**, **Nathan Schmidt**, and **Darren Skoldqvist**. The following deputies were promoted to sergeant: **Howard Baron**, **Jared Hattaway**, **Kevin Monaghan**, **Robert Nobriga**, **Ranvir Sanghera**, and **David Vandagriff**.

The following deputies have retired: Division Commander **Kevin Hart** who, after 31 years of service, accepted a position with POST as senior consultant, Lt. **Gordon Bowman** (26 years), Lt. **James Farr** (26 years), Lt. **Linda Thuman** (28 years), Sgt. **George Lytle** (29 years), Sgt. **Robert Wallen** (26 years), **Brenton Cantrell** (4 years), **Bryan Knittel** (12 years), **Denny Adams** (22 years), **Douglas Anderson** (22 years), **Kenneth Brawley** (26 years), and **Christopher Stewart** (25 years).

The following POST graduates have joined ACSO: **Nicholas Cassell**, **Alexander Faber**, **Harvey Ollis**, **John Paul Ty**, **Michael Ella**, **Robert King**, **Taylor Perea**, **Jason Podany**, and **Nicholas Salcedo**. New recruits: **Jacob Cesena**, **Patrick Dolan**, **William Dorshkind**, **Christopher Edwards**, **Keith Frederickson**, **Joshua Miller**, **Eric Rombough**, and **Natasha Stone**.

Retired technician **Bob Wagner** died of a heart attack on January 6, 2012. He was 66 years old.

Alameda Police Department

Lt. **Sean Lynch** retired after more than 26 years of service. **Greg Ella** retired after more than 21 years of service. Sgt. **Lance Leibnitz** was promoted to lieutenant and transferred from Personnel and Training to Patrol. Acting sergeants **Aaron Hardy** and **Mark Reynolds** were promoted to sergeant. Ofc. **Michael Abreu** was promoted to acting sergeant. Transfers: Lt. **Ted Horlbeck** from Patrol to Investigations, Sgt. **Eileen Tannahill** from Investigations to Patrol, Sgt. **Jeff Emmitt** from Patrol to Investigations.

Berkeley Police Department

The following officers have retired: Sgt. **Howard Nonoguchi** (31 years at BPD and 33 years in law enforcement), **Marianne Jamison** (16 years), and **Karen Buckheit** (11 years). Lateral appointment: **Christopher Scott** (San Jose PD). New officer: **Greg Michalczyk**.

Retired lieutenant **Don Smithson** passed away. Lt. Smithson retired in 1985 after 30 years of service. Retired officer **Alfred Benjamin** has died. Officer Benjamin served with BPD from 1974 to 2002. The department's second African-American patrol officer, **Jennifer Rose**, has passed away. Officer Rose served in BPD in the 1970s and helped pave the way for women entering law enforcement in Berkeley.

California Highway Patrol

Dublin office: **Don Beringer** retired after 28 years of service.

East Bay Regional Parks Police Dept.

Officer **Chuck Torres** was promoted to patrol sergeant.

Emeryville Police Department

Police Service Technician **Janet Tso** retired after 37 years with EPD. She was the most senior EPD employee at the time of her retirement. Jan's career started in the early 70's after having grown up and attended primary and secondary schools in Emeryville. In fact, Jan had gone to kindergarten with a future EPD officer who later become her sergeant. Jan always came to work with a smile and was routinely referred to as "one of the nicest persons you can ever meet." Many people from the community, current and retired EPD members came see to Jan off and wish her well in retirement. And true to Jan's form, she asked to join the volunteer's program on her last day. Good luck Jan. Lateral appointment: **Joshua Patterson** from Draper Police Department in Utah.

Fremont Police Department

Capt. **Frank Grgurina** was selected as Director of the Sunnyvale Department of Public Safety. Capt. Grgurina had been a Fremont officer for 22 years. Lt. **Clarise Lew**

was promoted to captain. Sgt. **Sean Washington** was promoted to lieutenant. The following officers were promoted to sergeant: **Jeremy Miskella**, **Eric Tang**, and **Matthew Snelson**. Lateral appointments: **Richard Hamblin** (Stockton PD), **Michael Chan** (San Jose PD), **Heidi Kindorf** (San Jose PD), and **Anthony Piol** (Sacramento SO). Sgt. **Pat Hunt** retired after 30 years of service. Sgt. **Chris Mazzone** retired after 29 years of service. **Jesse Hartman** graduated from the academy.

NEWARK POLICE DEPARTMENT

Former Police Chief **Ray Samuels** passed away unexpectedly on February 17, 2012 after suffering a heart attack. He was 58. Chief Samuels began his law enforcement career with Vallejo PD in 1975, then joined Concord PD in 1981 where he remained for the next 18 years. He joined NPD as a lieutenant in March 1999, was promoted to captain in April 2002, then appointed chief in September 2003. Chief Samuels retired from NPD in July 2008 and subsequently worked as Interim Chief at the Menlo Park and Lodi police departments, and as a public safety consultant/investigations manager for Renne Sloan Holtzman Sakai LLP.

Former sergeant **Paul Dubois** passed away on February 19, 2012 at the age of 69 after a five month battle with cancer. Sergeant Dubois was hired as an officer with NPD on August 17, 1964 and was promoted to sergeant on March 1, 1968. He left NPD in 1976 after over 11 years of service to start his own security business.

Commander **Donna Shearn** retired after over 25 years with NPD, but she has since been hired back in a part-time capacity to supervise the Community Engagement Program. Sgt. **Frank Lehr** retired after over 25 years with NPD and over 27 years in law enforcement. Transfers: Sgt. **Jonathan Arguello** from Patrol to the Special Enforcement Team, Sgt. **Jeff Mapes** from the Special Enforcement Team to Patrol, **Adeceli Kovach** from Detectives to Patrol, **Elsa Cervantes** from Patrol to Detectives; **Scott Baswell** from Patrol to the Major Crimes Task Force, **David Lee** from the Major Crimes Task Force to Patrol.

OAKLAND HOUSING AUTHORITY POLICE DEPT.

Newly appointed officers: **David Cach**, **Chano Socarras**, and **Kristi Baughman**. New dispatcher: **Stephanie Chan**.

OAKLAND POLICE DEPARTMENT

Interim Chief **Howard Jordan** was appointed chief of police. Capt. **Anthony Toribio** was promoted to deputy chief. The following officers have retired: Sgt. **Paul Hara**, Sgt. **Daniel Donovan**, Sgt. **James Morris**, Sgt. **Larry Krupp**, and **Vincent Fratangelo**. New officers: **Jared Blue-Lowry**, **Bryan Glick**, **Miguel Guzman**, **Ephrian Jordan**, **David McLaughlin**, **Ryan McLaughlin**, **Carlos Navarro**, **Keith Pullin**, **Mathias Sather**, **Alexander Ying**, **Bryan Budgin**, **Dustin Filce**, **Jeremy Guevara**, **Michael Murphy**, **Erik Scofield**, and **Stephen Stout**. Lateral appointment: **Rodger Ponce De Leon**.

The department reports that the following retired officers have died: Capt. **Jim Hahn**, Lt. **Melvin Berg**, Sgt. **Rex Mummey**, Sgt. **William Andrews**, and Sgt. **Carl Hewitt**, Jr.

PIEDMONT POLICE DEPARTMENT

John Lagios has been hired as a police officer. He served as a Reserve Officer for Piedmont PD for 1 ½ years and prior to that he worked as a police officer for SFPD for 8 ½ years.

SAN LEANDRO POLICE DEPARTMENT

Lt. **Christopher Tankson** retired after 27 years of service. Sgts. **Randy Brandt** and **Rick DeCosta** were promoted to lieutenant and assigned to the Patrol Division. **Isaac Benabou** and **Annie O'Callaghan** were promoted to sergeant and assigned to the Patrol Division. **Derrel Ramsey** was promoted to acting sergeant and assigned to the Patrol Division. **Jeff Walton** transferred from the Patrol Division to Criminal Investigation Division – Property Crimes. New public safety dispatcher: **Karine Manookian**.

UNION CITY POLICE DEPARTMENT

Chief **Greg Stewart** retired after 35 years of service. Capt. **Brian Foley** was appointed Chief of Police. Lieutenants **Kelly Musgrove**, **Ben Horner**, **Gloria Lopez-Vaughan**, and **Mark Quindoy** were promoted to commander. Sgt. **Jared Rinetti** was promoted to commander. Corp. **Victor Derting** was promoted to sergeant. **Fred Camacho** was promoted corporal. **Michael Dalisay** retired after over 26 years of service. Police Office Coordinator **Anita Vejar** retired after 12 years of service.

Brigid Dinneen transferred from Patrol to Traffic. **Jean Luevano-Ryken** transferred from Patrol to Investigations. Lateral Appointment: **Michael Yeager** (from Brentwood PD).

UNIVERSITY OF CALIFORNIA, BERKELEY POLICE DEPARTMENT

Retired sergeant **Ronald Tipton** passed away on November 23, 2011.

War Stories

Cross-examination follies

The attorney for a juvenile on trial for murder was cross-examining the Hayward detective who had investigated the case. The attorney was trying to get the detective to admit that the killer might have been a juvenile named Bobby:

Attorney: If it turns out that Bobby was the shooter, we have been sold a bill of goods, right?

Detective: If that was a fact, yes.

Attorney: You and I don't know who did it, do we? We weren't there, right?

Detective: Well, I'm not sure about you. But I know *I* wasn't there.

What a coincidence

A few minutes after three men robbed a liquor store in Hayward, an Alameda County sheriff's deputy spotted a vehicle that matched the description of the getaway car. In addition, the two men on the front seat matched the descriptions of two of the robbers. After making a felony stop, deputies removed the two men and briefly questioned them. They then looked in the back seat and found the third robber who was pretending to be asleep.

After he was pulled outside and notified he was under arrest for robbery, he said, "Hey, I don't know nothin' about no robbery. I was just hitchhiking and those two dudes picked me up. I never saw 'em before." "That's odd," replied one of the deputies, "because the driver just told me that the guy in the back seat—that's you—was his brother." The man thought for a few seconds and said, "Now ain't that a coincidence. I thought that dude looked familiar."

What's going on at the DMV?

One afternoon, a Fremont police officer made a traffic stop on a young man who was driving erratically. The officer quickly determined that the man was very drunk, so he arrested him for DUI and called for a tow truck. While waiting for the tow, the officer asked the man where he was coming from. He replied, "I was just over at the DMV. I got my license renewed."

Detect this

Another Fremont traffic stop: As the officer was walking up to the car, the driver got out, threw his radar detector to the ground—smashing it to bits. He then started jumping up and down on the parts, yelling "I paid $200 for this damn thing. I drove right by you and it didn't make a sound." As the officer examined the remains of the radar detector, he said, "That's because I don't have radar. I stopped you because you had a broken tail light."

"Cop Drop"

People who drive on today's busy streets and freeways have so many distractions. In addition to monitoring their radar detectors (see above) and talking to their friends on their cell phones, they must keep one eye out for cops so they can hide the phone. Thus, the Urban Dictionary added the term "cop drop" which it defines as quickly dropping a cell phone onto the floor of his car in order to avoid a ticket. It should also be noted that, because it is extremely rude to suddenly break off a phone conversation with a person, the W*all Street Journal* noted that cell phone etiquette now requires that drivers notify the person of the situation by quickly saying "cop drop" as they pitch the phone to the floor.

No hoodies, No hoods

In Columbus, Ohio, a man entered the Columbus PNC Bank and got into line. When a bank employee noticed that the man was wearing a hoodie that was covering most of his face, the employee walked up and said, "I'm sorry, sir, but we have a strict 'no hats, no hoods' policy. You'll have to lower your hood." The man said "that's cool" and immediately complied. When he reached the teller, he handed her a holdup note and walked out with a few thousand dollars. But, thanks to the excellent surveillance photos of his face, he was quickly arrested. FBI agents are still wondering why a man who intended to rob a bank was so willing to comply with a policy the would result in his identification.

Another hapless bank robber

One morning at 10:18:07 A.M., a man walked into the Bank of America branch in Oakland's Eastmont Town Center and handed the teller a holdup note. At 10:18:47, the teller hit the silent alarm. At 10:19:34 A.M. two OPD officers rushed into the bank and arrested the robber. What did he do wrong? He failed to notice the big sign on the office located next door to the bank. It said: "Oakland Police Department, Eastmont Substation."

A day in Monte Carlo

Monte Carlo is a classy place, full of classy people driving classy cars. Well, it seems there are six fewer classy cars on the streets today thanks to a woman who lost control of her new Bentley and crashed into all of the following: (1) a $75,000 Mercedes Benz CLS, (2) a $250,000 Bentley Azure, (3) a $143,000 Ferrari Italia, (4) an $80,000 Porsche 911, and a $150,000 Aston-Martin Rapide. After examining the wreckage, a Monte Carlo traffic officer approached the driver and said, "Madam, I *do* hope you are insured."

Do-it-yourself parking enforcement

Somone was keying cars in the parking garage of an office building in downtown Seattle and leaving angry notes complaining about how the cars were taking up two parking spaces. This prompted the garage's management set up a sting: they parked a car so that it straddled two parking spots and pointed a surveillance camera at it. The camera eventually produced footage of a man driving along in a Porsche, stopping behind the bait car, stepping out and keying it. The man was subsequently identified as an attorney who worked in the building. He was arrested.

What were you thinking?

In Wyoming, a man named James Fraser was representing himself on a federal charge of possessing an illegal firearm. At his trial, he asked the judge to allow him to testify that he had previously used the gun to kill a man who had threatened him. The judge refused, and the Tenth Circuit upheld the ruling. "How," wondered the court, "could evidence that he killed a man have *helped* Mr. Fraser?"

Ouch

According to an Alameda County probation report, the defendant's criminal history included the following:

Offense: Battery, struck a 14-year old girl on the head with a dildo.

Disposition: Pled to disturbing the peace.

Just horsing around

In Ventura County, a judge who was arraigning a suspect noticed a note attached to the complaint. The note was from the DA's Office and it read:

Judge: The defendant was previously arrested for 647(a) [lewd conduct in a public place] after he was observed having sex with a horse. So we request that he *not* be housed in the honor farm.

Gotcha

A defense attorney was cross-examining an officer at a motion to suppress in Oakland:

Attorney: Did you see my client run away?

Officer: No, another officer saw him and put out a description on the radio.

Attorney: So, another officer furnished this description. Do you always trust your fellow officers?

Officer: Yes.

Attorney: Then how come officers put padlocks on their lockers at the police station?

Officer: Because we share the building with the court complex, and lawyers sometimes walk through.

The War Story Hotline

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We made your job easier (unless you're a crook)

For officers, prosecutors, and judges, it has never been easier to understand the law pertaining to police procedure and to keep up with the constant barrage of changes. For starters, there's the 2012 edition of *California Criminal Investigation* which sets out the rules and principles that regulate criminal investigations and police field operations in California. Not only is *CCI* comprehensive, it explains everything in plain English and is organized logically in an uncluttered outline format so that readers can *see* the structure of each subject. *CCI 2012* contains 690 pages, including more than 3,500 endnotes featuring comments, examples, and over 14,000 citations to federal and California appellate decisions with illuminating quotes from selected cases.

In addition, there is CCI Online, our innovative website which contains all of the information in the *CCI* manual plus continuous updates, a unique endnotes-at-a-glance feature, a global word search application, and links to articles in *Point of View*.

To order *CCI 2012* or an unlimited one-year subscription to CCI Online (or both at a discount), visit our website: www.le.alcoda.org. The following is the Table of Contents:

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Since 1970

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Nancy E. O'Malley
District Attorney

Writer and Editor
Mark Hutchins

Notice of Change in Frequency of Publication

To help ensure that we can continue to publish Point of View for the law enforcement and legal communities, it has become necessary to reduce the frequency of publication from four times a year to three. Distribution will now occur in January, May, and September.

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Point of View is published in January, May, and September. Articles and case reports may be reprinted by law enforcement and prosecuting agencies or for any educational purpose if attributed to the Alameda County District Attorney's Office. Send correspondence to Point of View, District Attorney's Office, 1225 Fallon St., 9th Floor, Oakland, CA 94612. Email: POV@acgov.org.

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Entry to Arrest
Ramey, Payton, and *Steagald*

An intrusion by the state into the privacy of the home for any purpose is one of the most awesome incursions of police power into the life of the individual.[1]

There was a time when officers who had developed probable cause to arrest someone would simply drive over to his house and arrest him. If they needed to break in, no problem. If they needed to search the premises for him, that was okay, too. And if they happened to see any evidence in plain view while they were looking around, they could seize it. This was, in fact, standard police practice in most states for around two hundred years and it was, to say the least, efficient. (It was also good for the environment because there was no paperwork.) But despite its efficiency and usefulness, it became illegal. What happened?

The immediate cause was a pair of landmark court decisions. The first was the California Supreme Court's 1976 decision in *People* v. *Ramey* in which the court ruled that entries into a person's home to arrest him were prohibited unless the officers had an arrest warrant.[2] Then, four years later, the U.S. Supreme Court in *Payton* v. *New York* essentially adopted the *Ramey* rule in its entirety and made it a constitutional requirement.[3]

But the underlying cause was that routine warrantless entries into homes to arrest a resident had become repugnant to the American people, especially since such intrusions had been common occurrences in Nazi Germany and were still the norm in many dictatorships and communist countries. The court in *Ramey* described it as "[t]he frightening experience of certain foreign nations with the unexpected invasion of private homes by uniformed authority to seize individuals therein, often in the dead of night."

While the decisions in *Ramey* and *Payton* were based in part of the need to protect the privacy interests of arrestees, there was equal—maybe even greater—concern about the impact of warrantless entries on innocent occupants, especially any children in the residence.[4] After all, such an intrusion into a home is a "frightening experience" to everyone there.[5]

These were the reasons that the courts in *Ramey* and *Payton* ruled that officers must ordinarily have an arrest warrant for a suspect in order to enter his home to take him into custody. But the Court in *Payton* announced two additional requirements: the officers must have had reason to believe that the arrestee currently lived in the residence, and they must have had reason to believe that he was inside when they made entry.

As the title of this article suggests, there is a third case that has a bearing on entries to arrest. That case is *Steagald* v. *United States*,[6] and it was announced by the U.S. Supreme Court just one year after it decided *Payton*. In *Steagald* the Court ruled that, while an arrest warrant was sufficient to enter the home of the arrestee, greater protections were necessary when officers needed to search for the arrestee in the home of a friend or relative. In these situations, said the Court, officers must have a special type of search warrant that has become known as a *Steagald* warrant.

Later in this article, we will explain exactly what officers must do to comply with *Ramey-Payton* and *Steagald*, how the courts enforce these rules, and the exceptions to the warrant requirement. But because the first issue that officers are apt to confront is whether compliance is, in fact, required, that is where we will start.

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[1] *People* v. *Ramey* (1976) 16 Cal.3d 263, 275.
[2] (1976) 16 Cal.3d 263.
[3] (1980) 445 U.S. 573.
[4] See *Minnesota* v. *Olson* (1990) 495 U.S. 91, 95.
[5] See *People* v. *Tillery* (1979) 99 Cal.App.3d 975, 978 ["The emphasis is on the intrusion, not on the residential status of the arrestee"].
[6] (1981) 451 U.S. 204.

When Compliance Is Required

Because *Ramey-Payton* and *Steagald* apply only if officers entered a "private" building for the purpose of making an arrest, compliance is required only if all of the following circumstances existed: (1) the location of the arrest was a home or other structure in which the occupants had a reasonable expectation of privacy, (2) the officers physically entered the structure, and (3) they entered with the intent to immediately arrest an occupant.

Private Buildings

At the top of the list of places in which most people can reasonably expect privacy are homes—whether detached houses, apartments, duplexes, or condominiums.[7] Thus, one of the Supreme Court's most-quoted observations is that "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."[8]

Ramey-Payton and *Steagald* are not, however, limited to homes and other residences.[9] Instead, as the court explained in *People* v. *Willis*, "for *Ramey* purposes, 'home' should be defined in terms as broad as necessary to protect the privacy interests at stake and, therefore, would include any premises in which the occupant had acquired a legitimate expectation of privacy."[10] Thus, the term includes such places as motel and hotel rooms, mobile homes, even sheds and tents that serve as residences.[11] It also covers those areas of businesses and other commercial structures in which the arrestee could reasonably expect privacy; e.g., his private office.[12] On the other hand, *Ramey-Payton* and *Steagald* would not apply if the arrest occurred in a place or area that was open to the public, such as a store, restaurant, or the reception area of an office.[13]

Physical entry

Since the sole concern of *Ramey-Payton* and *Steagald* is the intrusion into the structure,[14] they do not apply unless officers actually entered; i.e., crossed the threshold.

ARREST OUTSIDE THE DOORWAY: Officers do not violate *Ramey-Payton* or *Steagald* if they arrest the suspect anywhere outside the doorway; e.g., on the front porch.[15] Furthermore, officers may ask the arrestee to exit, then arrest him as he steps outside. For example, in *People* v. *Tillery* the court ruled that an officer did not violate *Ramey* when he arrested the defendant in the hallway of his apartment building after asking him to step out to talk. Said the court, "Once he stepped outside, it was lawful for the officer to arrest him."[16]

Officers may also trick or even order the arrestee to exit the premises—then arrest him as he does so. As for trickery, the Court of Appeal observed that "the use of a ruse to persuade a potential arrestee to leave a house, thereby subjecting himself to arrest

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[7] See *People* v. *Ramey* (1976) 16 Cal.3d 263; *Payton* v. *New York* (1980) 445 U.S. 573.
[8] *Payton* v. *New York* (1980) 445 U.S. 573, 590.
[9] See *People* v. *Lee* (1986) 186 Cal.App.3d 743, 746 [*Ramey* covers any structure of "private retreat"]; *U.S.* v. *Driver* (9th Cir. 1985) 776 F.2d 807, 809 ["The relevant question . . . is the individual's expectation of privacy."].
[10] (1980) 104 Cal.App.3d 433, 443.
[11] See *People* v. *Tillery* (1979) 99 Cal.App.3d 975, 979 ["The expectation of privacy against warrantless searches and seizures applies to tenancy of any kind, regardless of duration of the stay or nature of any consideration paid."]; *People* v. *Bennett* (1998) 17 Cal.4th 373, 384 [hotel room]; *People* v. *Superior Court (Arketa)* (1970) 10 Cal.App.3d 122 [shed in which a light was burning, the shed was about 25 yards from a house]; *People* v. *Bigham* (1975) 49 Cal.App.3d 73, 81 [converted garage]; *People* v. *Boyd* (1990) 224 Cal.App.3d 736, 744 [mobile home]; *People* v. *Watkins* (1994) 26 Cal.App.4th 19 [motel room].
[12] See *People* v. *Lee* (1986) 186 Cal.App.3d 743, 750 ["Lee had a reasonable expectation of privacy in his locked interior office, which was not accessible to the public without permission."]; *U.S.* v. *Driver* (9th Cir. 1985) 776 F.2d 807, 810 ["Mrs. Driver was not in an area exposed or visible to the public, but in an area of the warehouse with a reasonable expectation of privacy."]; *O'Rourke* v. *Hayes* (11th Cir. 2004) 378 F.3d 1201, 1206 [area was "off-limits to the general public"].
[13] See *United States* v. *Watson* (1976) 423 U.S. 411, 418, fn.6 [restaurant]; *People* v. *Lovett* (1978) 82 Cal.App.3d 527, 532 [a store]; *People* v. *Pompa* (1989) 212 Cal.App.3d 1308, 1311 [upholstery store open for business].
[14] See *New York* v. *Harris* (1990) 495 U.S. 14, 17; *Minnesota* v. *Olson* (1990) 495 U.S. 91, 95; *People* v. *McCarter* (1981) 117 Cal.App.3d 894, 908 ["It is the intrusion into, rather than the arrest in, the dwelling which offends constitutional standards under *Ramey*."]; *People* v. *Lewis* (1999) 74 Cal.App.4th 662, 672.
[15] See *Steagald* v. *United States* (1981) 451 U.S. 204, 221 [the arrestee "can be readily seized . . . after leaving"].
[16] (1979) 99 Cal.App.3d 975, 979-80. Also see *People* v. *Jackson* (1986) 187 Cal.App.3d 499, 505.

on the street where the concerns attendant to *Ramey* are not present is not necessarily precluded."[17] For example, in *People* v. *Porras*[18] an undercover narcotics officer, having developed probable cause to arrest Porras for drug trafficking, phoned him and identified himself as one of Porras's drug customers. He then warned him that some underhanded officers had forced him to reveal that Porras was his supplier and, in fact, a bunch of them were on their way to Porras's house now with a search warrant. The officer concluded by suggesting that Porras immediately "get rid of the dope."

Shortly thereafter, officers who were watching the house saw Porras stick his head out the door, look around, then advise someone inside that "the coast is clear." He then ran off with a tool box filled with drugs which the officers recovered after he tripped and dropped it. On appeal, the court ruled there was nothing illegal about the officers' trickery, noting that "[m]any cases have held that the mere fact that a suspect is led to incriminate himself by use of some ruse or stratagem does not make the evidence thus obtained inadmissible."

As noted, officers may also order the suspect to exit, then arrest him when he complies. This happened in *People* v. *Trudell*[19] in which Fremont officers arrested a rape suspect after he exited his house in response to a command by an officer using a loudspeaker. On appeal, he claimed the arrest violated *Ramey-Payton* because his decision to exit was not consensual. But the court ruled the validity of his consent did not matter because, "[g]iven that the police made no warrantless entry into appellant's residence," *Payton* and *Ramey* were "inapplicable."

"DOORWAY" ARRESTS: A "doorway" arrest occurs when officers, having probable cause to arrest a suspect, make the arrest as he is standing in his doorway.[20] Such an arrest is permissible because the Supreme Court ruled in *United States* v. *Santana* that a person who is standing in the doorway of a home is in a "public" place (i.e., "one step forward would have put her outside, one step backward would have put her in the vestibule").[21] The Court reasoned that Ms. Santana "was not merely visible to the public but was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house."

Note that if the arrestee runs inside after officers attempt to arrest him at the doorway (as occurred in *Santana*) officers may chase him inside. This subject is covered later in the section on the exigent circumstance exception to *Ramey-Payton* and *Steagald*.

ARRESTS JUST INSIDE THE DOORWAY: If the arrestee is standing just inside an open doorway, the question arises: Do officers violate *Ramey-Payton* or *Steagald* if they reach in and grab him? Unfortunately, this is a gray area. On the one hand, there is a case from the Eleventh Circuit in which the court announced a broad rule that any intrusion past the threshold violates *Payton*.[22] On the other hand, the Ninth Circuit has ruled that a violation would not result if (1) the arrestee voluntarily opened the door; (2) he opened it so widely that he was exposed to public view; and (3) he knew, or should have known, that the callers were officers; e.g., the officers identified themselves as they knocked.

In the Ninth Circuit case, *U.S.* v. *Vaneaton,*[23] several Portland police officers went to Vaneaton's motel room to arrest him for a series of burglaries. When they knocked on the door, Vaneaton "opened the curtains of a window, looked at the officers, and opened the door." As he was standing "just inside the

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[17] *In re Danny E.* (1981) 121 Cal.App.3d 44, 51. Also see *People* v. *Martino* (1985) 166 Cal.App.3d 777, 789 ["The cops are getting a search warrant. If you have any dope, you had better get it out of there."]; *U.S.* v. *Michaud* (9th Cir. 2001) 268 F.3d 728, 733.

[18] (1979) 99 Cal.App.3d 874.

[19] (1985) 173 Cal.App.3d 1221.

[20] See *People* v. *Watkins* (1994) 26 Cal.App.4th 19, 29.

[21] (1976) 427 U.S. 38. Also see *People* v. *Hampton* (1985) 164 Cal.App.3d 27, 36; *U.S.* v. *Whitten* (9th Cir. 1983) 706 F.2d 1000, 1015.

[22] *McClish* v. *Nugent* (11th Cir. 2007) 483 F.3d 1231, 1248.

[23] (9th Cir. 1995) 49 F.3d 1423. Compare *U.S.* v. *Johnson* (9th Cir. 1980) 626 F.2d 753, 757 ["[I]t cannot be said that Johnson voluntarily exposed himself to warrantless arrest by opening his door to agents who misrepresented their identities."]; *U.S.* v. *McCraw* (4th Cir. 1990) 920 F.2d 224, 229 ["By opening the door only halfway, Mathis did not voluntarily expose himself to the public to the same extent as the arrestee in *Santana*"]; *U.S.* v. *Edmondson* (11th Cir. 1986) 791 F.2d 1512 [entry unlawful because the suspect opened the door after an agent yelled, "FBI. Open the door"].

threshold," an officer arrested him and obtained his consent to search the room. The search produced a gun which Vaneaton argued should have been suppressed on grounds that, unlike Santana, he was standing *inside* the threshold. Even so, said the court, the arrest did not violate *Payton* because, "[w]hen Vaneaton saw [the officers] through the window, he voluntarily opened the door and exposed both himself and the immediate area to them."

Although the California Supreme Court has not directly addressed the issue, it seemed to indicate that it, too, would rule that a violation would not result if the arrestee voluntarily opened to door to officers who had identified themselves. Specifically, in *People* v. *Jacobs* the court indicated that a warrantless entry might not violate *Ramey-Payton* if, under the circumstances, it did not "undermine the statutory purposes of safeguarding the privacy of citizens in their homes and preventing unnecessary violent confrontations between startled householders and arresting officers."[24]

Entry to arrest

Because *Ramey-Payton* and *Steagald* apply only if officers entered with the intent to immediately arrest an occupant, neither would apply if officers entered for some other purpose, even though the entry culminated in an arrest.

ENTRY TO INTERVIEW: Apart from the fact that *Ramey-Payton* and *Steagald* do not pertain to most consensual entries (a subject we will discuss shortly), they are also inapplicable to situations in which officers were admitted for the purpose of interviewing a person about a crime for which he was a suspect. Thus, a violation would not occur if officers made the arrest after the suspect said or did something that provided them with probable cause. As the California Court of Appeal explained, "[I]f probable cause to arrest arises *after* the officers have been voluntarily permitted to enter a residence in connection with their investigative work, an arrest may then be effected within the premises without the officers being required to beat a hasty retreat to obtain a warrant."[25]

If, however, the officers had probable cause to arrest when they entered, a court might find that they intended to make an arrest (which, as we will also discuss later, would probably invalidate the consent) unless the court was satisfied that the officers had not yet made the decision to do so. In other words, it must appear that the evidence against the suspect was such that he might have been able to explain it away, or at least cause the officers to postpone making an arrest until they could investigate further.

For example, in *People* v. *Patterson*[26] an untested informant told LAPD narcotics officers that he had observed the manufacture and sale of PCP inside a certain house. While an officer listened in on an extension, the informant phoned the house and spoke with an unidentified woman who said he could pick up an ounce for $105. About ten minutes later, four officers arrived at the house and knocked on the door. A woman, Patterson, came to the door and, after being informed of the tip and the ruse phone call, told the officers, "I don't know anything about any angel dust. Come on in." As the officers entered, they saw some vials containing a crystalline substance, and they could smell a strong chemical odor that was associated with cooking PCP. At that point, they arrested Patterson, obtained her consent to search the premises, and seized additional evidence.

On appeal, Patterson argued that, because the officers had probable cause when they entered, they must have intended to arrest her. The court disagreed, pointing out that the informant did not name Patterson as the source, plus the officers were not certain that Patterson was the woman who spoke with the informant on the phone. It was, therefore, possible that Patterson could have provided information that undermined or negated probable cause. "There is nothing in the record," said the court, "to indicate that the police intended to arrest Patterson immediately following the entry or that they were not prepared to discuss the matter with Patterson first in order to permit her to explain away the basis of the officers' suspicions."

[24] (1987) 43 Cal.3d 472, 480-81. Edited.
[25] *In re Danny E.* (1981) 121 Cal.App.3d 44, 52. Also see *People* v. *Villa* (1981) 125 Cal.App.3d 872, 878.
[26] (1979) 94 Cal.App.3d 456.

ENTRY TO MAKE UNDERCOVER BUY: Undercover officers are often admitted into the homes of suspects to buy or sell drugs or other contraband. As the officers walk through the door, they may intend to arrest the suspect *if* the sale is made. Nevertheless, the restrictions imposed by *Ramey-Payton* and *Steagald* do not apply because (1) the intent to arrest was contingent on what happened after the officers entered, and (2) the entry was consensual. We will discuss the subject of undercover entries below in the section on the consent exception.

PROBATION SEARCH, SEARCH WARRANT: *Ramey-Payton* and *Steagald* do not apply if officers entered to conduct a probation or parole search, or to execute a search warrant.[27] Accordingly, a violation would not result if officers arrested an occupant after they found incriminating evidence and thereby developed probable cause to arrest. (As noted on the next page, such authorization to search also constitutes authorization to enter to arrest.)

EXIGENT CIRCUMSTANCES: If officers entered because they reasonably believed an immediate entry was necessary to save lives or prevent the destruction of evidence, they do not violate *Ramey-Payton* or *Steagald* if they arrested an occupant after having developed probable cause.[28] Also see "Exceptions" (Exigent Circumstances) on page 13.

How to Comply: Entering the Arrestee's Home

As we will now discuss, if *Ramey-Payton* apply, officers may enter a suspect's home to arrest him only if all of the following circumstances existed:

(1) **Authorization to enter**: The officers must have had a legal right to enter.

(2) **Arrestee's home**: The officers must have had reason to believe the arrestee lived in the house or that he otherwise owned or controlled it.

(3) **Arrestee now inside**: The officers must have reasonably believed the arrestee was inside.

Authorization to enter

Legal authorization to enter the suspect's home will exist if the officers were aware that a conventional or *Ramey* warrant for his arrest had been issued, or that a warrant to search the premises had been issued, or that a warrantless entry was authorized by the terms of the suspect's probation or parole.

CONVENTIONAL ARREST WARRANT: A conventional arrest warrant is issued by a judge who, based on the filing of a criminal complaint by prosecutors and supporting documents (e.g., witness statements, laboratory reports, police reports), determined that there is probable cause to arrest.[29] A conventional warrant may be based on either a felony or a misdemeanor.[30]

RAMEY WARRANT: A so-called *Ramey* warrant is an arrest warrant that is issued by a judge *before* a complaint has been filed by prosecutors. As the name implies, *Ramey* warrants were developed in response to the *Ramey* decision, the reason being that, until then, most arrest warrants were conventional; i.e., they were issued only after prosecutors were satisfied that they could establish the arrestee's guilt beyond a reasonable doubt. But in many cases, officers could not obtain such proof unless they were able to take the suspect into custody and, for example, interrogate him, place him in a lineup, monitor his phone calls or visitor conversations, or obtain his fingerprints or a DNA sample.

As prosecutors considered the situation, they concluded that, because the Fourth Amendment permits judges to issue search warrants based on nothing more than probable cause, there was no reason to impose a higher standard for arrest warrants. And the courts subsequently agreed, ruling that an arrest warrant need not also demonstrate that prosecutors had made the decision to charge the suspect with the crime. As the Court of Appeal explained in *People* v. *Case*:

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[27] See *Payton* v. *New York* (1980) 445 U.S. 573, 576 [restrictions apply only if officers enter "in order to make a routine felony arrest"].

[28] See *People* v. *Bacigalupo* (1991) 1 Cal.4th 103, 122 ["The [arrest] warrant requirement is excused when exigent circumstances require prompt action by the police to prevent imminent danger to life or to forestall the imminent escape of a suspect or destruction of evidence."].

[29] See *Steagald* v. *United States* (1981) 451 U.S. 204, 213 ["An arrest warrant is issued upon a showing that probable cause exists to believe that the subject of the warrant has committed an offense."].

[30] See Pen. Code § 813 [felony warrants], Pen. Code § 1427 [misdemeanor warrants].

> From a practical standpoint the use of the "*Ramey* Warrant" form was apparently to permit, prior to an arrest, judicial scrutiny of an officer's belief that he had probable cause to make the arrest without involving the prosecutor's discretion in determining whether to initiate criminal proceedings.[31]

Today, the procedure for obtaining *Ramey* warrants has been incorporated into the Penal Code which authorizes judges to issue them if officers comply with the following procedure:[32]

(1) PREPARE DECLARATION: The officer prepares a Declaration of Probable Cause which, like a search warrant affidavit, contains the facts upon which probable cause is based.

(2) PREPARE *RAMEY* WARRANT: The officer prepares the *Ramey* warrant, which is technically known as a "Warrant of Probable Cause for Arrest."[33] A sample *Ramey* warrant is shown on page 19.

(3) SUBMIT TO JUDGE: The officer submits the declaration and warrant to a judge for review. This may be done in person, by fax, or by email.[34]

(4) WARRANT ISSUED: If the judge finds there is probable cause, he or she will issue the warrant.

(5) FILE CERTIFICATE OF SERVICE: After the warrant is executed, officers must file a "Certificate of Service" with the court clerk.[35] Such a certificate must include the date and time of arrest, the location of arrest, and the location of the facility in which the arrestee is incarcerated.

It is important to note that, although *Ramey* warrants sometimes contain the arrestee's last known address or some other address at which he might be staying, this does not constitute authorization to enter the home at that address. The reason (as we will explain in more detail below in the section "Arrestee's house?") is that, regardless of the inclusion of an address on the warrant, a *Ramey* warrant constitutes authorization to enter only a home in which officers—at the moment they entered—had reason to believe the arrestee was living and is now present. Thus, unlike an address that appears on a search warrant, an address on a *Ramey* warrant has no legal significance; i.e., it serves only as an aid in locating the arrestee.[36] (A sample *Ramey* Warrant is shown on page 19. Officers and prosecutors may obtain a copy of this form in Microsoft Word format (which can be edited) by sending a request from a departmental email address to POV@acgov.org.)

SEARCH WARRANT: Because a search warrant authorizes officers to enter the listed premises, it satisfies the "legal authorization" requirement even if they intended only to make an arrest. As the court observed in *People* v. *McCarter*, "[N]o *Ramey* violation as to [the arrestee] could have occurred under the present facts since the police had judicial authorization to enter her home via a validly issued and executed search warrant."[37] (It is arguable that officers with a search warrant who intended only to make an arrest could enter even if they lacked reason to believe that the arrestee lived there or that he is now on the premises. We are, however, unaware of any cases in which this issue was raised.)

PROBATION OR PAROLE SEARCH CONDITION: Officers have legal authorization to enter the arrestee's home for the purpose of arresting him if they were legally authorized to search it without a warrant pursuant to the terms of probation or parole.[38]

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[31] (1980) 105 Cal.App.3d 826, 831 [Edited]. Also see *Godwin* v. *Superior Court* (2001) 90 Cal.App.4th 215, 225.

[32] Pen. Code § 817.

[33] See Pen. Code §§ 815, 815a, 816; *People* v. *McCraw* (1990) 226 Cal.App.3d 346, 349.

[34] See Pen. Code § 817(c)(2).

[35] See Pen. Code § 817(h).

[36] See *Wanger* v. *Bonner* (5th Cir. 1980) 621 F.2d 675, 682 [court rejects the argument that "the inclusion of an address for the person to be arrested in the warrant provided the deputies with a reasonable basis for the belief that the [arrestee] could be found within the premises"]; *U.S.* v. *Lauter* (2d Cir. 1995) 57 F.3d 212, 215 ["Any discrepancy between the address in the supporting affidavit and the address where Lauter was ultimately arrested is irrelevant because all an arrest warrant must do is identify the person sought."]; *U.S.* v. *Bervaldi* (11th Cir. 2000) 226 F.3d 1256, 1263 [insignificant "that the arrest warrant listed the 132nd Place address"].

[37] (1981) 117 Cal.App.3d 894, 908.

[38] See *People* v. *Palmquist* (1981) 123 Cal.App.3d 1, 15 ["Since the officers had authorization to enter the home to search, the arrest inside was of no constitutional significance."]; *People* v. *Lewis* (1999) 74 Cal.App.4th 662, 673 ["The parolee who could not stop entry into the home for a search can have no greater power to prevent an entry for an arrest. The intrusion for the latter purpose is virtually the same as for the former."].

OTHER ARREST WARRANTS: There are five other types of arrest warrants that provide officers with authorization to enter:

PROBATION VIOLATION WARRANT: Issued by a judge based on probable cause to believe that the arrestee has violated the terms of his probation.[39]

PAROLE VIOLATION WARRANT: A parole violation warrant (also known as a parolee-at-large or PAL warrant) is issued by the parole board based on probable cause to believe that the parolee absconded.[40]

INDICTMENT WARRANT: Issued by a judge on grounds that the arrestee was indicted by a grand jury.[41]

BENCH WARRANT: Issued by a judge when a defendant fails to appear in court.[42]

WITNESS FTA WARRANT: Issued by a judge for the arrest of a witness who failed to appear in court after being ordered to do so.[43]

Arrestee's house?

In addition to having legal authorization to enter the residence, officers must have reason to believe the arrestee is, in fact, living there.[44] In many cases, however, this requirement is difficult to satisfy, especially when the arrestee is a transient or when he knows he is wanted, in which case he may try to conceal his whereabouts or move around a lot, staying with friends and relatives, or moving in and out of motels.[45] To complicate matters even more, it is common for a suspect's friends to furnish officers with false leads as to his current residence.[46] Nevertheless, this requirement is strictly enforced by the courts and is frequently litigated.

"LIVES" = COMMON AUTHORITY: An arrestee will be deemed "living" in a home if he has "common authority" or some other "significant relationship" to it.[47] As the Eighth Circuit observed, when a person has common authority over a residence, "that dwelling can certainly be considered her 'home' for Fourth Amendment purposes."[48]

Although there is no easy definition of the term "common authority,"[49] the Supreme Court noted that people will ordinarily have it if they had "joint access or control for most purposes."[50] Thus, in discussing this subject in *U.S.* v. *Franklin,* the Ninth Circuit observed that "[r]esidential arrangements take many forms. A 'residence' does not have to be an old ancestral home, but it requires more than a sleepover at someone else's place. It is insufficient to show that the [arrestee] may have spent the night there occasionally."[51]

On the other hand, an arrestee may be deemed to be "living in" a residence in which he stays on a regular basis for any significant period. For example, in *Washington* v. *Simpson* the Eighth Circuit ruled that an arrestee "resided" in a house in which she stayed two to four nights per week, kept some of her personal belonging there, and had previously given that address as her residence when she was booked."[52]

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[39] See Pen. Code § 1203.2(a).
[40] See Pen. Code § 3060(a); *People* v. *Hunter* (2006) 140 Cal.App.4th 1147, 1153-54; *U.S.* v. *Harper* (9th Cir. 1991) 928 F.2d 894, 896; *U.S.* v. *Pelletier* (1st Cir. 2006) 469 F.3d 194, 200.
[41] See Pen. Code § 945.
[42] See Pen. Code §§ 978.5, 813(c), 853.8, 983; *Allison* v. *County of Ventura* (1977) 68 Cal.App.3d 689, 701-2; *U.S.* v. *Gooch* (9th Cir. 2007) 506 F.3d 1156, 1159; *U.S.* v. *Spencer* (2nd Cir. 1982) 684 F.2d 220, 222.
[43] See Code Civ. Proc. § 1993.
[44] See *Payton* v. *New York* (1980) 445 U.S. 573, 602-3 [officers must have "reason to believe the suspect is within" the residence].
[45] See *U.S.* v. *Gay* (10th Cir. 2001) 240 F.3d 1222, 1227 ["Indeed the officers may take into account the fact that a person involved in criminal activity may be attempting to conceal his whereabouts."]; *U.S. Magluta* (11th Cir. 1995) 44 F.3d 1530, 1538.
[46] See *Motley* v. *Parks* (9th Cir. en banc 2005) 432 F.3d 1072, 1082 ["It is not an unheard-of phenomenon that one resident will tell police that another resident is not at home, when the other resident actually is hiding under a bed when the police came to call."].
[47] See *Case* v. *Kitsap County Sheriff's Department* (9th Cir. 2001) 249 F.3d 921, 931; *Valdez* v. *McPheters* (10th Cir. 1999) 172 F.3d 1120, 1225; *U.S.* v. *Gay* (10th Cir. 2001) 240 F.3d 1222, 1226.
[48] *U.S.* v. *Risse* (8th Cir. 1996) 83 F.3d 212, 217.
[49] See *U.S.* v. *Nezaj* (S.D.N.Y. 1987) 666 F.Supp. 494, 500 ["The question of when a dwelling is someone's home can be a difficult factual and legal issue"].
[50] *United States* v. *Matlock* (1974) 415 U.S. 164, 171, fn.7.
[51] (9th Cir. 2010) 603 F.3d 652, 656. Also see *Perez* v. *Simpson* (9th Cir. 1989) 884 F.2d 1136, 1141 [arrestee did not reside in the house merely because "he spent the night there on occasion"].
[52] (8th Cir. 1986) 806 F.2d 192, 196.

It should be noted that a person may have common authority over two or more residences, or a residence that is owned by someone else.[53] Consequently, when this issue arose in *U.S.* v. *Risse* the court explained:

> [S]o long as [the arrestee] possesses common authority over, or some other significant relationship to, the Huntington Road residence, that dwelling can certainly be considered her "home" for Fourth Amendment purposes, even if the premises are owned by a third party and others are living there, and even if [the arrestee] concurrently maintains a residence elsewhere as well.[54]

"REASON TO BELIEVE": As noted, officers must have "reason to believe" that the arrestee currently lives in the residence. Unfortunately, when the United States Supreme Court announced the "reason to believe" standard in *Payton* v. *New York* it neglected to mention whether it means probable cause, reasonable suspicion, or some hybrid level of proof. Not surprisingly, the Court's failure has resulted in much confusion, and has required the lower courts to expend substantial resources in trying to resolve the matter.[55]

In any event, most courts have concluded that the term means reasonable suspicion,[56] while only one—the Ninth Circuit—has categorically ruled that it means probable cause.[57] Other courts that have been presented with the issue—including the California Supreme Court—have declined to rule on the issue in cases where it was unnecessary to do so since it was apparent that, even if probable cause were required, the officers had it.[58]

It would be pointless to try to resolve the matter here, except perhaps to note that, because the U.S. Supreme Court is quite familiar with the term "probable cause" (after all, it plays a central role in the text of the Fourth Amendment), and because the Court elected not to use it in *Payton*, there is a strong possibility that it had something else in mind.[59] As the District of Columbia Circuit aptly observed, "We think it more likely that the Supreme Court in *Payton* used a phrase other than 'probable cause' because it meant something other than 'probable cause.'"[60]

That being said, it doesn't seem to matter much whether the standard is reasonable suspicion or probable cause. This is because officers usually have sufficient information as to where arrestees live to

[53] See *Case* v. *Kitsap County Sheriff's Department* (9th Cir. 2001) 249 F.3d 921, 931 [officers reasonably believed that the arrestee lived at the house "at least part of the time"]; *U.S.* v. *Litteral* (9th Cir. 1990) 910 F.2d 547, 553 ["But if the suspect is a co-resident of the third party, then . . . *Payton* allows both arrest of the subject of the arrest warrant and use of the evidence found against the third party."]; *U.S.* v. *Junkman* (8th Cir. 1998) 160 F.3d 1191, 1194 ["As long as the officers reasonably believed Kent Junkman was a co-resident of the room, the entry into the room to arrest Kent Junkman was a reasonable one."].

[54] (8th Cir. 1996) 83 F.3d 212, 217.

[55] See *U.S.* v. *Diaz* (9th Cir. 2007) 491 F.3d 1074, 1077 ["The question of what constitutes an adequate 'reason to believe' has given difficulty to many courts, including the district court in the present case. The Supreme Court did not elaborate on the meaning of 'reason to believe' in *Payton* and has not done so since then."]; *U.S.* v. *Magluta* (11th Cir. 1995) 44 F.3d 1530, 1533 ["The 'reason to believe' standard was not defined in *Payton,* and since *Payton,* neither the Supreme Court, nor the courts of appeals have provided much illumination."].

[56] See *U.S.* v. *Lauter* (2nd Cir. 1995) 57 F.3d 212, 215; *U.S.* v. *Lovelock* (2nd Cir. 1999) 170 F.3d 339, 343; *U.S.* v. *Thomas* (D.C. Cir. 2005) 429 F.3d 282, 286; *U.S.* v. *Route* (5th Cir. 1997) 104 F.3d 59, 62; *U.S.* v. *Risse* (8th Cir. 1996) 83 F.3d 212, 216; *Valdez* v. *McPheters* (10th Cir. 1999) 172 F.3d 1220, 1224.

[57] *U.S.* v. *Gorman* (9th Cir. 2002) 314 F.3d 1105, 1111. Also see *Cuevas* v. *De Roco* (9th Cir. 2008) 531 F.3d 726, 736 [court notes the "inconsistency" between the Ninth Circuit and other circuits]; *U.S* v. *Harper* (9th Cir. 1991) 900 F.2d 213; *U.S.* v. *Diaz* (9th Cir. 2007) 491 F.3d 1074, 1077 ["The phrase 'reason to believe' is interchangeable with and conceptually identical to the phrases 'reasonable belief' and 'reasonable grounds for believing,' which frequently appear in our cases."]. Also see *People* v. *Downey* (2011) 198 Cal.App.4th 652, 661 ["The Ninth Circuit stands alone among the federal circuits in its interpretation of *Payton* as requiring probable cause."].

[58] See *People* v. *Jacobs* (1987) 43 Cal.3d 472, 479, fn.4 ["Whatever the quantum of probable cause required by the Fourth Amendment, the officers in this case did not have it"; but the court also noted that Pen. Code § 844 requires "reasonable grounds" which has been deemed the "substantial equivalent" of probable cause, at p. 479.]; *People* v. *White* (1986) 183 Cal.App.3d 1199, 1207 [California cases "leave open the question whether this means a full measure of probable cause or something less"].

[59] See *U.S.* v. *Magluta* (11th Cir. 1995) 44 F.3d 1530, 1534 ["The strongest support for a lesser burden than probable cause remains the text of *Payton,* and what we must assume was a conscious effort on the part of the Supreme Court in choosing the verbal formulation of 'reason to believe' over that of 'probable cause.'"].

[60] *U.S.* v. *Thomas* (D.C. Cir. 2005) 429 F.3d 282, 286. Also see *People* v. *Downey* (2011) 198 Cal.App.4th 652, 661.

satisfy the higher standard. In fact, we are unaware of any case decided on grounds that the officers had reasonable suspicion but not probable cause. As the Fifth Circuit observed, "The disagreement among the circuits has been more about semantics than substance."[61]

It is, however, clear that, in applying the "reason to believe" standard, the courts will consider the totality of circumstances known to the arresting officers; and they will analyze the circumstances by applying common sense, not hypertechnical analysis.[62] And although a single circumstance will sometimes suffice, in most cases it will take a combination of two or more. Finally, the significance of a particular circumstance will naturally depend on when it occurred. Thus, if the information concerning the arrestee's residence is old, officers will be required to prove that they had reason to believe he still lives there.[63]

RELEVANT CIRCUMSTANCES: Although the courts will consider the totality of circumstances in making a determination as to where the arrestee lives, the following are especially relevant:

LISTED ADDRESS: The address was listed as the arrestee's residence on one or more of the following: rental or lease agreement,[64] hotel or motel registration,[65] utility billing records,[66] telephone or internet records,[67] credit card application,[68] employment application,[69] post office records,[70] DMV records,[71] vehicle repair work order,[72] jail booking records,[73] bail bond application,[74] police or arrest report,[75] parole or probation records.[76]

INFORMATION FROM ARRESTEE OR OTHERS: The arrestee, a reliable informant, or a citizen informant notified officers that the arrestee was presently living at that address.[77] On this subject, two things should be noted. First, the significance of information from an untested informant will usually

[61] *U.S.* v. *Barrera* (5th Cir. 2006) 464 F.3d 496, 501, fn.5.
[62] See *U.S.* v. *Graham* (1st Cir. 2009) 553 F.3d 6, 14; *U.S.* v. *Bervaldi* (11th Cir. 2000) 226 F.3d 1256, 1263; *U.S.* v. *Lovelock* (2nd Cir. 1999) 170 F.3d 339, 344; *U.S.* v. *Gay* (10th Cir. 2001) 240 F.3d 1222, 1227.
[63] See *People* v. *Bennetto* (1974) 10 Cal.3d 695, 699-700; *U.S.* v. *Bervaldi* (11th Cir. 2000) 226 F.3d 1256, 1264.
[64] See *U.S.* v. *Edmonds* (3d Cir. 1995) 52 F.3d 1236, 1247-48 [arrestee "signed the lease and paid the rent"]; *U.S.* v. *Bennett* (11th Cir. 2009) 555 F.3d 962, 965 ["Bennett had recently delivered the rent for the apartment to the building's landlord"].
[65] See *People* v. *Fuller* (1983) 148 Cal.App.3d 257, 263 [hotel room was registered to suspect]; *U.S.* v. *Franklin* (9th Cir. 2010) 603 F.3d 652, 657 ["When the location in question is a motel room, however, especially one identified as having been rented by the person in question, establishing that location as the person's residence is much less difficult."].
[66] See *People* v. *Downey* (2011) 198 Cal.App.4th 652, 659 [officer testified that "utility bills were a very good source in finding out where someone lives because in his experience many probationers and parolees . . . did not know that police had access to utility bills"]; *U.S.* v. *Route* (5th Cir. 1997) 104 F.3d 59, 61, fn.1; *U.S.* v. *Romo-Corrales* (8th Cir. 2010) 592 F.3d 915.
[67] See *People* v. *Icenogle* (1977) 71 Cal.App.3d 576, 581; *U.S.* v. *Terry* (2nd Cir. 1983) 702 F.2d 299, 319.
[68] See *U.S.* v. *Route* (5th Cir. 1997) 104 F.3d 59, 62, fn.1.
[69] See *People* v. *Jacobs* (1987) 43 Cal.3d 472, 478.
[70] See *U.S.* v. *Route* (5th Cir. 1997) 104 F.3d 59, 61, fn.1; *U.S.* v. *Stinson* (D. Conn. 1994) 857 F.Supp. 1026, 1031.
[71] See *U.S.* v. *Route* (5th Cir. 1997) 104 F.3d 59, 62, fn.1; *People* v. *Boyd* (1990) 224 Cal.App.3d 736, 740; *U.S.* v. *Ayers* (9th Cir. 1991) 924 F.2d 1468, 1480.
[72] See *U.S.* v. *Manley* (2d Cir. 1980) 632 F.2d 978, 983.
[73] See *Washington* v. *Simpson* (8th Cir. 1986) 806 F.2d 192, 196; *U.S.* v. *Clayton* (8th Cir. 2000) 210 F.3d 841, 842-43.
[74] See *U.S.* v. *Barrera* (5th Cir. 2006) 464 F.3d 496, 504.
[75] See *People* v. *Ott* (1978) 84 Cal.App.3d 118, 126; *U.S.* v. *Graham* (1st Cir. 2009) 553 F.3d 6, 13; *U.S.* v. *Ayers* (9th Cir. 1991) 924 F.2d 1468, 1479.
[76] See *U.S.* v. *Lovelock* (2nd Cir. 1999) 170 F.3d 339, 344; *People* v. *Kanos* (1971) 14 Cal.App.3d 642, 645, 648; *U.S.* v. *Thomas* (D.C. Cir. 2005) 429 F.3d 282, 286; *U.S.* v. *Mayer* (9th Cir. 2008) 530 F.3d 1099, 1104; *U.S.* v. *Graham* (1st Cir. 2009) 553 F.3d 6, 13.
[77] See *People* v. *Dyke* (1990) 224 Cal.App.3d 648, 659 [motel desk clerk had reason to believe that the arrestee was staying with a guest]; *U.S.* v. *Risse* (8th Cir. 1996) 83 F.3d 212, 216-17; *People* v. *Alcorn* (1993) 15 Cal.App.4th 652, 655; *U.S.* v. *Junkman* (8th Cir. 1998) 160 F.3d 1191, 1192 [motel desk clerk ID'd the arrestee as a guest]; *U.S.* v. *De Parias* (11th Cir. 1986) 805 F.2d 1447, 1457 ["The apartment manager had informed the FBI agents that the De Pariases lived there"]; *U.S.* v. *Franklin* (9th Cir. 2010) 603 F.3d 652, 656 [an officer "previously received a tip that Franklin was living in the room from a credible informant"]; *U.S.* v. *Edmonds* (3d Cir. 1995) 52 F.3d 1236, 1248 [apartment manager notified agents that the arrestee had just been observed "exiting his apartment and departing the area"]; *U.S.* v. *Mayer* (9th Cir. 2008) 530 F.3d 1099, 1104 ["one of Mayer's Hansen Lane neighbors called Rauch to report that Mayer was residing at 103 Hansen Lane"]; *U.S.* v. *Graham* (1st Cir. 2009) 553 F.3d 6, 13 ["officers showed a picture of Graham to a person outside the apartment who pointed the officers towards the apartment"].

depend on whether there was some corroboration or other reason to believe the information was accurate.[78]

Second, officers are not required to accept information from a friend or relative that the arrestee lives or does not live in a certain residence. Thus, in *Motley* v. *Parks* the court noted that "Motley's statement that [the parolee] did not live at that address, coming from a less-than-disinterested source, did not undermine the information that officers previously had received from their advance briefing."[79]

DIRECT OBSERVATION: Officers, neighbors, landlords, or others had repeatedly or recently seen the arrestee on the premises.[80] It is especially relevant that the arrestee was observed doing things that residents commonly do; e.g. taking out the garbage, chatting with neighbors, leaving early in the morning, opening the door with a key.[81]

ARRESTEE'S CAR PARKED OUTSIDE: The arrestee's car (or a car he was using) was regularly parked in the driveway, in front of the residence, or nearby; e.g., "cars known to be driven by [the arrestee] were at the [residence],"[82] the apartment manager confirmed that the arrestee "used the black Ford Mustang then parked immediately in front of the apartment."[83]

Arrestee is now inside

Even if officers had reason to believe that the arrestee was living in a certain residence, they may not enter the premises unless they also had reason to believe that he was presently inside.[84] This requirement may be satisfied by direct or circumstantial evidence, so we will start with the most common examples of direct evidence:

SURVEILLANCE: Officers saw the arrestee enter but not exit.[85]

INFORMATION FROM OTHERS: A friend, relative, property manager, or other person provided officers with firsthand information that the arrestee was now inside; e.g., the person had just seen him inside.[86] Again, officers are not required to accept the word of a friend or relative of the arrestee as to his current whereabouts because, as the Ninth Circuit observed, "It is not an unheard-of phenomenon that one resident will tell police that another resident is not at home, when the other resident actually is hiding under a bed when the police came to call."[87]

INFORMATION FROM PERSON WHO ANSWERED THE DOOR: The person who answered the door said the arrestee was now inside.[88]

ARRESTEE ANSWERED THE PHONE: Officers phoned the residence, and the arrestee answered.[89]

[78] See *U.S.* v. *Mayer* (9th Cir. 2008) 530 F.3d 1099; *People* v. *Spratt* (1980) 104 Cal.App.3d 562, 568; *People* v. *Icenogle* (1977) 71 Cal.App.3d 576, 581.

[79] (9th Cir. en banc 2005) 432 F.3d 1072, 1082.

[80] See *People* v. *Gibson* (2001) 90 Cal.App.4th 371, 381; *U.S.* v. *Bervaldi* (11th Cir. 2000) 226 F.3d 1256, 1263; *People* v. *Kanos* (1971) 14 Cal.App.3d 642, 645, 648-49; *U.S.* v. *Risse* (8th Cir. 1996) 83 F.3d 212, 217; *U.S.* v. *Romo-Corrales* (8th Cir. 2010) 592 F.3d 915, 919; *People* v. *Ford* (1975) 54 Cal.App.3d 149, 156.

[81] See *U.S.* v. *Dally* (9th Cir. 1979) 606 F.2d 861; *People* v. *Kanos* (1971) 14 Cal.App.3d 642, 648 [officers saw the suspect leaving the house at 7:30 A.M. with his wife and child]; *U.S.* v. *Harper* (9th Cir. 1991) 928 F.2d 894, 896 ["the police observed David entering the home with his own key once or twice during a three day period"]; *People* v. *Icenogle* (1977) 71 Cal.App.3d 576, 582; *People* v. *Ford* (1975) 54 Cal.App.3d 149, 156.

[82] *U.S.* v. *Barrera* (5th Cir. 2006) 464 F.3d 496, 504. Also see *People* v. *Icenogle* (1977) 71 Cal.App.3d 576, 581; *U.S.* v. *Magluta* (11th Cir. 1995) 44 F.3d 1530, 1537-38; *U.S.* v. *Edmonds* (3d Cir. 1995) 52 F.3d 1236; *U.S.* v. *Harper* (9th Cir. 1991) 928 F.2d 894, 896; *U.S.* v. *Bervaldi* (11th Cir. 2000) 226 F.3d 1256, 1264; *People* v. *Boyd* (1990) 224 Cal.App.3d 736, 750.

[83] *U.S.* v. *Edmonds* (3d Cir. 1995) 52 F.3d 1236, 1248.

[84] See *Payton* v. *New York* (1980) 445 U.S. 573, 603; *People* v. *Alcorn* (1993) 15 Cal.App.4th 652, 655.

[85] See *People* v. *Ford* (1975) 54 Cal.App.3d 149, 156. *People* v. *Wader* (1993) 5 Cal.4th 610, 633 [an officer saw the suspect inside the house in the early morning hours; at about 2:30 A.M. the lights in the house were turned off; officers entered at 6:15 A.M.]; *U.S.* v. *Agnew* (3d Cir. 2005) 407 F.3d 193, 196, ["they saw him through the window"].

[86] See *U.S.* v. *Jackson* (7th Cir. 2009) 576 F.3d 465, 469; *People* v. *Jacobs* (1987) 43 Cal.3d 472, 479; *People* v. *Alcorn* (1993) 15 Cal.App.4th 652, 655; *People* v. *Superior Court (Dai-Re)* (1980) 104 Cal.App.3d 86, 89; *People* v. *Bacigalupo* (1991) 1 Cal.4th 103, 121; *U.S.* v. *Hardin* (6th Cir. 2009) 539 F.3d 404, 414; *People* v. *Manderscheid* (2002) 99 Cal.App.4th 355, 361-62; *People* v. *Marshall* (1968) 69 Cal.2d 51, 56; *People* v. *Dyke* (1990) 224 Cal.App.3d 648, 659.

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

[88] See *U.S.* v. *Clayton* (8th Cir. 2000) 210 F.3d 841, 844; *U.S.* v. *Taylor* (D.C. Cir. 2007) 497 F.3d 673, 679.

[89] See *Maryland* v. *Buie* (1990) 494 U.S. 325, 328; *Case* v. *Kitsap County Sheriff's Department* (9th Cir. 2001) 249 F.3d 921, 931.

As for circumstantial evidence, the following will help support an inference that the arrestee is now inside the residence:

SUSPICIOUS RESPONSE BY PERSON AT THE DOOR: The person who answered the door did not respond or was evasive when officers asked if the arrestee was inside.[90]

ARRESTEE'S CAR WAS PARKED OUTSIDE: The arrestee's car (or a car he was known to be using) was parked at or near the residence. As the court observed in *United States* v. *Magluta,* "The presence of a vehicle connected to a suspect is sufficient to create the inference that the suspect is at home."[91] It is, of course, also relevant that the hood over the engine compartment was relatively warm.[92]

ARRESTEE LIVED ALONE, PLUS SIGNS OF ACTIVITY: Officers reasonably believed that the suspect lived alone and there were indications that someone was inside; e.g., sounds of TV or radio, a "thud," lights on. Thus, the court in *U.S.* v. *Morehead* pointed out that the illuminated lights "could have reasonably led the officers to believe that [the arrestee] was inside."[93]

SUSPICIOUS RESPONSE TO KNOCKING: When officers knocked and announced, they heard sounds or saw activity inside the premises that reasonably indicated an occupant was trying to hide or avoid them; e.g., someone yelled "cops," then there was a "commotion in the room."[94]

WORK SCHEDULE, HABITS: Officers entered when the arrestee was usually at home based on his work schedule or habits. As the Eleventh Circuit observed, "[O]fficers may presume that a person is at home at certain times of the day—a presumption which can be rebutted by contrary evidence regarding the suspect's known schedule."[95]

Also note that the failure of anyone to respond to the officers' knock and announcement does not conclusively prove that the arrestee was not at home, especially if there were other circumstances that reasonably indicated he was present.[96]

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[90] See *People* v. *Dyke* (1990) 224 Cal.App.3d 648, 659 [the person who opened the door "appeared nervous and uncooperative"]. Compare *People* v. *Jacobs* (1987) 43 Cal.3d 472, 479 ["When they asked Gretchen if defendant was home, she told them he would be back in an hour. The evidence does not suggest that Gretchen's response or behavior further aroused the officers' suspicions."].

[91] (11th Cir. 1995) 44 F.3d 1530, 1538. Also see *People* v. *Williams* (1989) 48 Cal.3d 1112, 1139 ["The proximity of the [murder] victim's car clearly suggested defendant's presence in the apartment"]; *U.S.* v. *Morehead* (10th Cir. 1992) 959 F.2d 1489, 1496 ["[T]he presence of a car in the carport and a truck in front of the house gave the officers reason to believe [the arrestee] was on the premises."]; *U.S.* v. *Litteral* (9th Cir. 1990) 910 F.2d 547, 554 ["The informant told the agents that if Litteral's car was there, he would be there."]; *Valdez* v. *McPheters* (10th Cir. 1999) 172 F.3d 1120, 1225 ["The suspect's presence may be suggested by the presence of an automobile."]; *U.S.* v. *De Parias* (11th Cir. 1986) 805 F.2d 1447, 1457 ["The apartment manager had informed the FBI agents that the De Pariases lived there and that they were home if a certain car was parked in front of the apartment."]. Compare *People* v. *White* (1986) 183 Cal.App.3d 1199, 1209 ["[W]hen they arrived at the house they did not see any car fitting the victim's description anywhere in the vicinity."]; *People* v. *Jacobs* (1987) 43 Cal.3d 472, 479 ["Defendant's vehicles were nowhere in sight."].

[92] See *U.S.* v. *Boyd* (8th Cir. 1999) 180 F.3d 967, 978 ["the hood of Troup's black Volvo was still warm which confirmed the CI's statement that Troupe had just arrived"].

[93] (10th Cir. 1992) 959 F.2d 1489, 1496-97. Also see *U.S.* v. *Gay* (10th Cir. 2001) 240 F.3d 1222, 1227 [a "thud"]. Compare *People* v. *Bennetto* (1974) 10 Cal.3d 695, 700 ["the police heard no sounds during the short time they listened outside the apartment"].

[94] *U.S.* v. *Junkman* (8th Cir. 1998) 160 F.3d 1191, 1193. Also see *People* v. *Dyke* (1990) 224 Cal.App.3d 648, 659 [someone inside said "it's the fucking pigs"].

[95] *U.S.* v. *Magluta* (11th Cir. 1995) 44 F.3d 1530, 1535. Also see *U.S.* v. *Diaz* (9th Cir. 2007) 491 F.3d 1074, 1078 [the arrestee previously told officers that he was usually home during the day, and that he worked at home as a mechanic]; *U.S.* v. *Terry* (2d Cir. 1983) 702 F.2d 299, 319 ["[T]he agents arrived at the apartment at 8:45 A.M. on a Sunday morning, a time when they could reasonably believe that [the arrestee] would be home."]; *U.S.* v. *Edmonds* (3d Cir. 1995) 52 F.3d 1236, 1248 ["Normally a person who is currently living at an apartment returns there at some point to spend the night and does not leave prior to 6:45 A.M."]; *U.S.* v. *Lauter* (2d Cir. 1995) 57 F.3d 212, 215 [reliable informant said the arrestee was unemployed and usually slept late]; *Valdez* v. *McPheters* (10th Cir. 1999) 172 F.3d 1120, 1227 [officer was aware that the suspect "was unemployed, liked to stay out late drinking, sometimes abused drugs such as heroin and cocaine, and was suspected of having committed at least two nighttime burglaries"]. But also see *People* v. *Jacobs* (1987) 43 Cal.3d 472, 478-79 ["Although [the officer's] testimony supports an inference that [the unemployed] defendant *could* be home at 3:20 P.M. . . . it does not, without more, support a finding that the officers had reasonable grounds to believe defendant was in fact home."].

[96] See *U.S.* v. *Beck* (11th Cir. 1984) 729 F.2d 1329, 1332; *U.S.* v. *Edmonds* (3d Cir. 1995) 52 F.3d 1326, 1248; *Case* v. *Kitsap County Sheriff's Department* (9th Cir. 2001) 249 F.3d 921, 931.

Steagald Warrants: Entering a Third Party's Home

Until now, we have been discussing the requirements for entering the arrestee's home. But officers will often have reason to believe that the arrestee is temporarily staying elsewhere, such as the home of a friend or relative. This typically occurs when the arrestee does not have a permanent address or when he is staying away from his home because he knows that officers are looking for him.

Although officers may enter a third party's home to arrest a guest or visitor if they obtained consent from a resident or if there were exigent circumstances (discussed below), they may not enter merely because they had an arrest warrant. Instead, the Supreme Court ruled in *Steagald* v. *United States* that they must have a search warrant—commonly known as a *Steagald* warrant—that expressly authorizes a search of the premises for the arrestee.[97]

There are essentially two reasons for this requirement. First, a warrant helps protect the privacy interests of the people who live in the home because it cannot be issued unless a judge has determined there is, in fact, probable cause to believe that the arrestee is on the premises. Second, there would exist a "potential for abuse"[98] because officers with an arrest warrant would have carte blanche to forcibly enter any home in which the arrestee was reasonably believed to be temporarily located.

As we will now discuss, there are two types of *Steagald* warrants: conventional and anticipatory.

Conventional Steagald warrants

Conventional *Steagald* warrants can be issued only if there is both probable cause to search the premises for the arrestee, and probable cause to arrest him. Thus, the affidavit in support of a conventional *Steagald* warrant must establish the following:

PROBABLE CAUSE TO ARREST: There are two ways to establish probable cause to arrest the suspect:

(1) WARRANT OUTSTANDING: If an arrest warrant had already been issued, the affiant can simply attach a copy and incorporate it by reference; e.g., *"Attached hereto and incorporated by reference is a copy of the warrant for the arrest of [name of arrestee]. It is marked Exhibit A."*

(2) SET FORTH FACTS: If an arrest warrant had not yet been issued, probable cause to arrest can be established in two ways, depending on whether officers are seeking a conventional *Steagald* warrant or an anticipatory *Steagald* warrant.

STANDARD STEAGALD WARRANT: The affidavit must contain the facts upon which probable cause to arrest is based.

ANTICIPATORY STEAGALD WARRANT: If officers are seeking an anticipatory *Steagald* warrant (discussed below), the affidavit must contain the facts demonstrating that probable cause to arrest will exist when a triggering event occurs.

PROBABLE CAUSE TO SEARCH: To establish probable cause to search the premises for the arrestee, the affidavit must contain facts that establish a "fair probability" or "substantial chance"[99] of the following: (1) the arrestee was inside the residence when the warrant was issued, and (2) he would still be there when the warrant was executed. A sample *Steagald* Warrant is shown on page 20. (Officers and prosecutors may obtain a copy of this form in Microsoft Word format (which can be edited) by sending a request from a departmental email address to POV@acgov.org.)

Anticipatory Steagald warrants

If officers expect that it will be difficult to establish probable cause for a conventional *Steagald* warrant, they may be able to obtain an "anticipatory" *Steagald* warrant which will authorize them to enter the premises and search for the arrestee if and when a "triggering event" occurs; e.g., a completed sale of drugs. As the Fourth Circuit observed, "[M]ost anticipatory warrants subject their execution to some condition precedent—a so-called 'triggering condition'—which, when satisfied, becomes the final piece of evidence needed to establish probable cause."[100]

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[97] (1981) 451 U.S. 204, 216.
[98] *Steagald* v. *United States* (1981) 451 U.S. 204, 215.
[99] See *Illinois* v. *Gates* (1983) 462 U.S. 213, 238, 244, fn13.
[100] *U.S.* v. *Andrews* (4th Cir. 2009) 577 F.3d 231, 237. Edited.

To obtain an anticipatory warrant, the affiant must describe the triggering event in terms that are "explicit, clear, and narrowly drawn."[101] In addition, the affidavit must contain facts that establish the following:

(1) PROBABLE CAUSE TO ARREST: Probable cause to arrest the suspect will exist when the triggering event occurs.

(2) PROBABLE CAUSE FOR TRIGGERING EVENT: There is probable cause to believe the triggering event will occur,[102] and that it will occur before the warrant expires.[103]

(3) PROBABLE CAUSE TO SEARCH: There is probable cause to believe the arrestee will be inside the premises when the triggering event occurs.[104]

An example of an Anticipatory *Steagald* Warrant is shown on page 20.

Alternatives to Steagald warrants

Steagald warrants—whether conventional or anticipatory—are often impractical. Anticipatory warrants are problematic because it may be difficult to satisfy the triggering event requirement. And conventional warrants may not be feasible because it is often difficult to prove that the arrestee will still be inside the residence when officers arrive to execute the warrant. As the Justice Department noted in its argument in *Steagald*, "[P]ersons, as opposed to objects, are inherently mobile, and thus officers seeking to effect an arrest may be forced to return to the magistrate several times as the subject of the arrest warrant moves from place to place."[105]

In many cases, however, officers can avoid the need for a *Steagald* warrant if they can locate the arrestee inside his own home (in which case only an arrest warrant would be required) or if they can wait until he leaves the premises or is in a public place (in which case only probable cause would be required).[106] Also, as we will discuss next, officers may enter if they obtained consent or if there were exigent circumstances.

Exceptions

There are three exceptions to the rule that officers must have an arrest warrant or a *Steagald* search warrant to enter a residence to arrest an occupant: (1) exigent circumstances, (2) consent, and (3) "consent once removed."

Exigent circumstances

While there are many types of exigent circumstances that will justify a warrantless entry, there are essentially only four that are relevant in situations where officers enter with the intent to arrest an occupant: hot pursuits, fresh pursuits, armed standoffs, and evidence destruction.

HOT PURSUITS: In the context of *Ramey-Payton* and *Steagald*, a "hot" pursuit occurs when (1) officers attempt to arrest a suspect in a public place, and (2) he responds by fleeing into his home or other private structure. When this happens, as the Court of Appeal explained, officers may go in after him:

> As the term suggests, this exception dispenses with the warrant requirement when officers are chasing a suspect who is in active flight. The justification is that otherwise he might escape again while the police sit around waiting for the warrant to be issued.[107]

For example, in *United States* v. *Santana*[108] officers in Philadelphia went to Santana's home to arrest her shortly after she sold heroin to an undercover officer. As they pulled up, Santana was standing in the doorway to the house, but then quickly ran inside. The officers followed her and, in the course of making the arrest, they seized some heroin in plain view. On appeal, the Supreme Court ruled that the entry fell within the "hot pursuit" exception, explaining that "a suspect may not defeat an arrest which has been set in motion in a public place by the expedient of escaping to a private place." Note that an entry under the hot pursuit exception is permitted even though the arrestee was wanted for only a misdemeanor.[109]

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[101] *U.S.* v. *Penney* (6th Cir. 2009) 576 F.3d 297, 310.
[102] See *United States* v. *Grubbs* (2006) 547 U.S. 90, 96; *People* v. *Sousa* (1993) 18 Cal.App.4th 549, 559-60.
[103] See *Alvidres* v. *Superior Court* (1970) 12 Cal.App.3d 575, 581.
[104] See *United States* v. *Grubbs* (2006) 547 U.S. 90, 96; *People* v. *Sousa* (1993) 18 Cal.App.4th 549, 559.
[105] *Steagald* v. *United States* (1981) 451 U.S. 204, 220-21.
[106] See *Steagald* v. *United States* (1981) 451 U.S. 204, 221, fn.14.
[107] *People* v. *White* (1986) 183 Cal.App.3d 1199, 1203.
[108] (1976) 427 U.S. 38, 43.
[109] See *People* v. *Lloyd* (1989) 216 Cal.3d 1425, 1430.

FRESH PURSUITS: Unlike "hot" pursuits, "fresh" pursuits are not physical chases. Instead, they are better defined as investigative pursuits in the sense that officers are actively attempting to apprehend the perpetrator of a crime and, in doing so, are quickly responding to leads as to his whereabouts; and eventually they develop reason to believe that he is presently inside a certain home or other private structure. In such situations, officers may enter the premises under the "fresh pursuit" exception if the following circumstances existed:

(1) SERIOUS FELONY: The crime under investigation must have been a serious felony, usually a violent one.

(2) DILIGENCE: After the crime was committed, the officers must have been diligent in their attempt to apprehend the perpetrator.

(3) PROBABLE CAUSE: At some point in their investigation, the officers must have developed probable cause to arrest the suspect.

(4) SUSPECT LOCATED: The officers must have developed "reason to believe" that the perpetrator was inside the premises. (The "reason to believe" standard was covered earlier.)

(5) CIRCUMSTANTIAL EVIDENCE OF FLIGHT: The officers must have been aware of circumstances indicating the perpetrator was in active flight or soon would be; ė.g., he knew he had been identified by a witness or that an accomplice had been arrested.[110]

ARMED STANDOFFS: An armed standoff is loosely defined as a situation in which (1) officers have probable cause to arrest a person who is reasonably believed to be armed and dangerous, (2) the person is inside his home or other structure, and (3) he refuses to surrender. In these situations, officers may enter without a warrant for the purpose of arresting him. As the Ninth Circuit explained in *Fisher* v. *City of San Jose*:

> [D]uring such a standoff, once exigent circumstances justify the warrantless seizure of the suspect in his home, and so long as the police are actively engaged in completing his arrest, police need not obtain an arrest warrant before taking the suspect into full physical custody.[111]

DESTRUCTION OF EVIDENCE: Officers may also make a warrantless entry to arrest an occupant if they reasonably believed (1) there was evidence on the premises, and (2) the arrestee would destroy it if they waited for a warrant.[112] Note that, although the crime under investigation need not be "serious" or even a felony,[113] the courts may be less apt to find exigent circumstances if the evidence did not pertain to a serious crime.[114] Also, officers must be able to cite specific facts that reasonably indicated the evidence was about to be destroyed. For example, in *People* v. *Edwards* the court ruled that an officer's testimony that the arrestee "might destroy evidence" was insufficient because, said the court, "Those generalized misgivings present in every case do not constitute exigent circumstances."[115]

Consensual entry

Officers may, of course, enter a home if they had obtained voluntary consent to do so from a person who reasonably appeared to have had the authority to admit them. But such consent may be ineffective if the officers intended to immediately arrest the consenting person or other occupant but neglected to reveal their intentions. This is because such consent would not have been "knowing and intelligent," and also because an immediate arrest would have been beyond the scope and intensity of the consent.

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[110] See *Minnesota* v. *Olson* (1990) 495 U.S. 91, 100; *People* v. *Bacigalupo* (1991) 1 Cal.4th 103, 123; *People* v. *Escudero* (1979) 23 Cal.3d 800, 811; *People* v. *Lanfrey* (1988) 204 Cal.App.3d 491, 509; *People* v. *Williams* (1989) 48 Cal.3d 1112, 1139.

[111] (9th Cir. 2009) 558 F.3d 1069, 1071.

[112] See *Kentucky* v. *King* (2011) __ U.S. __ [2011 WL 1832821] ["to prevent the imminent destruction of evidence has long been recognized as a sufficient justification for a warrantless search"]; *United States* v. *Santana* (1976) 427 U.S. 38, 43 ["Once Santana saw the police, there was likewise a realistic expectation that any delay would result in destruction of evidence."]; *People* v. *Ramey* (1976) 16 Cal.3d 263, 276 ["exigent circumstances" exist if reasonably necessary to "forestall the . . . destruction of evidence"].

[113] See *Illinois* v. *McArthur* (2001) 531 U.S. 326, 331-32.

[114] See *People* v. *Thompson* (2006) 38 Cal.4th 811, 820-25; *People* v. *Hua* (2008) 158 Cal.App.4th 1027, 1035-36; *U.S.* v. *Johnson* (9th Cir. 2001) 256 F.3d 895, 908 [the fact the crime was a misdemeanor "does not definitely preclude a finding of exigent circumstances, [but] it weighs heavily against it"].

[115] (1981) 126 Cal.App.3d 447.

DETERMINING THE OFFICERS' INTENT: In determining the officers' intent, the courts are especially interested in the following circumstances: (1) whether they had probable cause to arrest an occupant when they obtained consent; and (2) whether they made the arrest immediately after entering. For example, consent that was given to officers who said they wanted to come inside to "talk" with a suspect will ordinarily be deemed invalid if they had probable cause to arrest him and immediately did so. As the Court of Appeal explained, "A right to enter for the purpose of talking with a suspect is not consent to enter and effect an arrest."[116]

On the other hand, if the officers had something less than probable cause, their entry may be deemed consensual if they made the arrest only after they saw or heard something that generated it. For example, in *People* v. *Villa*[117] a man raped and beat a woman who immediately reported the attack to Sacramento County sheriff's deputies. A deputy who overheard a description of the rapist on the sheriff's radio thought the attacker might have been Villa because he had been arrested about a month earlier for prowling in the victim's yard. So the deputy and others went to Villa's home, knocked on the door, and spoke with his mother. After explaining that they wanted to talk with her son about the attack, she consented to their entry and told them that Villa was sleeping in his bedroom. As they entered the bedroom, they saw that Villa was not sleeping; he was watching television. More importantly, he was wearing clothing that matched the clothing worn by the rapist, and he had scratch marks on his face. So the deputies arrested him.

Villa argued that his mothers' consent was ineffective because the deputies lied to her about their intentions. The Court of Appeal disagreed, saying "the evidence disclosed the entry was for the purpose of investigating the earlier incident. There was no evidence of subterfuge at the time consent to enter was given."

While the existence of probable cause is a strong indication that the officers intended to make an immediate arrest, in some cases they may have good reason to defer making the arrest until they had heard what the suspect had to say; e.g., his explanation of what had occurred. This might happen, for example, if the officers' probable cause was not so overwhelming that they would have disregarded the suspect's story in determining whether an immediate arrest was appropriate. Under such circumstances, an arrest may not invalidate the consent if officers made it clear that they wanted to enter for the purpose of talking with the suspect. As the court observed in *People* v. *Superior Court (Kenner)*:

> A person may willingly consent to admit police officers for the purpose of discussion, with the opportunity, thus suggested, of explaining away any suspicions, but not be willing to permit a warrantless and nonemergent entry that affords him no right to explanation or justification.[118]

OFFICERS' INTENT WAS REASONABLY APPARENT: Even if officers had probable cause and intended to make an immediate arrest, consent may be deemed knowing and intelligent if a court finds that they had effectively notified the consenting person of their intentions based on a reasonable interpretation of their stated purpose. As the Supreme Court explained, "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?"[119]

For example, in *People* v. *Newton*[120] LAPD officers, having developed probable cause to arrest Newton for rape, went to a house in which they thought he might be staying. When a woman answered the door, an officer asked if Newton lived there. The woman said no, claiming she had not seen him for several months. One of the officers then asked if they could "come in and look around." She replied, "Yes, come on in, but you are not going to find anything,

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[116] *In re Johnny V.* (1978) 85 Cal.App.3d 120, 130. Also see *People* v. *Williams* (1979) 93 Cal.App.3d 40, 57-58; *U.S.* v. *Johnson* (9th Cir. 1980) 626 F.2d 753.
[117] (1981) 125 Cal.App.3d 872.
[118] (1977) 73 Cal.App.3d 65, 69.
[119] *Florida* v. *Jimeno* (1991) 500 U.S. 248, 251.
[120] (1980) 107 Cal.App.3d 568. Also see *People* v. *Ford* (1979) 97 Cal.App.3d 744.

I am here by myself." As the officers entered one of the bedrooms, they found Newton watching TV and arrested him. Apparently, they also saw some evidence because Newton filed a motion to suppress, claiming his arrest violated *Ramey*. Specifically, he argued that the woman had given the officers consent to "look around," not arrest him. The motion was denied and, on appeal, the court ruled that the nature of the conversation between the woman and the officers at the front door would "lead the officers reasonably to believe that they had a consent to enter to find defendant for any purpose they desired, either to question him or to arrest him."

ENTRY TO ARREST FOR DOMESTIC VIOLENCE: In domestic violence cases, if one spouse consented to an entry for the purpose of arresting the other, officers may enter even though the other spouse objected. This is because the rule that prohibits an entry if one spouse objects—the rule of *Georgia* v. *Randolph*[121]—applies only when the objective of the officers' entry was to obtain evidence against the non-consenting spouse. Thus, it does not apply when the purpose was to arrest him or protect the consenting spouse.

Consent to undercover officers

Suspects will frequently consent to an entry by undercover officers for the purpose of engaging in some sort of illegal activity, such as selling drugs. If the suspect was immediately arrested, the analysis will depend on whether the arrest was made by the undercover officers themselves, or whether it was made by backup officers.

ARREST BY UNDERCOVER OFFICERS: When undercover officers obtain consent to enter from a suspect, they will necessarily have misrepresented their identities and purpose. Although such consent is therefore not technically "knowing and intelligent," it is nevertheless valid based on an overriding rule that criminals who admit strangers into their homes to commit or plan crimes are knowingly taking a chance that the strangers are officers or police informants. As the Ninth Circuit pointed out, "It is well-settled that undercover agents may misrepresent their identity to obtain consent to entry."[122] Consequently, even if the undercover officers had probable cause to arrest the suspect when they entered, and even if they fully intended to arrest him after the sale was completed, the entry does not violate *Ramey-Payton* or *Steagald* because it was consensual.

It should also be noted that, apart from the validity of the consent, *Ramey-Payton* and *Steagald* do not apply to most entries by undercover officers because, even if they arrested the suspect on the premises, their intent upon entering would ordinarily have been contingent on what happened inside. Thus, when this issue arose in *People* v. *Evans* the court found no violation because the officers "were inside with consent, with probable cause to arrest but with the intent to continue the investigation by effecting a purchase of [drugs]."[123]

ARREST BY BACKUP OFFICERS: Because it would be extremely dangerous for an undercover officer to arrest a suspect who had admitted him into his home (and it would be foolhardy for a police informant to make a citizens arrest), the courts developed a rule—known as "consent once removed"—by which backup officers may be permitted to forcibly enter to make the arrest.[124] While the term "consent once removed" suggests that the suspect's act of consenting to an entry by an undercover officer may somehow be conferred on the backup officers, in reality the rule is based on the theory that a suspect who admits someone into his home for a criminal purpose has assumed the "incremental risk" that officers would immediately enter to arrest him.[125]

This does not mean, however, that the arresting officers may enter whenever a suspect has allowed an undercover officer or police agent inside for a criminal purpose. Instead, such entries are permitted only if the following five circumstances existed:

(1) CONSENT: The undercover officer or police agent must have entered with the consent of someone with apparent authority to do so.

(2) PROBABLE CAUSE: Probable cause must have developed after the undercover officer entered.

[121] (2006) 547 U.S. 103, 108.
[122] *U.S.* v. *Bramble* (9th Cir. 1997) 103 F.3d 1475. 1478. Also see *Toubus* v. *Superior Court* (1981) 114 Cal.App.3d 378, 383.
[123] (1980) 108 Cal.App.3d 193, 196.
[124] See *Pearson* v. *Callahan* (2009) 555 U.S. 223, 244; *People* v. *Cespedes* (1987) 191 Cal.App.3d 768,771-73.
[125] *U.S.* v. *Paul* (7th Cir. 1986) 808 F.2d 645, 648. Also see *Toubus* v. *Superior Court* (1981) 114 Cal.App.3d 378, 384.

(3) NOTIFICATION: The undercover officer or police agent must have notified the backup officers by radio signal or other means that probable cause now existed.

(4) DILIGENCE: The notification must have been made without unnecessary delay after probable cause developed.

(5) ENTRY WHILE UNDERCOVER IS INSIDE: The backup officers must have entered while the undercover officer or police agent was on the premises, or at least so quickly after he stepped outside that there existed an implied right to reenter.[126]

One other thing: A suspect's attempt to withdraw "consent" (e.g., by trying to close the door on the arresting officers) is ineffective if they had probable cause to arrest.[127]

Entry and Search Procedure

Even when the officers' entry was authorized under *Ramey-Payton* or *Steagald*, there are certain restrictions on what they may do after they enter. For example, if the entry was consensual, they may do only those things that they reasonably believed the consenting person authorized them to do. If, however, the entry was based on the issuance of a conventional arrest warrant, a *Ramey* warrant, a *Steagald* warrant, exigent circumstances, or on "consent once removed," the required procedure is as follows:

POSSESSION OF ARREST WARRANT: Although it is "highly desirable" for officers to possess a copy of the warrant when they enter, this is not a requirement.[128]

KNOCK-NOTICE: If officers entered under the authority of a search or arrest warrant, they must comply with the knock-notice requirements unless there were exigent circumstances that justified an immediate entry. On the other hand, if the entry was based "consent once removed," compliance will ordinarily be excused because (1) an announcement would alert the arrestee that he had been "set up" by the undercover officer or police agent, who would then be in imminent danger;[129] and (2) when an undercover officer or police agent is already inside the residence, the purposes behind the knock-notice requirements would not be sufficiently served by compliance.[130]

SEARCH FOR THE ARRESTEE: If it is necessary to search the premises for the arrestee, officers may look in those places in which a person might be hiding.[131]

SEARCH INCIDENT TO ARREST: If officers arrest the suspect, they may, as an incident to the arrest, search those places and things to which he had immediate access when the search occurred.[132] Even if the suspect lacked immediate access, officers may inspect areas and things that were (1) "immediately adjoining the place of arrest," and (2) large enough to conceal a hiding person.[133]

ACCOMPANY ARRESTEE: If officers permit the arrestee to go into any other rooms (e.g., to obtain a wallet or jacket) they may accompany him and stay "literally at his elbow."[134]

PROTECTIVE SWEEP: Officers may conduct a protective sweep if they reasonably believed there was another person on the premises who posed a threat to them.[135]

Three other things should be noted about the required procedure. First, if the officers have probable cause to believe that an item they observed in plain view is evidence, they may seize it.[136] Second, if they decide to seek a search warrant after they have entered, they may secure the premises for a

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[126] See *People* v. *Cespedes* (1987) 191 Cal.App.3d 768, 774; *U.S.* v. *Bramble* (9th Cir. 1996) 103 F.3d 1475,1478; *O'Neil* v. *Louisville/Jefferson County Metro Government* (6th Cir. 2011) __ F.3d __ [2011 WL 5345409].

[127] See *U.S.* v. *Jachimko* (7th Cir. 1994) 19 F.3d 296, 299.

[128] See *Nunes* v. *Superior Court* (1980) 100 Cal.App.3d 915, 935-36; *Washington* v. *Simpson* (8th Cir. 1986) 806 F.2d 192, 196, fn.4.

[129] See *United States* v. *Banks* (2003) 540 U.S. 31, 37; *U.S.* v. *Pollard* (6th Cir. 2000) 215 F.3d 643, 646.

[130] See *People* v. *Toubus* (1981) 114 Cal.App.3d 378, 384.

[131] See *Maryland* v. *Buie* (1990) 494 U.S. 325, 330; *U.S.* v. *Harper* (9th Cir. 1991) 928 F.2d 894, 897.

[132] See *Arizona* v. *Gant* (2009) 556 U.S. 332; *People* v. *Arvizu* (1970) 12 Cal.App.3d 726, 729.

[133] *Maryland* v. *Buie* (1990) 494 U.S. 325, 333.

[134] *Washington* v. *Chrisman* (1982) 455 U.S. 1, 7. Also see *U.S.* v. *Roberts* (5th Cir. 2010) 612 F.3d 306, 310-11.

[135] See *Maryland* v. *Buie* (1990) 494 U.S. 325, 334; *People* v. *Dyke* (1990) 224 Cal.App.3d 648, 661-62.

[136] See *Arizona* v. *Hicks* (1987) 480 U.S. 321, 326-28; *Payton* v. *New York* (1980) 445 U.S. 573, 587.

reasonable period of time pending issuance of the warrant.[137] Third, if the entry was made under the authority of a *Ramey* warrant, they must file a "Certificate of Service" with the clerk of the issuing court within a reasonable time after the arrest.[138] (To obtain a copy of a certificate in Microsoft Word format (which can be edited), send a request from a departmental email address to POV@acgov.org.)

Suppression Rules

Because the sole purpose of *Ramey-Payton* and *Steagald* is to protect the reasonable privacy expectations of the occupants of homes and other protected structures, a violation will render the entry—and the fruits of the entry—unlawful. But it will not render the arrest unlawful. As the Court of Appeal explained, "[I]t is the unlawful *intrusion* into the dwelling which offends constitutional safeguards and which is therefore at the heart of the matter, rather than the arrest itself."[139]

Consequently, the admissibility of statements and other evidence obtained after officers made an entry in violation of *Ramey-Payton* or *Steagald* will depend on two things: (1) whether the evidence was the "fruit" of the entry; i.e., whether the officers obtained it while they were inside the building, and (2) whether the defendant had a reasonable expectation of privacy in the premises.

EVIDENCE OBTAINED IN THE ARRESTEE'S HOME: If officers entered the arrestee's home in violation of *Ramey-Payton*, their presence there is illegal. Consequently, any evidence and statements they obtained while inside will be suppressed.[140]

EVIDENCE OBTAINED AFTER EXITING: Evidence and statements obtained from the arrestee after he had been removed from the premises will not be suppressed so long as officers had probable cause to arrest.[141] This is because, as noted above, a violation of *Ramey-Payton* or *Steagald* renders the entry illegal—but not the arrest. As the Ninth Circuit explained in *U.S.* v. *Crawford*, "[T]he presence of probable cause to arrest has proved dispositive when deciding whether the exclusionary rule applies to evidence or statements obtained after the defendant is placed in custody."[142]

For example, in *New York* v. *Harris*[143] NYPD officers arrested Harris in his home in violation of *Payton*. While still inside the house, an officer obtained a *Miranda* waiver from Harris who essentially confessed. The officers then took him to a police station where, after again informing Harris of his *Miranda* rights, they resumed the questioning which produced a written incriminating statement. Although the trial court suppressed the statement obtained inside Harris's home because of the *Payton* violation, it admitted the written statement obtained at the police station.

The United States Supreme Court upheld the trial court's ruling, explaining that, "where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of *Payton*."

EVIDENCE OBTAINED IN A THIRD PARTY'S HOME: If officers entered the home of an arrestee's friend, relative, or other third party in violation of *Steagald*, any evidence they discovered inside the premises will be inadmissible against the third party.[144] It will, however, be admissible against the arrestee unless he had a reasonable expectation of privacy in the place or thing in which it was found.[145] POV

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[137] See *Illinois* v. *McArthur* (2001) 531 U.S. 326, 331-32.
[138] See Pen. Code § 817(h).
[139] *People* v. *Ford* (1979) 97 Cal.App.3d 744, 748.
[140] See *New York* v. *Harris* (1990) 495 U.S. 14, 20.
[141] See *People* v. *Marquez* (1992) 1 Cal.4th 553, 569 ["[T]he lack of an arrest warrant does not invalidate defendant's arrest or require suppression of statements he made at the police station."]; *People* v. *Watkins* (1994) 26 Cal.App.4th 19, 29; *In re Jessie L.* (1982) 131 Cal.App.3d 202, 214.
[142] (9th Cir. 2004) 372 F.3d 1048, 1056.
[143] (1990) 495 U.S. 14.
[144] See *Steagald* v. *United States* (1981) 451 U.S. 204, 219; *People* v. *Dyke* (1990) 224 Cal.App.3d 648, 658.
[145] See *U.S.* v. *McCarson* (D.C. Cir. 2008) 527 F.3d 170, 172; *U.S.* v. *Agnew* (3d Cir. 2005) 407 F.3d 193, 196. Compare *Minnesota* v. *Olson* (1990) 495 U.S. 91, 96-97 [overnight houseguest had a reasonable expectation of privacy].

SUPERIOR COURT OF CALIFORNIA

County of _____

SEARCH and ARREST WARRANT Steagald Warrant

The People of the State of California
To Any Peace Officer in _____ County **Warrant No. _____**

Name of arrestee: *[Insert name]*, hereinafter "Arrestee."
Premises to be searched: *[Insert address]*, hereinafter "Premises."
Affiant: *[Insert name and agency]*, hereinafter "Affiant."

Findings: Based on the affidavit sworn to and subscribed before me on this date (hereinafter "Affidavit"), I make the following findings in accordance with Penal Code § 1524(a)(6):

Probable cause to arrest: There is probable cause to arrest Arrestee for the following crime[s]: *[List crime(s)]*:

Basis of probable cause to arrest: Probable cause to arrest was established as follows:

☐ **Affidavit:** The facts are set forth in Affidavit.

☐ **Arrest warrant**: A warrant for the arrest of Arrestee has been issued and is outstanding.

Probable cause to search: There is probable cause to believe that Arrestee is now inside the Premises and will be there when this warrant is executed.

Orders: You are hereby ordered to search the Premises for Arrestee forthwith and, if located, place Arrestee under arrest for the crime[s] listed above and bring Arrestee before a magistrate in this county pursuant to Penal Code §§ 821, 825, 826, and 848.

Bail: ☐ No bail ☐ Bail is set at $_____

☐ **Night service**: Good cause for night service having been established in Affidavit, this warrant may be executed at any hour of the day or night.

_____ _____
Date and time issued Judge of the Superior Court

◆ Arrestee Information ◆

For identification purposes only

Name:

AKAs:

Last known address(es):

Sex: M F Race: Height: Weight: Color hair: Color eyes:

Scars, marks, tattoos:

Vehicle(s) linked to Arrestee:

Other information:

SUPERIOR COURT OF CALIFORNIA

County of _____

SEARCH and ARREST WARRANT Anticipatory Steagald Warrant

The People of the State of California
To Any Peace Officer in _____ County **Warrant No. _____**

Name of arrestee: *[Insert name]*, hereinafter "Arrestee."
Premises to be searched: *[Insert address]*, hereinafter "Premises."
Affiant: *[Insert name and agency]*, hereinafter "Affiant."

Findings: Based on the affidavit sworn to and subscribed before me on this date (hereinafter "Affidavit"), I make the following findings in accordance with Penal Code § 1524(a)(6):

Probable cause to arrest: Probable cause to arrest Arrestee for the following crime(s) will exist upon the occurrence of the Triggering Event described in Affidavit: *[List crime(s)*

Probable cause for triggering event: There is probable cause to believe the Triggering Event will occur.

Probable cause to search: There is probable cause to believe that Arrestee will be inside the Premises when the Triggering Event occurs.

Orders: Without undue delay after the Triggering Event occurs, you are ordered to search Premises for Arrestee and, if located, place Arrestee under arrest for the crime[s] listed above and bring Arrestee before a magistrate in this county pursuant to Penal Code §§ 821, 825, 826, and 848.

Bail: ☐ No bail ☐ Bail is set at $_____

☐ **Night service**: Good cause for night service will exist, and is therefore authorized, if the Triggering Event occurs at night.

_____ _____
Date and time issued Judge of the Superior Court

◆ Arrestee Information ◆

For identification purposes only

Name:

AKAs:

Last known address(es):

Sex: M F Race: Height: Weight: Color hair: Color eyes:

Scars, marks, tattoos:

Vehicle(s) linked to Arrestee:

Other information:

Recent Cases

Howes v. Fields

(2012) __ U.S. __ [2012 WL 538280]

Issue

Are state prison inmates automatically "in custody" for *Miranda* purposes?

Facts

While Randall Fields was serving time at a state prison in Michigan, sheriff's deputies began investigating allegations that, before being incarcerated, he had engaged in illegal sexual conduct with a young boy. In the course of the investigation, two deputies arranged to interview Fields in a conference room at the prison. He was not handcuffed. At the start of the interview, the deputies told Fields he "was free to leave and return to his cell." They did not seek a *Miranda* waiver.

The interview lasted between five and seven hours, and was sometimes accusatorial. At no time, however did Fields request return to his cell, even though he was reminded at one point that he could do so. He eventually confessed, and his confession was used against him at trial. He was convicted.

The Sixth Circuit, however, reversed the conviction, ruling that Fields' confession was obtained in violation of *Miranda* because the deputies neglected to obtain a waiver. The state appealed to the U.S. Supreme Court.

Discussion

Officers who are about to interrogate a suspect must obtain a *Miranda* waiver only if the suspect was "in custody." And a person is "in custody" only if a reasonable person in his position would have believed that he was not free to terminate the interview and leave.[1] In *Fields*, however, the Sixth Circuit announced an exception to this rule: Regardless of what a reasonable person would have believed, prison inmates are automatically "in custody" when they are "questioned about events that occurred outside the prison walls." The Supreme Court disagreed.

The Court observed that the term "custody," as used in *Miranda*, is a "term of art that specifies circumstances that are thought generally to present a serious danger of coercion." For example, the Court noted that a *Miranda* waiver will usually be required when "a person is arrested in his home or on the street and whisked to a police station for questioning" because such a "sharp and ominous" change in circumstances "may give rise to coercive pressures."

But the situation is much different when the person is serving time because, as the Court pointed out, "the ordinary restrictions of prison life, while no doubt unpleasant, are expected and familiar and thus do not involve the same inherently compelling pressures." In addition, prison inmates know that, regardless of what they say, they won't be walking out the prison gates when the interview is over, so they are "unlikely to be lured into speaking by a longing for prompt release."

Accordingly, the Court ruled that prison inmates are not automatically "in custody" for *Miranda* purposes. Instead, the determination depends on "all of the features of the interrogation." The Court then examined the circumstances surrounding the interrogation of Fields and noted that, although the interview was lengthy and somewhat accusatorial, there were several overriding circumstances. "Most important," said the Court, was that Fields "was told at the outset of the interrogation, and was reminded again thereafter, that he could leave and go back to his cell whenever he wanted." It was also important that Fields was not handcuffed. Thus, the Court ruled that Fields' confession was not obtained in violation of *Miranda* because he was not "in custody" when he was interviewed.

Comment

Three questions arise: (1) Does *Fields* apply to interviews with county jail inmates; i.e., are jail inmates automatically "in custody" or is their status also dependent on the totality of circumstances? (2) If they are not automatically in custody, does it matter that they were pre-trial detainees as opposed to time-servers? (3) Does it matter that they were questioned about a crime that occurred inside the facility. For the following reasons we think that, with one exception noted below, a waiver would not be required of *any* county jail inmate if he was not handcuffed, and if he was notified in no uncertain terms that he could end the interview and return to his cell whenever he wanted.

First, regardless of whether the interview occurred in a prison or jail, an inmate who was told he was free to terminate the interview and return to his cell would

[1] See *Thompson* v. *Keohane* (1995) 516 U.S. 99, 112.

not feel the degree of pressure that *Miranda* was designed to alleviate. Moreover, as noted earlier, the Court also said that this admonition was the "[m]ost important" of the relevant circumstances. If, however, the interview is lengthy (as in *Fields*), officers should periodically remind the suspect that he can terminate the interview at any time.

Second, an inmate who is interviewed in jail about a crime unrelated to the crime for which he was incarcerated would know that the officers who were interviewing him lack the power to release him. Third, the Court in *Fields* said that it "is not enough to tip the scale in the direction of custody" that the inmate was questioned about a crime that occurred in the facility.

Fourth, the California Court of Appeal ruled in *People* v. *Macklem* that a pre-trial detainee at a county jail was not "in custody" for *Miranda* purposes when he was questioned about a jailhouse assault.[2] And the court's analysis in *Macklem* was almost identical to that employed by the Supreme Court in *Fields*, including the *Macklem* court's observation that the defendant was not handcuffed and "was given the opportunity to leave the room if he requested to do so."

The only exception to the above would be a situation in which officers interviewed the inmate so soon after he was booked into the jail that he had not yet settled into a routine. This is because one of the central premises upon which *Fields* was based was that the coercive environment in a penal institution is significantly reduced when the "ordinary restrictions of prison life" are "expected and familiar" and thus "do not involve the same inherently compelling pressures" that are associated with an interview that occurs immediately after an arrest.

United States v. Jones

(2012) __ U.S. __ [2012 WL 17117]

Issues

Must officers obtain a search warrant to install a tracking device to a vehicle and then utilize the device to monitor the vehicle's whereabouts?

Facts

FBI agents and officers with the Metropolitan Police Department in Washington, D.C. suspected that Antoine Jones was a drug dealer. In the course of their investigation, they obtained a search warrant which authorized them to attach a GPS monitoring device to Jones' Jeep Grand Cherokee and track its movements for ten days. One day after the warrant expired, the officers installed the device to the undercarriage of the vehicle while it was parked in a public parking lot.

For the next 28 days, they used the transmissions from the GPS tracker to monitor Jones' travels, and these transmissions revealed that he had visited a "stash house" where officers had found $850,000 in cash, 97 kilograms of cocaine, and one kilogram of crack cocaine. This information was part of the evidence that was used against Jones at his trial, and he was found guilty of conspiracy to distribute drugs.

Discussion

On appeal to the United States Supreme Court, Jones argued that the installation and monitoring of the device constituted a "search." And because the officers had installed the device one day after the warrant expired, the search was unlawful.

Addressing only the legality of the installation, the Court ruled that an officer's act of attaching a device to a vehicle would constitute a "search" if the device permitted the officer to obtain information. It follows, said that Court, that because a GPS device reveals the vehicle's whereabouts, the officers had, in fact, "searched" Jones' vehicle when they installed it. Said the Court, "The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted."

Significantly, the Court did not rule that a warrant would be required to conduct such a "search." Instead, it simply affirmed the D.C. Circuit's ruling, but without explaining what parts of the ruling it approved other than to say that the "admission of the evidence obtained by warrantless use of the GPS device . . . violated the Fourth Amendment."

Comment

In 1991, the Supreme Court said, "We have noted the virtue of providing clear and unequivocal guidelines to the law enforcement profession."[3] Well, if it is truly "virtuous" for judges to provide officers with "clear and unequivocal guidelines," the Court's decision in *Jones* would fall into the category of "depraved." In fact, judging from the uncertainty as to what the Court actually ruled—even uncertainty among commentators, law professors, and journalists—its opinion not only lacked clarity, it was virtually incoherent.

[2] (2007) 149 Cal.App.4th 674, 696.

[3] *California* v. *Acevedo* (1991) 500 U.S. 565, 577

This was particularly troubling because the Court had previously ruled that neither the installation nor monitoring of a tracker would constitute a search so long as the vehicle was in a public place. As for monitoring, the Court simply stated that a "person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another."[4] As for the installation of a tracker, the Court ruled (on two occasions) that a technical trespass (such as occurred in *Jones*) has little bearing on Fourth Amendment privacy determinations. Here are the Court's words:

- "The existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated."[5]
- "[I]t does not follow that the right to exclude conferred by trespass law embodies a privacy interest also protected by the Fourth Amendment."[6]

But now the Court announces—without explanation—that a physical trespass is not actually "marginally relevant." In fact, it is pivotal when (as is almost always the case), the officers' objective was to obtain information.

Strangely, the Court did not explain why it had decided not to analyze the issues by subjecting the facts to traditional Fourth Amendment analysis; i.e., that the officers' actions would have constituted a search only if their intrusion under the Jeep and their monitoring of Jones' movements infringed on Jones' reasonable privacy expectations.[7] Such an analysis would have been helpful because the Court would have had to reaffirm or overturn its earlier decisions that people cannot reasonably expect that their travels on streets and highways will be private. The Court might also have addressed the issue of whether the use of sophisticated surveillance technology affects the privacy analysis, and whether, as the D.C. Circuit determined, it matters that the surveillance was conducted over a lengthy period of time.

In fairness, the Court did not completely ignore these issues. It said: "We may have to grapple with these vexing problems in some future case . . . but there is no reason for rushing forward to resolve them here." But isn't it the job of the United States Supreme Court to "grapple" with "vexing" constitutional problems that are causing widespread uncertainty in the courts?

Even more troubling was that the Court demeaned itself by dodging the complex technological and privacy issues presented in this case by resorting to 18th century trespassing law, citing cases from 1765 and 1886 as authority for its decision, and topping it off with a quote from a Lord Chancellor in old England (Lord Camden, 1714–1794) about "tread[ing] upon his neighbor's ground." Sadly, it appears the Supreme Court will be dragged kicking and screaming into the 21st century.

The Court's decision in *Jones* is, however, consistent with its current policy of providing little, if any, guidance as to how to analyze the complex privacy issues that result from the use of modern telecommunications technology. As we discussed in our Winter 2012 article on searches of email and other electronic communications, the Court had an opportunity to provide some direction in this area in 2010 but it not only ducked the issue, it advised the lower courts to do the same, saying, "The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear."[8] But there is nothing unclear about the role of this technology: it plays a *dominant* role. After all, millions of people rely on it daily—almost hourly—to obtain information and communicate with others.

Meanwhile, to no one's surprise, the fallout from the decision is causing serious problems for criminal investigators throughout the country. For example, according to reports in *The Wall Street Journal* and *USA Today*, the FBI has "turned off" over 3,000 GPS trackers in use while it attempts to figure out the potential implications of the decision. And a former FBI counterterrorism official was quoted as saying that, without GPS, "surveillance becomes hugely labor-intensive, especially in cases in which you need round-the-clock coverage. It's something that could strap the bureau."

Adding to the confusion, it was widely reported in the news media that the Court had ruled that officers must now have a warrant to install and monitor tracking devices on vehicles. That is wrong. In fact, the Court said that officers might not need a warrant at all if they had probable cause, or maybe even reasonable suspicion. But because the Government did not raise the issue below, the Court said "We have no occasion to consider this argument."

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[4] *United States* v. *Knotts* (1983) 460 U.S 276, 281.
[5] *United States* v. *Karo* (1984) 468 U.S. 705, 712-13.
[6] *Oliver* v. *United States* (1984) 466 U.S. 170, 183, fn.15.
[7] See *Maryland* v. *Macon* (1985) 472 U.S. 463, 469; *Katz* v. *United States* (1967) 389 U.S. 347, 353.
[8] *City of Ontario* v. *Quon* (2010) __ U.S. __ [130 S.Ct. 2619]. Also see *Rehberg* v. *Paulk* (11th Cir. 2010) 611 F.3d 828, 844 [*Quon* "shows a marked lack of clarity in what privacy expectations as to content of electronic communications are reasonable"].

Still, we recommend that officers seek a warrant if they have probable cause, at least until the lower courts have had an opportunity to address the issues that the Court avoided in *Jones*. In light of the concurring opinion in the case, it is especially important to seek a warrant if, as is usually the case, officers want to conduct such surveillance for more than a few days.

Note that such a warrant should ordinarily authorize officers to (1) install the device on the vehicle in a public place or in the driveway of the suspect's home, and (2) monitor the signals from the device without limitation for ten days; i.e. until the warrant expires. (While it is possible that a warrant could authorize monitoring for more than ten days, there is no express authority for it in California.) We have prepared a search warrant form that officers may find useful. To obtain a copy via email, send a request from a departmental email address to POV@acgov.org.

Second, there is nothing in *Jones* to suggest that officers would need a warrant to conduct "bait car" operations, or to install a GPS device on a car if the vehicle was subject to warrantless search per the terms of the owner's parole or probation, or if the device was launched during a pursuit; e.g. StarChase. Third, evidence obtained via a warrantless tracking device before *Jones* was decided should not be suppressed.[9]

Ryburn v. Huff

(2012) __ U.S. __ [2012 WL 171121]

Issue

Did exigent circumstances justify a warrantless entry by officers into the home of a teenager who was rumored to be planning to "shoot up" his school?

Facts[10]

The principal of a Catholic high school in Burbank notified officers that a rumor had been circulating that a student named Vincent Huff was going to "shoot up" the school. The principal, Sister Milner, explained that Vincent had been absent from school for the past two days, that some parents who had heard the rumor were so worried that they were keeping their children at home, and that she was "concerned about the threat and the safety of her students." The officers then spoke with some of Vincent's classmates who said that Vincent "was frequently subjected to bullying" and that he "was capable of carrying out the alleged threat." The officers, having been trained on "targeted school violence," were aware that bullying and absences from school "are common among perpetrators of school shootings." So they decided to go to Vincent's home and talk with him.

When they knocked, no one answered so they phoned the residence. Again, no one answered. So an officer called the cell phone of Vincent's mother, Maria. She answered the phone and admitted that she and Vincent were inside the house, but when the officer explained why he wanted to speak with her, she hung up.

About two minutes later, Ms. Huff and Vincent walked outside and stood on the front steps. When one of the officers explained that they wanted to "talk about some threats at the school," Vincent responded, "I can't believe you're here for that." Another officer asked Ms. Huff if they could come inside to talk about the matter, but she said no. The officer then asked if there were any guns in the house, at which point she "immediately turned around and ran into the house" followed by Vincent—and two officers. One of the officers later explained that he decided to enter "because of, again, the threat that he was going to blow up or shoot up the school. I wanted to make sure neither one of them could access any weapons from inside the house, and that's where they normally get the weapons from is from either their parents or relatives or friends." The officers left the house a few minutes later after satisfying themselves that the rumor was unfounded.

The Huffs sued the officers and the City of Burbank in federal court (seeking money damages), claiming that the officers' act of entering their living room without a warrant constituted a violation of the Fourth Amendment. Following a bench trial, the district court ruled the officers' entry was justified by exigent circumstances. The Huffs appealed to the Ninth Circuit.

In an opinion by Chief Judge Alex Kozinski and written by Algenon L. Marbley (a district court judge from Ohio on temporary assignment to the Ninth Circuit), the court reversed the district court, ruling that exigent circumstances did not exist because, in the opinion of the two judges, "any belief that the officers or other family members were in serious, imminent harm would have been objectively unreasonable." The officers and the City of Burbank appealed to the U.S. Supreme Court.

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[9] See *Davis* v. *United States* (2011) __ U.S. __ [2011 WL 2369583]; *Herring* v. *United States* (2009) 555 U.S. 135, 144.

[10] **NOTE**: Some of the facts were taken from the Court of Appeals decision in *Huff* v. *City of Burbank* (9th Cir. 2011) 632 F.3d 539.

Discussion

In a *per curiam* (unanimous) opinion, the Supreme Court ruled that Judges Kozinski and Marbley were quite wrong in their conclusion that the officers lacked sufficient reason to believe that an immediate entry was necessary. As the Court pointed out, "No decision of this Court has found a Fourth Amendment violation on facts even roughly comparable to those present in this case." It was also apparent that the Court was distressed by the arrogant manner in which the two judges purported to resolve the matter.

Of particular importance, the Court concluded that the judges, while claiming to have accepted the findings of the trial judge, had actually misrepresented (i.e., "changed") those findings "in several key respects." Specifically, they claimed that when Mrs. Huff was asked if there were any guns in the house, she "merely asserted her right to end her conversation with the officers and returned to her home." But that was not what happened. The district court determined that she "immediately turned around and ran into the house." And, as one of the officers testified, it was this unusual and highly suspicious action that precipitated the decision to enter.

The Supreme Court also ruled that, in addition to tinkering with the facts, Judges Kozinski and Marbley had announced a new rule of law that defied common sense. Specifically, the judges concluded that a person's actions (i.e., Mrs. Huff's running into the house) cannot be regarded as a matter of concern if such conduct was "lawful." But, as the Supreme Court observed, "It should go without saying that there are many circumstances in which lawful conduct may portend imminent violence."

There was more. The judges disregarded the Supreme Court's repeated instructions that the reasonableness of an officer's actions depends on an examination of the totality of circumstances.[11] As the Court pointed out, the judges "looked at each separate event in isolation and concluded that each, in itself, did not give cause for concern." The Court added that "it is a matter of common sense that a combination of events each of which is mundane when viewed in isolation may paint an alarming picture."

Finally, the Court reproached the judges for disregarding another basic rule: In determining whether exigent circumstances exist, judges must not engage in unrealistic second-guessing, especially when, as here, the officers were facing what reasonably appeared to be a life-and-death situation. As the Supreme Court put it, Judges Kozinski and Marbley, "far removed from the scene and with the opportunity to dissect the elements of the situation—confidently concluded that the officers really had no reason to fear for their safety or that of anyone else." In realty, said the Court, the officers reasonably concluded that such a threat existed based on the "rapidly unfolding chain of events that culminated with Mrs. Huff turning and running into the house after refusing to answer a question about guns."

Consequently, the Court ruled that the officers did not violate the Huff's Fourth Amendment rights when they entered their house, and it remanded the case to the Ninth Circuit with instructions to dismiss it.

People v. Nelson

(2012) __ Cal.4th __ [2012 WL 88552]

Issues

(1) In determining whether a remark by a juvenile constituted a *Miranda* invocation, must officers and judges apply the same test as is used when the suspect was an adult? (2) Does a juvenile's request to speak with a parent constitute a *Miranda* invocation? (3) Can waivers by juveniles be implied?

Facts

Late one night, 15-year old Samuel Nelson burglarized the home of a 72-year old woman in Orange County and startled her as she slept on the living room sofa. When she awakened, Nelson hit her over the head several times with a hammer, killing her.

Shortly after they began their investigation, sheriff's detectives began to suspect that Nelson was the killer, so they visited him at his home and obtained his consent to accompany them to the sheriff's station for questioning. After *Mirandizing* him and confirming that he understood his rights, the investigators began to question him. They did not seek an express waiver.

Nelson eventually admitted that he had burglarized the house, but denied killing the woman. As things progressed, the detectives asked if he would be willing to take a lie detector test and Nelson responded by asking if he could phone his mother to "let her know what's happening" and to ask her "what I should do." The investigators permitted him to call home, and he spoke to his grandmother who advised him not to take the test or "do anything" until his mother arrived, and that would take about ten minutes.

[11] See *Illinois* v. *Gates* (1983) 462 U.S. 213, 230-1; *United States* v. *Arvizu* (2002) 534 U.S. 266, 273.

The investigators then left Nelson alone in the interview room with pencil and paper, suggesting that he "do the right thing" and write down what had happened. But when they returned to the room, Nelson had written nothing, saying he wanted to be alone "until my family gets here." One of the investigators told Nelson that he was "real tired" of playing games and urged him to "take this opportunity to say what happened in his own words." They left him alone again, but this time Nelson wrote a statement in which he admitted killing the woman, saying that after he broke into her home he had "walked by her and she woke up. I freaked out and I hit her in the head several times."

Nelson was tried as an adult for murder and burglary after the trial court rejected his argument that his statement was obtained in violation of *Miranda*. Following a court trial, he was found guilty as charged. But in an unpublished 2-1 decision, the Court of Appeal reversed the murder conviction, ruling that Nelson's statement should have been suppressed.

Specifically, the court ruled that, in determining whether a remark by a juvenile constituted a *Miranda* invocation, the correct test is whether the juvenile subjectively intended to invoke; and not, as with adults, whether the objective circumstances would have reasonably demonstrated an intention to invoke. Applying its new subjective test, the court ruled that Nelson's "purpose when he first requested to speak with his mother was to secure her assistance to protect his *[Miranda]* rights." Consequently, the court ruled that Nelson's request constituted an invocation. The People appealed to the California Supreme Court.

Discussion

It is settled that a remark by an adult can constitute an invocation of the *Miranda* right to remain silent or the right to counsel only if it clearly and unambiguously constituted an invocation.[12] This is called an "objective" test because it depends solely on the facts known to the officers and how the facts would have been interpreted by a reasonable officer in the same situation. As noted, the Court of Appeal ruled that the courts must apply a different test—a "subjective" test—when the suspect is a juvenile; i.e., officers and judges must try to divine the juvenile's intent behind the remark. And because the court concluded that Nelson's request to speak with his mother demonstrated a subjective intent to invoke, it ruled that his statement should have been suppressed.

The Supreme Court rejected the court's new test, ruling that there is "no principled reason" for imposing different standards for juvenile and adult invocations, especially considering that the "interest in protecting lawful investigative activity is equally weighty in the adult and juvenile contexts." Said the court, "Because this standard is an objective one, the invocation determination does not call for an evaluation of the juvenile's state of mind or subjective desire."

REQUEST TO SPEAK WITH A PARENT: Having determined that a remark by a juvenile can constitute an invocation only if it was clear and unambiguous, the Supreme Court ruled that the Court of Appeal also erred when it ruled that Nelson's request to speak with his mother constituted an invocation. Said the court:

> Where, as here, a juvenile has made a valid waiver of his *Miranda* rights and has agreed to questioning, a postwaiver request for a parent is insufficient to halt questioning unless the circumstances are such that a reasonable officer would understand that the juvenile *is actually* invoking—as opposed to *might be* invoking . . . .

The court then reviewed the surrounding circumstances and determined that there were no objective circumstances that would have demonstrated to a reasonable officer that Nelson was invoking. Among other things, it pointed out that, "[a]fter waiving his *Miranda* rights, defendant was open and responsive to questioning on any topic," and that his stated purpose for wanting to talk to his mother was to let her "know what's happening" and "to ask her what he should do."

IMPLIED WAIVERS: As noted, Nelson did not expressly waive his *Miranda* rights; i.e., he was not asked the question, "Having these rights in mind, do you want to talk to us?" Instead, the officers advised him of his rights and began questioning him after determining that he understood them. Although the validity of implied waivers had been unsettled for many years, the U.S. Supreme Court ruled in 2010 that an implied waiver will suffice, and that a waiver will be implied if (1) the suspect was correctly advised of his rights, (2) he said he understood his rights, and (3) the waiver and subsequent questioning were not coerced.[13]

The court in *Nelson* ruled that these circumstances will also constitute a waiver by a juvenile and, accordingly, ruled that Nelson impliedly waived his rights "by willingly answering questions after acknowledging that he understood those rights." Accordingly, the Court reversed the dismissal of Nelson's murder conviction.

[12] See *Davis* v. *United States* (1994) 512 U.S. 452, 459; *People* v. *Nelson* (2012) 53 Cal.4th 367.

[13] *Berghuis* v. *Thompkins* (2010) __ U.S. __ [2010 WL 2160784]. Also see *People* v. *Johnson* (1969) 70 Cal.2d 541, 558.

People v. Tom

(2012) __ Cal.App.4th __ [2012 WL 899572]

Issue

Was a motorist who caused a fatal traffic accident "in custody" for *Miranda* purposes because he was required to remain at the scene?

Facts

At about 8 P.M. Richard Tom was driving his Mercedes E320 northbound on Woodside Road in Redwood City at a speed estimated by a SJPD accident reconstruction expert at 67 m.p.h. and possibly "much higher." The speed limit is 35. Meanwhile, Loraine Wong was driving her Nissan Maxima westbound on Santa Clara Avenue and was about to make a left turn onto Woodside. Seated in the back seat were Ms. Wong's two daughters, 10-year old Kendall and 8-year old Sydney.

After looking for approaching traffic and seeing none, Ms. Wong entered the intersection, at which point her car was broadsided by Mr. Tom's Mercedes. The result was "major, total damage" to the Maxima including a "massive intrusion" into the left rear passenger compartment where Sydney was sitting in a booster seat. She was killed. Kendall suffered major injuries. There was no evidence that Mr. Tom applied his brakes before the crash.

One of the first officers to arrive saw that paramedics were attending to Mr. Tom who was still sitting in his car. Sometime later, Mr. Tom exited his vehicle and walked around the scene with his girlfriend. Following that, he asked an officer if he could walk home because he lived "only a half-a-block away." The officer told him that "he had to stay at the scene because the investigation was still in progress." Sometime after that, Mr. Tom was observed sitting in another car at the scene; the car belonged to a friend who, as officers later learned, had just had dinner and drinks with Mr. Tom.

Sgt. Alan Bailey arrived on the scene and told another officer to place Mr. Tom in a patrol car and "ask" him if he would go to the station to give a statement and take a blood test. Mr. Tom agreed. During the trip, he was not handcuffed, and his girlfriend was allowed to accompany him. Shortly after they arrived, officers detected an odor of alcohol on Mr. Tom's breath and arrested him.

He was charged with, among other things, gross vehicular manslaughter while intoxicated. During his trial, the prosecutor was allowed to present evidence of Mr. Tom's "I don't care" attitude by eliciting testimony that he never inquired about the condition of Ms. Wong or her two daughters. He was convicted of vehicle manslaughter with gross negligence.

Discussion

Mr. Tom argued that the court erred by admitting testimony of his pre-arrest silence, claiming that he was "in custody" for *Miranda* purposes and, therefore, such testimony violated his Fifth Amendment right to remain silent.[14] The question, then, was essentially whether he was "in custody" at the crash scene.

It is settled that custody results if a suspect reasonably believed that he was under arrest or that his freedom had been restricted to the degree associated with an arrest.[15] Citing the following circumstances, the court then determined that Mr. Tom was in custody at some point before he was driven away:

- An officer told him he must remain at the scene.
- He "was held" at the scene for about 90 minutes.
- "[T]he atmosphere surrounding defendant's detention became increasingly coercive."
- He was asked to accompany officers to the police station for questioning.
- He sat in the back of a police car.
- He was not told that he was free to leave.

Having concluded that these circumstances rendered Mr. Tom "in custody" for *Miranda* purposes, the court ruled that the admission of testimony that he did not ask about the condition of Ms. Wong and her daughters violated his Fifth Amendment right to remain silent. For that reason it ordered that Mr. Tom's conviction be reversed.

Comment

To our knowledge, this is the first case in which a court ruled that a motorist who had been involved in a major traffic accident was "in custody" because he was required to remain at the scene. While there might be situations in which such a ruling would be appropriate, this is certainly not one of them.

At the outset, it is important to note that, although traffic violators and other detainees are not free to leave, they are not automatically in custody. This is because, unlike interrogations at police stations, detentions do not ordinarily occur behind closed doors and they are usually relatively brief and not coercive. As the United States Supreme Court noted in a DUI case, "The comparatively nonthreatening character of

[14] See *Griffin* v. *California* (1965) 380 U.S. 609; *Doyle* v. *Ohio* (1976) 426 U.S. 610.

[15] See *Yarborough* v. *Alvarado* (2004) 541 U.S. 652, 662 ; *People* v. *Stansbury* (1995) 9 Cal.4th 824, 830.

detentions of this sort explains the absence of any suggestion in our opinions that [detentions] are subject to the dictates of *Miranda*."[16]

As noted, the Court of Appeal explained that a significant reason for its decision was that Mr. Tom was "held at the scene" for about 90 minutes before he was transported to the police station. Although it is true that a 90-minute detention would hardly qualify as "brief," it is apparent that Mr. Tom was not being "held" throughout this period (if at all). For example, during some of that time he was being treated by paramedics, after which he walked around with his girlfriend. And after that, he sat inside a friend's car.

Furthermore, the abstract length of the detention is not a critical factor. Instead, the issue is whether the wait was reasonably necessary because of the surrounding circumstances. This is especially significant where, as here, the length of the detention was attributable to the actions of the suspect; i.e. he had caused an accident with one fatality and one serious injury.[17] Moreover, it is apparent that officers who have arrived at the scene of such an accident will have many things on their minds and many duties to perform, the *least* of which is to quickly question the driver who caused the accident so that he will not be inconvenienced any further. In fact, any motorist who caused such an accident would probably expect to be kept at the scene for a lengthy interview *after* the officers had attended to the victims and concluded their preliminary investigation. Furthermore, in the case of a fatal accident, the motorist would understand that such a preliminary investigation would ordinarily be somewhat lengthy. And yet, the court in *Tom* ignored these considerations and concluded that the officer's act of telling Mr. Tom that they "needed him to remain at the scene" would have generated such coercion—either alone or with the other listed circumstances—as to render Mr. Tom in custody. There is absolutely no legal precedent for such a conclusion.

The court also described the atmosphere at the scene as "increasingly coercive." But the facts do not support such a characterization. What, we ask, was coercive about permitting Mr. Tom to walk freely around the scene with his girlfriend? Was it coercive for the officers to allow him to sit for a while inside his friend's car? Was it improper for them to ask Mr. Tom to accompany them to the police station for questioning? The California Supreme Court definitively answered the latter question in another *Miranda* case, *People* v. *Stansbury,* when it ruled that merely asking the defendant "if he would come to the police station" would have conveyed to him that he "was not a suspect and was not in custody."[18]

Finally, the court thought it was significant that the officers neglected to tell Mr. Tom that he was "free to leave." But Mr. Tom was *not* free to leave—and for good reason: he had just caused a fatal accident and they needed to interview him *after* completing their other duties.[19]

It is possible that the court meant to fault the officers for not telling Mr. Tom that he could refuse their request to go to the police station. But it is undisputed that the officers "asked" him to accompany them to the station and that he agreed to do so. Thus, when this issue arose in a related Fourth Amendment context, the California Supreme Court observed that "when a person of normal intelligence" is asked to give his consent, he will "reasonably infer he has the option of withholding that consent if he chooses."[20]

The only circumstance that was arguably coercive was that an officer asked Tom to sit in a patrol car. But this hardly renders his status as "custodial" because (1) there is nothing in the case to indicate that Mr. Tom was *ordered* to sit in the car; (2) Mr. Tom was not handcuffed; and (3), as the court observed in *People* v. *Natale*, "A suspect's mere presence in a patrol car does not unambiguously state that the elements of an arrest have been satisfied."[21]

Because the court's ruling in this case constitutes an extreme and unwarranted expansion of *Miranda,* we expect that the Attorney General's Office will seek review by the California Supreme Court. POV

[16] *Berkemer* v. *McCarty* (1984) 468 US 420, 440.
[17] See *U.S.* v. *Sharpe* (1985) 470 U.S. 675, 687-68.
[18] (1995) 9 Cal.4th 824, 832.
[19] **NOTE**: The court said that its ruling was mandated by the U.S. Supreme Court's decision in *Berkemer* v. *McCarty* (1984) 468 U.S. 420, 440 in which the Court ruled that a man who was stopped for DUI was not "in custody" for *Miranda* purposes because the stop was "temporary and brief." The court, however, failed to consider two things: First, it ignored the fact that an officer's duties at the scene of a fatal automobile accident are much more demanding and time-consuming that those attendant to a simple DUI investigation. Second, the idea that a search or seizure is necessarily unlawful because it is unlike a search of seizure that the U.S. Supreme Court previously upheld has been repudiated by the Court. See *U.S.* v. *Knights* (2001) 534 U.S. 112, 117 [the Court used the term "dubious logic" to describe a ruling "that an opinion upholding the constitutionality of a particular search implicitly holds unconstitutional any search that is not like it"].

The Changing Times

Alameda County District Attorney's Office

Asst. DA **Charlette Green** retired after 29 years of service. Capt. **Lisa Foster** and Lt. **Cindy Hall** have retired. Both Lisa and Cindy were formerly with OPD and both served with the DA's Office for about 23 years. Asst. DA **Karen Meredith** was appointed head of the Hayward office. Insp. III **Craig Chew** graduated from the FBI National Academy. New prosecutors: **Peter McGuiness**, **Ashley Dodson**, **Keydon Levy**, and **Alex Hernandez**.

Former support staff member **Diane Leffler** died on January 11, 2012 after a lengthy battle with cancer.

Alameda County Sheriff's Office

Capt. **Dean Stavert** was promoted to division commander. Lt. **Thomas Madigan** was promoted to captain. The following sergeants were promoted to lieutenant: **Jason Arbuckle**, **Shawn Peterson**, **Nathan Schmidt**, and **Darren Skoldqvist**. The following deputies were promoted to sergeant: **Howard Baron**, **Jared Hattaway**, **Kevin Monaghan**, **Robert Nobriga**, **Ranvir Sanghera**, and **David Vandagriff**.

The following deputies have retired: Division Commander **Kevin Hart** who, after 31 years of service, accepted a position with POST as senior consultant, Lt. **Gordon Bowman** (26 years), Lt. **James Farr** (26 years), Lt. **Linda Thuman** (28 years), Sgt. **George Lytle** (29 years), Sgt. **Robert Wallen** (26 years), **Brenton Cantrell** (4 years), **Bryan Knittel** (12 years), **Denny Adams** (22 years), **Douglas Anderson** (22 years), **Kenneth Brawley** (26 years), and **Christopher Stewart** (25 years).

The following POST graduates have joined ACSO: **Nicholas Cassell**, **Alexander Faber**, **Harvey Ollis**, **John Paul Ty**, **Michael Ella**, **Robert King**, **Taylor Perea**, **Jason Podany**, and **Nicholas Salcedo**. New recruits: **Jacob Cesena**, **Patrick Dolan**, **William Dorshkind**, **Christopher Edwards**, **Keith Frederickson**, **Joshua Miller**, **Eric Rombough**, and **Natasha Stone**.

Retired technician **Bob Wagner** died of a heart attack on January 6, 2012. He was 66 years old.

Alameda Police Department

Lt. **Sean Lynch** retired after more than 26 years of service. **Greg Ella** retired after more than 21 years of service. Sgt. **Lance Leibnitz** was promoted to lieutenant and transferred from Personnel and Training to Patrol. Acting sergeants **Aaron Hardy** and **Mark Reynolds** were promoted to sergeant. Ofc. **Michael Abreu** was promoted to acting sergeant. Transfers: Lt. **Ted Horlbeck** from Patrol to Investigations, Sgt. **Eileen Tannahill** from Investigations to Patrol, Sgt. **Jeff Emmitt** from Patrol to Investigations.

Berkeley Police Department

The following officers have retired: Sgt. **Howard Nonoguchi** (31 years at BPD and 33 years in law enforcement), **Marianne Jamison** (16 years), and **Karen Buckheit** (11 years). Lateral appointment: **Christopher Scott** (San Jose PD). New officer: **Greg Michalczyk**.

Retired lieutenant **Don Smithson** passed away. Lt. Smithson retired in 1985 after 30 years of service. Retired officer **Alfred Benjamin** has died. Officer Benjamin served with BPD from 1974 to 2002. The department's second African-American patrol officer, **Jennifer Rose**, has passed away. Officer Rose served in BPD in the 1970s and helped pave the way for women entering law enforcement in Berkeley.

California Highway Patrol

Dublin office: **Don Beringer** retired after 28 years of service.

East Bay Regional Parks Police Dept.

Officer **Chuck Torres** was promoted to patrol sergeant.

Emeryville Police Department

Police Service Technician **Janet Tso** retired after 37 years with EPD. She was the most senior EPD employee at the time of her retirement. Jan's career started in the early 70's after having grown up and attended primary and secondary schools in Emeryville. In fact, Jan had gone to kindergarten with a future EPD officer who later become her sergeant. Jan always came to work with a smile and was routinely referred to as "one of the nicest persons you can ever meet." Many people from the community, current and retired EPD members came see to Jan off and wish her well in retirement. And true to Jan's form, she asked to join the volunteer's program on her last day. Good luck Jan. Lateral appointment: **Joshua Patterson** from Draper Police Department in Utah.

Fremont Police Department

Capt. **Frank Grgurina** was selected as Director of the Sunnyvale Department of Public Safety. Capt. Grgurina had been a Fremont officer for 22 years. Lt. **Clarise Lew**

was promoted to captain. Sgt. **Sean Washington** was promoted to lieutenant. The following officers were promoted to sergeant: **Jeremy Miskella**, **Eric Tang**, and **Matthew Snelson**. Lateral appointments: **Richard Hamblin** (Stockton PD), **Michael Chan** (San Jose PD), **Heidi Kindorf** (San Jose PD), and **Anthony Piol** (Sacramento SO). Sgt. **Pat Hunt** retired after 30 years of service. Sgt. **Chris Mazzone** retired after 29 years of service. **Jesse Hartman** graduated from the academy.

NEWARK POLICE DEPARTMENT

Former Police Chief **Ray Samuels** passed away unexpectedly on February 17, 2012 after suffering a heart attack. He was 58. Chief Samuels began his law enforcement career with Vallejo PD in 1975, then joined Concord PD in 1981 where he remained for the next 18 years. He joined NPD as a lieutenant in March 1999, was promoted to captain in April 2002, then appointed chief in September 2003. Chief Samuels retired from NPD in July 2008 and subsequently worked as Interim Chief at the Menlo Park and Lodi police departments, and as a public safety consultant/investigations manager for Renne Sloan Holtzman Sakai LLP.

Former sergeant **Paul Dubois** passed away on February 19, 2012 at the age of 69 after a five month battle with cancer. Sergeant Dubois was hired as an officer with NPD on August 17, 1964 and was promoted to sergeant on March 1, 1968. He left NPD in 1976 after over 11 years of service to start his own security business.

Commander **Donna Shearn** retired after over 25 years with NPD, but she has since been hired back in a part-time capacity to supervise the Community Engagement Program. Sgt. **Frank Lehr** retired after over 25 years with NPD and over 27 years in law enforcement. Transfers: Sgt. **Jonathan Arguello** from Patrol to the Special Enforcement Team, Sgt. **Jeff Mapes** from the Special Enforcement Team to Patrol, **Adeceli Kovach** from Detectives to Patrol, **Elsa Cervantes** from Patrol to Detectives; **Scott Baswell** from Patrol to the Major Crimes Task Force, **David Lee** from the Major Crimes Task Force to Patrol.

OAKLAND HOUSING AUTHORITY POLICE DEPT.

Newly appointed officers: **David Cach**, **Chano Socarras**, and **Kristi Baughman**. New dispatcher: **Stephanie Chan**.

OAKLAND POLICE DEPARTMENT

Interim Chief **Howard Jordan** was appointed chief of police. Capt. **Anthony Toribio** was promoted to deputy chief. The following officers have retired: Sgt. **Paul Hara**, Sgt. **Daniel Donovan**, Sgt. **James Morris**, Sgt. **Larry Krupp**, and **Vincent Fratangelo**. New officers: **Jared Blue-Lowry**, **Bryan Glick**, **Miguel Guzman**, **Ephrian Jordan**, **David McLaughlin**, **Ryan McLaughlin**, **Carlos Navarro**, **Keith Pullin**, **Mathias Sather**, **Alexander Ying**, **Bryan Budgin**, **Dustin Filce**, **Jeremy Guevara**, **Michael Murphy**, **Erik Scofield**, and **Stephen Stout**. Lateral appointment: **Rodger Ponce De Leon**.

The department reports that the following retired officers have died: Capt. **Jim Hahn**, Lt. **Melvin Berg**, Sgt. **Rex Mummey**, Sgt. **William Andrews**, and Sgt. **Carl Hewitt**, Jr.

PIEDMONT POLICE DEPARTMENT

John Lagios has been hired as a police officer. He served as a Reserve Officer for Piedmont PD for 1 ½ years and prior to that he worked as a police officer for SFPD for 8 ½ years.

SAN LEANDRO POLICE DEPARTMENT

Lt. **Christopher Tankson** retired after 27 years of service. Sgts. **Randy Brandt** and **Rick DeCosta** were promoted to lieutenant and assigned to the Patrol Division. **Isaac Benabou** and **Annie O'Callaghan** were promoted to sergeant and assigned to the Patrol Division. **Derrel Ramsey** was promoted to acting sergeant and assigned to the Patrol Division. **Jeff Walton** transferred from the Patrol Division to Criminal Investigation Division – Property Crimes. New public safety dispatcher: **Karine Manookian**.

UNION CITY POLICE DEPARTMENT

Chief **Greg Stewart** retired after 35 years of service. Capt. **Brian Foley** was appointed Chief of Police. Lieutenants **Kelly Musgrove**, **Ben Horner**, **Gloria Lopez-Vaughan**, and **Mark Quindoy** were promoted to commander. Sgt. **Jared Rinetti** was promoted to commander. Corp. **Victor Derting** was promoted to sergeant. **Fred Camacho** was promoted corporal. **Michael Dalisay** retired after over 26 years of service. Police Office Coordinator **Anita Vejar** retired after 12 years of service.

Brigid Dinneen transferred from Patrol to Traffic. **Jean Luevano-Ryken** transferred from Patrol to Investigations. Lateral Appointment: **Michael Yeager** (from Brentwood PD).

UNIVERSITY OF CALIFORNIA, BERKELEY POLICE DEPARTMENT

Retired sergeant **Ronald Tipton** passed away on November 23, 2011.

War Stories

Cross-examination follies

The attorney for a juvenile on trial for murder was cross-examining the Hayward detective who had investigated the case. The attorney was trying to get the detective to admit that the killer might have been a juvenile named Bobby:

Attorney: If it turns out that Bobby was the shooter, we have been sold a bill of goods, right?

Detective: If that was a fact, yes.

Attorney: You and I don't know who did it, do we? We weren't there, right?

Detective: Well, I'm not sure about you. But I know *I* wasn't there.

What a coincidence

A few minutes after three men robbed a liquor store in Hayward, an Alameda County sheriff's deputy spotted a vehicle that matched the description of the getaway car. In addition, the two men on the front seat matched the descriptions of two of the robbers. After making a felony stop, deputies removed the two men and briefly questioned them. They then looked in the back seat and found the third robber who was pretending to be asleep.

After he was pulled outside and notified he was under arrest for robbery, he said, "Hey, I don't know nothin' about no robbery. I was just hitchhiking and those two dudes picked me up. I never saw 'em before." "That's odd," replied one of the deputies, "because the driver just told me that the guy in the back seat—that's you—was his brother." The man thought for a few seconds and said, "Now ain't that a coincidence. I thought that dude looked familiar."

What's going on at the DMV?

One afternoon, a Fremont police officer made a traffic stop on a young man who was driving erratically. The officer quickly determined that the man was very drunk, so he arrested him for DUI and called for a tow truck. While waiting for the tow, the officer asked the man where he was coming from. He replied, "I was just over at the DMV. I got my license renewed."

Detect this

Another Fremont traffic stop: As the officer was walking up to the car, the driver got out, threw his radar detector to the ground—smashing it to bits. He then started jumping up and down on the parts, yelling "I paid $200 for this damn thing. I drove right by you and it didn't make a sound." As the officer examined the remains of the radar detector, he said, "That's because I don't have radar. I stopped you because you had a broken tail light."

"Cop Drop"

People who drive on today's busy streets and freeways have so many distractions. In addition to monitoring their radar detectors (see above) and talking to their friends on their cell phones, they must keep one eye out for cops so they can hide the phone. Thus, the Urban Dictionary added the term "cop drop" which it defines as quickly dropping a cell phone onto the floor of his car in order to avoid a ticket. It should also be noted that, because it is extremely rude to suddenly break off a phone conversation with a person, the W*all Street Journal* noted that cell phone etiquette now requires that drivers notify the person of the situation by quickly saying "cop drop" as they pitch the phone to the floor.

No hoodies, No hoods

In Columbus, Ohio, a man entered the Columbus PNC Bank and got into line. When a bank employee noticed that the man was wearing a hoodie that was covering most of his face, the employee walked up and said, "I'm sorry, sir, but we have a strict 'no hats, no hoods' policy. You'll have to lower your hood." The man said "that's cool" and immediately complied. When he reached the teller, he handed her a holdup note and walked out with a few thousand dollars. But, thanks to the excellent surveillance photos of his face, he was quickly arrested. FBI agents are still wondering why a man who intended to rob a bank was so willing to comply with a policy the would result in his identification.

Another hapless bank robber

One morning at 10:18:07 A.M., a man walked into the Bank of America branch in Oakland's Eastmont Town Center and handed the teller a holdup note. At 10:18:47, the teller hit the silent alarm. At 10:19:34 A.M. two OPD officers rushed into the bank and arrested the robber. What did he do wrong? He failed to notice the big sign on the office located next door to the bank. It said: "Oakland Police Department, Eastmont Substation."

A day in Monte Carlo

Monte Carlo is a classy place, full of classy people driving classy cars. Well, it seems there are six fewer classy cars on the streets today thanks to a woman who lost control of her new Bentley and crashed into all of the following: (1) a $75,000 Mercedes Benz CLS, (2) a $250,000 Bentley Azure, (3) a $143,000 Ferrari Italia, (4) an $80,000 Porsche 911, and a $150,000 Aston-Martin Rapide. After examining the wreckage, a Monte Carlo traffic officer approached the driver and said, "Madam, I *do* hope you are insured."

Do-it-yourself parking enforcement

Somone was keying cars in the parking garage of an office building in downtown Seattle and leaving angry notes complaining about how the cars were taking up two parking spaces. This prompted the garage's management set up a sting: they parked a car so that it straddled two parking spots and pointed a surveillance camera at it. The camera eventually produced footage of a man driving along in a Porsche, stopping behind the bait car, stepping out and keying it. The man was subsequently identified as an attorney who worked in the building. He was arrested.

What were you thinking?

In Wyoming, a man named James Fraser was representing himself on a federal charge of possessing an illegal firearm. At his trial, he asked the judge to allow him to testify that he had previously used the gun to kill a man who had threatened him. The judge refused, and the Tenth Circuit upheld the ruling. "How," wondered the court, "could evidence that he killed a man have *helped* Mr. Fraser?"

Ouch

According to an Alameda County probation report, the defendant's criminal history included the following:

Offense: Battery, struck a 14-year old girl on the head with a dildo.

Disposition: Pled to disturbing the peace.

Just horsing around

In Ventura County, a judge who was arraigning a suspect noticed a note attached to the complaint. The note was from the DA's Office and it read:

Judge: The defendant was previously arrested for 647(a) [lewd conduct in a public place] after he was observed having sex with a horse. So we request that he *not* be housed in the honor farm.

Gotcha

A defense attorney was cross-examining an officer at a motion to suppress in Oakland:

Attorney: Did you see my client run away?

Officer: No, another officer saw him and put out a description on the radio.

Attorney: So, another officer furnished this description. Do you always trust your fellow officers?

Officer: Yes.

Attorney: Then how come officers put padlocks on their lockers at the police station?

Officer: Because we share the building with the court complex, and lawyers sometimes walk through.

The War Story Hotline

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We made your job easier (unless you're a crook)

For officers, prosecutors, and judges, it has never been easier to understand the law pertaining to police procedure and to keep up with the constant barrage of changes. For starters, there's the 2012 edition of *California Criminal Investigation* which sets out the rules and principles that regulate criminal investigations and police field operations in California. Not only is *CCI* comprehensive, it explains everything in plain English and is organized logically in an uncluttered outline format so that readers can *see* the structure of each subject. *CCI 2012* contains 690 pages, including more than 3,500 endnotes featuring comments, examples, and over 14,000 citations to federal and California appellate decisions with illuminating quotes from selected cases.

In addition, there is CCI Online, our innovative website which contains all of the information in the *CCI* manual plus continuous updates, a unique endnotes-at-a-glance feature, a global word search application, and links to articles in *Point of View*.

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