

## Protecting Surveillance Sites

*“Like confidential informants, hidden observation posts may often prove to be useful law enforcement tools, so long as they remain secret.”<sup>1</sup>*

Sometimes the best place in which to conduct surveillance is in house or business whose occupants allow officers to use the premises for this purpose. For example, people who are fed up with drug dealers operating in their neighborhoods may permit narcotics officers to use their homes or businesses to conduct surveillance of street sellers.

Or officers may use a surveillance vehicle, such as a specially-equipped van, or utilize some strategic observation post which has been productive in the past.

In any event, if suspects are arrested or searched as the result of information obtained from surveillance at such a location, they may file a motion in court requesting that officers be ordered to divulge the exact location of the surveillance site or, in the case of a surveillance vehicle, a precise description.

In most cases, the suspects are not really interested in learning where the surveillance took place. Instead, they are hoping that if their motion is granted officers will invoke their right not to disclose the surveillance site,<sup>2</sup> in which case a court will usually suppress all information obtained from such surveillance, including testimony concerning observations made at the location.<sup>3</sup>

This strategy operates on the theory that officers would usually prefer to incur sanctions—including dismissal of charges—rather than reveal their surveillance sites. And there are some very good reasons for this. As the Court of Appeal observed, “[T]he identification of a hidden observation post will likely destroy the future value of that location for police surveillance. The revelation of a surveillance location might also threaten the safety of police officers using the observation post, or lead to adversity for cooperative owners or occupants of the building.”<sup>4</sup> Commenting on the danger to people who permit officers to use their homes or businesses for surveillance, another court pointed out, “[A] person whose address is revealed has no place to hide.”<sup>5</sup>

This does not mean officers will always be forced to decide whether to disclose their surveillance sites or incur sanctions. As we will now discuss, there are certain things officers can do to avoid being put into such a position.

### IS THE SITE “MATERIAL?”

A court will not order the disclosure of a surveillance site if the defendant’s need for disclosure is outweighed by society’s need to preserve the confidentiality of the location.<sup>6</sup> In most cases, the need to keep the surveillance location a secret is quite strong (otherwise officers would have readily revealed it). Thus, the main issue is whether there is a reasonable possibility that knowledge of the surveillance location would materially assist the defendant at trial.<sup>7</sup>

In most cases prosecutors will try prove such a reasonable possibility does not exist by presenting evidence of the following:

**Observations not significant:** The observations from the surveillance site were not necessary in establishing the defendant’s guilt.

**Clear view:** Even if the observations were somewhat material, the view from the surveillance site was so clear and unobstructed that there is no reasonable possibility the defense would be able to effectively challenge the accuracy of the officer's observations.

#### Observations not significant

A surveillance location is less apt to be deemed material if the prosecution can prove the officers' observations from the location were not necessary to establish the defendant's guilt. There are essentially two ways of doing this: (1) Demonstrating that the evidence of defendant's guilt—independent of surveillance—is so strong that the location of the surveillance site is irrelevant. (2) Demonstrating that because of the specific charges filed against the defendant, knowledge of the surveillance location is irrelevant.

**STRENGTH OF EVIDENCE:** The greater the quantity and quality of the evidence of the defendant's guilt, apart from surveillance, the less disclosure of the location is needed to assure the defendant of a fair trial. Thus, the prosecution may attempt to prove the evidence obtained as the result of surveillance is relatively insignificant in light of the other evidence.

For example, if the defendant was charged with possession of drugs for sale, the materiality of the surveillance observations would be reduced to the extent the defendant's intent to sell drugs could be established by other means; e.g., the drugs were packaged for sale, or the quantity of drugs in his possession was so great that it would have been beyond belief that they were intended for personal use.

Thus, in *People v. Garza*,<sup>8</sup> the court in refusing to order disclosure noted, among other things, "[A]t the time of his arrest defendant had on his person four bindles of cocaine. [Narcotics officers] testified that four bindles of cocaine in defendant's possession were sufficient to show that the possession was for sale. . . . [The officer] further testified that even removing from the evidence his observations from the surveillance location, he would still consider the four bindles in defendant's possession as being possessed for sale."

Similarly, the significance of the surveillance observations would be reduced if the defendant admitted selling drugs or admitted engaging in the conduct which was observed by officers, or if person who purchased drugs was detained and found to be in possession of drugs.<sup>9</sup>

**NATURE OF CHARGES:** The importance of the surveillance observations may also be reduced or eliminated by the nature of the charges that were eventually filed against the defendant.<sup>10</sup> For example, if the defendant is charged only with straight possession of drugs or other contraband that was found in his possession, his actions observed during surveillance before the contraband was found would be much less material than if he was charged with possession with intent to sell.

#### Clear view

In many cases, the defense contends it needs to know the exact location where surveillance occurred in order to attack the accuracy of the officers' observations

from the site; i.e., to prove there is a reasonable doubt as to what the officers' saw.

This is commonly refuted by presenting evidence proving the officers' view was unobstructed and there were no distractions or other reasons to doubt the accuracy of the officers' observations.<sup>11</sup> Circumstances that should be brought to the court's attention include the following:

**Distance:** The distance between the surveillance location and activities that were observed from the location.<sup>12</sup>

**Obstructions:** Whether there were any obstructions that would impair the officers' ability to see the activities that were observed from the location.<sup>13</sup>

**Lighting and weather:** Whether lighting and weather conditions would have impaired observations made from the surveillance site.<sup>14</sup>

**Visual aids:** Whether the officers' observations were made through binoculars and, if so, their strength.<sup>15</sup>

**Detailed observations:** The extent to which the officers could provide details concerning their observations so as to demonstrate they had a good view of the location.<sup>16</sup>

**Other people in area:** Whether there were other people nearby and in such a position that officers may inadvertently attributed their actions to the defendant.<sup>17</sup>

For example, in a case in which an officer was watching drug sales on a street, the court ruled the surveillance location was material because the officer testified he was watching appellant and three other men on the corner. "It is possible," said the court, "that discovery of the surveillance location would have shown that because of distance or partial obstruction, the officer could not have distinguished the activities of one suspect from those of another."<sup>18</sup>

In another case, a surveillance location was ruled material when the drug transaction took place about 50 yards away, the officer watched the transaction through binoculars, and the weather was overcast.<sup>19</sup>

On the other hand, in *People v. Walker*<sup>20</sup> the court ruled the surveillance location in a drug sale case was not material because, among other things, the officer was standing 15 feet away from the drug transaction, it occurred in early October at about 5:45 P.M. under good lighting conditions, the officer did not use binoculars, and he had an unobstructed view. As the court noted, "Defendant did not prove or even offer evidence to indicate that there was some point within the 15 feet to the rear of the building that the officer could not have observed him due to an obstruction."

Similarly, in *In re Sergio M.*,<sup>21</sup> the court ruled that disclosure was not required based on testimony that the officer "was within 100 yards of the [suspect], and was using 35-power binoculars. He had an unobstructed view of the [suspect at all times]. It was clear and sunny that afternoon. Nobody else in the vicinity was dressed like the [suspect]." The officer also witnessed the transaction in which the suspect received money in return for a small object which, following the arrest of the buyer, was determined to be marijuana.

## HEARING PROCEDURE

If a defendant seeks the disclosure of a surveillance location which officers want to remain secret, prosecutors must respond by explaining, (1) why disclosure of the surveillance location falls within the “official information” privilege, or (2) declare they cannot provide such an explanation in open court without betraying the privilege.”<sup>22</sup>

The defendant then has the burden of demonstrating there is a reasonable possibility that knowledge of the exact location of the surveillance site is material on the issue of the defendant’s guilt.<sup>23</sup> If the defendant meets this burden, the court will conduct an *in camera* hearing.<sup>24</sup> The defense may submit questions to be asked at the hearing.<sup>25</sup>

The purpose of an *in camera* hearing is to determine if the need for disclosure is outweighed by the need to preserve the confidentiality of the surveillance location.<sup>26</sup> Consequently, the prosecution must disclose to the judge the precise nature of the information obtained from the site<sup>27</sup> and will attempt to prove it is in the public interest to maintain the confidentiality of the surveillance location. This may be accomplished by showing that disclosure of the location would put the occupants or owner in danger of retaliation, threaten the safety of officers who may use the location in the future, or destroy the usefulness of the location to officers in the future.<sup>28</sup> Other relevant evidence includes the nature of the crime charged and possible defenses.<sup>29</sup> In appropriate cases, the prosecution may attempt to prove there were no obstructions of the view so as to require disclosure by furnishing the court with a videotape or photograph of the view taken from the surveillance site.<sup>30</sup>

The court will also consider the relevance of the information to the defense and any available alternatives to full disclosure.<sup>31</sup>

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<sup>1</sup> *People v. Walker* (1991) 230 Cal.App.3d 230, 235 [quoting from *U.S. v. Green* (D.C. Cir. 1981) 670 F.2d 1148, 1155].

<sup>2</sup> NOTE: Officers have a legal right not to reveal the location of a confidential surveillance location. See Evidence Code § 1040; *People v. Walker* (1991) 230 Cal.App.3d 230, 235-8; *Hines v. Superior Court* (1988) 203 Cal.App.3d 1231, 1234; *In re Sergio M.* (1993) 13 Cal.App.4th 809, 813; *People v. Montgomery* (1988) 205 Cal.App.3d 1011, 1018-9 [“We agree that one effect of section 1040 is to establish, under appropriate circumstances, a ‘surveillance location privilege’ in California.”]; *People v. Haider* (1995) 34 Cal.App.4th 661, 665.

<sup>3</sup> See *People v. Montgomery* (1988) 205 Cal.App.3d 1011, 1022; *Hines v. Superior Court* (1988) 203 Cal.App.3d 1231, 1234-6.

<sup>4</sup> *People v. Montgomery* (1988) 205 Cal.App.3d 1011, 1019 [quoting from *U.S. v. Green* (D.C. Cir. 1981) 670 F.2d 1148, 1155]. ALSO SEE *People v. Walker* (1991) 230 Cal.App.3d 230, 235 [“Furthermore, in most cases a surveillance location and consequently the people who have permitted the use of their property deserve more protection than the informant who has mobility as a protection against reprisal since a person whose address is revealed has no place to hide.”].

<sup>5</sup> *People v. Montgomery* (1988) 205 Cal.App.3d 1011, 1019. ALSO SEE *People v. Haider* (1995) 34 Cal.App.4th 661, 665.

<sup>6</sup> See *People v. Walker* (1991) 230 Cal.App.3d 230, 236; *People v. Montgomery* (1988) 205 Cal.App.3d 1011, 1020-2.

<sup>7</sup> See *People v. Garza* (1995) 32 Cal.App.4th 148, 153; *People v. Walker* (1991) 230 Cal.App.3d 230, 236, 238; *People v. Montgomery* (1988) 205 Cal.App.3d 1011, 1021. **NOTE:** Disclosure is not required merely because the surveillance observations would have been “relevant.” See *People v. Garza* (1995) 32 Cal.App.4th 148, 156; *People v. Haider* (1995) 34 Cal.App.4th 661, 669.

<sup>8</sup> (1995) 32 Cal.App.4th 148, 155.

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<sup>9</sup> See *People v. Haider* (1995) 34 Cal.App.4th 661, 667 [“the purchaser was detained and was observed discarding a piece of rock cocaine as the officers approached.”]; *People v. Montgomery* (1988) 205 Cal.App.3d 1011, 1022; *People v. Walker* (1991) 230 Cal.App.3d 230, 238 [defendant admitted the main fact established by surveillance, that he was the person who had been talking with the buyer who was subsequently arrested]; *In re Sergio M.* (1993) 13 Cal.App.4th 809, 814.

<sup>10</sup> See *People v. Montgomery* (1988) 205 Cal.App.3d 1011, 1023 [“(T)he observation of the [drug] sale formed an essential basis for the expert testimony that appellant possessed marijuana for sale.”]; *People v. Haider* (1995) 34 Cal.App.4th 661, 667; *People v. Garza* (1995) 32 Cal.App.4th 148, 155; *People v. Walker* (1991) 230 Cal.App.3d 230, 238.

<sup>11</sup> See *Hines v. Superior Court* (1988) 203 Cal.App.3d 1231, 1235.

<sup>12</sup> See *People v. Haider* (1995) 34 Cal.App.4th 661, 667; *People v. Walker* (1991) 230 Cal.App.3d 230, 238; *In re Sergio M.* (1993) 13 Cal.App.4th 809, 814; *People v. Garza* (1995) 32 Cal.App.4th 148, 151.

<sup>13</sup> See *People v. Walker* (1991) 230 Cal.App.3d 230, 238; *In re Sergio M.* (1993) 13 Cal.App.4th 809, 814; *People v. Garza* (1995) 32 Cal.App.4th 148, 151; *People v. Haider* (1995) 34 Cal.App.4th 661, 669.

<sup>14</sup> See *People v. Haider* (1995) 34 Cal.App.4th 661, 667; *People v. Walker* (1991) 230 Cal.App.3d 230, 238; *In re Sergio M.* (1993) 13 Cal.App.4th 809, 814; *People v. Garza* (1995) 32 Cal.App.4th 148, 151 [“It was dark, but the area was lit by amber street lights. . . .”]; *People v. Haider* (1995) 34 Cal.App.4th 661, 669.

<sup>15</sup> See *In re Sergio M.* (1993) 13 Cal.App.4th 809, 814; *People v. Walker* (1991) 230 Cal.App.3d 230, 238; *People v. Haider* (1995) 34 Cal.App.4th 661, 669.

<sup>16</sup> See *People v. Haider* (1995) 34 Cal.App.4th 661, 667 [“officer testified that he saw an off-white rock being brushed into Alvarez’s hands.”]; *People v. Garza* (1995) 32 Cal.App.4th 148, 155 [“(D)uring the surveillance [the officer] broadcast to the other officers detailed descriptions of Garza and Ramirez and their activities. Evidently, if [the officer’s] view had been obstructed by anything or if [the officer] had been at a location beyond hearing distance from defendant and Ramirez, [the officer] would not have been able to describe defendant and Ramirez to the other officers and monitor their activities.”]; *In re Sergio M.* (1993) 13 Cal.App.4th 809, 814-5; *People v. Walker* (1991) 230 Cal.App.3d 230, 238-9.

<sup>17</sup> *In re Sergio M.* (1993) 13 Cal.App.4th 809, 814.

<sup>18</sup> *People v. Montgomery* (1988) 205 Cal.App.3d 1011.

<sup>19</sup> *Hines v. Superior Court* (1988) 203 Cal.App.3d 1231.

<sup>20</sup> (1991) 230 Cal.App.3d 230.

<sup>21</sup> (1993) 13 Cal.App.4th 809.

<sup>22</sup> See *Torres v. Superior Court* (2000) 80 Cal.App.4th 867, 873.

<sup>23</sup> See *People v. Garza* (1995) 32 Cal.App.4th 148, 153; *People v. Walker* (1991) 230 Cal.App.3d 230, 236, 238; *Torres v. Superior Court* (2000) 80 Cal.App.4th 867, 873 [“(T)he district attorney is not entitled to an in camera hearing just for the asking [but] the court has the authority to hold an in camera hearing on a proper showing that the hearing is necessary to determine the claim of privilege.”].

<sup>24</sup> See *People v. Montgomery* (1988) 205 Cal.App.3d 1011, 1021 [“The correct procedure in these cases is for the court first to ask the defendant to make a prima facie showing for disclosure. If defendant does so, the court should then proceed [with the in camera hearing].”]; *People v. Haider* (1995) 34 Cal.App.4th 661, 665, fn.3; *People v. Walker* (1991) 230 Cal.App.3d 230, 236.

<sup>25</sup> See *People v. Montgomery* (1988) 205 Cal.App.3d 1011, 1021; *Torres v. Superior Court* (2000) 80 Cal.App.4th 867, 874.

<sup>26</sup> See *People v. Walker* (1991) 230 Cal.App.3d 230, 236; *People v. Montgomery* (1988) 205 Cal.App.3d 1011, 1020-2.

. **NOTE:** The court should “exercise its inherent power to order that the proceedings be recorded and transcribed and that the transcript be sealed.” See *Torres v. Superior Court* (2000) 80 Cal.App.4th 867, 874; *People v. Montgomery* (1988) 205 Cal.App.3d 1011, 1021, fn.4.

<sup>27</sup> See *People v. Montgomery* (1988) 205 Cal.App.3d 1011, 1021.

<sup>28</sup> See *People v. Haider* (1995) 34 Cal.App.4th 661, 666; *People v. Walker* (1991) 230 Cal.App.3d 230, 235-6.

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<sup>29</sup> See *People v. Walker* (1991) 230 Cal.App.3d 230, 237, fn.6.

<sup>30</sup> See *People v. Montgomery* (1988) 205 Cal.App.3d 1011, 1022.

<sup>31</sup> See *People v. Montgomery* (1988) 205 Cal.App.3d 1011, 1021.