POINT of VIEW

A publication of the Alameda County District Attorney's Office

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Point of View

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This edition of Point of View
is dedicated to the memory of
Sergeant Paul Starzyk
of the Martinez Police Department
who was killed in the line of duty
on September 6, 2008

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Probable Cause to Search

"Probable cause to arrest does not necessarily provide probable cause to search."[1]

While probable cause to arrest requires proof of just one thing—guilt—its sibling is more complicated. In fact, probable cause to search requires proof of three existing conditions that can be difficult to substantiate: (1) that certain evidence pertaining to the crime under investigation exists; (2) that it was taken to, or produced at, the location of the search; and (3) it's still there.[2] As the United States Supreme Court explained:

> The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific "things" to be searched for and seized are located on the property to which entry is sought.[3]

This is not, however, as difficult as it sounds. That's because probable cause to search can be based on circumstantial evidence and reasonable inferences. For example, probable cause to arrest a suspect for armed robbery may justify an inference that the handgun he used and the clothing he wore are now located in his home or car. Still, it will be helpful to keep in mind that proving the existence of probable cause to search—with or without a warrant—will usually require more attention to detail than establishing probable cause to arrest.

The Evidence Exists

It might sound obvious, but probable cause to search for something requires proof that the thing exists. As the court noted in the case of *Fitzgerald* v. *City of Los Angeles*, "[P]olice may not conduct a search based on probable cause to believe a crime has been committed when no physical evidence exists for that crime."[4]

This issue is especially likely to cause problems in search warrant cases when officers prepare the list of evidence they want to look for by incorporating lists of evidence (known as "boilerplate") from warrants they have used in the past. The problem is that there may be nothing in the affidavit to indicate that some of these things exist. If so, they will be suppressed if officers happen to find them.

That occurred in *People* v. *Holmsen*[5] where an officer obtained a warrant to search the defendant's home for cocaine. While he clearly had probable cause to search for the drugs, he also obtained authorization to search for documents pertaining to a conspiracy to sell cocaine. This resulted in suppression because, as the court pointed out:

> There is no indication [in the affidavit] why "papers showing or tending to show the trafficking of cocaine" were likely to exist. Nor was there any indication of a narcotics conspiracy, hence there was no probable cause to believe there might be "personal phone books to identify co-conspirators."

Although officers will sometimes have direct proof that the evidence exists—as when an officer, informant, victim, or witness saw it—in many cases they must rely on reasonable inference based on common experience and their training and experience. What kinds of inferences do the courts permit? The following are examples.

INDICIA: The existence of indicia (i.e., documents and other things that tend to prove the identity of the people in control of the place to be searched) can usually be inferred because it is widely known that people keep indicia in their homes, businesses, and cars.[6] As the court observed in *People* v. *Rogers*, "[C]ommon experience tells us that houses and vehicles ordinarily contain evidence establishing the identities of those occupying or using them."[7]

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[1] *State* v. *Varnado* (1996) 675 So.2d 268, 269.
[2] See *Illinois* v. *Gates* (1983) 462 U.S. 213, 238; *People* v. *Frank* (1985) 38 Cal.3d 711, 727.
[3] *Zurcher* v. *Stanford Daily* (1978) 436 U.S. 547, 556.
[4] (C.D.Cal. 2007) 485 F.Supp.2d 1137, 1149.
[5] (1985) 173 Cal.App.3d 1045. ALSO SEE *People v. Frank* (1985) 38 C3 711, 728 ["But nowhere in all these 24 pages was there alleged one single fact that gave probable cause to believe that any of the boilerplate allegations of the warrant were true."]. ALSO SEE *U.S.* v. *Ribeiro* (1st Cir. 2005) 397 F.3d 43, 51 ["boilerplate" is "stereotyped or formulaic writing"].
[6] See *People* v. *Stafford* (1973) 29 Cal.App.3d 940, 948; *U.S.* v. *Crews* (9th Cir. 2007) 502 F.3d 1130, 1137.
[7] (1986) 187 Cal.App.3d 1001, 1009.

BUSINESS RECORDS: The existence of certain types of business records may be inferred, based on common business practice; e.g., incorporation documents, accounting and personnel records.[8]

TRACE EVIDENCE: The existence of some kinds of evidence can be inferred from human physiology and basic physics; e.g., fingerprints and DNA molecules are naturally left by people on the premises; trace blood spatters, powder burns, and gunshot residue will probably be found at the scene of a shooting.[9]

MANNER IN WHICH THE CRIME WAS CARRIED OUT: The existence of certain evidence may be inferred from the manner in which the crime under investigation was carried out. Some examples:

- The existence of a certain "medium caliber handgun" was proven by autopsy results that revealed that the murder victim had been shot with such a weapon.[10]
- The existence of pliers, rope, and pieces of flesh was proven by the condition of the victim's body and forensic reports that she had been tied up and tortured.[11]
- The existence of a map of a certain remote area in Nevada was based on information that the murder suspect had driven the victim's body from Pinole to that area; it was therefore reasonable to believe he would have needed a map.[12]
- Because the crimes under investigation were serial murders that occurred on or near hiking trails in Marin County, the existence of maps, books, and schedules pertaining to hiking in the area was proven circumstantially.[13]

COMMON INSTRUMENTALITIES OF SUCH CRIMES: Even if there was nothing unusual or distinctive about how the crime was carried out, officers may usually infer the existence of things that are commonly used to commit or facilitate such crimes. As the Court of Appeal explained, "[R]easonable inferences may be indulged as to the presence of articles known to be usually accessory to or employed in the commission of a specific crime."[14]

For example, the courts have ruled that officers reasonably believed that the following instrumentalities existed:

DRUG SALES PARAPHERNALIA: Because officers had probable cause to believe that the suspect was a drug dealer, they reasonably believed that he possessed sales paraphernalia, such as scales, pay and owe records, lists of customers and suppliers.[15]

DRUG PRODUCTION PARAPHERNALIA: Having probable cause to believe the suspect was producing methamphetamine, officers reasonably believed he possessed lab equipment and chemicals.[16]

MARIJUANA CULTIVATION PARAPHERNALIA: Because officers had probable cause to believe the suspect was growing marijuana, they reasonably believed he possessed marijuana seeds, tools used to harvest marijuana, and books on how to cultivate it.[17]

BOOKMAKING PARAPHERNALIA: Because the premises were being used for loan sharking and bookmaking, it was reasonable to infer the existence of customer lists and betting slips.[18]

FENCING PARAPHERNALIA: Because the suspect had been selling stolen furs, officers reasonably be-

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[8] See *Fenwick & West* v. *Superior Court* (1996) 43 Cal.App.4th 1272, 1279-80.
[9] See *People* v. *Schilling* (1987) 188 Cal.App.3d 1021, 1031 [with probable cause that a shooting occurred in a home, it was reasonable to infer the existence of "fingerprints, powder burns, blood, blood spatters, bullet holes, hairs, fibers"]; *People* v. *Superior Court (Nasmeh)* (2007) 151 Cal.App.4th 85, 101 ["[B]ased on his training and experience, Officer Wahl suspected that valuable trace evidence might be found in Nasmeh's vehicle"].
[10] *People* v. *Schilling* (1987) 188 Cal.App.3d 1021, 1026, 1030.
[11] *People* v. *Frank* (1985) 38 Cal.3d 711, 722.
[12] *U.S.* v. *Wong* (9th Cir. 2003) 334 F.3d 831, 836.
[13] *People* v. *Carpenter* (1999) 21 Cal.4th 1016, 1043.
[14] *People* v. *Senkir* (1972) 26 Cal.App.3d 411, 421. ALSO SEE *U.S.* v. *Spilotro* (9th Cir. 1986) 800 F.2d. 959, 964.
[15] See *People v. Tuadles* (1992) 7 Cal.App.4th 1777, 1782, 1785 [infer "pay and owe records, customer lists with addresses and phone numbers, and similar identifying information concerning confederates"]; *People v. Brevetz* (1980) 112 Cal.App.3d 65, 70 [infer "associated paraphernalia for packaging and sale of cocaine"]; *U.S.* v. *Feliz* (1st Cir. 1999) 182 F.3d 82, 87 [reasonable to infer the existence of "documents showing the names and telephone numbers of customers and suppliers"].
[16] See *People v. McNabb* (1991) 228 Cal.App.3d 462, 469.
[17] See *People v. Senkir* (1972) 26 Cal.App.3d 411, 420-1; *People v. Vermouth* (1974) 42 Cal.App.3d 353, 362.
[18] *U.S.* v. *Spilotro* (9th Cir. 1986) 800 F.2d 959, 964.

lieved that "books and records would be utilized as instrumentalities in connection with the crime of disposing of hundreds of fur garments through a façade of legitimacy."[19]

PROSTITUTION PARAPHERNALIA: Because the premises were being used for prostitution, officers reasonably believed they would find "trick books," address books, phone message slips, and "mechanical devices employed by prostitutes."[20]

ASSOCIATED ITEMS OR CONDITIONS: The existence of some evidence may be based, at least in part, on the discovery of items or conditions that officers have learned from experience are closely associated with such evidence. Some examples:

AMMO ⇨ FIREARMS: Because officers saw a bullet on the console of the suspect's car, they might reasonably believe there was a firearm somewhere in the passenger compartment.[21]

BURGLAR TOOLS ⇨ STOLEN PROPERTY: Because officers found burglar tools in the suspect's possession, they reasonably believed that the laden pillowcase he was carrying contained stolen property.[22]

ALCOHOL ODOR ⇨ OPEN CONTAINER: Because officers could smell the odor of fresh beer in the suspect's car, they reasonably believed there was an open container in the passenger compartment.[23]

These types of inferences are especially useful in drug cases. For example, as we discuss in the accompanying article on plain view, officers may reasonably believe that drugs or other contraband will be found inside a container based on the nature of the container (e.g., bindles, rolled-and-tied balloons),[24] or the distinctive feel or odor of the contents.[25] Some other examples:

DRUGS ⇔ PARAPHERNALIA: Because drugs and drug paraphernalia are closely associated, the discovery of one will usually prove the existence of the other.[26]

DRUGS FOR SALE ⇨ WEAPONS: Because drug dealers are often armed, the discovery of drugs possessed for sale will often support an inference that there are weapons nearby.[7]

PHYSICAL SYMPTOMS ⇨ DRUGS: If officers have probable causes to believe that a suspect is under the influence of drugs, they will frequently have probable cause to believe he possesses drugs and paraphernalia.[28]

HEAVY FOOT TRAFFIC ⇨ DRUGS OR STOLEN PROPERTY: The observation of heavy foot traffic in and out of a residence might be an indication there are drugs, stolen property, or other contraband inside that the visitors are buying or selling.[29]

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[19] *U.S.* v. *Scharfman* (2nd Cir. 1971) 448 F.2d 1352, 1355.
[20] *People* v. *McEwen* (1966) 244 Cal.App.2d 534, 536.
[21] See *People* v. *DeCosse* (1986) 183 Cal.App.3d 404, 411.
[22] See *People* v. *Suennen* (1980) 114 Cal.App.3d 192, 203; *People* v. *Gee* (1982) 130 Cal.App.3d 174, 182.
[23] See *People* v. *Molina* (1994) 25 Cal.App.4th 1038, 1042; *People* v. *Evans* (1973) 34 Cal.App.3d 175.
[24] See *Texas* v. *Brown* (1983) 460 U.S. 730, 743 ["the distinctive character of the balloon itself spoke volumes as to its contents"]; *Arkansas* v. *Sanders* (1979) 442 U.S. 753, 764, fn.13; *People v. Banks* (1990) 217 Cal.App.3d 1358, 1364 [zip-lock bags "are routinely used to carry rock cocaine"]; *People v. Nonnette* (1990) 221 Cal.App.3d 659, 666 [bundle of tiny baggies of the type used for drugs].
[25] See *United States* v. *Johns* (1985) 469 U.S. 478, 482 ["After the officers came closer and detected the distinct odor of marijuana, they had probable cause to believe that the vehicles contained contraband."]; *Minnesota* v. *Dickerson* (1993) 508 U.S. 366, 376; *People v. Thurman* (1989) 209 Cal.App.3d 817, 826; *People* v. *Gale* (1973) 9 Cal.3d 788, 794 ["[T]he strong odor of fresh marijuana which Officer Aumond smelled after entering [the vehicles] would have given him probable cause to believe that contraband may be present."]; *People* v. *Weaver* (1983) 143 Cal.App.3d 926, 931 ["[The odor of PCP was] quite sufficient to justify the warrantless search of the package area"].
[26] See *Wyoming* v. *Houghton* (1999) 526 U.S. 295, 300 [because officers saw a hypodermic syringe in the driver's shirt pocket, they reasonably believed there were drugs in the vehicle].
[27] See *People v. Simpson* (1998) 65 Cal.App.4th ["Illegal drugs and guns are a lot like sharks and remoras. And just as a diver who spots a remora is well-advised to be on the lookout for sharks, an officer investigating cocaine and marijuana sales would be foolish not to worry about weapons."].
[28] See *People v. Gonzales* (1989) 216 Cal.App.3d 1185, 1189, 1191; *People v. Ruth H.* (1972) 26 Cal.App.3d 77, 82; *People v. Decker* (1986) 176 Cal.App.3d 1247, 1250; *People v. Guy* (1980) 107 Cal.App.3d 593, 598.
[29] See *Bailey* v. *Superior Court* (1992) 11 Cal.App.4th 1107, 1112 ["'[U]nder certain circumstances, [heavy foot traffic] might raise suspicions, or be one indicator of possible narcotics transactions."]; *People v. Medina* (1985) 165 Cal.App.3d 11, 19-20, fn.4 ["[T]he foot traffic to Medina's residence was indeed suggestive of criminal conduct when examined as part of the total picture."]; *U.S.* v. *Johnson* (8th Cir. 2008) __F.3d__ [2008 WL 2369649] ["[T]here was a great deal of short-term traffic to the apartment, consistent with narcotics trafficking."].

MARIJUANA SEEDS ⇨ MARIJUANA: The presence of marijuana seeds or leaves may establish the existence of marijuana nearby.[30]

SECRET COMPARTMENT ⇨ DRUGS: The discovery of a secret compartment or a suspicious modification to a vehicle that is being used by a suspected drug dealer may support an inference there are drugs inside it.[31]

WHERE THERE'S SOME, THERE'S PROBABLY MORE: When officers find contraband such as illegal weapons,[32] drugs,[33] or stolen property,[34] it is usually reasonable to believe there is more of it nearby. For example, in ruling that this type of inference was reasonable, the courts have noted the following:

- "Certain items carried by appellants at the time of their arrest—numerous counterfeit credit and identification cards, large amounts of cash—suggested that additional items of that sort existed elsewhere."[35]
- "[H]aving already arrested appellant for possession of one weapon, the deputy could have reasonably suspected the vehicle would contain other weapons."[36]
- "Once the officer discovered rock cocaine in the passenger compartment, he had probable cause to believe illegal drugs would be found in the trunk of the car."[37]
- "We find that a person of ordinary caution would conscientiously entertain a strong suspicion that even if defendant makes only personal use of the marijuana found in his day planner, he might stash additional quantities for future use in other parts of the vehicle, including the trunk."[38]
- "It requires no perspicacious intellect to reason the person smoking one marijuana cigarette may well want another and will carry sufficient marijuana to satisfy his appetite of the moment."[39]
- "When [the officer] saw the beer can through the car window, that observation constituted probable cause for his further examination of the vehicle to ascertain whether other open cans were in the car."[40]

Note, however, that the "where there's some . . ." inference will probably not support a search of the suspect's *home* unless, based on the quantity of contraband or other circumstances, there is probable cause to believe he possessed it for sale.

Proof of Location

In addition to proving that the evidence exists, officers must be able show that there is fair probability that it was taken to the location of the search or was produced there, or that there was some other nexus or connection between the two.[41] As the Court of Appeal pointed out, "In order to have a valid search the officers must have probable cause to believe the object of the search is in the particular place to be searched."[42]

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[30] See *People* v. *Dey* (2000) 84 Cal.App.4th 1318, 1322; *People* v. *Thuss* (2003) 107 Cal.App.4th 221.
[31] See *People v. Crenshaw* (1992) 9 Cal.App.4th 1402, 1415 ["Here, to an experienced officer the suspicious door panel was not an unlikely repository of narcotics."]; *U.S.* v. *Bravo* (9th Cir. 2002) 295 F.3d 1002, 1008; *U.S.* v. *Price* (5th Cir. 1989) 869 F.2d 801, 804 ["Once the agents had discovered the secret compartment they had probable cause to search the compartment itself."]; *U.S.* v. *Strickland* (11th Cir. 1990) 902 F.2d 937, 943 ["The tire's bent rim, extreme weight, and flopping sound, provided the officer with at least probable cause to believe that something had been secreted in the tire."]; *U.S.* v. *Gill* (8th Cir. 2008) __ F.3d __ [2008 WL 190789] [although the tonneau cover locks without external mechanisms, it was also latched down with extra wires and straps].
[32] See *People* v. *Stafford* (1973) 29 Cal.App.3d 940, 948; *People* v. *Benites* (1992) 9 Cal.App.4th 309, 328.
[33] See *Wyoming* v. *Houghton* (1999) 526 U.S. 295, 300; *People* v. *LeBlanc* (1997) 60 Cal.App.4th 157, 166; *People* v. *Coleman* (1991) 229 Cal.App.3d 321, 327; *People v. Hunt* (1990) 225 Cal.App.3d 498, 509 ; *People v. Varela* (1985) 172 Cal.App.3d 757, 762.
[34] See *People* v. *Stafford* (1973) 29 Cal.App.3d 940, 948; *People* v. *Evans* (1973) 34 Cal.App.3d 175, 180.
[35] *U.S.* v. *Holzman* (9th Cir. 1989) 871 F.2d 1496, 1506.
[36] *People* v. *Carrillo* (1995) 37 Cal.App.4th 1662, 1669.
[37] *People* v. *Hunt* (1990) 225 Cal.App.3d 498, 509. ALSO SEE *People* v. Hunter (2005) 133 Cal.App.4th 371, 382.
[38] *People* v. *Dey* (2000) 84 Cal.App.4th 1318, 1322. ALSO SEE *People* v. *Superior Court (Courie)* (1974) 44 Cal.App.3d 207, 212.
[39] *People* v. *Brocks* (1981) 124 Cal.App.3d 959, 963.
[40] *People* v. *McNeal* (1979) 90 Cal.App.3d 830, 841.
[41] See *People* v. *Garcia* (2003) 111 Cal.App.4th 715, 721 ["The affidavit must establish a nexus between the criminal activities and the place to be searched."]; *U.S.* v. *Crews* (9th Cir. 2007) 502 F.3d 1130, 1136-7 ["[A]ffidavit must establish a reasonable nexus between the crime or evidence and the location to be searched."].
[42] *People* v. *Superior Court (Haflich)* (1986) 180 Cal.App.3d 759, 766.

Sometimes there will be direct proof, as when an officer or informant saw the evidence there, or the suspect admitted it, or the location was revealed during a wiretap.[43] Otherwise, officers must rely on circumstantial evidence or reasonable inference based on their training and experience.[44] As the Ninth Circuit noted in a search warrant case:

> For probable cause to exist, a magistrate need not determine that the evidence sought is *in fact* on the premises to be searched, or that the evidence is more likely than not to be found where the search takes place. The magistrate need only conclude that it would be reasonable to seek the evidence in the place indicated in the affidavit.[45]

Before going further, there are two things about this requirement that should be noted. First, if there is probable cause to search a certain home or business, it doesn't matter that the owner or occupant is innocent of the crime under investigation.[46] As the Supreme Court pointed out, "[T]he State's interest in enforcing the criminal law and recovering evidence is the same whether the third party is culpable or not."[47] For example, if officers have probable cause to believe that the suspect is storing evidence inside the home of his elderly grandmother, a warrant could be issued to search it even though she is no longer involved in his criminal activities.

Second, it has been argued that a warrant to search two or more places for a single item of evidence is necessarily invalid because it is apparent that the officers do not know where the evidence is located. And, even if it is found in one of, say, three places, the probability percentage would be only 33%.

The courts have, however, consistently rejected these arguments, ruling that multiple locations may be searched for a single piece of evidence so long as there is sufficient reason to believe that it could have been found in each place.[48] As the Ninth Circuit observed in *U.S.* v. *Hillyard*, officers "need not confine themselves to chance by choosing only one location for a search."[49]

For example, in *People* v. *Easley*[50] the defendant, a contract killer, murdered two people in Modesto for $4,000. After developing probable cause to arrest him, investigators obtained a warrant to search for a pair of wire cutters (an instrumentality of the crime) in four places: the house in which he lived just before the murders, the apartment he rented four days later, and both of his cars. The cutters were found in one of the cars.

On appeal, Easley argued that the evidence should have been suppressed because "authorization to search four different places demonstrates that the affiant did not know where the sought-after property was located." The California Supreme Court rejected

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[43] See *People* v. *Garcia* (2003) 111 Cal.App.4th 715, 721; *People* v. *Balassy* (1973) 30 Cal.App.3d 614, 622; *People* v. *Gonzalez* (1990) 51 Cal.3d 1179, 1206; *U.S.* v. *Pinson* (6th Cir. 2003) 321 F.3d 558, 564.

[44] See *People* v. *Sandlin* (1991) 230 Cal.App.3d 1310, 1315 ["A magistrate is entitled to rely upon the conclusions of experienced law enforcement officers . . . as to where evidence of crime is likely to be found."]; *U.S.* v. *Fernandez* (9th Cir. 2004) 388 F.3d 1199, 1254 ["[W]e require only a reasonable nexus between the activities supporting probable cause and the location to be searched."].

[45] *U.S.* v. *Peacock* (9th Cir. 1985) 761 F.2d 1313, 1315.

[46] See *Los Angeles County* v. *Rettele* (2007) __ U.S. __ [2007 WL 1461071] ["Valid warrants will issue to search the innocent"]; *People* v. *Watson* (1979) 89 Cal.App.3d 376, 385 ["It is irrelevant that the affidavit did not directly implicate appellant in the sale of heroin. It is enough that it showed probable cause that heroin would be found in the apartment."]; *U.S.* v. *Elliott* (9th Cir. 2003) 322 F.3d 710, 716 ["[P]robable cause to believe that a person *conducts* illegal activities in the place where he is to be searched is not necessary; the proper inquiry is whether there was probable cause to believe that *evidence* of illegal activity would be found in the search."]; *U.S.* v. *Kelley* (9th Cir. 2007) 482 F.3d 1047, 1055 ["[A] location . . . can be searched for evidence of a crime even if there is no probable cause for arrest"].

[47] *Zurcher* v. *Stanford Daily* (1978) 436 U.S. 547, 555.

[48] See *People* v. *Miller* (1978) 85 Cal.App.3d 194, 204 ["[T]he magistrate's further conclusion that those items would probably be found in either of the two cars used by defendant or the apartment which he apparently maintained alone, had a substantial basis in fact."]; *Bowyer* v. *Superior Court* (1974) 37 Cal.App.3d 151, 161 [the officer "had seen the Bowyers walking in and out of each house. These observations gave him reasonable grounds for believing that [the evidence was] to be found in one house or the other"]; *People* v. *McCarter* (1981) 117 Cal.App.3d 894, 901 [officers had probable cause to believe "that the murder weapon and/or ammunition would be located in Noor's vehicle used during the shooting, in the apartment where Noor lived, or in his mother's house where Noor obtained the murder weapon."].

[49] (9th Cir. 1982) 677 F.2d 1336.

[50] (1983) 34 Cal.3d 858.

the argument, saying, "There is no logical inconsistency in the conclusion that an affidavit establishes probable cause to believe that evidence of a crime will be in any one of a suspect's homes or vehicles." What matters, said the court, is whether it was reasonable to look for the evidence in each location.

Circumstantial evidence

Circumstantial evidence that an item is located at a certain place exists when officers are aware of facts that tend to—but do not directly—indicate it is there. For example, in *People* v. *Tuadles*[51] police officers in Long Beach learned that a large amount of marijuana was being shipped via United Parcel Service to Tuadles at an address in the city. They also learned that the telephone number Tuadles had given to UPS was listed to a house in Cerritos. Based on this information, they obtained a warrant to search both locations.

On appeal, Tuadles challenged the search of the Cerritos house, claiming there was insufficient reason to believe that evidence would be found there. The court disagreed, pointing out that he had listed the phone number for that house with UPS, an indication it was either his "second home" or the residence of a "trusted confederate." In addition, the court noted that the affiant had stated that "large scale traffickers commonly use two, three or more residences for their activities."

The following are some other examples of situations in which the location of drugs or some other instrumentality of a crime was established by means of circumstantial evidence:

- Officers reasonably believed that duct tape and other items that had been used in a murder were inside a certain car because there was probable cause to believe that the perpetrator had driven it on the night of the killing.[52]
- Officers reasonably believed that the gun used a few minutes earlier in a drive-by shooting would be found in the truck occupied by the shooter.[53]
- Officers reasonably believed that evidence of a robbery would be found inside the robbers' getaway car.[54]
- Officers reasonably believed that drugs were being stored inside a certain residence because a drug dealer went there just before selling drugs to an undercover officer.[55]
- Officers reasonably believed that chemicals would be found inside the suspect's vehicle because he had used it to transport equipment and chemicals to a clandestine lab.[56]
- Officers reasonably believed that drugs would be found in the suspect's car because they had information that he "owned a number of vehicles, transported drugs in vehicles, and sold drugs out of vehicles."[57]

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[51] (1992) 7 Cal.App.4th 1777.
[52] See *People* v. *Webb* (1993) 6 Cal.4th 494.
[53] *People* v. *Odom* (1980) 108 Cal.App.3d 100, 107.
[54] See *Chambers* v. *Maroney* (1970) 399 U.S. 42, 47-8 ["[T]here was probable cause to arrest the occupants of the station wagon [for robbery]; just as obviously there was probable cause to search the car for guns and stolen money."]; *People* v. *Chavers* (1983) 33 Cal.3d 462, 467; *People* v. *Weston* (1981) 114 Cal.App.3d 764, 774-5; *People* v. *Franklin* (1985) 171 Cal.App.3d 627, 637; *People* v. *Gee* (1982) 130 Cal.App.3d 174, 182.
[55] See *Segura* v. *United States* (1984) 468 U.S. 796, 810-1 ["The agents had maintained surveillance over petitioners for weeks, and had observed petitioners leave the apartment to make sales of cocaine."]; *People* v. *Hernandez* (1974) 43 Cal.App.3d 581, 585 ["Ochoa went directly from the apartment to the bar, where the deal was consummated."]; *People* v. *Romero* (1996) 43 Cal.App.4th 440, 447 ["[W]ithin minutes of agreeing to sell drugs, the drug dealer stopped briefly at defendant's residence and then drove without interruption to consummate a drug sale."]; *People* v. *Flores* (1968) 68 Cal.2d 563, 566 ["The officers had seen defendant drive from the apartment to the place of sale named by the informers without stopping."]; *U.S.* v. *Chavez-Miranda* (9th Cir. 2002) 306 F.3d 973, 978 ["Chavez-Miranda traveled to and from the MacArthur apartment at times and in a manner that appeared consistent with heroin being stored there before it was delivered to drug dealer Magana for sale to DEA operatives."]; *People* v. *Gray* (1976) 63 Cal.App.3d 282, 288-9 ["Over a period of time the informant had observed young persons going to the apartment, leaving after a short time carrying large bags, and driving away quickly."]; *People* v. *Dickinson* (1974) 43 Cal.App.3d 1034, 1037 ["Trotochau was seen to visit the Hi Point apartment on two occasions during the progress of negotiations for the sale of narcotics."].
[56] See *People* v. *McNabb* (1991) 228 Cal.App.3d 462, 469.
[57] *U.S.* v. *Smith* (6th Cir. 2007) 510 F.3d 641, 649.

- Even though a numbers operator took most of his bets inside a bar, officers reasonably believed that evidence would be found inside his home because he had taken at least two numbers-related phone calls there.[58]

In contrast, in *People* v. *Hernandez*[59] two informants separately arranged to buy heroin from the defendant in El Rio at a location away from his residence. At the sale to the first informant, the defendant arrived in a black Oldsmobile which, afterwards, he drove to a house on Balboa Street. Following the sale to the second informant, he drove a Camaro to a residence on Orange Drive. Officers later obtained a warrant to search both houses.

But the court ruled the connection between the defendant and the house on Orange Drive was too tenuous. Said the court, "The presence of the vehicles raised suspicions, but failed to establish a nexus between the criminal activities and the residence. No information was presented that [the defendant] owned the vehicles, lived at the 610 Orange Drive residence, received mail or phone calls at the residence, or was seen carrying packages to and from it."

Reasonable inference

If officers have neither direct nor circumstantial proof concerning the probable location of the evidence, they may resort to reasonable inference.[60] As the Court of Appeal observed:

> The connection between the items to be seized and the place to be searched need not rest on direct observation. It may be inferred from the type of crime involved, the nature of the item, and the normal inferences as to where a criminal might likely hide incriminating evidence.[61]

PERPETRATOR'S HOME: As noted, probable cause to arrest someone will not automatically establish probable cause to search his home for evidence of his crime.[62] But, depending on the nature of the evidence and the crime, the suspect's home may be a sufficiently logical place to look.[63] This is mainly because a person's residence is usually the most secure and accessible place at his disposal.

For example, if officers have probable cause to believe that a person is a drug dealer, it is usually reasonable to believe he keeps his drugs and sales paraphernalia in his home.[64] As the court observed in

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[58] *U.S.* v. *Martinez* (9th Cir. 1979) 588 F.2d 1277.

[59] (1994) 30 Cal.App.4th 919.

[60] See *People* v. *Sandlin* (1991) 230 Cal.App.3d 1310, 1315 ["the magistrate is entitled to draw reasonable inferences about where evidence is likely to be kept"]; *U.S.* v. *Laury* (5th Cir. 1993) 985 F.2d 1293, 1313 ["This nexus may be established through normal inferences as to where the articles sought would be located."].

[61] *People* v. *Miller* (1978) 85 Cal.App.3d 194, 201.

[62] See *People* v. *Gonzalez* (1990) 51 Cal.3d 1179, 1206 ["Mere evidence of a suspect's guilt provides no cause to search his residence."]; *U.S.* v. *Pitts* (9th Cir. 1993) 6 F.3d 1366, 1369 ["Probable cause to believe that a suspect has committed a crime is not by itself adequate to obtain a search warrant for the suspect's home."]; *U.S.* v. *Jones* (3rd Cir. 1993) 994 F.2d 1051, 1055 ["[W]e start with the premise that probable cause to arrest does not automatically provide probable cause to search the arrestee's home."].

[63] See *People* v. *Miller* (1978) 85 Cal.App.3d 194, 204 ["A number of California cases have recognized that from the nature of the crimes and the items sought, a magistrate can reasonably conclude that a suspect's residence is a logical place to look for specific incriminating items."]; *People* v. *Koch* (1989) 209 Cal.App.3d 770, 779 ["It is settled under both California and federal law that the total circumstances surrounding an arrest or other criminal conduct can, without more, support a magistrate's probable cause finding that the culprit's home is a logical place to search for specific contraband."]; *U.S.* v. *Jones* (3rd Cir. 1993) 994 F.2d 1051, 1055-6 ["If there is probable cause to believe that someone committed a crime, then the likelihood that that person's residence contains evidence of the crime increases."].

[64] See *People* v. *Garcia* (2003) 111 Cal.App.4th 715, 721 ["The right of access to the residence leads to a reasonable inference that the seller of controlled substances will store the controlled substances at his residence."]; *People* v. *Koch* (1989) 209 Cal.App.3d 770, 780 [officer reasonably concluded "that because defendant was a trafficker in illegal drugs his residence was a likely depository for more contraband or evidence"]; *People* v. *Cleland* (1990) 225 Cal.App.3d 388, 392-3 [seizure of a "significant amount of contraband from a suspect's person, combined with an expert's opinion as to the likelihood that additional contraband might be found at that suspect's residence, *can* justify the issuance of a search warrant for that suspect's residence"]; *People* v. *Superior Court (Marcil)* (1972) 27 Cal.App.3d 404, 414 ["Numerous cases have upheld search warrants on the theory that one who sells narcotics may have more at his residence or place of operations."]; *U.S.* v. *Fernandez* (9th Cir. 2004) 388 F.3d 1199, 1254 ["[A] magistrate is allowed to draw the reasonable inference that in the case of drug dealers, evidence is likely to be found where the dealers live."]; *U.S.* v. *Johnson* (D.C. Cir. 2006) 437 F.3d 69, 71 [it was reasonable to infer that a drug dealer kept drugs in one or both of her homes]; *U.S.* v. *Dubrofsky* (9th Cir. 1978) 581 F.2d 208, 213 ["[H]eroin importers commonly have heroin and related paraphernalia where they live"].

U.S. v. *Spencer*, "For the vast majority of drug dealers, the most convenient location to secure [drugs and paraphernalia] is the home. After all, drug dealers don't tend to work out of office buildings."[65]

The following are some other examples of evidence that the courts have ruled would likely be found in the suspect's residence:

- the loot from a robbery he committed[66]
- clothing and masks he wore during a robbery[67]
- firearms he used in the commission of a crime[68]
- documents relating to his criminal conspiracy[69]
- implements he used to torture a murder victim[70]
- explosives that he had threatened to use[71]
- child pornography[72]

SUSPECT'S CAR: Another logical place to look for evidence is the suspect's car because vehicles, like homes, are convenient and fairly secure. Thus, in *People* v. *Dumas* the California Supreme Court ruled that officers reasonably believed that stolen bonds would be found inside the suspect's car, saying, "[W]e cannot disregard the likelihood that a person who holds stolen property he wishes to sell will attempt to conceal it in a place under his control that is nearby and apparently secure."[73]

Similarly, in *U.S.* v. *Brown*[74] an officer found a fake driver's license and credit card in the passenger compartment of a car he had stopped. The names on both documents were the same so he figured the suspect was using them to buy things. Where might these things be? "Everyone knows," said the court, "that drivers who lawfully purchase items at stores often place their purchases in the trunks of their cars. Nothing in common experience suggests that criminals act any differently." Thus, the court ruled the officer had probable cause to search the trunk.

SUSPECT'S STORAGE LOCKER: If the perpetrator rented a storage locker, it may be reasonable to believe that he was using it to store evidence of his crimes.[75]

SUSPECT'S COMPUTER: If there is probable cause to search for information, data, or graphics in the suspect's possession (such as financial records, child pornography, or indicia), it is usually reasonable to believe that at least some of it is stored on his computer or other digital storage device.[76] Thus, in *U.S.* v. *Terry* the court concurred with the trial judge's conclusion that, "as a matter of plain common sense, if a pornographic image has originated or emanated from a particular individual's email account, it logically follows that the image is likely to be found on that individual's computer or on storage media associated with the computer."[77]

SUSPECT'S BUSINESS: If the evidence consists of documents pertaining to the suspect's business, it is usually reasonable to believe they are in his office.[78]

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[65] (D.C.Cir 2008) __F.3d__ [2008 WL 2697191].
[66] See *People* v. *Schilling* (1987) 188 Cal.App.3d 1021, 1030 [purse of a murder victim]; *People* v. *Schoennauer* (1980) 103 Cal.App.3d 398, 410 [stolen stereo speakers]; *U.S.* v. *Lucarz* (9th Cir. 1970) 430 F.2d 1051, 1055 [stolen registry envelopes]; *U.S.* v. *Jones* (3rd Cir. 1993) 994 F.2d 1051, 1056 [cash].
[67] See *People* v. *Miller* (1978) 85 Cal.App.3d 194, 204; *U.S.* v. *Gann* (9th Cir. 1984) 732 F.2d 714, 722.
[68] See *U.S.* v. *Gann* (9th Cir. 1984) 732 F.2d 714, 722 [officer explained that "bank robbers frequently use firearms and leave such weapons, ammunition and clothing in their cars or residences"]; *People* v. *Kraft* (2000) 23 Cal.4th 978, 1049; *U.S.* v. *Crews* (9th Cir. 2007) 502 F.3d 1130, 1137; *People* v. *Bennett* (1998) 17 Cal.4th 373, 388.
[69] See *U.S.* v. *Feliz* (1st Cir. 1999) 182 F.3d 82, 87-8; *People* v. *Meyer* (1986) 183 Cal.App.3d 1150, 1161.
[70] See *People* v. *Frank* (1985) 38 Cal.3d 711, 728.
[71] See *People* v. *Barnum* (1980) 113 Cal.App.3d 340, 346.
[72] See *U.S.* v. *Hay* (9th Cir. 2000) 231 F.3d 630, 635; *U.S.* v. *Perez* (5th Cir. 2007) 484 F.3d 735, 740-1.
[73] (1973) 9 Cal.3d 871, 885. ALSO SEE *U.S.* v. *Davis* (9th Cir. 2008) __F3__ [2008 WL 2574510].
[74] (D.C. Cir. 2004) 374 F.3d 1326.
[75] See *U.S.* v. *Curry* (7th Cir. 2008) __ F.3d __ [search of storage unit rented by a suspected bank robber]; *U.S.* v. *Riley* (2nd Cir. 1990) 906 F.2d 841, 845.
[76] See *People* v. *Ulloa* (2002) 101 Cal.App.4th 1000, 1007 ["But home computers are now common, and the officers had specific information that defendant had been communicating with the minor by computer."]; *People* v. *Varghese* (2008) 162 Cal.App.4th 1084, __ ["It was reasonable to believe appellant used the computer found in his car to conduct [relevant] correspondence."]; *People* v. *Balint* (2006) 138 Cal.App.4th 200, 209 [We perceive no reasonable basis to distinguish between records stored electronically on the laptop and documents placed in a filing cabinet or information stored in a microcassette."]; *U.S.* v. *Giberson* (9th Cir. 2008) 527 F.3d 882 [officers reasonably believed that relevant financial records would be found on suspect's computer].
[77] (6th Cir. 2008) 522 F.3d 645, 648.
[78] See *U.S.* v. *Word* (6th Cir. 1986) 806 F.2d 658, 662.

SUSPECT'S PERSON: It may be reasonable to believe that the suspect will be carrying certain types of evidence on his person; e.g., a handgun, drugs.[79]

PROCESS OF ELIMINATION: If officers have determined that evidence for which probable cause exists is not located in certain likely places, they may have probable cause to search the next logical location.[80]

The evidence is there *now*

In addition to showing that the evidence exists and that it was taken to or produced at the location of the search, officers must be able to prove there is a fair probability that the evidence is still there.[81] This is especially important in search warrant cases because of the delay that necessarily exists between the establishment of probable cause and the issuance of the warrant.

In some cases, officers will have direct proof that the evidence is presently located at the place to be searched. For example, in *California* v. *Carney* a reliable witness who had just left the defendant's mobile home told officers that he had seen drugs inside.[82] In most cases, however, officers must rely on one or more inferences, such as the following.

"Fresh" and "Stale" Information

If probable cause to search is based on recent events it will ordinarily be reasonable to believe that the evidence is still located at the place to which it was taken or produced; i.e. it had not been used, moved, or destroyed.[83] As the Court of Appeal observed in *People* v. *McDaniels,* "The element of time is crucial to the concept of probable cause."[84]

Although probable cause may be lacking if it is based on old or "stale" information, the passage of time may be unimportant if, based on the nature of the evidence or the crime under investigation, it is reasonable to infer that the evidence is still at the location.[85] Discussing this issue, the court in *Andresen* v. *State* gave us this memorable passage:

> The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock: the character of the crime (chance encounter in the night or regenerating conspiracy?), of the criminal (nomadic or entrenched?), of the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), of the place to be searched (mere criminal forum of convenience or secure operational base?), etc.[86]

The nature of the evidence

The nature of the evidence is significant because some things, such as drugs and currency, are usually moved or used up rather quickly.[87] On the other hand, some types of evidence will probably remain in one place for weeks, months, and even years. Included in this category are clothing,[88] firearms,[89]

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[79] See *New Jersey* v. *T.L.O.* (1985) 469 U.S. 325, 345-6; *People* v. *Joseph G.* (1995) 32 Cal.App.4th 1735, 1741-2.
[80] See *People* v. *Dumas* (1973) 9 Cal.3d 871, 885; *U.S.* v. *Vesikuru* (9th Cir. 2002) 314 F.3d 1116, 1123.
[81] *People* v. *Cleland* (1990) 225 Cal.App.3d 388, 393 ["An affidavit in support of a search warrant must provide probable cause to believe the material to be seized is still on the premises to be searched when the warrant is sought."].
[82] (1985) 471 U.S. 386, 395. ALSO SEE *People* v. *Thompson* (1979) 89 Cal.App.3d 425, 429 [suspect told an informant that the heroin "was available"].
[83] See *People* v. *Gibson* (2001) 90 Cal.App.4th 371, 380 ["The general rule is that information that is remote in time may be deemed to be stale and therefore unreliable."]; *U.S.* v. *Johnson* (D.C. Cir. 2006) 437 F.3d 69, 72 ["Everything else being equal, of course, dated information is less likely to show probable cause than fresh evidence."].
[84] (1994) 21 Cal.App.4th 1560, 1564.
[85] See *U.S.* v. *Morales-Aldahondo* (1st Cir. 2008) 524 F.3d 115, 119; *U.S.* v. *Urban* (3rd Cir. 2005) 404 F.3d 754, 774.
[86] *Andresen* v. *State* (1975) 24 Md.App. 128, 172.
[87] See *U.S.* v. *Steeves* (8th Cir. 1975) 525 F.2d 33, 38 ["[T]here was little reason to believe that any of the bank's money or the money bag would still be in the home [three months after the robbery]."].
[88] See *U.S.* v. *Laury* (5th Cir. 1993) 985 F.2d 1293, 1314, fn.25 [clothes worn during bank robbery]; *U.S.* v. *Steeves* (8th Cir. 1975) 525 F.2d 33, 38 [ski mask]; *U.S.* v. *Gann* (9th Cir. 1984) 732 F.2d 714, 722; *U.S.* v. *Collins* (9th Cir. 1977) 559 F.2d 561, 565.
[89] See *People* v. *Weston* (1981) 114 Cal.App.3d 764, 775 [reasonable to believe that a firearm would be inside a getaway four days after robbery]; *U.S.* v. *Neal* (8th Cir. 2008) __F3__ [2008 WL 2404429] ["Information that someone is suspected of possessing firearms illegally is not stale, even several months later, because individuals who possess firearms tend to keep them for long periods of time."]; *U.S.* v. *Maxim* (8th Cir. 1995) 55 F.3d 394, 397 ["firearm enthusiasts tend to keep their weapons for long periods of time"]; *Bastida* v. *Henderson* (5th Cir. 1973) 487 F.2d 860, 864 [firearms used in robbbery]; *U.S.* v. *Gann* (9th Cir. 1984) 732 F.2d 714, 722 [firearms used in robbery]; *U.S.* v. *Steeves* (8th Cir. 1975) 525 F.2d 33, 38 [firearm used in robbery].

certain types of stolen property,[90] burglar tools,[91] and child pornography.[92] Commenting on this rule, the Maryland Court of Special Appeals pointed out, "The observation of a half-smoked marijuana cigarette in an ashtray at a cocktail party may well be stale the day after the cleaning lady has been in; the observation of the burial of a corpse in a cellar may well not be stale three decades later. The hare and the tortoise do not disappear at the same rate of speed."[93]

Other items that tend to stay put are business and financial records.[94] Thus, when this issue arose in *McKirdy* v. *Superior Court* the court responded, "[W]hat the Fraud Unit sought was no evanescent contraband but rather business and professional records which presumably would be retained unaltered for periods of several years."[95]

Ongoing crimes

When people are engaging in serial or ongoing criminal activity, officers may usually infer that evidence pertaining to these crimes will be kept around much longer than if the crime was impulsive or sporadic.[96] As the court observed in *U.S.* v. *Johnson*:

> Where the affidavit recites a mere isolated violation it would not be unreasonable to imply that probable cause dwindles rather quickly with the passage of time. However, where the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant.[97]

Commenting on this principle, the Fifth Circuit said in *United States* v. *Hyde*, "The upshot of this rule in practical application has been to allow fairly long periods of time to elapse between information and search warrant in cases where the evidence clearly shows a longstanding, ongoing pattern of criminal activity."[98] Crimes falling into this category have included drug production and sales,[99] smuggling,[100] bribery schemes,[101] and fraud.[102] POV

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[90] See *People* v. *Weston* (1981) 114 Cal.App.3d 764, 775 [reasonable to believe stolen jewelry in getaway four days after robbery]; *People* v. *Cletcher* (1982) 132 Cal.App.3d 878, 883 [art stolen two years earlier]; *U.S.* v. *Gann* (9th Cir. 1984) 732 F.2d 714, 722 [stolen credit cards]; *People* v. *Superior Court (Brown)* (1975) 49 Cal.App.3d 160, 167 [stolen antiques and credit cards].

[91] See *People* v. *Gee* (1982) 130 Cal.App.3d 174, 182 [gloves and pillowcase used by burglar].

[92] See *U.S.* v. *Terry* (6th Cir. 2008) 522 F.3d 645, 650, fn.2; *U.S.* v. *Perrine* (10th Cir. 2008) __ F.3d __ [2008 WL 638687]; *U.S.* v. *Gourde* (9th Cir. en banc 2006) 440 F.3d 1065, 1072 [collectors of child pornography "are inclined to download and keep such images for a long period of time, and they rarely, if ever, dispose of their sexually explicit materials"].

[93] *Andresen* v. *Maryland* (1975) 24 Md.App. 128, 172.

[94] See *Andresen* v. *Maryland* (1976) 427 U.S. 462, 478, fn.9 ["It is eminently reasonable to expect that such [business] records would be maintained in those offices for a period of time and surely as long as the three months"]; *U.S.* v. *Johnson* (D.C. Cir. 2006) 437 F.3d 69, 72 [records of drug sales]; *U.S.* v. *Nguyen* (8th Cir. 2008) __ F.3d __ ["Nguyen would have needed to maintain accurate records about how much he had purchased and the status of the account balances"]; *U.S.* v. *Dozier* (9th Cir. 1988) 844 F.2d 701, 707 ["The documentary records sought are the type of records typically found to be maintained over long periods of time."].

[95] (1982) 138 Cal.App.3d 12, 26.

[96] See *People* v. *Cooks* (1983) 141 Cal.App.3d 224, 298 [instrumentalities used in "numerous murders and shootings over a period of six or seven months"]; *People* v. *Miller* (1978) 85 Cal.App.3d 194, 204 ["continuing and ongoing crime spree"]; *People* v. *Hulland* (2003) 110 Cal.App.4th 1646, 1652 ["If circumstances would justify a person of ordinary prudence to conclude that an activity had continued to the present time, then the passage of time will not render the information stale."]; *U.S.* v. *Weinrich* (5th Cir. 1978) 586 F.2d 481, 491 ["If an affidavit recites activity indicating protracted or continuous conduct, time is of less significance."]; *Bastida* v. *Henderson* (5th Cir. 1973) 487 F.2d 860, 864 ["The Circuits hold that where an affidavit recites a mere isolated violation then it is not unreasonable to believe that probable cause quickly dwindles with the passage of time. On the other hand, if an affidavit recites activity indicating protracted or continuous conduct, time is of less significance."]; *U.S.* v. *Sherman* (10th Cir. 1978) 576 F.2d 292, 296 ["[W]hen the activity is of a protracted and continuous nature the passage of time diminishes in significance."].

[97] (10th Cir. 1972) 461 F.2d 285, 287.

[98] (5th Cir. 1978) 574 F.2d 856, 865.

[99] See *People* v. *Wilson* (1986) 182 Cal.App.3d 742, 755 [meth lab]; *People* v. *Medina* (1985) 165 Cal.App.3d 11, 20; *People* v. *Mikesell* (1996) 46 Cal.App.4th 1711, 1719; *U.S.* v. *Fernandez* (9th Cir. 2004) 388 F.3d 1199, 1254 ["[I]n cases involving ongoing narcotics businesses, lapses of several months—and up to two years in certain circumstances—are not sufficient to render the information in an affidavit too stale to support probable cause."].

[100] See *U.S.* v. *Weinrich* (5th Cir. 1979) 586 F.2d 481, 491.

[101] See *U.S.* v. *Urban* (3rd Cir. 2005) 404 F.3d 754, 775.

[102] See *People* v. *Hepner* (1994) 21 Cal.App.4th 761, 782-3; *U.S.* v. *Snow* (10th Cir. 1990) 919 F.2d 1458, 1460.

Plain View

"The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable." [1]

Finding evidence of a crime often requires a lot of work and a little luck. But sometimes it just takes luck, like winning the lottery. For example, in *People* v. *Bagwell*[2] an officer in Alameda County had just arrested a murder suspect in her home when he happened to notice a trail of blood leading into the hallway. So he followed it and discovered the murder weapon—a butcher knife—still covered in blood.

Granted, this example was rather melodramatic. But it often happens that officers find garden-variety evidence in plain view, especially drugs, illegal weapons, and stolen property. It is especially likely to occur in situations when the suspect did not anticipate the officers' arrival and, thus, did not have time to hide it. Thus, plain-view discoveries are fairly common during contacts, detentions, and traffic stops; while officers are conducting pat searches, searches incident to arrest, protective sweeps, and vehicle inventory searches; while they are executing search and arrest warrants; and sometimes while they are just walking past an open door or window.

Although most of this evidence will be admissible in court, some of it will be suppressed. Why? Because "plain view" is not as simple as it sounds. While the logical basis of the rule can be stated easily—"What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection"[3]—evidence is not useful just because an officer has seen it. What matters is whether he took possession of it; and that he did so lawfully so that prosecutors can use it in court.[4]

The question, then, is what are the legal requirements for seizing evidence in plain view. As we will discuss in this article, there are three:

(1) **Lawful discovery**: The officers must have had a legal right to be at the location from which they initially saw, felt, or smelled the evidence.

(2) **Probable cause**: Upon discovering it, they must have had probable cause to believe it was, in fact, evidence of a crime.

(3) **Lawful access**: If officers could not seize the evidence without entering a place in which the suspect reasonably expected privacy, they must have had a legal right to enter.[5]

Lawful Discovery

It is a basic rule of criminal law that an officer's observation of evidence in plain view is not a "search."[6] But it is also settled that evidence is not "in plain view" if it was discovered in the course of an unlawful search or seizure. Thus, the first requirement for a seizure of evidence in plain view is that officers must have had a legal right to be at the spot from which they initially detected it.[7] As the Supreme Court pointed out in *Horton* v. *California:*

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[1] *Texas* v. *Brown* (1983) 460 U.S. 730, 738.

[2] (1974) 38 Cal.App.3d 127.

[3] *Katz* v. *United States* (1967) 389 U.S. 347, 351.

[4] See *People* v. *Albritton* (1982) 138 Cal.App.3d 79, 85, fn.1 ["The 'plain view doctrine' is intended to provide a basis for making a *seizure* without a warrant. . . . By comparison, 'in plain view' is descriptive of a situation in which there has been *no search* at all."].

[5] See *U.S.* v. *Jones* (1st Cir. 1999) 187 F.3d 210, 219-21; *U.S.* v. *Carter* (6th Cir. 2004) 378 F.3d 584, 590. **NOTE**: In the past, there was a fourth requirement: the officer's discovery of the evidence must have been "inadvertent." This requirement was abrogated by the United States Supreme Court in *Horton* v. *California* (1990) 496 U.S. 128, 141.

[6] See *Arizona* v. *Hicks* (1987) 480 U.S. 321, 328 ["[A] truly cursory inspection—one that involves merely looking at what is already exposed to view, without disturbing it—is not a 'search'"]; *Minnesota* v. *Dickerson* (1993) 508 US 366, 375 ["The rationale of the plain-view doctrine is that if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no 'search'"]; *People* v. *Miranda* (1993) 17 Cal.App.4th 917, 927 ["[I]t is settled that a plain view observation is not itself an invasion of privacy, that is, a search."].

[7] See *Texas* v. *Brown* (1983) 460 U.S. 730, 737 ["The question whether property in plain view of the police may be seized therefore must turn on the legality of the intrusion that enables them to perceive . . . the property in question."]; *Washington* v. *Chrisman* (1982) 455 U.S. 1, 5-6 [the evidence must have been discovered "in a place where the officer has a right to be."]; *People* v. *Bradford* (1997) 15 Cal.4th 1229, 1295 ["The officers lawfully must be in a position from which they can view a particular area"].

> It is, of course, an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed.[8]

It should be noted that an item can be in plain view even though it was not conspicuous. For example, it is immaterial that officers needed a flashlight or spotlight to see it.[9] As the Court of Appeal explained, "Observation of that which is in view is lawful, whether the illumination is daylight, moonlight, lights with the vehicle, lights from street lamps, neon signs, or lamps, or the flash of lights from adjacent vehicles."[10]

Nor does it matter that an officer had to bend down or elevate himself to see the evidence. Thus, in *People* v. *Chavez* the Court of Appeal ruled that an officer's observation of a handgun in the defendant's backyard was lawful even though the officer had to stand on tiptoes to see over the fence.[11]

As we will now discuss, the legality of the officer's discovery frequently becomes an issue when the evidence was found during detentions, or while the officers were inside the suspect's home pursuant to a warrant or consent, or while they were walking on the suspect's property.

DISCOVERY DURING DETENTIONS: If the evidence was observed during a detention or arrest, the discovery is lawful if, (1) officers had grounds to detain or arrest the suspect, and (2) the discovery occurred while they were carrying out their lawful duties.[12] Thus, in *United States* v. *Hensley* the Supreme Court noted, "Having stopped Henley, the Covington police were entitled to seize evidence revealed in plain view in the course of the lawful stop."[13]

DISCOVERY DURING PAT SEARCH: When officers find evidence while pat searching a suspect, the "lawful discovery" requirement will be satisfied if, (1) the officers had sufficient grounds to search, and (2) they discovered the evidence while searching places and things in which a weapon might reasonably be found.[14] Discussing the second requirement, the Third Circuit pointed out that the "proper question" is whether the officer detected the evidence "in a manner consistent with a routine frisk."[15]

DISCOVERY DURING CONTACTS: An officer's view of evidence in the suspect's possession is necessarily lawful if it occurred during a contact. This is because officers do not need a legal basis for contacting a suspect.[16]

For example, in *People* v. *Sandoval*[17] a Modesto police officer decided to check out the occupants of a parked car because it was 1 A.M. and he had seen them "alternately leaning forward in their seats, out of sight." As he looked through the window, he saw the driver, Sandoval, "holding a rolled up $20 bill in his right hand and balancing an upside-down frisbee on his lap with his left hand." Any question as to the purpose of this peculiar activity was eliminated when the officer noticed that the frisbee contained a four-inch long straw, a razor blade, and some white powder. The officer then arrested the occupants and seized the drugs and paraphernalia. On appeal, the court rejected Sandoval's argument that the evidence was discovered unlawfully, pointing out that "[t]he objects were in plain view and the officer clearly had a right to be in the position to have that view."

DISCOVERY WHILE EXECUTING SEARCH WARRANTS: Officers who are executing search warrants often find evidence that was not listed in the warrant. If so,

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[8] (1990) 496 U.S. 128, 136.
[9] See *On Lee* v. *United States* (1952) 343 U.S. 747, 754; *Texas* v. *Brown* (1983) 460 U.S. 730, 740; *People* v. *Clark* (1989) 212 Cal.App.3d 1233, 1238.
[10] *People* v. *Superior Court (Mata)* (1970) 3 Cal.App.3d 636, 639.
[11] (2008) 161 Cal.App.4th 1493, 1501. ALSO SEE *People* v. *Superior Court (Stroud)* (1974) 37 Cal.App.3d 836, 839; *U.S.* v. *Elkins* (6th Cir. 2002) 300 F.3d 638, 654 ["Any contortions [the officer] made to peer through the opening did not change the 'plain view' character of his observation"].
[12] See *Texas* v. *Brown* (1983) 460 U.S. 730, 737, 739; *People* v. *DeCosse* (1986) 183 Cal.App.3d 404, 410 ["Standing where he had a right to be, the officer was lawfully entitled to observe, in plain sight, the opened alcoholic beverage container."].
[13] (1985) 469 U.S. 221, 235.
[14] See *Minnesota* v. *Dickerson* (1993) 508 U.S. 366, 378; *People v. Thurman* (1989) 209 Cal.App.3d 817, 826.
[15] *U.S.* v. *Yamba* (3rd Cir. 2007) 506 F.3d 251, 259.
[16] See *Florida* v. *Royer* (1983) 460 U.S. 491, 498; *People v. Rivera* (2007) 41 Cal.4th 304, 309.
[17] (1985) 164 Cal.App.3d 958.

the discovery is lawful under the plain view rule if they found it while looking in places or things in which any of the listed evidence might have been found. For example, in *Skelton* v. *Superior Court*[18] officers in La Palma were searching for a stolen wedding ring and carving set when they happened to find five stolen watches, five stolen rings, two sets of stolen silverware, and illegal drugs. On appeal, the California Supreme Court ruled the unlisted evidence was lawfully discovered because "the warrant mandated a search for and seizure of several small and easily secreted items," and thus "the officers had the authority to conduct an intensive search of the entire house."

Similarly, in *United States* v. *Smith*[19] officers in Tampa obtained a warrant to search the home of Smith's mother for drugs and indicia of ownership, including "photographs that would be probative to establish residency." In the course of the search, they opened Smith's lockbox and found several hundred photos, many of which contained images of child pornography. In ruling that the photos were discovered lawfully, the court said, "Here, the officers were lawfully at the Smith residence pursuant to an unchallenged search warrant authorizing the officers to search for and seize evidence of illicit drug activity. . . . It was through the lawful execution of the warrant that the officers came across the photographs at issue here."

In contrast, in *People* v. *Albritton*[20] narcotics officers in Bakersfield obtained a warrant to search the defendant's home for drugs and indicia. A detective assigned to the auto theft detail learned about the warrant and decided to "go along for the ride" because the defendant was also a suspected car thief. When the officers arrived, the detective "immediately separated himself from the vice officers and went to the garage" where he checked the VIN numbers on several vehicles and discovered that four of them were stolen. On appeal, prosecutors argued that the VIN numbers were in plain view, but the court disagreed because none of the listed evidence could reasonably have been found in the areas in which the VIN numbers were located.

DISCOVERY WHILE OTHERWISE IN THE SUSPECT'S HOME: In the absence of a warrant, a seizure of evidence inside the suspect's home is lawful if, (1) the officers were lawfully on the premises (e.g., to make an arrest, conduct a protective sweep; defuse an exigent circumstance), and (2) they discovered the evidence while they were carrying out their lawful duties.[21]

A good illustration of how this second requirement can cause problems is found in *Arizona* v. *Hicks*.[22] Here, officers had entered Hicks' apartment without a warrant because someone inside had fired a shot through the floor, injuring an occupant of the apartment below. Although the entry was lawful, one of the officers noticed an expensive stereo system which he thought might have been stolen because the apartment was otherwise "squalid." He confirmed his suspicion by picking up the turntable, writing down the serial number, and running it.

On appeal to the Supreme Court, Hicks argued that the serial number was not discovered lawfully because the officer had no legitimate reason for picking up the turntable. The Court agreed, pointing out that the officer's act of moving it to locate the serial number constituted a "search separate and apart from the search for the shooter, victims, and weapons that was the lawful objective of his entry into the apartment."

DISCOVERY FROM SUSPECT'S LAND: If officers were standing on the suspect's property when they saw the evidence, the discovery will ordinarily be lawful if they were on or near a normal access route. In the words of the California Supreme Court, "A sidewalk, pathway, common entrance or similar passageway offers an implied permission to the public to enter which necessarily negates any reasonable expectation of privacy in regard to observations made there."[23]

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[18] (1969) 1 Cal.3d 144. ALSO SEE *Horton* v. *California* (1990) 496 U.S. 128, 142.
[19] (11th Cir. 2006) 459 F.3d 1276.
[20] (1982) 138 Cal.App.3d 79.
[21] See *Mincey* v. *Arizona* (1978) 437 US 385, 393 ["[A] warrantless search must be strictly circumscribed by the exigencies which justify its initiation."]; *Thompson* v. *Louisiana* (1984) 469 U.S. 17, 22 [a call for emergency medical assistance "would have justified the authorities in seizing evidence under the plain-view doctrine while they were in petitioner's house"]; *Washington* v. *Chrisman* (1982) 455 U.S. 1, 5-6; *People v. Bradford* (1997) 15 Cal.4th 1229, 1293; *People* v. *Superior Court (Quinn)* (1978) 83 Cal.App.3d 609.
[22] (1987) 480 U.S. 321.
[23] *Lorenzana* v. *Superior Court* (1973) 9 Cal.3d 626, 629.

For example, in *People* v. *Edelbacher*[24] the defendant shot and killed his estranged wife in Fresno County, then drove back to Madera where he and his parents lived. A sheriff's deputy who was investigating the murder drove to Madera and, while standing on Edelbacher's driveway, saw shoeprints that looked just like the shoeprints that had been found at the murder scene. So he requested that a criminalist take photographs of the prints, and these photos were used against Edelbacher at his trial.

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

Similarly, an officer's observation of evidence through a window or open door of a house is lawful if the officer was standing on a normal access route.[25] As the court pointed out in *United States* v. *Hatfield,* "Although privacy in the interior of a home and its curtilage are at the core of what the Fourth Amendment protects, there is no reasonable expectation that a home and its curtilage will be free from ordinary visual surveillance."[26]

DISCOVERY DURING COMPUTER SEARCH: Officers who are executing a warrant to search a computer will often discover unlisted data or graphics that constitute evidence in the crime under investigation or some other crime. If so, the discovery will be deemed lawful if the file in which the evidence was found could have contained any of the data or graphics listed in the warrant.[27]

Probable Cause to Seize

The second requirement for a plain view seizure is that the officers must have had probable cause to believe the item was, in fact, evidence of a crime.[28] This type of probable cause—probable cause *to seize*—exists when "the facts available to the officer would warrant a man of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime."[29]

In discussing this level of proof, the United States Supreme Court has said "it does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical probability that incriminating evidence is involved is all that is required."[30]

Such a probability is often based on direct observation, as when officers see an illegal weapon,[31] readily-identifiable drugs or drug paraphernalia,[32] an instrumentality of a crime,[33] or property that had been reported stolen.[34] But it may also be based on circumstantial evidence and reasonable inference. As the Court of Appeal explained in *People* v. *Stokes*, "In the context of the plain view doctrine, probable cause is a flexible, commonsense standard, which requires

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[24] (1989) 47 Cal.3d 983.

[25] See *People* v. *Walker* (1969) 276 Cal.App.2d 39, 43 ["there was an unobstructed view into the kitchen"]; *People* v. *Zabelle* (1996) 50 Cal.App.4th 1282, 1287 ["the door was 'wide open'"].

[26] (10th Cir. 2003) 333 F.3d 1189, 1196.

[27] See *Andresen* v. *Maryland* (1976) 427 U.S. 463, 482, fn.11 ["In searches of papers, it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized."]; *U.S.* v. *Adjani* (9th Cir. 2006) 452 F.3d 1140, 1149-50 ["Computer files are easy to disguise or rename"]; *U.S.* v. *Wong* (9th Cir. 2003) 334 F.3d 831, 838 ["While searching the graphics files for evidence of murder, as allowed by the warrant, [the officer] discovered [child pornography]."].

[28] See *Minnesota* v. *Dickerson* (1993) 508 US 366, 376; *Arizona* v. *Hicks* (1987) 480 U.S. 321, 326.

[29] *Texas* v. *Brown* (1983) 460 U.S. 730, 742.

[30] *Texas* v. *Brown* (1983) 460 U.S. 730, 742.

[31] See *U.S.* v. *Banks* (8th Cir. 2008) 514 F.3d 769, 776 [gun possessed by a felon]; *People* v. *McNeal* (1979) 90 Cal.App.3d 830, 841 [nunchucks].

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

[33] See *Horton* v. *California* (1990) 496 U.S. 128, 131 [stun gun used in robbery]; *People* v. *Bradford* (1997) 15 Cal.4th 1229, 1296 [murder weapon]. ALSO SEE *People* v. *Duncan* (1981) 115 Cal.App.3d 418, 426 [OK to seize poetry from a rape suspect's home because the rapist had read poetry to the victim].

[34] *See Colorado* v. *Bannister* (1980) 449 U.S. 1, 2; *People* v. *Bright* (1970) 4 Cal.App.3d 926, 930; *Christians* v. *Chester* (1990) 218 Cal.App.3d 273, 275 ["[The ring] had been identified as stolen by its owner."].

only that the facts available to the officer would warrant a person of reasonable caution in believing that the item may be contraband or stolen property or evidence of a crime."[35]

STOLEN PROPERTY: Circumstantial evidence that property was stolen may consist of the condition of the property, such as obliterated serial numbers, clipped wires, and pry marks. For example, in *People* v. *Gorak*[36] the court ruled that officers had probable cause to seize an air compressor in the back seat of the defendant's car mainly because "the electrical lines and air lines appeared to have been broken off" and water was leaking out of a broken line.

Other relevant circumstances include the presence of store merchandise tags or anti-shoplifting devices that are usually removed when retail goods are sold; or the presence of an inordinate amount of property, especially if it's the type of property that is frequently stolen, such as television sets, CD players, PDAs, tools, firearms, and jewelry. It would also be significant that the suspect possessed burglar tools, or that he provided officers with a conflicting or dubious explanation as to how he happened to possess the property.[37]

For example, in *People* v. *Stokes*[38] two Hayward police officers in an unmarked car were driving through a mobile home park that was occupied mainly by senior citizens when they saw Stokes standing in the middle of the street, and he was holding a rectangular object covered by a blanket. The officers recognized Stokes as a local burglar, and they noticed that he kept looking around and appeared to be nervous. They also knew that several residents of the park had recently been burglarized. Just then, a car pulled up beside him and he stepped inside. As the officers walked up to the car, they heard the driver say to Stokes, "I told you not to do it." They also noticed a screwdriver in Stokes' back pocket, and they saw that the object he had been carrying was a VCR. Although the officers had no direct evidence that the VCR was stolen, the court ruled there was sufficient circumstantial evidence to satisfy the plain view rule.

DRUGS: Even though officers cannot see the contents of a container, they may have probable cause to believe it contains drugs based on the surrounding circumstances, especially the nature of the container. As the court noted in *People* v. *Holt*, "Courts have recognized certain containers as distinctive drug carrying devices which may be seized upon observation [such as] heroin balloons, paper bindles, and marijuana smelling brick-shaped packages."[39] But the court added that other containers, such as pill bottles, plastic bags, and film canisters, "are seen as more generic and may not be seized merely because they may be used to store narcotics."

Other relevant circumstances include a distinctive odor, the presence of narcotic paraphernalia nearby, an alert by a drug-detecting dog, and the "feel" of the container.[40]

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[35] (1990) 224 Cal.App.3d 715, 719.

[36] (1987) 196 Cal.App.3d 1032.

[37] See *People* v. *Clark* (1989) 212 Cal.App.3d 1233, 1236 ["As appellant pulled out a wallet, [the officers] saw a 'clump' of ladies' watches and miscellaneous jewelry in the pocket."]; *People* v. *Williams* (1988) 198 Cal.App.3d 873, 890 ["[The officers] knew from experience that firearms and electronic equipment are among the 'hottest' items encountered by the burglary detail."]; *People* v. *Superior Court (Thomas)* (1970) 9 Cal.App.3d 203, 210 ["some items still carried price tags and some which defendant claimed to have acquired at 'surplus' bore no markings indicating prior government ownership"]; *People* v. *Curtis T.* (1989) 214 Cal.App.3d 1391 [large quantity of car stereo equipment piled on the floor].

[38] (1990) 224 Cal.App.3d 715.

[39] (1989) 212 Cal.App.3d 1200, 1205.

[40] See *Texas* v. *Brown* (1983) 460 U.S. 730, 742-3 [heroin-filled balloon]; *People* v. *Arango* (1993) 12 Cal.App.4th 450, 455 ["distinctively shaped and wrapped kilos of cocaine"]; *Guidi* v. *Superior Court* (1973) 10 Cal.3d 1, 18 [a marijuana "joint"]; *People v. Lennies H.* (2005) 126 Cal.App.4th 1232, 1238 [although a key is not inherently illegal to possess, the officer "had probable cause to believe that the keys were evidence linking the minor to the carjacking at the time of the initial 'plain-feel' search"]; *People* v. *Glasgow* (1970) 4 Cal.App.3d 416, 418 ["commercial packages" of marijuana]; *U.S.* v. *Yamba* (3rd Cir. 2007) 506 F.3d 251, 260 ["soft, spongy-like substance" containing "small buds and seeds"]; *U.S.* v. *Hudson* (9th Cir. 1996) 100 F.3d 1409, 1420 ["glassware often associated with methamphetamine manufacture"]; *People* v. *Topp* (1974) 40 Cal.App.3d 372, 378 ["tell-tale" leafy and powdery feel]; *People* v. *Shandloff* (1985) 170 Cal.App.3d 372, 381 [odor of cocaine]; *U.S.* v. *Yamba* (3rd Cir. 2007) 506 F.3d 251, 260 [a "soft, spongy-like substance" [marijuana] inside a plastic bag]; *People* v. *Molina* (1994) 25 Cal.App.4th 1038, 1042 [odor of fresh beer]. COMPARE *Kaplan* v. *Superior Court* (1971) 6 C3 150, 153 [officer merely "had an idea" the objects he felt were pills].

For example, in *People* v. *Lee*[41] an Oakland police officer was pat searching a suspected drug dealer when he felt "a clump of small resilient objects" which he believed (correctly) were heroin-filled balloons. In ruling that the officer's seizure of the balloons was lawful under the "plain feel" rule, the court noted that he "recognized the feel of such balloons from at least 100 other occasions on which he had pat-searched people and felt what were later determined to be heroin-filled balloons. As he described it, the feel is unmistakable."

Lawful Access

The last requirement—lawful access—pertains only to situations in which officers must enter a residence or other private structure to seize evidence they had lawfully discovered from the outside. Although the evidence is in plain sight, it cannot be seized under the plain view rule unless the officers had a legal right to enter.[42] Summarizing this requirement, the United States Supreme Court explained, "[N]ot only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself."[43]

For example, officers who see evidence inside a vehicle will automatically have lawful access because the Supreme Court has ruled that officers may enter and search a vehicle without a warrant whenever they have probable cause to believe it contains evidence of a crime.[44] Lawful access may also be based on a search warrant, consent, an emergency situation, or the terms of an occupant's probation or parole. It may also be based on the exigent circumstance known as "destruction of evidence" if, (1) officers who were standing outside a house saw drugs or other evidence inside; and (2) they reasonably believed that an occupant knew that they had seen the evidence, in which case it would be reasonable to believe that the suspect would destroy it if he was given the opportunity.

For example, in *People* v. *Ortiz*,[45] an officer was walking by the open door to the defendant's hotel room when he saw a woman inside. He also noticed that she was "counting out tinfoil bindles and placing them on a table near the bed" on which the defendant was sitting. Believing (correctly) that the bindles contained heroin, the officer went inside, seized them and arrested the occupants. In ruling that the officer had lawful access to the evidence, the court pointed out that, because he was only three to six feet away from the woman, he reasonably believed that she had seen him and it is "common knowledge that those who possess drugs often attempt to destroy the evidence when they are observed by law enforcement officers." Thus, said the court, "it was reasonable for [the officer] to believe the contraband he saw in front of defendant and the woman was in imminent danger of being destroyed."[46] POV

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[41] (1987) 194 Cal.App.3d 975.

[42] See *Illinois* v. *Andreas* (1983) 463 U.S. 765, 771 [plain view applies only if the evidence was "visible to a police officer whose access to the object has some prior Fourth Amendment justification"]; *Washington* v. *Chrisman* (1982) 455 U.S. 1, 5-6 [the evidence must be "discovered in a place where the officer has a right to be"]; *Texas* v. *Brown* (1983) 460 U.S. 730, 738 [the officer's "access to an object [must have had] some prior justification under the Fourth Amendment"]; *People* v. *Ortiz* (1995) 32 Cal.App.4th 286, 291 ["[I]t was not enough that the contraband was in plain view. Before [the officer] could enter the hotel room to [seize the heroin], he needed to have a lawful right of access to defendant and the heroin."]; *G&G Jewelry* v. *City of Oakland* (9th Cir. 1993) 989 F.2d 1093, 1101 ["[Even [when] contraband plainly can be seen and identified from outside the premises, a warrantless entry into those premises to seize the contraband would not be justified absent exigent circumstances"].

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

[44] See *United States* v. *Ross* (1982) 456 U.S. 798, 809; *People* v. *Carpenter* (1997) 15 Cal.4th 312, 365 ["The police had probable cause to search the vehicle. Under the 'automobile exception' to the warrant requirement, they did not need a warrant at all."]; *People* v. *Superior Court* (*Nasmeh)* (2007) 151 Cal.App.4th 85, 100 ["When the police have probable cause to believe an automobile contains contraband or evidence they may search the automobile and the containers within it without a warrant."]. ALSO SEE *Texas* v. *Brown* (1983) 460 U.S. 730, 738, fn.4 ["Alternatively, police may need no justification under the Fourth Amendment for their access to an item, such as when property is left in a public place."].

[45] 32 Cal.App.4th 286.

[46] **NOTE**: The court also ruled that even if there was no reason for the officers to believe the woman had seen them, they would still have had a right to access the room because they could have reasonably believed that a drug deal "was soon to be completed, and that the purchaser or seller was about to leave the hotel room.

Recent Cases

People v. Diaz

(2008) 165 Cal.App.4th 732

Issue

Can officers search an arrestee's cell phone as an incident to the arrest if the search occurred about 90 minutes after he was taken into custody?

Facts

Diaz was arrested by Ventura County sheriff's deputies for transporting a controlled substance. The arrest was made in the course of a controlled buy after Diaz drove another man to a location where the man sold ecstacy pills to a police informant. About an hour later at the sheriff's station, deputies seized a cell phone Diaz had been carrying. About 30 minutes after that, a deputy searched the text message folder in the cell phone and found a message indicating that Diaz was selling the drug. When confronted with this information, Diaz confessed.

Discussion

Diaz argued that the text message was obtained as the result of an illegal search. Consequently, he contended that his confession, as well as the text message, should have been suppressed as the fruit of the search. The court disagreed.

Officers who have arrested a suspect may, as an incident to the arrest, search any property in his immediate control.[1] These types of searches, however, must be conducted contemporaneously with the arrest, which generally means they must occur at or near the time of arrest.[2] Thus, Diaz argued that the search of his cell phone did not qualify as a search incident to his arrest because it occurred about 90 minutes later.

There is, however, an exception to this rule: A search of personal property need not be contemporaneous with an arrest if the property was of the type that is "immediately associated with the person of the arrestee."[3] Items falling into this category include wallets, purses, address books, and pagers.[4]

Diaz argued that cell phones should not be included because they "have the capacity to store tremendous quantities of personal information." That's true, said the court, but it "does not give rise to a legitimate heightened expectation of privacy where, as here, the defendant is subject to a lawful arrest while carrying the device on his person."

Accordingly, the court ruled the cell phone could be searched "for a reasonable amount of time following the arrest," that 90 minutes was not excessive, and therefore the search was lawful.

U.S. v. Giberson

(9th Cir. 2008) 527 F.3d 882

Issues

(1) While executing a warrant to search for certain documents, could officers search the defendant's computer even though the warrant did not expressly authorize a computer search? (2) During a subsequent warranted search of the computer for financial records, did a technician exceed the permissible scope of the search when he viewed files containing child pornography?

Facts

In the course of a traffic stop in North Las Vegas, an officer discovered that the driver, Giberson, possessed a false Nevada ID card. He also learned that Giberson was wanted on outstanding warrants, so he arrested him. When the officer asked him about the fake ID, Giberson said he printed it to avoid paying child support. This comment prompted the officer to notify the U.S. Department of Health and Human Services which assigned an investigator to the case.

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[1] See *U.S.* v. *Robinson* (1973) 414 U.S. 218, 224.

[2] See *Shipley* v. *California* (1969) 395 U.S. 818, 820; *Vale* v. *Louisiana* (1970) 399 U.S. 30, 33.

[3] See *U.S.* v. *Chadwick* (1977) 433 U.S. 1, 15; *U.S.* v. *Edwards* (1974) 415 U.S. 800.

[4] See *People* v. *Decker* (1986) 176 Cal.App.3d 1247, 1252; *U.S.* v. *Passaro* (9th Cir. 1980) 624 F.2d 938, 944; *U.S.* v. *Rodriguez* (7th Cir. 1993) 995 F.2d 776, 777-9; *U.S.* v. *Chan* (N.D. Cal. 1993) 830 F.Supp. 531, 536.

The investigator learned that Giberson owed over $100,000 in child support, so he obtained a warrant to search Giberson's home for financial records that would be relevant in the child support case. Although the warrant did not specifically authorize a search of computers for the documents, investigators searched one on the premises and discovered evidence that Giberson had been printing false Social Security cards and birth certificates. This evidence included transparencies of the Nevada State Seal and photographs that were apparently used on the false IDs.

After obtaining a warrant to search the computer for forged documents, a technician created a mirror image of the computer's hard drive and searched the mirror image using software that permitted him to view thumbnails of the saved files. While examining these thumbnails, he discovered that some contained child pornography. So investigators obtained a warrant to search the mirror image for child pornography. The search netted more than 700 such images.

When Giberson's motion to suppress was denied, he pled guilty to possessing child pornography.

Discussion

Giberson contended that the images should have been suppressed because, (1) the first warrant did not expressly authorize a search of his computer, and (2) while executing the second warrant, the technician exceeded the permissible scope of the search when he viewed files containing child pornography.

THE FIRST WARRANT: Giberson argued that officers who have obtained a warrant to search for certain documents at a residence may not search for those documents in a computer on the premises unless the warrant expressly authorized a computer search. The court disagreed.

As a general rule, officers who are executing a warrant may search all places and containers in which any of the listed evidence may reasonably be found. As the United States Supreme Court explained in a car search case, "When a legitimate search is underway, and when its purpose and its limits have been precisely defined, nice distinctions between glove compartments, upholstered seats, trunks, and wrapped packages in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand."[5]

Nevertheless, Giberson argued that this rule should not apply to computers because, unlike cars, they contain "massive quantities of intangible, digitally stored information," much of which pertains to "many different areas of a person's life." While this is true, said the court, "there is no reason why officers should be permitted to search a room full of filing cabinets or even a person's library for documents listed in a warrant but should not be able to search a computer."

The court also noted the practical problems that would result if digitally stored documents were treated differently than papers. Said the court, "If we permit a person's Day-Timer to be searched, what about one's BlackBerry? The format of a record or document should not be dispositive to a Fourth Amendment inquiry." In conclusion, the court observed:

> While officers ought to exercise caution when executing the search of a computer, just as they ought to when sifting through documents that may contain personal information, the potential intermingling of materials does not justify an exception or heightened procedural protections for computers beyond the Fourth Amendment's reasonableness requirement.

THE SECOND WARRANT: As noted, the technician who was searching for forged documents utilized software that allowed him to view thumbnail images of each file. It was while he was viewing thumbnails that he discovered the child pornography.

Giberson argued that this method of conducting computer searches should be unlawful; that technicians should not be permitted to view a file unless they had reason to believe it contained some of the listed evidence. But, as the court pointed out, this would be impractical:

> Computer records are extremely susceptible to tampering, hiding, or destruction, whether deliberate or inadvertent. Images can be hidden in all manner of files, even word processing documents and spreadsheets. Criminals will do all they can to conceal contraband, including the simple expedient of changing the names and extensions of files to disguise their content from the casual observer.

For this reason, the court ruled the thumbnail search was lawful because "[i]t would be unreasonable to require the government to limit its search to directories called, for example, 'Fake I.D. Documents.'"

[5] *US* v. *Ross* (1982) 456 US 798, 821-2. Quote edited.

U.S. v. Craighead

(9th Cir. 2008) __ F.3d __ [2008 WL 3863709]

Issue

Was Craighead "in custody" for *Miranda* purposes when he was questioned at his home while officers were executing a search warrant?

Facts

FBI agents obtained a warrant to search for child pornography at Craighead's home on an Air Force base in Arizona. The warrant was served at 8:40 A.M. by five FBI agents, two Air Force investigators, and a sheriff's detective.

After introducing herself and the detective to Craighead, the lead FBI agent told him that he was free to leave, that he was not under arrest, and that he would not be arrested that day. She also asked if he was willing to speak with her and the detective, and he said yes. Because other officers were in the process of searching the home, the three of them went to a storage room in the back of the house where, in the words of the agent, "they could have a private conversation."

In the course of the interview, which took 20-30 minutes, Craighead admitted that he had downloaded the child pornography that was subsequently found on his computer. He had not been *Mirandized*. As promised, the officers did not arrest Craighead that day. He was, however, subsequently charged with possession of child pornography, to which he pled guilty after the district court denied his motion to suppress his admission.

Discussion

Craighead argued that he was "in custody" for *Miranda* purposes when he was questioned and, therefore, his statement should have been suppressed. The Ninth Circuit agreed.

It is settled that officers must obtain a *Miranda* waiver before interrogating a suspect who is "in custody." It is also settled that a suspect who has not been arrested will be deemed "in custody" if a reasonable person in his position would have believed he was under arrest or that his freedom was restricted to the degree associated with an arrest.[6]

In making this determination, one circumstance that is especially significant is the location of the interview. This is because some places can be intimidating, some are neutral, while others may help reduce or even eliminate coercion. For example, police interview rooms are considered "inherently coercive,"[7] while suspects' homes are inherently hospitable. Nevertheless, the court ruled that the interview in Craighead's home was "custodial" because the atmosphere was "police dominated," and because Craighead did not believe he was free to leave.

In discussing the "police dominated" atmosphere, the court said, "When a large number of law enforcement personnel enter a suspect's home, they may fill the home," and "the presence of a large number of visibly armed law enforcement officers goes a long way towards making the suspect's home a police-dominated atmosphere."

Although Craighead was not handcuffed, the court concluded that he was effectively restrained in the storage room because he testified that the detective "appeared to him to be leaning with his back to the door in such a way as to block Craighead's exit from the room"; and that Craighead "did not feel he had the freedom to leave the storage room because, in order to get to the room's only door, he 'would have either had to have moved the police detective or asked him to move.'" The court also noted that, while Craighead was taller and heavier than the detective, Craighead had testified that he "found him to be 'physically intimidating' because 'he represents law enforcement.'"

As noted, the FBI agent told Craighead that he was not under arrest and that he would not be arrested that day—and he wasn't. But the court discounted the significance of this circumstance because Craighead testified he did not think the FBI agent could speak for the members of the other two law enforcement agencies who were present. Thus, Craighead thought they would have prevented him from leaving if he had tried.

Based on these circumstances, the court ruled that the interview in Craighead's home "was custodial," and because Craighead had not waived his *Miranda* rights, his admission should have been suppressed.

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[6] See *California* v. *Beheler* (1983) 463 U.S. 1121, 1125 ["the ultimate inquiry" is whether there was a "restraint on freedom of movement of the degree associated with a formal arrest"]; *Berkemer* v. *McCarty* (1984) 468 U.S. 420, 440 [*Miranda* applies when "a suspect's freedom of action is curtailed to a degree associated with formal arrest"].

[7] *People* v. *Celaya* (1987) 191 Cal.App.3d 665, 672.

Comment

There are several things about the court's analysis that are troublesome. In determining whether a suspect was "in custody," it is significant—often decisive—that an officer told him that he was not under arrest or was free to leave.[8] As the Ninth Circuit observed in *U.S.* v. *Crawford*, "Perhaps most significant for resolving the question of custody, Defendant was expressly told that he was not under arrest."[9] In fact, the Eighth Circuit has pointed out that "no governing [federal] precedent holds that a person was in custody after being clearly advised of his freedom to leave or terminate questioning."[10]

But the court in *Craighead* seemed confused in applying this principle to situations in which the interview occurred at a place the suspect did not *want* to leave. Said the court, "If a reasonable person is interrogated inside his own home and is told he is 'free to leave,' where will he go? The library? The police station?"

The answer, of course, is that it doesn't matter *where* he goes—what counts is whether a reasonable person under the circumstances would have felt free to walk away or otherwise terminate the interview. The United States Supreme Court made this clear in 1991 in the case of *Florida* v. *Bostick*[11] when it ruled that Bostick, who was a passenger on a bus, was not seized for Fourth Amendment purposes when two officers entered during a stopover and obtained his consent to search his luggage. Like Craighead, Bostick argued that a person cannot feel free to leave a place he does not want to leave. But the Court simply pointed out that "the mere fact that Bostick did not feel free to leave the bus does not mean that the police seized him."

In any event, the court in *Craighead* thought that the agent's "free to leave" notification had little, if any, meaning in this case because Craighead testified that the "prevailing mood" had left him with "the impression" that he wasn't free to go. According to the court, he felt that, "even if the FBI agent had permitted him to leave, he would have been stopped by the Air Force investigators or the sheriff's detective." Expanding on Craighead's feelings, the court said he "was unclear as to whether the agencies were acting in coordination," and that the presence of the different agencies "led him to doubt whether [the agent] spoke for all of the agencies" when she told him he was free to leave.

There are three problems with the court's analysis of this issue. First, Craighead's feelings and beliefs are irrelevant. What matters is how the circumstances would have appeared to a "reasonable person" in his position. As the United States Supreme Court explained in *Stansbury* v. *California, Miranda* "custody" depends on "the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being interrogated."[12] And in *Berkemer* v. *McCarty* the Court said, "[T]he only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation."[13]

Thus, the court in *Craighead* based its decision on information it was required to disregard, and it disregarded "the only relevant inquiry": What would a reasonable person believe if he was told by an FBI agent that he was "free to leave?" If it had addressed this question, it might have concluded that most people—especially most reasonable people—have confidence that FBI agents are honest; and that when an agent tells them they are free to leave, they can believe him.

Second, the court ruled that a person whose home is "crawling" with law enforcement officers "may not feel that he can successfully terminate the interrogation if he knows that he cannot empty his home of his interrogators until they have completed their search." But, again, the issue is not whether the suspect can order the officers to leave, but whether *he* is free to leave or refuse to answer their questions.

[8] See *Oregon* v. *Mathiason* (1977) 429 US 492, 495 ["[H]e was immediately informed that he was not under arrest."]; *California* v. *Beheler* (1983) 463 US 1121, 1122 ["the police specifically told Beheler that he was not under arrest."].
[9] (9th Cir. en banc 2004) 372 F.3d 1048, 1060.
[10] *U.S.* v. *Czichray* (8th Cir. 2004) 378 F.3d 822, 826; *U.S.* v. *Brave Heart* (8th Cir. 2005) 397 F.3d 1035, 1039. Quote edited.
[11] (1991) 501 US 429.
[12] (1994) 511 U.S. 318, 323.
[13] (1984) 468 US 420, 442. ALSO SEE *Yarborough* v. *Alvarado* (2004) 541 US 652, 662 ["[C]ustody must be determined based on how a reasonable person in the suspect's position would perceive his circumstances."]; *Thompson* v. *Keohane* (1995) 516 US 99, 112 [the issue is "would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave"].

Third, even if Craighead's feelings were somehow relevant, the record indicates that he was lying when he testified he did not believe he was free to leave. Not only was such a belief unsupported by the surrounding circumstances, the trial judge who had listened to his testimony at the motion to suppress determined that Craighead was not a credible witness. Specifically, the court concluded that he had lied when he testified that the FBI agent never told him he was free to leave.

As noted, the court also ruled that Craighead was "in custody" because the atmosphere in his house was "police dominated." Said the court, "[O]ur analysis considers the extent to which the circumstances of the interrogation turned the otherwise comfortable and familiar surroundings of the home into a 'police-dominated atmosphere.'" Apart from the fact that Craighead's surroundings remained "comfortable and familiar" (Craighead was on his own "turf"—the officers were strangers in an unfamiliar place[14]) the United States Supreme Court has ruled that an interview does not become custodial merely because it occurred in a police station which, after all, is the most police-dominated location on the planet.[15]

Another circumstance cited by the court in *Craighead* as proof of police coercion was that the detective was armed. In fact, it mentioned this three times: ". . . and, we would add, he was armed," "[at] the door stood an armed detective," "an armed guard by the door." The court's fixation on this circumstance was silly. As the United States Supreme Court has pointed out, "That most law enforcement officers are armed is a fact well known to the public. The presence of a holstered firearm thus is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon."[16]

Finally, the court said that Craighead was "directed" to accompany the officers to the storage room. It appears the court was mistaken. The record indicates it was Craighead's idea—not the officers'—to conduct the interview there. As Craighead testified at the motion to suppress, he "did not want to leave his house entirely because he did not want to leave the officers alone with his belongings," and he "did not want to leave his dog unattended."

U.S. v. Lopez

(6th Cir. 2008) 531 F.3d 420

Issues

(1) Did an officer's questions to a suspect constitute permissible "booking" questions under *Miranda*? (2) Did the officer utilize the prohibited "two step" *Miranda* procedure?

Facts

Officers in Louisville, Kentucky learned that drug traffickers would be transporting cocaine to a certain house from somewhere out of state. When two suspects arrived at the house carrying 16 kilograms of cocaine, officers arrested them and obtained a warrant to search another house in Louisville to which the vehicles were registered.

Lopez was one of the people who was in the house when the officers arrived. After handcuffing him, an officer asked, when did you arrive here? and, how did you get here? Lopez responded that he had arrived from Mexico the previous Sunday. At that point, the officer *Mirandized* him and asked if he had been transporting cocaine on the trip. He said yes. When Lopez's motion to suppress his statements was denied, he pled guilty.

Discussion

Lopez contended that his statements should have been suppressed because they were obtained in violation of *Miranda*. The court agreed, rejecting the government's argument that the officer's initial questions constituted routine booking inquiries. It also ruled that the post-waiver question resulted from the officer's use of the illegal "two-step" procedure.

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[14] See *U.S.* v. *Czichray* (8th Cir. 2004) 378 F.3d 822, 826 ["When a person is questioned 'on his own turf,' we have observed repeatedly that the surroundings are not indicative of the type of inherently coercive setting that normally accompanies a custodial interrogation."]; *U.S.* v. *Sutera* (8th Cir. 1991) 933 F.2d 641, 647 ["While a person may be deemed to be in custody even in his own home, it is not the type of coercive setting normally associated with custodial interrogation."]; *U.S.* v. *Newton* (2nd Cir. 2004) 369 F.3d 659, 675 ["[A]bsent an arrest, interrogation in the familiar surroundings of one's own home is generally not custodial."].

[15] See *California* v. *Beheler* (1983) 463 U.S. 1121, 1124 ["*Miranda* warnings are not required simply because the questioning takes place in the station house"]; *Oregon* v. *Mathiason* (1977) 429 U.S. 492, 495 ["Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house."].

[16] *United States* v. *Drayton* (2002) 536 U.S. 194, 204.

ROUTINE BOOKING QUESTIONS: It is basic *Miranda* law that officers must obtain a waiver before interrogating a suspect who is "in custody." Although Lopez had not been placed under arrest before he was questioned, he was obviously in custody for *Miranda* purposes because he had been handcuffed.[17] The question, then, was whether the officer's questions constituted "interrogation."

As a general rule, officers "interrogate" a suspect if they ask questions that are reasonably likely to elicit an incriminating response.[18] Accordingly, so-called "routine booking questions" are exempt from *Miranda* because, by definition, they merely call for basic identifying data or biographical information needed to complete the booking or pretrial services process. Falling into this category are questions about the suspect's name, address, date of birth, place of birth, phone number, occupation, social security number, employment history, and arrest record.[19]

It was therefore apparent to the court that the officer's pre-waiver questions did not qualify as booking inquiries for two reasons: (1) the questions did not seek biographical information, and (2) they were reasonably likely to elicit an incriminating response. Said the court:

> The officers who questioned Lopez did know that the shipment of cocaine involved in the arranged buy had arrived from outside the state during the previous week. Consequently, asking questions about when and how Lopez arrived at a household ostensibly linked to a drug sale, as well as his origin, are relevant to an investigation and cannot be described as related only to securing the house or identifying the defendant.

THE "TWO STEP": The government argued that, even if Lopez's pre-waiver answers were suppressed, his admission that he transported cocaine was obtained lawfully because, just seconds earlier, he had waived his rights. But the court ruled that, despite the waiver, the admission was obtained unlawfully because it resulted from the officer's use of the illegal "two step" procedure.

The "two step"—also known as "Question first. Warn later" or "*Miranda*-in-the-middle"—is a tactic whereby officers attempt to obtain an incriminating statement from an arrested suspect before seeking a waiver. If they succeed, they *Mirandize* him and, if he waives, ask him the same questions as before. If things work out, he will make a post-*Miranda* statement that is virtually identical to the illegal pre-*Miranda* statement. The idea is that a suspect will likely do so because he had previously "let the cat out of the bag" and, therefore, had nothing to loose by repeating his earlier admission.

In 2004, however, the U.S. Supreme Court ruled in *Missouri* v. *Seibert* that such a procedure is unlawful if it was done intentionally.[20] And in determining whether officers utilized the two step the Court said the following circumstances would be relevant: (1) the completeness of the details involved in pre-wavier questioning; (2) the overlapping content of the statements made before and after the waiver; (3) the timing and setting of the interrogation, (4) the continuity of police personnel during the pre- and post-waiver interrogations, and (5) the degree to which the interrogator's questions treated the post-waiver round as continuous with the first.[21]

Applying these criteria to the facts, the court in *Lopez* said that the "third, fourth, and fifth factors, in particular, inform our determination that the warning in this case was ineffective, as the same officers conducted the interrogation in the same location without any break between the two sets of questions. The interrogation was continuous—the break lasted for the amount of time it took the investigators to read Lopez the *Miranda* warning."

The second factor was even more important because, although there was technically no direct overlap between the pre- and post-waiver questions, the pre-waiver questions effectively set the stage for the critical post-waiver question: Did you transport the cocaine from Mexico? As the court pointed out, "While the exact questions did not overlap, the post-*Miranda* question resulted from the knowledge

[17] See *People v. Pilster* (2006) 138 CA4 1395, 1405 [handcuffing "is a distinguishing feature of a formal arrest."].
[18] See *Rhode Island* v. *Innis* (1980) 446 US 291.
[19] See *Rhode Island* v. *Innis* (1980) 446 US 291, 301 [questions "normally attendant to arrest and custody" are not "interrogation"].
[20] (2004) 542 US 600.
[21] See *Missouri* v. *Seibert* (2004) 542 US 600, 615.

gleaned during the initial questioning—that Lopez had driven from Mexico to Kentucky."

Consequently, the court ruled that Lopez's admissions were obtained in violation of *Miranda*.

U.S. v. Henderson

(7th Cir. 2008) __ F.3d __ [2008 WL 3009968]

Issue

If one spouse consents to a search of the family home but the other spouse objects, can officers conduct a search if the objecting spouse was subsequently arrested and removed from the premises?

Facts

Patricia Henderson phoned 911 in Chicago and said her husband had just choked her and had thrown her out of the family home. When officers arrived they spoke with her on the front lawn where she explained what had happened and said she wanted the officers to arrest her husband. Having noticed "red marks" around Patricia's neck, the officers entered the house where they encountered Henderson who told them to "get the fuck out of my house."

After arresting Henderson and removing him from the premises, the officers obtained Patricia's consent to search the attic where officers found crack cocaine, sales paraphernalia, and firearms. As the result, Henderson was charged with possession with intent to distribute and various firearms-related offenses.

Discussion

Henderson argued that his wife's consent to search was invalid, citing the United States Supreme Court's decision in *Georgia* v. *Randolph*.[22] In *Randolph*, the Court ruled that if one spouse consents to a search of the family home but the other objects, the consent is invalid if both of the following circumstances existed:

(1) OBJECTION IN OFFICERS' PRESENCE: The objecting spouse must have objected in the officers' presence when they sought to enter or search.

(2) OBJECTIVE TO OBTAIN EVIDENCE: The purpose of the officer's entry or search must have been to obtain evidence against the objecting spouse.

Although both of these requirements were met, the court ruled that a spouse's objection loses its force if, before the search occurred, the objecting spouse was lawfully arrested and removed from the premises. Said the court, "Here, it is undisputed that Henderson objected to the presence of the police in his home. Once he was validly arrested for domestic battery and taken to jail, however, his objection lost its force, and Patricia was free to authorize a search of the home. This she readily did."

Consequently, the court ruled the search was lawful and the evidence was admissible.

Comment

Last February, a panel of the Ninth Circuit ruled in *U.S.* v. *Murphy*[23] that an objection to a search made by a temporary occupant of a storage locker remained effective even though the objector had been lawfully arrested for processing methamphetamine in the unit and was sitting in jail when the renter of the unit consented. As we explained in the Summer 2008 edition, the panel's analysis was not only unsound, it ignored the *Randolph* Court's explicit instructions that its ruling must be limited to the unique facts of the case.

The court in *Henderson* was also critical of the *Murphy* court's disregard of the Supreme Court's express instructions. As the court pointed out, *Murphy* "essentially reads the presence requirement out of *Randolph*" even though the Supreme Court "went out of its way to limit its holding to the circumstances of the case: a disputed consent by two then-present residents with authority." It also noted the patent absurdity of *Murphy's* conclusion that "a one-time objection by one [co-tenant] is sufficient to permanently disable the other from *ever* validly consenting to a search of their shared premises."

One other thing. The Court said in *Randolph* that officers may not remove a co-tenant from the residence for the purpose of preventing him from objecting. This was not, however, an issue in *Henderson* because, as noted, the officers removed Henderson for the purpose of taking him to jail after they had lawfully arrested him.[24]

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[22] (2006) 547 U.S. 103.

[23] (9th Cir. 2008) 516 F.3d 1117.

[24] See *U.S.* v. *Alama* (8th Cir. 2007) 486 F.3d 1062, 1066; *U.S.* v. *Parker* (7th Cir. 2006) 469 F.3d 1074, 1078; *U.S.* v. *Wilburn* (7th Cir. 2007) 473 F.3d 742, 745 ["Wilburn was validly arrested and he was lawfully kept in a place—the back seat of a squad car—where people under arrest are usually held."].

People v. Sandoval

(2008) 163 Cal.App.4th 205

Issue

Did an officer have sufficient grounds to pat search the defendant?

Facts

While conducting surveillance of a house in Redding, officers detained some visitors and determined that "several" of them were carrying drugs and drug paraphernalia. The officers knew that the resident, Shawn Funchess, was on probation with a search condition, so they decided to conduct a probation search. During the pre-search briefing, officers discussed Funchess's "known associates," one of whom was Sandoval. In fact, Sandoval was living in Funchess's house. The officers also knew that Sandoval had been arrested "several times" in the past two years for possession of methamphetamine.

When the search team arrived at the house at about 9:30 A.M., they saw Sandoval sitting on the front porch, smoking a cigarette and wearing a heavy jacket. After detaining him and securing the residence, they pat searched him for weapons. During the search, an officer found a stun gun and methamphetamine. When Sandoval's motion to suppress the drugs was denied, he pled guilty to possession.

Discussion

Sandoval contended that the evidence should have been suppressed because the officers did not have sufficient grounds to pat search him. The court agreed.

Officers may pat search a suspect if they reasonably believe he is armed or dangerous.[25] But the court ruled that, because the officer who conducted the search "did not testify he thought defendant was armed and dangerous," the pat search was unlawful and the evidence should have been suppressed.

Comment

One of the most basic legal principles pertaining to pat searches is that the courts must disregard the officers' subjective beliefs as to whether the suspect was armed or dangerous. Instead, what counts is whether the objective circumstances would have caused a reasonable officer to believe so. The United States Supreme Court made this clear when it said:

> [I]t is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or search warrant a man of reasonable caution in the belief that the action taken was appropriate?[26]

This is not a new rule. It has been consistently applied by the courts throughout the country for over 40 years. As the Supreme Court observed in 2006:

> Our cases have repeatedly rejected this [subjective] approach. An action is "reasonable" under the Fourth Amendment, regardless of the individual officer's state of mind, as long as the circumstances, viewed *objectively,* justify the action.[27]

It is, therefore, beyond comprehension how the court in *Sandoval* could have disregarded this principle and based its decision solely on what it perceived as the officer's subjective beliefs.[28] It is especially troubling because, if it had applied the objective test, it would undoubtedly have ruled the pat search was justified. This is because one of the most important objective circumstances in making this determination is the nature of the crime under investigation. As the Ninth Circuit observed, "[I]ndeed, some crimes are so frequently associated with weapons that the mere suspicion that an individual has committed them justifies a pat down search."[29] And, in this day and age, one crime that falls squarely into this category is drug trafficking. As the Court of Appeal has pointed out:

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[25] See *Terry* v. *Ohio* (1968) 392 US 1, 27-8. **NOTE**: Although the courts sometimes say that officers must reasonably believe the detainee was armed *and* dangerous, either is sufficient. This is because a suspect who is armed is necessarily "dangerous" to any officer who is detaining him; and a pat search is justified when officers reasonably believe that a detainee constituted an immediate threat, even if there was no reason to believe he was armed. See *Michigan* v. *Long* (1983) 463 U.S. 1032, 1049 ["[P]rotection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger"].

[26] *Terry* v. *Ohio* (1968) 392 U.S. 1, 21-2. ALSO SEE *Maryland v. Macon* (1985) 472 U.S. 463, 470-1.

[27] *Brigham City* v. *Stuart* (2006) 547 U.S. 398, 404.

[28] **NOTE**: Although the court disregarded it, the officer who pat searched Sandoval testified he was fully aware of this danger when he arrived. As he explained, "The concern is always when you're dealing with a narcotics search at a residence is that someone may have a weapon to try to harm the entry team . . . . [A]nd there's the concern that people that are in the vicinity of the residence such as the front yard or back yard may be a threat to the team making entry into the residence to perform the search."

[29] *U.S.* v. *Flatter* (9th Cir. 2006) 456 F.3d 1154, 1158.

> Rare is the day which passes without fresh reports of drug related homicides, open street warfare between armed gangs over disputed 'drug turf,' and police seizures of illicit drug and weapon caches in warranted searches of private residences and other locales.[30]
>
> It should come as no great surprise that those who would profit by the illicit manufacture and sale of drugs which so often destroy their customers' very lives, are not above adopting lethal means to protect their products from seizure and themselves from apprehension.[31]

It is also apparent that there was an objective basis for the officers' belief that Funchess was selling drugs from the house. As noted, they had been conducting surveillance of the residence (presumably they did so because they already had reason to believe it was a drug house) and they had determined that "several" of the visitors possessed drugs and paraphernalia. It therefore appears that it was reasonable for the officers to believe that the occupants of the premises were selling drugs from the house. Furthermore, the officers knew that Sandoval resided in this drug house and that he had been arrested "several times" in the past two years for possession.

But there's more. The search could also have been upheld under the settled rule that officers who are lawfully searching a residence for drugs may pat search all of the occupants on the premises, regardless of whether there is reason to believe they are armed or dangerous.[32] As the California Supreme Court observed:

> The police interest in protecting against violence during the search of a home for narcotics has been widely recognized. In the narcotics business, 'firearms are as much "tools of the trade" as are most commonly recognized articles of narcotics paraphernalia. The danger is potentially at its greatest when, as here, the premises to be searched are a private home, rather than a [public place].[33]

One other thing. The reason our discussion of the court's analysis was so brief was that there was nothing to discuss. Instead of providing a reasoned decision, the court cut-and-pasted large blocks of quoted material from a published summary of a case that was not germane. Reading it, one was reminded of the familiar experience of countless high school and college students who, having neglected to study, fill their answer books with lots of extraneous material, trying to give the impression they know something. While such chicanery can be amusing when the perpetrator was a clueless student, it is unworthy of a justice of the Court of Appeal.

U.S. v. Hicks

(7th Cir. 2008) 531 F.3d 555

Issue

Did officers have sufficient grounds to detain a suspect based on a 911 call from a man who had furnished inconsistent information?

Facts

Hicks went to the home of David Woodbury in Indiana where he pushed his way inside and confronted his girlfriend, Lynn McClendon, who had been spending time with Woodbury. While this was going on, Woodbury went outside and phoned 911 on his cordless phone, saying, "There's a guy beating a woman up in my house." He gave his address and said the assailant was armed with a handgun and was threatening to shoot the woman. When the 911 operator asked for Woodbury's name, he said he was "Albert."

At this point, Woodbury said some things that cast doubt on his credibility. At first he said he was calling from inside his house, but when the operator said she didn't hear any fighting he said he was actually standing outside and was calling on a cell phone. When the operator asked for the number of his cell

[30] *People* v. *Thurman* (1989) 209 Cal.App.3d 817, 822.
[31] *People* v. *Osuna* (1986) 187 Cal.App.3d 845, 856.
[32] See *People* v. *Thurman* (1989) 209 Cal.App3d 817, 822 ["We hold that where police officers are called upon to execute a warranted search for narcotics within a private residence they have the lawful right to conduct a limited *Terry* patdown search for weapons upon the occupants present while the search is in progress."]; *People* v. *Roach* (1971) 15 Cal.App.3d 628, 632 ["Defendants' self-induced presence at an apartment where dangerous drugs were sold provided rational support for [the officer's belief that they were dangerous]."]. ALSO SEE *Michigan* v. *Summers* (1981) 452 U.S. 692, 702 ["[T]he execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence"].
[33] *People* v. *Glaser* (1995) 11 Cal.4th 354, 367-8.

phone, he said he was actually calling on a cordless phone. She then asked him to repeat his name, and this time he gave his true name. Finally, when asked to confirm that the perpetrator had a handgun, he changed his story and said the assailant was unarmed. The officers who were dispatched to the call were notified only that it was a domestic disturbance with an armed suspect.

When they arrived, they located Hicks and Woodbury standing in the driveway of a house nearby. The officers detained Hicks following a short scuffle, after which they pat searched him and found a loaded handgun in his pants pocket. As the result, Hicks was charged with being a felon in possession of a firearm.

Discussion

Hicks argued that his detention and pat search were unlawful because they were based on "miscommunicated information gleaned from a nearly anonymous and completely uncorroborated tip that contained several inconsistencies." Although Hicks' characterization of the information was substantially correct, the court ruled the detention and pat search were justified.

As a general rule, a detention based solely on information from a phone caller is lawful only if there was reason to believe the caller was reliable or that his information was accurate. For example, it is usually reasonable to believe that a caller is reliable if he exposed himself to identification by giving the operator his name, phone number, and/or present location. For this reason, it is especially relevant that the caller phoned 911 (as opposed to a non-emergency line) because most people know that 911 calls are automatically traced and recorded. As the California Supreme Court observed, "[M]erely calling 911 and having a recorded telephone conversation risks the possibility that the police could trace the call or identify the caller by his voice."[34]

Other circumstances that the courts have cited as evidence of a caller's reliability include the following:

DETAILS OF INCIDENT: Whether the caller furnished a detailed explanation of what was happening, or whether his report was vague or skimpy.[35]

PERPETRATOR DESCRIPTION: Whether he furnished a sufficiently detailed description of the perpetrator or his vehicle so that officers could be reasonably certain they were detaining the right person.[36]

DEMEANOR: Whether the caller's manner of speaking—his tone and demeanor—was consistent with that of someone reporting an emergency.

MULTIPLE CALLERS: Whether other callers had provided the same or similar information.[37]

CORROBORATION: Whether the responding officers saw or heard something that tended to corroborate the caller's information.[38]

TIME LAPSE: Whether the caller was reporting an incident that was happening now or had just occurred, or whether it had happened in the past.[39]

In addition, officers and operators must take into account any circumstances that tend to cast doubt on the caller's report. And here, as noted, there were several: He gave conflicting statements as to his identity, where he was calling from, whether he was calling on a cell or cordless phone, and whether the perpetrator was armed.

The court was therefore faced with a dilemma: some of the circumstances indicated the caller was reliable, while others indicated he was flaky. Fortunately, it recognized the importance of providing officers with a basis for making a decision in these situations, especially because they are not uncommon and they often have life-and-death consequences. So the court ruled—as has the California Supreme Court[40]—that officers may also consider whether the caller was reporting an emergency or merely "general criminality," e.g., "There's a guy acting suspicious." And because Woodbury was reporting an emergency—"There's a guy beating a woman up in my house"—it ruled that the officers had sufficient grounds to detain Hicks and seize his handgun.

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[34] *People v. Dolly* (2007) 40 Cal.4th 458, 467. ALSO SEE *People v. Lindsey* (2007) 148 Cal.App.4th 1390, 1398.
[35] See *People v. Wells* (2006) 38 Cal.4th 1078, 1088; *People v. Dolly* (2007) 40 Cal.4th 458, 467.
[36] See *Lowry* v. *Gutierrez* (2005) 129 Cal.App.4th 926, 938; *People v. Lindsey* (2007) 148 Cal.App.4th 1390, 1400.
[37] See *People v. Dolly* (2007) 40 Cal.4th 458, 468.
[38] See *Illinois* v. *Gates* (1983) 462 U.S. 213, 244; *Florida* v. *J.L.* (2000 529 U.S. 266, 270.
[39] See *People v. Jordan* (2004) 121 Cal.App.4th 544, 557; *U.S.* v. *Wheat* (8th Cir. 2001) 278 F.3d 722, 731.
[40] See *People* v. *Wells* (2006) 38 Cal.4th 1078, 108.

People v. Baker

(2008) 164 Cal.App.4th 1152

Issue

While conducting a parole search of a vehicle, may officers search a woman's purse if the parolee was a man?

Facts

During a traffic stop in Kern County, an officer learned that the driver was on parole. Having decided to conduct a parole search of the vehicle, he asked the passenger, Wendy Baker, to exit. When Baker stepped from the car, she left her purse on the floorboard. In the course of the search, the officer searched the purse and found methamphetamine. Baker was arrested for possession.

Discussion

Baker argued that the search of her purse was illegal because it obviously did not belong to the parolee. The court agreed.

California parolees are automatically subject to warrantless searches of their homes and any property under their "control."[41] This means that officers may search property that the parolee controls exclusively or jointly with another person.[42] Furthermore, unless there is reason to believe otherwise, it is usually reasonable for officers to believe that a parolee has control over all containers in the rooms and vehicles that are under his sole or joint control.

The problem in *Baker* was that there was, in fact, reason to believe the purse belonged to someone other than the parolee. As noted, the parolee was a man, while it was apparent that the purse belonged to a woman. Furthermore, it obviously belonged to Baker because it had been located at her feet. As the court pointed out, "Although the officer testified that he did not know who the purse belonged to when he searched it, there was no reasonable basis to believe the purse belonged to anyone other than the sole female passenger. Baker was sitting in the front passenger seat and the distinctly female purse was located at her feet."

Thus, the search of the purse was unlawful.

U.S. v. Caseres

(9th Cir. 2008) 533 F.3d 1064

Issues

Did an officer have grounds to make a traffic stop on the defendant and search his car?

Facts

While on patrol at about 9:45 P.M., a Los Angeles police officer saw a car with window tinting that appeared to be in violation of the Vehicle Code. He also noticed that the driver, Caseres, made a turn without signaling. Although the officer intended to stop Caseres, by the time he caught up with him, Caseres had already parked his car on the street and was walking away. (Unbeknownst to the officer, Caseres had parked just two houses away from his home and was heading there when the officer arrived.)

The officer parked behind Caseres' car and, after catching up with him, ordered him to stop. Caseres replied, "Fuck you, I'm home." The officer, who was trying to "buy time" until backup arrived, tried to reason with him. Caseres responded by threatening the officer, saying, "I'm gonna kick your fuckin' ass." The officer then notified Caseres that he was under arrest, at which point Caseres fled. The officer apprehended him following a lengthy foot chase.

After the arrest, the officers searched Caseres' car and found some ammunition under the driver's seat. As a result, Caseres was charged with being a felon in possession of ammunition. When his motion to suppress the evidence was denied, he pled guilty.

Discussion

Caseres contended that the evidence should have been suppressed because, (1) the officer lacked grounds to detain him, and (2) the warrantless search of his car was unlawful.

THE DETENTION: The court said it was "skeptical" that the officer had grounds to make a traffic stop. The window tinting violation was weak, said the court, because there was little, if any, testimony at the suppression hearing as to whether the tinting was, in fact, unlawful under California law.[43] As for

[41] See 15 CA ADC § 2511(b)(4) ["Search. You and your residence and any property under your control may be searched without a warrant at any time by any agent of the Department of Corrections or any law enforcement officer."].

[42] See *People* v. *Woods* (1999) 21 Cal.4th 668, 682 ["[O]fficers generally may only search those portions of the residence they reasonably believe the probationer has complete or joint control over."].

[43] See Veh. C. § 26708(a)(1).

the illegal turn, the court noted that the Vehicle Code requires signaling only if another vehicle "may be affected by the movement."[44] But here, said the court, "there is insufficient evidence in the record to find that any other vehicles would have been affected by Caseres's turn."

Although the court concluded that the detention "would likely have been unconstitutional" if Caseres had complied with the officer's command to stop, he did not comply. Thus, a detention did not occur as the result of the command.[45] Almost simultaneously, however, the officer developed probable cause to arrest Caseres because of the threat ("I'm gonna kick your fuckin' ass").[46] Consequently, the court ruled the officer had probable cause to arrest him.

THE VEHICLE SEARCH: The government contended that the ammunition was admissible because the search of Caseres' car qualified as a search incident to the arrest. The court disagreed.

It is settled that officers may search a vehicle incident to an arrest if, (1) the arrestee was an "occupant" or "recent occupant" of the vehicle; (2) there was probable cause to arrest him; (3) the arrest was custodial in nature (meaning the suspect would not be cited and released); and (4) the search was "contemporaneous" with the arrest. Here, the officer had probable cause to arrest, and he presumably intended to take him into custody for it. Thus, the second and third requirements were satisfied. It was the other two that presented problems.

Caseres argued that he was not an "occupant" of the vehicle because, as noted, he had already parked his car and was walking away when the officer arrived on the scene. Furthermore, the officer did not develop probable cause to arrest him until well after Caseres had exited the car.

But even if an arrestee was not inside the vehicle when he was arrested, the courts have ruled that the "occupant" requirement will be met if, (1) officers saw the arrestee exit the car and he was near it when arrested,[47] or (2) officers had reason to believe the arrestee was a recent occupant of the vehicle, and that he continued to have a "close association" with it; e.g., an officer saw him standing next to the vehicle and discard a beer can inside it.[48] But neither of these circumstances existed because, as the court pointed out, "the attempted detention of Caseres did not occur until after he had parked, exited his car, and was walking through a yard to his residence—which was two houses down the street."

The court also ruled that the search was not "contemporaneous" with the arrest. While the word "contemporaneous" in common usage refers to situations in which two acts occur at about the same time, a search incident to arrest need not occur simultaneously with the arrest or even immediately thereafter. What counts is whether the search was "roughly" or "substantially" contemporaneous with the arrest. For example, even if the time lapse was significant, the search will ordinarily be upheld if there was a good reason for the delay, or if the search and arrest were part of a closely connected progression of events.[49]

In ruling that the search and arrest were not contemporaneous, the court in *Caseres* said that, after the arrest, the officers engaged in unnecessary intervening actions; i.e., they "took time to question Caseres, to converse with one another, and to transport themselves back and forth between the arrest site and the vehicle's location." Thus the court ruled "the search of Caseres's car was too far removed in time from the arrest to be considered as incidental to Caseres's arrest."

For these reasons, the court ordered the suppression of the ammunition that was found in Caseres' car. POV

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[44] See Veh. C. § 22107.

[45] See *California* v. *Hodari D.* (1991) 499 U.S. 621, 626.

[46] See Pen. C. § 69.

[47] See *New York* v. *Belton* (1981) 453 US 454; *Thornton* v. *U.S.* (2004) 541 U.S. 615, 621 ["[T]he arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle."]; *U.S.* v. *Osife* (9th Cir. 2005) 398 F.3d 1143, 1146 [defendant "had recently occupied the car and was standing near it when he was placed under arrest. [T]he search was therefore permissible under the Fourth Amendment."].

[48] See *People v. Stoffle* (1991) 1 Cal.App.4th 1671.

[49] See *People v. McBride* (1969) 268 Cal.App.2d 824, 829 ["Manifestly, the second search was part of a continuous process which began with a valid arrest"]; *People v. Webb* (1967) 66 Cal.2d 107, 120 [court noted an "emphasis on the 'continuing series of events'"]; *U.S.* v. *McLaughlin* (9th Cir. 1999) 170 F.3d 889, 892; *U.S.* v. *Brown* (D.C. Cir. 1982) 671 F.2d 585, 587.

The Changing Times

Alameda County District Attorney's Office

Deputy District Attorney **Pat Ector** died on June 19, 2008. Pat joined the office in 1996 and spent most of her career in the juvenile division where she became a respected advocate for children in trouble. Despite a lengthy illness, she kept working until shortly before her death. Pat was 60 years old.

Retired prosecutor **Bud Meloling** died on August 18, 2008 at the age of 84. Bud joined the office in 1967 and tried over 100 cases, including more than 60 homicides. In 1981, he received the "Outstanding Prosecutor Award" from the CDAA. He retired in 1989.

Retired inspector **Jack Richardson** died on June 12, 2008 at the age of 90. Before joining the office in 1970, Jack was a legendary OPD homicide detective.

Deputy DAs **Stuart Hing** and **Trevor White** were appointed to the California Superior Court. Deputy DA **Mike White** retired after 21 years of service. Inspector II **Michael Duarte** retired after 10 years with the DA's Office. He was previously an officer with Union City PD and ACSO. New inspectors: **Jeff Jouanicot** (San Leandro PD) and **Nina Garcia** (BART PD).

Alameda County Narcotics Task Force

Transferring out: **Dave Lembi** (Albany PD), and **Paul Delucchi** (DA). Transferring in: **Jim Panetta** (DA).

Alameda County Sheriff's Department

Lt. **James Ayala** was promoted to captain. Sgts. **Donald Mattison** and **Andrew Theobald** were promoted to lieutenant. Deputies **Mark Foster** and **Michael O'Brien** were promoted to sergeant. The following deputies have retired: Capt. **Larry Perea**, Lt. **Jerry Maldonado**, Sgt. **Walter Finn**, Sgt. **Daniel Watkins**, **Leland Jones**, **Roslyn Devereaux**, **Dennis Jeglum**, **Robert Rodrigues**, **Larry Strickland**, **Douglas Buckmaster**, **Jerry Martin**, **Ronald Jackson**, **Joan Lockhart**, **Thomas Wilson**, **David Martin**, **Daniel McCann**, and **Kenneth Klopfenstein**.

The department reports that retired lieutenant **Arthur Allen** and retired sergeant **Sidney Bobe, Jr.** have passed away.

Alameda Police Department

New officers: **Cameron Miele** and **Koby Burns**. Sgt. **Steve Rodekohr** was reassigned from Patrol to Personnel and Training. Transfers: **Josh Crossley** from Patrol to School Resource Officer, and **Tom Cobb** from School Resource Officer to Patrol.

BART Police Department

Members of the department mourned the loss of Officer **Craig Wilson**. On June 28, 2008, Craig, his wife Michele, and two close friends died when their private plane crashed near Las Vegas. The couples had been celebrating their wedding anniversaries and were flying home when the accident occurred.

Officer **David Laursen** retired after 26 years of service. **Scott Hamilton** was selected Officer of the Year by the Albany-El Cerrito Exchange Club. **Stewart Lehman**, **Shaun O'Connor**, **Eric Poindexter**, **Edward Schlegel**, **Aaron Togonon**, and **Wendy Trieu** were appointed to the newly-formed Special Problems Unit. **Joel Enriquez**, **Michael Maes**, **Tania Mendez**, and **Thomas Smith** were appointed detectives and assigned to Criminal Investigations. **Jeffrey Zwetsloot** was selected administrative traffic officer, **Shane Reiss** joined the SWAT Team, and **Brandon Moore** was selected field training officer. Lateral appointment: **David Martinez** (Oakland PD).

Berkeley Police Department

Michael Durbin was promoted to sergeant. Lateral appointments: **Shan Johnson** (OPD), **Jesse Grant** (OPD), **John Lenny** (SFDA), and **Norma Caro** (UCPD). New recruit officers: **Michael Yu** and **Frank Cadiz, Jr**.

California Highway Patrol

Dublin Area: Lt. **Sherie Latimer** was selected as commander of the Nimitz Commercial Inspection Facility. Lt. **Robert McGrory** retired after 20 years of service to begin a career with ACSO. Lt. **Sam Samra** transferred to the Marin Area. Sgt. **John Martinho** was selected as Supervisory Case Analyst for the CHP's Internal Affairs Section. Sgt. **Michael Allen** was promoted into the Area from Tracy. Transferring out: **Sean Fiorio** (Mission Grade Inspection Facility), **Jeff Borgen** (Contra Costa Area), **Aaron Norseen** (Modesto Area). Transferring in: **Tom Stewart**, **Timothy Darling**, **Mathew Overby**, **Matthew Hill**, and recent academy graduate **Joshua Miller**.

Oakland Area: Officer **Ted Wong** retired after 25 years of service. The following officers were promoted to sergeant and assigned to the Oakland Area: **William Preciado** (East Los Angeles) and **Sheri Jones** (San Bernardino). Transferring in: **Kevin White** (Marin CHP) and **Fabio Serrato** (East Los Angeles). Reporting in from the CHP Academy: **Sean Deise**, **Michael Huggleston**, and **Shawn Mulholland**. **Scott Heitman** transferred to the Cordelia Inspection Facility.

EMERYVILLE POLICE DEPARTMENT

Mike Allen and **Jason Bosetti** were promoted to sergeant. Transfers: **Brian Head** from Patrol to Administration and Training, **Richard Davis** from Patrol to Administration, **Mike Lee** and **Lance Goodfellow** from Patrol to Investigations, **Alan Johnson** from Investigations to Patrol, **Steve Andretich** and **Latona Whitaker** to bicycle patrol, **Tracer Borden** to Motors, and **Eric White** to School Resource Officer. **John Foley** is again a K-9 handler with his new partner **Basco**. The department is now at full staff for the first time in over 20 years with the following new officers: **Ryan Duff**, **Spencer Giddings**, **Michelle Kellner**, **Richard McDiarmid**, **Michael Pena**, **Pablo Rojas**, **Arnie Salaiz**, and **Jason Thompson**. Two of the department's retired K-9s, **Orry** and **Xato**, have passed away.

FREMONT POLICE DEPARTMENT

Sgts. **John Liu** and **Greg Gerhard** were promoted to lieutenant. The following officers retired: Lt. **David Lanier** (32 years), Lt. **Mike Eads** (30 years), Sgt. **Dennis Moore** (30 years), and **Kendrick Lawrence** (30 years). Lateral appointments: **Omeed Zargham** (ACSO), **Bryce Loughery** (Newark PD), **David Higbee** (Newark PD). New officers: **Antonio Ceniceros**, **James Ihrig**, and **Jason Macciola**.

NEWARK POLICE DEPARTMENT

Chief **Ray Samuels** retired after nine years of service. During his 34 years in law enforcement, Ray also worked for the Vallejo and Concord PDs. Capt. **Jim Leal** was appointed Chief of Police. Jim joined the department in 1988. The following officers joined other agencies: Capt. **Andrew Bidou** (Benicia PD), **Sam Ackerman** (San Jose PD), **David Higbee** and **Bryce Loughery** (Fremont PD), and **Carson Thomas** (Morgan Hill PD). Sgt. **Fred Zachau** transferred from Traffic to Patrol. **Aaron Slater** was appointed School Resource Officer. New officers: **Ted Relan**, **Yama Homayoun**, **Matthew Warren**, **Matthew Wright**, and **Todd Nobbe** (Davis PD). Police K-9 **Gero** passed away on May 27, 2008. Gero served the department and public well for five years. His partner was **Lee Lawrence**.

OAKLAND POLICE DEPARTMENT

Lt. **Derrick Norfleet** died on July 30, 2008. He was 45 years old. Derrick joined the department in 1987 and was promoted to lieutenant in 2007. Among his friends was attorney John Burris who said, "They have a lot of good people in the department, and he was one of them. His word was his bond. You could trust him."

Sgt. **Kevin O'Rourke, Terry Lewis**, and **Ramon Alcantar** retired. Lateral appointments: **William Seay**, **Rio DelMoral**, **Miguel Masso**, **Benjamin Mendler**, **Brian Simon**, **Jason Turmer**, **Allan Corpus**, **Michelle Day**, **John Johnson**, and **James Duncan**. **Wallace Hunter, Kenneth Kim**, and **Edward Barrientos** have rejoined the department. New officers: **Eric Arriaza**, **Dominic Ayala**, **Jo Balaoro**, **Andrew Bicker**, **Brown Brown**, **Chanelle Del Rosario**, **Gordon Dorham**, **Christopher Flores**, **Ronald Freeman II**, **Wenceslao Garcia**, **Jeffrey Gimenez**, **Terry Hoang**, **Terry Jones**, **Ethan Katz**, **David Lloyd**, **Donald Lockett**, **Matthew Lopez**, **John McDonell**, **Jose Pereznegron**, **Pheareak Phan**, **Evan Pomar**, **James Pulsipher**, **Kristian Razmilovic**, **Derek Russell**, **Megan Sheridan**, **Brandon Taylor**, **Joseph Turner**, **Eric Van Scoy**, **Nathaniel Walker III**, **and Yun Zhou.**

PLEASANTON POLICE DEPARTMENT

Sgt. **Jeff Bretzing** was promoted to lieutenant. **Mark Reimer**, **Robert Leong**, and **Scott Rohovit** were promoted to sergeant. Lt. **Robert Lyness** retired after 30 years in law enforcement. Reserve officer **Bart Sellick** retired after 29 years of service. **Jason Hunter** and **Brandon Stocking** joined the department after graduating from the Napa Police Academy.

SAN LEANDRO POLICE DEPARTMENT

Sgt. **Jeff Jouanicot** retired after 24 years of service. Retired sergeant **Walt Wright** passed away. Walt served the department for 14 years. Lateral appointment: **Jason Bryan** (Hayward PD). **Timothy Chinn** graduated from the ACSO Academy. Transferring to the Criminal Investigation Division: Sgt. **Mike Sobek**, Sgt. **Jeff Tudor**, and **Jason Fredriksson**. Transferring to Patrol: Sgt. **Jerry Codde**, **Dan Leja**, and **Mike Nemeth**. **Tim DeGrano** transferred to the Administrative Services Division. **Alex Rendez** transferred to the Bicycle Unit. **Deborah Trujillo** was appointed School Resource Officer.

UNION CITY POLICE DEPARTMENT

Lisa Graetz was promoted to corporal. **Brian Simon** joined Oakland PD.

UNIVERSITY OF CALIFORNIA, BERKELEY POLICE DEPARTMENT

Sgt. **Lou Milani** retired after 25 years of service. **Rick McAllaster** retired after 26 years of service. Sgt. **David Roby** was chosen to be the new EOD K-9 program coordinator. Sgt. **Don Jewell** was picked as Southside/Telegraph Avenue patrol supervisor. **Carolyn "C.J." Ellis** was selected as EOD K-9 handler. **Nicole Miller** was assigned as a detective in the Threat Management Unit. **Tom Syto** was selected for motorcycle patrol.

Richard (Dick) Smith, who retired in 1984, died on July 13, 2008. Retired sergeant **William (Bill) Major** died on July 19, 2008. Bill retired in 1980.

War Stories

Think fast

An undercover San Leandro vice officer saw a prostitute standing on a corner, so he drove up and asked, "Are you dating?" She said "Sure am" and hopped in his car. As they were driving to a local park the officer noticed that the woman had turned around and was looking at something on the back seat. So he looked back and saw that she was staring at his SLPD "raid ballistic vest" which he had inadvertently left in the car. The apprehensive hooker then looked at the officer and asked, "You're a cop?" Without missing a beat, he replied, "Yes, I am. But if you say anything about what we're doing I'll get fired. You gotta promise not to tell anybody." "All right," she said. [Pause] "I guess cops needed lovin' too."

More 647(b) antics

An Alameda County sheriff's deputy was driving to work at about 7 P.M. when he was flagged down by a prostitute on a street corner who propositioned him The deputy told her he was busy right now, but that he would return in a few minutes. After donning his uniform and attending pre-shift briefing, he checked out a patrol car and, as promised, returned to the street corner, where he took the hooker into custody.

Busting a forgetful addict

Another Alameda County sheriff's deputy was on patrol with his rookie partner when he saw a known heroin addict standing on a street corner. The deputy decided to demonstrate to his partner the procedure for determining whether an addict is under the influence of drugs. So he stopped and asked the man if he would assist him in educating the new officer. The addict said sure, so the deputy began the exam while the rookie watched.

According to the deputy's crime report, "When we got to where I told my partner about dry mouths and coated tongues, I asked the subject to open his mouth real wide. He was so involved in helping out that he forgot he had a heroin balloon in his mouth, at which point I demonstrated to my partner how to make an arrest for possession."

If you can't beat 'em, join 'em

The Federal Signal Corp., which sells emergency lights and sirens, has invented a new siren, called "The Rumbler." According to the company, "The Rumbler" works in conjunction with existing sirens and consists of two woofers that produce "penetrating vibrating low frequency sound waves." The company boasts that the sounds generated by "The Rumbler" can actually be heard over the thunderous sound systems used by hip-hoppers.

Strippers Unite!

Strippers in L.A. have filed a lawsuit against 19 strip clubs, claiming the owners are illegally taking a percentage of their tips. The lawsuit was filed by an organization called the California Coalition of Undressed Performers, better known as "C-CUP."

Gamecocks Unite!

A man charged with running a cockfighting operation in Oakland claimed that the charges had to be dismissed on grounds that the law prohibiting cockfighting is unconstitutional. In a motion filed with the court, the defendant's attorney said that "Gamecocks by their very nature are aggressive, and their natural tendency is to fight amongst themselves. In fact, keeping gamecocks from freely doing what nature dictates is cruel and violates their freedom of expression." The motion was denied.

What happened?

Late one night, San Francisco police started receiving reports that a man was throwing concrete blocks through the windows of downtown jewelry stores and grabbing items on display. A few minutes later, two of the responding officers spotted a man lying unconscious on the sidewalk in front of a jewelry store on Market Street. Witnesses on the scene told them that the man had just tried to break the display window of the jewelry store by throwing a big concrete block at it.

So, why was the man knocked unconscious? It seems that the owner of the jewelry store had re-

cently replaced his glass windows with military strength plexi-glass. So when the concrete hit the window it bounced right back and hit the man on the head. As he regained consciousness, his first words were, "What happened?"

Trying to score a bed on death row

At Santa Rita, an acidhead inmate charged with second-degree murder told a deputy that if he couldn't get a plea bargain to manslaughter he was going to confess to first-degree murder with special circumstances in hopes of getting the death penalty. Why? "Because the word around the yard is that living conditions are much better on death row."

But death row can't beat this

Authorities in Brazil raided a prison in Salvador after receiving reports that some inmates were receiving special treatment by bribing guards. During the raid, they came upon the cell occupied by reputed mobster Genilson "Legs" da Silva. And what they saw was shocking. Among other things, his enormous cell was equipped with a plasma TV, a DVD player, a king sized bed, gym equipment, two refrigerators, $172,000 in cash, and several guns. "Legs" is now back in general population where he is reportedly suffering severe lifestyle withdrawal.

Meanwhile at the Dallas City Jail

Three prisoners at the City Jail in Dallas were injured as they were trying to escape. According to officers, the men were sliding down a rope from their 5th floor cellblock when the rope suddenly broke. Actually, it didn't just break. It was severed by a fourth inmate who was "pissed" because he wasn't included in their escape plans.

Bank robbing blues

A woman named Melody decided to rob a Bank of America branch in Richmond. But she didn't have a car for her getaway, so she told her friend Linda that she needed a ride to the bank to cash a check, and Linda agreed to drive her. Linda was waiting in her car outside the bank when Melody jumped in, dumped a pile of currency on the floor, and yelled, "Go!" It was obvious to Linda what was going on, and it was equally obvious that she wanted no part in it. So she pushed Melody and the money out of the car and sped off. Quickly implementing a new plan, Melody started flagging down cars, one of which was driven by a guy named Anthony Simon who stopped and said "hop in." Naturally, when Anthony saw all the money Melody was carrying, he started grabbing it, and Melody started hitting Anthony. That's when Richmond police arrived. Melody was arrested for bank robbery. Anthony was arrested for robbing Melody.

"Laughter gives us distance. It allows us to step back from an event, deal with it and then move on." —Bob Newhart

The War Stories Archives

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California Criminal Investigation

◆ 2009 Edition ◆

We will start shipping the 2009 edition of *CCI* in late November 2008. For readers who don't know about *CCI*, it is a reference manual in which we have organized the rules and principles that control criminal investigations in California. The 2009 edition—which is the 13th annual edition—consists of over 700 pages, including more than 3,200 endnotes with comments, examples, edifying quotes from court opinions, and over 15,000 case citations. The coverage is thorough, but in a condensed outline format. The price is $68. To order, send a check payable to the Alameda County DA's Office to: CCI, District Attorney's Office, 1225 Fallon St., 9th Floor, Oakland, CA 94612. **CONTENTS**:

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