POINT of VIEW

A publication of the Alameda County District Attorney's Office

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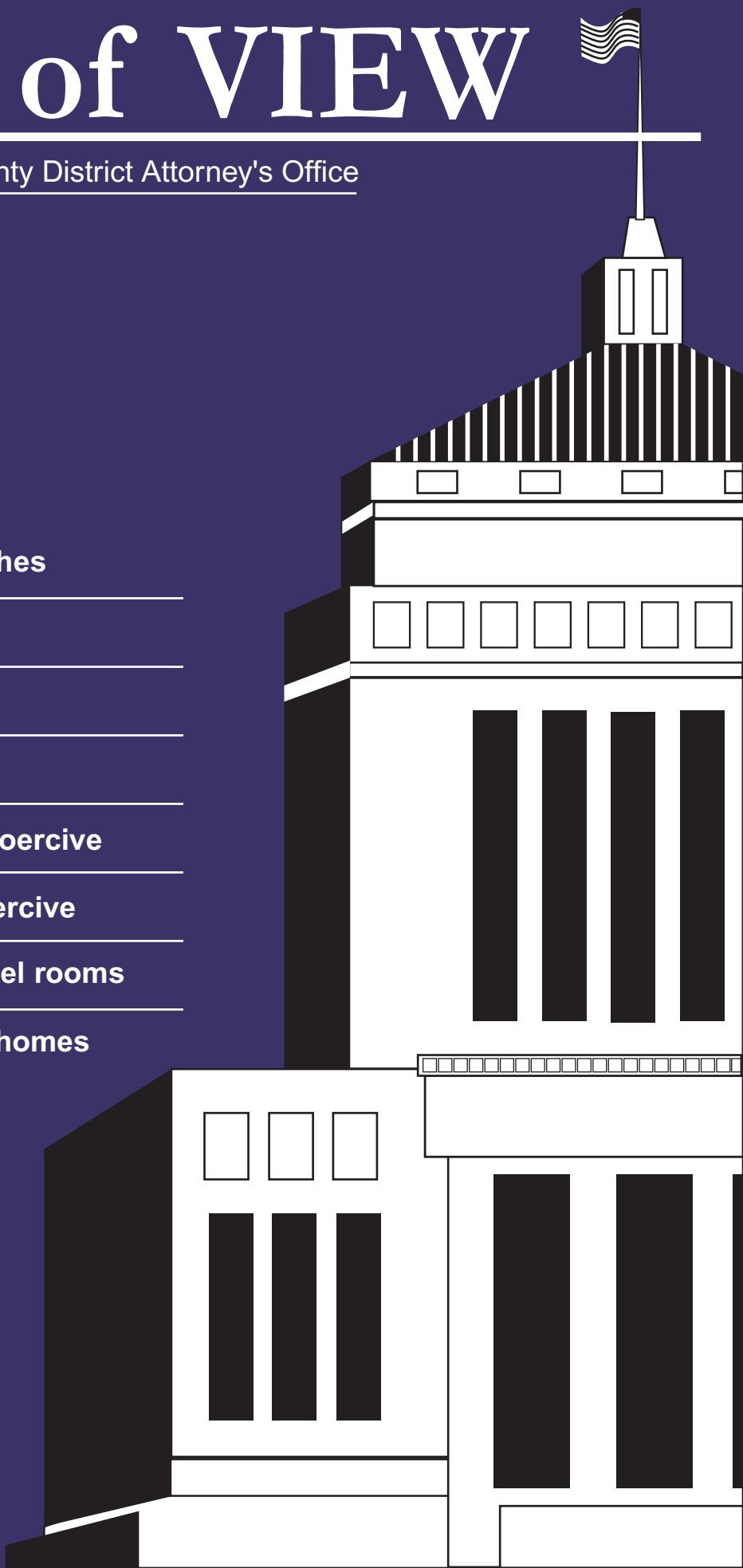
In this issue



WINTER 2009

Point of View

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• Volume 37 Number 1 •

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This edition of Point of View
is dedicated to the memory of
Officer Brad Moody
of the Richmond Police Department
who was killed in the line of duty
on October 4, 2008

Contents

Probation and Parole Searches

"Parolees, like drunk drivers on our highways, are a discrete group that are a demonstrable menace to the safety of the communities into which they are discharged."[1]

For some people, committing or planning crimes is a way of life—just part of the daily routine. So it was not too surprising when a study reported that 70% of California's parolees committed new crimes within 18 months of their release.[2] That's the highest recidivism rate in the nation. And though there is no solid information on the recidivism rate for probationers, the U.S. Supreme Court has pointed out that "the very assumption of the institution of probation is that the probationer is more likely than the ordinary citizen to violate the law."[3]

While some people contend that the recidivism rate is somewhat inflated,[4] it is probably much worse. After all, it includes only those crimes for which the parolees and probationers were caught. Because it is unlikely that they were apprehended for each and every crime they committed (in which case they would have thrown in the towel), the actual number is probably much larger. In fact, a 15-year study published in the book *The Criminal Personality* reported that each of the felons who were studied committed "enough crimes to spend over 1,500 years in jail." Summing up their research, the authors said, "If we were to calculate the total number of crimes committed by all the men with whom we worked, it would be astronomic."[5]

The causes of recidivism are, of course, complex. One reason, according to the United States Supreme Court, is that criminals "have necessarily shown a lapse in the ability to control and conform their behavior to the legitimate standards of society by the normal impulses of self-restraint."[6] There are certainly other causes, and many dedicated people have made it their life's work to address them. Officers and prosecutors certainly share their concern and often work closely with them. But their primary responsibility lies elsewhere: protecting the public from those parolees and probationers who continue to inflict misery on others.

And that's where parole and probation searches come in. Among other things, they help provide the criminal justice system with the information it needs to determine whether parolees and probationers are continuing to possess drugs or weapons, or are otherwise still committing crimes. Thus, the California Court of Appeal observed that parole and probation searches tend to "minimize the risk to the public safety inherent in the conditional release of a convicted offender."[7]

In addition to protecting the public, parole and probation searches help in the rehabilitation effort because some parolees and probationers will be less likely to keep committing crimes if they know they can be searched at any time.[8] As the court pointed out in *In re Anthony S.*:

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[1] *U.S.* v. *Crawford* (9th Cir. 2004) 372 F.3d 1048, 1071 (conc. opn. of Trott, J.)
[2] Joan Petersilia, *Challenges of Prisoner Reentry and Parole in California*, 12 CPRC (June 2000). ALSO SEE *Samson* v. *California* (2006) 547 U.S. 843, 853 ["As of November 30, 2005 . . . California's parolee population has a 68-70% recidivism rate."]; *Ewing* v. *California* (2003) 538 U.S. 11, 26 ["According to a recent report, approximately 67 percent of former inmates released from state prisons were charged with at least one 'serious' new crime within three years of their release."].
[3] *United States* v. *Knights* (2001) 534 U.S. 112, 120.
[4] See U.C. Irvine Center for Evidence-Based Corrections, *Are California's Recidivism Rates Really the Highest?"* (2005). **NOTE**: Some of these lower rates might have resulted from the authors' decision not to count drug-related arrests as arrests.
[5] Samuel Yochelson and Stanton Samenow, *The Criminal Personality* (Published by J. Aronson, 1976).
[6] *Hudson* v. *Palmer* (1984) 468 U.S. 517, 526. ALSO SEE *Samson* v. *California* (2006) 547 U.S. 843, 854.
[7] *People* v. *Constancio* (1974) 42 Cal.App.3d 533, 540.
[8] See *Griffin* v. *Wisconsin* (1987) 483 U.S. 868, 876 [the possibility of "expeditious searches" has a "deterrent affect"].

> Being on probation with a consent search term is akin to sitting under the Sword of Damocles. With knowledge he may be subject to a search by law enforcement officers at any time, [the probationer] will be less inclined to have narcotics or dangerous drugs in his possession.[9]

As for those parolees and probationers who continue to commit crimes while they are on the outside, search conditions provide another valuable service: they help put them back inside—sometimes permanently, thanks to the Three Strikes law.

Although parole and probation searches provide a vital public service, there is an unusual amount of uncertainty in this area of the law among officers, prosecutors, and even judges. This is mainly because the law has seen a lot of fluctuation over the years. The Court of Appeal called it a "sea change,"[10] while the California Supreme Court used the term "moveable feast."[11] A more descriptive term is "chaotic."

There are several causes of this unhealthy situation. For one thing, the courts have been unable to decide on the legal basis of these searches. Some have said they are simply a form of consent search. Others had said that a person's acceptance of a search condition cannot be deemed consensual if his refusal will result in a prison sentence or an extended stay. Still others have sought to justify these searches on grounds that the privacy expectations of parolees and probationers were "completely waived,"[12] or "waived,"[13] or "greatly reduced,"[14] or "somewhat diminished,"[15] or "significantly diminished,"[16] or "severely diminished,"[17] or just plain "diminished."[18]

The courts have also had difficulty deciding whether parole and probation searches could be conducted in the absence of proof that the parolee or probationer had committed new crimes. In 1985, the Court of Appeal ruled that officers could not conduct probation searches unless they had reasonable suspicion of recidivism.[19] One year later, the California Supreme Court ruled that reasonable suspicion was also required for parole searches.[20] The next year, it ruled that reasonable suspicion was no longer required for probation searches.[21]

That same year, when the issue presented itself before the United States Supreme Court, it announced that it was going to duck it.[22] In 1998, the California Supreme Court eliminated the reasonable-suspicion requirement for parole searches.[23] In 1998 and 2001 the United States Supreme Court steadfastly continued its policy of evasion.[24] But it did provide a helpful hint: If and when it ever decided to decide the question, it would probably require "no more than" reasonable suspicion.[25]

Adding to the confusion, some courts were ruling that parole and probation searches were unlawful unless they were authorized by parole or probation officers. Others said it didn't matter. In 1981, the Court of Appeal eliminated that requirement as it applied to probation searches,[26] and in 1992 it did the same for parole searches.[27]

On another front, the California Supreme Court ruled in 1994 that juvenile probationers would not be permitted to challenge the legality of searches of places that could be searched under the terms of their

[9] *In re Anthony S.* (1992) 4 Cal.App.4th 1000, 1002, fn.1.
[10] *People* v. *Lewis* (1999) 74 Cal.App.4th 662, 667.
[11] *People* v. *Reyes* (1998) 19 Cal.4th 743, 748. **ALSO SEE** *Motley* v. *Parks* (9th Cir. 2005) 432 F.3d 1072, 1083 ["disarray"].
[12] See *Samson* v. *California* (2006) 547 U.S. 843, 852, fn. 3; *United States* v. *Knights* (2001) 534 U.S. 112, 118.
[13] See *People* v. *Bravo* (1987) 43 Cal.3d 600, 607; *People* v. *Medina* (2007) 158 Cal.App.4th 1571, 1576 ["complete waiver"].
[14] *People* v. *Reyes* (1998) 19 Cal.4th 743, 753.
[15] See *People* v. *Burgener* (1986) 41 Cal.3d 505, 533.
[16] *United States* v. *Knights* (2001) 534 U.S. 112, 120.
[17] *Samson* v. *California* (2006) 547 U.S. 843, 852.
[18] *People* v. *Reyes* (1998) 19 Cal.4th 743, 752.
[19] *People* v. *Bravo* (1985) 211 Cal.Rptr. 439 [superseded by *People* v. *Bravo* (1987) 43 Cal.3d 600, 611].
[20] *People* v. *Burgener* (1986) 41 Cal.3d 505, 535.
[21] *People* v. *Bravo* (1987) 43 Cal.3d 600, 611.
[22] *Griffin* v. *Wisconsin* (1987) 483 U.S. 868, 872 ["[W]e find it unnecessary to embrace a new principle of law."].
[23] *People* v. *Reyes* (1998) 19 Cal.4th 743.
[24] *Pennsylvania Board of Probation and Parole* v. *Scott* (1998) 524 U.S. 357, 362, fn.3; *U.S.* v. *Knights* (2001) 534 U.S. 112, 120, fn.6.
[25] *United States* v. *Knights* (2001) 534 U.S. 112, 121.
[26] *People* v. *Palmquist* (1981) 123 C.A.3d 1, 7-8.
[27] *People* v. *Williams* (1992) 3 Cal.App.4th 100, 1106. ALSO SEE *People* v. *Brown* (1989) 213 Cal.App.3d 187, 192.

probation.[28] The case was *In re Tyrell J.,* and it was based on the idea that a probationer who knows that law enforcement officers can search a certain place or thing at any time cannot reasonably expect that those officers will not find the weapons, drugs, stolen property, and other incriminating evidence that he keeps in those places and things. But while *Tyrell J.* was a sound and pragmatic decision, the defense bar and its allies in some law schools thought it was outrageous. Subsequently, the court significantly undermined *Tyrell J.* in 2000 and 2003,[29] and then overturned it in 2006.[30]

Meanwhile, the Ninth Circuit was muddying up the waters even more by ruling that parole and probation searches were unlawful if the officers' objective was to obtain evidence of criminal activity, as opposed to rehabilitation[31] (as if the commission of new crimes by parolees and probationers had no bearing on whether they were rehabilitated). In 2001, the United States Supreme Court ended this nonsense.[32]

Our historical snapshot would not be complete without one additional entry. In 1993, a career criminal named Richard Allen Davis was paroled from the California Men's Colony in San Luis Obispo after serving a 16-year sentence for kidnapping. Three months later, he kidnapped 12-year old Polly Klass from her bedroom in Petaluma, sexually assaulted her, then killed her. This horrific crime resulted in passage of California's Three Strikes law and, of importance to the subject at hand, it heightened the public's awareness of the danger presented by recidivists, and the need to closely monitor their activities.

Parole Searches

With few exceptions, every inmate released from prison in California is placed on parole for three years.[33] Discussing the concept of parole, the United States Supreme Court explained that it is "a variation on imprisonment of convicted criminals, in which the State accords a limited degree of freedom in return for the parolee's assurance that he will comply with the often strict terms and conditions of his release."[34] But, as the Ninth Circuit pointed out, "Parole is a risky business. Recidivism is high."[35] That's why the law imposes search conditions.

Search conditions

Under California's old indeterminate sentencing system, the parole board decided whether to release a prisoner before he had served his entire sentence. And in most cases it would not do so unless the inmate agreed to submit to warrantless searches. Because he could refuse and complete his sentence, the courts would say that he "consented" to the search conditions. Thus, parole searches were treated the same as any other consent search.

That changed in 1976 when California converted to the current determinate sentencing system whereby most prisoners are automatically paroled when they complete their sentences.[36] Although they can technically avoid some of the conditions of release by choosing to serve their period of parole behind bars,[37] the courts have determined that parole searches can no longer be viewed as "consensual."[38] They have also concluded that, even though parolees remain "under the legal custody" of the Department of Cor-

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[28] (1994) 8 Cal.4th 68, 89.
[29] See *People* v. *Robles* (2000) 23 Cal.4th 789, 797; *People* v. *Sanders* (2003) 31 Cal.4th 318, 330.
[30] See *In re Jaime P.* (2006) 40 Cal.4th 128, 134.
[31] See *U.S.* v. *Knights* (9th Cir. 2000) 219 F.3d 1138, 1143.
[32] *United States* v. *Knights* (2001) 534 U.S. 112, 122.
[33] See Pen. Code §§ 3000(b)(1), 3000(b)(3). **NOTE** re federal parole: With passage of the Sentencing Reform Act of 1984, "Congress eliminated most forms of parole in favor of supervised release, a form of postconfinement monitoring overseen by the sentencing court, rather than the Parole Commission." *Johnson* v. *United States* (2000) 529 U.S. 694, 696-97. But the main difference for our purposes is that federal search conditions are not an automatic condition of release. Instead, they are imposed at the discretion of the sentencing judge. See *U.S.* v. *Hanrahan* (10th Cir. 2007) 508 F.3d 962, 970.
[34] *Pennsylvania Board of Probation and Parole* v. *Scott* (1998) 524 U.S. 357, 365.
[35] *Latta* v. *Fitzharris* (9th Cir. 1975) 521 F.2d 246, 249.
[36] See Pen. Code § 3000 et seq.
[37] See Pen. Code § 3060.5; *Samson* v. *California* (2006) 547 U.S. 843, 851 ["A California inmate may serve his parole period either in physical custody, or elect to complete his sentence out of physical custody and subject to certain conditions."]; *People* v. *Middleton* (2005) 131 Cal.App.4th 732, 740 ["Any inmate who refuses to agree to warrantless search shall not be released until he agrees or has served his/her entire sentence."].
[39] See *People* v. *Reyes* (1998) 19 Cal.4th 743, 749.

rections,[39] these searches cannot be deemed "prison" searches.[40] So now they are justified on the basis of the fundamental Fourth Amendment test that their need outweighs their intrusiveness.[41]

One thing that hasn't changed is that all parolees are subject to the same search condition. Specifically, they must "agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause."[42] As we will discuss later, all parole searches are also subject to the same scope and intensity limitations.

Grounds not required

Before conducting most types of searches, officers must have probable cause or reasonable suspicion to believe that the search is warranted. But because one of the objectives of parole searches is to make sure that parolees are *not* in possession of the fruits or instrumentalities of crime, officers are not required to justify their decision to search. As we will now discuss, this was not always the law in California, which, as noted earlier, is one reason for some of the confusion today.

In 1986, the California Supreme Court ruled that officers could not conduct parole searches unless they had reason to believe that the parolee had committed a new crime or was otherwise in violation of the terms of parole.[43] Thus, the court gutted a key component of the parole system by prohibiting officers from conducting the kinds of unprovoked or "suspicionless" parole searches that are necessary to determine whether parolees are "sticking to the straight and narrow life of noncriminality."[44]

In 1998, however, a reconstituted court eliminated this requirement. In *People* v. *Reyes*[45] the court said that, "[b]ecause of society's interest both in assuring the parolee corrects his behavior and in protecting its citizens against dangerous criminals, a search pursuant to a parole condition, without reasonable suspicion, does not intrude on a reasonable expectation of privacy." This principle was then affirmed by the United States Supreme Court in 2006 when it said in *Samson* v. *California*:

> The California Legislature has concluded that, given the number of inmates the State paroles and its high recidivism rate, a requirement that searches be based on individualized suspicion would undermine the State's ability to effectively supervise parolees and protect the public from criminal acts by reoffenders. This conclusion makes eminent sense. Imposing a reasonable suspicion requirement, as urged by petitioner, would give parolees greater opportunity to anticipate searches and conceal criminality.[46]

Requirements

Having explained what is *not* required, we must now discuss what *is*. Actually, the requirements are fairly straightforward: (1) officers must have known that the suspect was on parole, (2) the search must have been motivated by a legitimate law enforcement or rehabilitative interest, and (3) the search must have been reasonable in its scope and intensity.

NOTICE OF SEARCH CONDITION: The first requirement is that the officers who conducted the search must have known that the suspect was on parole.[47] This probably sounds obvious, but because this requirement has been interpreted so as to provide parolees with greater privacy rights than those of law-abiding citizens, it has become controversial. (See "The 'Notice' Requirement: Unsound and Unnecessary" on the next page.)

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[39] See Pen. Code § 3056; *Samson* v. *California* (2006) 547 U.S. 843, 851 ["[A parolee] remains in the legal custody of the California Department of Corrections through the remainder of his term"].

[40] See *U.S.* v. *Crawford* (9th Cir. 2004) 372 F.3d 1048, 1068 (conc. opn. of Trott, J.) ["Although parole restrictions and conditions strictly speaking are not prison regulations, they are akin to that category."].

[41] See *Samson* v. *California* (2006) 547 U.S. 843, 853-55; *Motley* v. *Parks* (9th Cir. 2005) 432 F.3d 1072, 1083.

[42] Pen. Code § 3067(a). ALSO SEE *Samson* v. *California* (2006) 547 U.S. 843, 846.

[43] *People* v. *Burgener* (1986) 41 Cal.3d 505, 533.

[44] See *People* v. *Lewis* (1999) 74 Cal.App.4th 662, 671.

[45] (1998) 19 Cal.4th 743. ALSO SEE *People* v. *Hunter* (2006) 140 Cal.App.4th 1147, 1152 ["A suspicionless parole search is constitutionally permissible because the parolee lacks a legitimate expectation of privacy, and the state has a substantial interest in supervising parolees and reducing recidivism."].

[46] (2006) 547 U.S. 843, 854.

[47] See *People* v. *Sanders* (2003) 31 Cal.4th 318, 332 ["[A] search conducted under the auspices of a properly imposed parole search condition, presumes the officer's awareness of the search condition"].

The "Notice" Requirement: Unsound and Unnecessary

For years, California courts agonized over the question: Can a search be upheld as a parole or probation search if the officers who conducted it were unaware that the suspect was on parole or searchable probation? And if not, must the evidence obtained from the search be suppressed? These questions would arise when officers had conducted an illegal search inadvertently—not intentionally—and were later informed that the suspect was on parole or searchable probation.

The California Supreme Court seemingly resolved the issue in 1994 in the case of *In re Tyrell J.*,[1] ruling that evidence obtained during such a search cannot be suppressed because people on probation cannot reasonably expect privacy in searchable places and things. But some justices were uncomfortable with *Tyrell J.* So in 2000 when the issue reappeared in *People* v. *Sanders*[2] the court watered it down. Three years later, it overturned it in *In re Jaime P.*[3]

And yet, in neither of these decisions did the court address the pivotal issue: If a parolee or probationer knows—actually *knows*—that a certain place or thing can be searched by officers at any time, how can he reasonably expect that officers will not discover the contents of those places and things?

Instead, it ruled that the searches in *Sanders* and *Jaime P.* were "unlawful," which was bewildering because the court in *Tyrell J.* had not ruled on the lawfulness of the search. In fact, it declined to do so, saying, "[Tyrell] relies heavily on his perception that [the officer] acted improperly by detaining and then searching him. We need not reach that issue because the premise of the argument is flawed. The detention and pat-search of the minor did not intrude on a *reasonable* expectation of privacy."

The court in *Sanders* and *Jaime P.* did not, however, completely ignore the privacy issue. In *Sanders*, it made several superficial references to privacy expectations, and in *Jaime P.* it purported to dispose of the matter by saying that "a search condition may diminish privacy but not extinguish it." But this was irrelevant because no one had suggested that parolees and probationers were devoid of privacy rights. On the contrary, it has long been settled that they retain a sufficient expectation of privacy as to compel suppression of evidence obtained as the result of a search that was arbitrary, capricious, or harassing.[4] Instead, the real issue before the court in all three cases was whether parolees and probationers retained sufficient privacy expectations as to justify the suppression of evidence resulting from an unlawful search when the illegality resulted from negligence or inadvertence.

Nor did the court in *Sanders* or *Jaime P.* try to explain how a parolee's or probationer's subjective privacy expectations could possibly depend on circumstances of which he was unaware; i.e., that the search violated a rule or principle of law derived from a published appellate court decision. It did, however, note that *Tyrell J.* had received a "chilly reception" from a certain doctrinaire law professor, and that some students had written law review articles that were "unkind" to it—as if law schools were known as bastions of impartiality in matters pertaining to law enforcement.

The court also sought to justify its ruling on grounds that suppression of evidence in such cases was necessary to prevent officers from grabbing people off the streets and searching them illegally in hopes that, if evidence were discovered, it would turn out they were on parole or searchable probation. That the court would resort to such a baseless argument only demonstrated the absence of any logical support for its position. Moreover, *Tyrell J.* had been the law since 1994, and during that time there was never even a hint that this was happening. And even if it had occurred, the evidence would have been suppressed under the rule prohibiting searches that are arbitrary, capricious, or harassing. As the United States Supreme Court observed in *Samson* v. *California* when this same specious argument was raised, such a concern "is belied by California's prohibition on 'arbitrary, capricious or harassing' searches."[5]

As noted in the accompanying article, much of the crime inflicted upon Californians these days is committed by career criminals who are on parole or searchable probation. Consequently, it makes no sense to grant them privacy rights beyond the right to be free of searches that are arbitrary, capricious, or harassing. But that is what the courts have done. And they have utterly failed to explain why.

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[1] (1994) 8 Cal.4th 68. [2] (2003) 31 Cal.4th 318. [3] (2006) 40 Cal.4th 128, 134. [4] See *People* v. *Bravo* (1987) 43 Cal.3d 600, 610. [5] (2006) 547 U.S. 843, 856.

Where can officers obtain information on parolees and probationers? The most common sources are departmental, countywide, and regional law enforcement databases. For instance, officers in the nine Bay Area counties can obtain it through the Automated Warrant System (AWS).[48] Another source is the suspect, himself. If officers ask him if he is on parole or searchable probation, and he says yes, they can usually conclude that he is telling the truth because there is no logical reason for someone to lie.[49]

Note that because parole search conditions are mandatory, officers need not confirm that a parolee was released with a search condition.[50]

REHABILITATIVE OR LAW ENFORCEMENT MOTIVATION: The second requirement is that the search must have been motivated by a legitimate law enforcement or rehabilitative interest.[51] This has been interpreted to mean that the officers' objective must have been to determine whether the parolee or probationer was continuing to commit crimes or was otherwise in violation of the terms of release.

But more and more, the courts have been expressing this requirement in the negative, saying it means that parole searches must not have been arbitrary, capricious, or harassing.[52] Unfortunately, this has become another source of confusion because the courts do not apply the common definitions of "arbitrary" and "capricious." For example, officers sometimes decide to conduct a parole search because they see a known parolee driving down the street and they had nothing else to do at the time. These searches might technically qualify as "arbitrary" (i.e., depending completely on individual discretion) or "capricious" (i.e., sudden, impulsive, random), yet they are unquestionably lawful because, as noted earlier, random and unprovoked searches serve important law enforcement and rehabilitative interests.

The courts do, however, apply the common definition to the term "harassment." Thus, a search would not have been motivated by a law enforcement or rehabilitative interest if the officers' objective was to annoy the parolee. For instance, a search would likely be deemed harassing if officers had conducted several unproductive searches of the parolee in the recent past with no reason to believe the search in question would be fruitful, or if the search was conducted in an unnecessarily oppressive or intrusive manner.[53]

SCOPE AND INTENSITY: The third requirement—that the search must have been reasonable in its scope and intensity—is covered below in the section "Scope and Intensity of the Search."

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[48] **NOTE**: The terms of probation may also be found in the probationer's court file. See *People* v. *Bravo* (1987) 43 Cal.3d 600, 606 [officers "must be able to determine the scope of the condition by reference to the probation order"].

[49] See *In re Jeremy G.* (1998) 65 Cal.App.4th 553, 556. **NOTE:** Even if the suspect was mistaken and was not subject to a probation search condition, the search is lawful if it reasonably appeared the person comprehended what he was saying and the consequences of saying it. See *In re Jeremy G.* (1998) 65 Cal.App.4th 553, 556.

[50] See *People* v. *Middleton* (2005) 131 Cal.App.4th 732, 739.

[51] See *People* v. *Reyes* (1998) 19 Cal.4th 743, 754 [the search must be "for a proper purpose"]. **NOTE**: Although the Supreme Court in *U.S.* v. *Knights* (2001) 534 U.S. 112, 121 said "there is no basis for examining official purpose" for conducting probation searches, this does not mean the officers' motivation is irrelevant. The officers' motivation was not significant in *Knights* because the Court had assumed that the search was supported by reasonable suspicion and, thus, its ruling was based on "the objective circumstances of a search," not the officers' motivation. See *Whren* v. *United States* (1996) 517 U.S. 806, 812 [officer's motivation for making a traffic stop is irrelevant if the stop is based on probable cause]. But because California does not require reasonable suspicion before officers may conduct parole and probation searches, it appears the officers' motivation remains relevant, at least if they did not have reasonable suspicion.

[52] See *People* v. *Reyes* (1998) 19 Cal.4th 743, 754 [court notes that a search "is arbitrary and capricious when the motivation for the search is unrelated to rehabilitative, reformative or legitimate law enforcement purposes"]; *In re Anthony S.* (1992) 4 Cal.App.4th 1000, 1004 ["Where the motivation is unrelated to rehabilitative and reformative purposes or legitimate law enforcement purposes, the search is 'arbitrary.'"]; *People* v. *Zichwic* (2001) 94 Cal.App.4th 944, 951 ["A search is arbitrary when the motivation for the search is unrelated to rehabilitative, reformative or legitimate law enforcement purposes"]; *People* v. *Medina* (2007) 158 Cal.App.4th 1571, 1577 ["A search is arbitrary and capricious when the motivation for it is unrelated to rehabilitative, reformative or legitimate law enforcement purposes, or when it is motivated by personal animosity toward the probationer."]. ALSO SEE *People* v. *Cervantes* (2002) 103 Cal.App.4th 1404, 1408 [a mere legal or factual error "does not render the search arbitrary, capricious or harassing"].

[53] See *People* v. *Clower* (1993) 16 Cal.App.4th 1737, 1743 ["Six searches over a four- to five-month period, without more, do not necessarily indicate harassment."].

Search after arrest or parole hold

The question arises: Can officers conduct a parole search if the parolee is in custody on a new case or on a parole hold.[54] The answer is yes, because parole does not terminate until it has been formally revoked by the Board of Prison Terms.

For example, in *People* v. *Hunter*[55] the driver of a stolen car bailed out when officers signaled him to stop. Although he got away, the officers who searched the car found a slip of paper with the name of a parole officer. With this information, it didn't take long before they learned that the driver was Hunter, and that shortly after the pursuit he had been arrested on a parole hold and was now back in prison awaiting a parole revocation hearing. They also learned that he had rented a storage unit, so they decided to search it under the terms of parole. Inside it they found several items that had been taken in a burglary.

On appeal, Hunter argued that the search could not be justified as a parole search because his "parole was violated and he was physically returned to prison as a result of that violation." The court pointed out, however, that the terms of parole remained in effect "while Hunter was incarcerated on a parole violation because Hunter was still a parolee until his parole was formally revoked."

Similarly, in *United States* v. *Holiday*[56] the Ninth Circuit ruled that "Holiday's arrest for a parole violation did not end the need for a parole search." Said the court, "California had a continuing interest in Holiday's progress so it could determine whether to continue, modify or revoke his parole."

Note, however, that when a parolee absconds and a parolee-at-large (PAL) warrant is issued, his parole is automatically suspended until he has been arrested, at which point it is reinstated.[57]

Pretext searches

Officers will sometimes learn that the suspect in a case they are investigating is living with a person who is on parole or searchable probation. The question arises: Can officers conduct a parole or probation search of the residence if their sole objective is to obtain evidence against the suspect?

Before answering that question, it is important to note that searches of this sort—known as "pretext" searches—are extremely rare. This is because the officers' objective will seldom be limited to seeking evidence against only the suspect. After all, when officers have reason to believe that a person has committed a crime, and they learn that that person is living with a parolee or probationer, they will naturally have a legitimate concern that the parolee or probationer is involved.[58]

But even if the officers' only objective was to obtain evidence against the suspect, the search would be lawful if, (1) they had reason to believe that the parolee or probationer was in violation (this is an exception to the rule that grounds to search are not required), and (2) the search was limited to places and things over which the parolee or probationer had sole or joint control.

For example, in *People* v. *Woods*[59] an police officer in Antioch arrested a man named Mofield for possessing drugs and an illegal weapon. The officer was

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[54] See *People* v. *Burgener* (1986) 41 Cal.3d 505, 536 ["Nor is it relevant that the parolee may already be under arrest when the search is conducted."]; *People* v. *Johnson* (1988) 47 Cal.3d 576, 594; *People* v. *Stanley* (1995) 10 Cal.4th 764, 790 ["Neither police participation nor the fact the parolee is already under arrest invalidates an otherwise proper parole supervision purpose."]; *Latta* v. *Fitzharris* (9th Cir. 1975) 521 F.2d 246, 252 ["A parole officer's interest in inspecting [the parolee's] place of residence [does] not terminate upon his arrest; if anything, it intensified."]; *U.S.* v. *Dally* (9th Cir. 1979) 606 F.2d 861, 863 ["Holiday's arrest for a parole violation did not end the need for a parole search"].

[55] (2006) 140 Cal.App.4th 1147.

[56] (9th Cir. 1979) 606 F.2d 861, 863.

[57] See 15 CCR § 2000(b)(75) ["Parolee at large: an absconder from parole supervision, who is officially declared a fugitive by board action suspending parole."]; 15 CCR § 2515 ["Any time during which the parolee has absconded from supervision while on parole or during a period of revocation shall not be credited to the period of parole."]; 15 CCR § 3060 ["parole authority shall have full power to suspend or revoke any parole"]; 15 CCR § 2600 ["absconder whose parole has been suspended"].

[58] See, for example, *Maryland* v. *Pringle* (2003) 540 U.S. 366, 373 [drug dealing is "an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him"].

[59] (1999) 21 Cal.4th 668. ALSO SEE *Horton* v. *California* (1990) 496 U.S. 128, 138 ["The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by the terms of a warrant or a valid exception to the warrant requirement."].

aware that Mofield lived in a house with Gayla Loza who was on probation with a residential search condition. The officer had also received a tip three days earlier that drugs were being sold at the house. So he decided to conduct a probation search, during which he found drugs belonging to a third occupant, Cheryl Woods.

Woods argued that the search was unlawful because the officer was using Loza's search condition as a pretext to obtain evidence against Mofield. But the California Supreme Court ruled it didn't matter because, "Regardless of [the officer's] ulterior motives, the circumstances, viewed objectively, show a possible probation violation."[60]

Probation Searches

When a defendant is convicted of a crime, the sentencing judge usually has two options: (1) send him to jail or prison, or (2) grant probation.[61] If the judge grants probation, he or she will usually do so only if the defendant agrees to certain terms that the judge determines are appropriate; e.g., obey all laws, try to get a job, don't use drugs.[62]

Another common requirement imposed by judges in California is that the probationer must submit to warrantless searches by law enforcement and probation officers.[63] This requirement is especially common when the defendant was convicted of a crime involving drugs, weapons, or stolen property as it helps "in deterring further offenses by the probationer and in monitoring compliance with the terms of probation."[64] Search conditions are also useful if officers are investigating the possibility that the probationer has committed a new crime.

But unlike parolees, probationers in California are not required to accept search conditions. As the California Supreme Court observed

> If the defendant considers the conditions of probation more harsh than the sentence the court would otherwise impose, he has the right to refuse probation and undergo the sentence.[65]

Of course, this doesn't happen very often. But because defendants technically have this choice, the courts have determined that a defendant's decision to accept probation with a warrantless search condition makes these searches consensual.[66]

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[60] **NOTE**: One year later, the court summarized its decision in *Woods* as follows: "We concluded there that, regardless of the searching officer's ulterior motives, the circumstances presented ample justification for a search pursuant to the probation clause at issue because the facts known to the officer showed a possible probation violation." *People* v. *Robles* (2000) 23 Cal.4th 789, 797.

[61] See *Griffin* v. *Wisconsin* (1987) 483 U.S. 868, 874 ["Probation, like incarceration, is a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty."]; *People* v. *Burgener* (1986) 41 Cal.3d 505, 532-33 ["A convicted defendant released on probation, as distinguished from a parolee, has satisfied the sentencing court that notwithstanding his offense imprisonment in the state prison is not necessary to protect the public."]. ALSO SEE Pen. Code § 1203(a) ["[probation] means the suspension of the imposition or execution of a sentence and the order of conditional and revocable release in the community under the supervisions of a probation officer"].

[62] See *In re Anthony S.* (1992) 4 Cal.App.4th 1000, 1006 ["With the benefit of probation comes the burden of a consent search term."]; *People* v. *Balestra* (1999) 76 Cal.App.4th 57, 67 ["[A] warrantless search condition is intended to ensure that the subject thereof is obeying the fundamental condition of all grants of probation [i.e., obey all laws]."]; *People* v. *Lent* (1975) 15 Cal.3d 481, 486 ["The Legislature has placed in trial judges a broad discretion in the sentencing process, including the determination as to whether probation is appropriate and, if so, the conditions thereof."]; *People* v. *Welch* (1993) 5 Cal.4th 228, 233 ["The sentencing court has broad discretion to determine whether an eligible defendant is suitable for probation and what conditions should be imposed."]. ALSO SEE *United States* v. *Knights* (2001) 534 U.S. 112, 119, fn5.

[63] See *United States* v. *Knights* (2001) 534 U.S. 112, 116 [such a search clause is a "common California probation condition"].

[64] *People* v. *Robles* (2000) 23 Cal.4th 789, 795. ALSO SEE *People* v. *Bravo* (1987) 43 Cal.3d 600, 611 [the "dual purpose" of search conditions is "to deter further offenses by the probationer and to ascertain whether he is complying with the terms of his probation."].

[65] *In re Bushman* (1970) 1 Cal.3d 767, 776. ALSO SEE *U.S.* v. *Barnett* (7th Cir. 2005) 415 F.3d 690 692 ["[S]ince imprisonment is a greater invasion of personal privacy than being exposed to searches of one's home on demand," the bargain that Barnett struck was "advantageous to him"].

[66] See *People* v. *Bravo* (1987) 43 Cal.3d 600, 608 ["A probationer, unlike a parolee, consents to the waiver of his Fourth Amendment rights in exchange for the opportunity to avoid service of a state prison term."]; *People* v. *Medina* (2008) 158 Cal.App.4th 1571, 1575 ["[T]he basis for the validity of a probation search is consent, not reasonableness under a general Fourth Amendment analysis."]; *People* v. *Ramos* (2004) 34 Cal.4th 494, 506 ["[B]y accepting probation, a probationer consents to the waiver of Fourth Amendment rights in order to avoid incarceration."]; *People* v. *Baker* (2008) 164 Cal.App.4th 1152, 1158 [parole and probation "searches have repeatedly been evaluated under the rules governing consent searches"].

Grounds not required

Like parole searches, probation searches may be conducted even though officers have no reason to believe that the probationer committed a new crime or was otherwise in violation of the terms of probation.[67] As the California Supreme Court observed:

> The purpose of an unexpected, unprovoked search of defendant is to ascertain whether he is complying with the terms of probation; to determine not only whether he disobeys the law, but also whether he obeys the law. Information obtained under such circumstances would afford a valuable measure of the effectiveness of the supervision given the defendant and his amenability to rehabilitation.[68]

For example, in *In re Anthony S*.[69] officers in Ventura learned that several members of a street gang called the "Ventura Avenue Gangsters" were on probation, the terms of which included authorization to search their homes for stolen property and gang paraphernalia. So they decided to search, and in the home of the defendant they found handguns, a sawed-off rifle, nunchakus, knives, and marijuana. The trial judge ruled, however, that the search was unlawful saying, "I think this was a random search. The officers decided, 'let's go search the gang members today' and you've got to have something [more]."

The Court of Appeal ruled the judge was wrong because, as it explained, "[T]he evidence shows that the officers were motivated by a law enforcement purpose; i.e., to look for stolen property, alcohol, weapons, and gang paraphernalia at the homes of the Ventura Avenue Gangsters members. This is a legitimate law enforcement purpose."

It should be noted that, although it seldom happens, sentencing judges will sometimes permit probation searches only if officers have reason to believe the probationer has committed a new crime.[70] Such a requirement will not, however, be implied.[71]

(We have heard that some departments have been advised by a civil lawyer to prohibit their officers from conducting suspicionless probation searches so as to avoid any possible liability. But when a sentencing judge does not require reasonable suspicion, and when California's highest court has ruled that suspicionless probation searches are lawful, and when there is a consensus that these searches are necessary to help protect the public against criminal predators, this advice is, in our opinion, irresponsible.)

Requirements

The requirements for conducting probation searches are essentially the same as those for conducting parole searches.

KNOWLEDGE OF SEARCH CONDITION: A search will not qualify as a probation search unless the searching officers were aware of the search condition.[72] This requirement was discussed in detail in the section on parole searches. Note, however, that because some probationers are not subject to search conditions, it is important that officers who testify at suppression hearings make it clear that they knew that the defendant was on *searchable* probation.

PROBATIONARY PURPOSE: Although probation searches must be "reasonably related to a probationary purpose,"[73] this requirement will be satisfied if the officer's objective was, (1) to determine whether the probationer had committed a new crime for

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[67] See *People* v. *Medina* (2008) 158 Cal.App.4th 1571, 1576 ["[A] search of a probationer pursuant to a search condition may be conducted *without any reasonable suspicion of criminal activity*"]; *People* v. *Bravo* (1987) 43 Cal.3d 600, 611 ["[A] search condition of probation that permits a search without a warrant also permits a search without 'reasonable cause'"].

[68] *People* v. *Reyes* (1998) 19 Cal.4th 743, 752.

[69] (1992) 4 Cal.App.4th 1000.

[70] See *People* v. *Bravo* (1987) 43 Cal.3d 600, 607, fn6 ["[I]f a sentencing judge believes that a 'reasonable cause' requirement is warranted . . . he has the discretion to place such language in the probation search condition."].

[71] See *People* v. *Bravo* (1987) 43 Cal.3d 600, 607, fn.6 ["Absent such express language, however, a reasonable-cause requirement will not be implied."]. **NOTE**: The United States Supreme Court has not ruled on whether a sentencing judge can authorize a probation search in the absence of some level of suspicion. See *United States* v. *Knights* (2001) 534 U.S. 112, 121 [Court notes that it would require "no more than" reasonable suspicion]; *U.S.* v. *Barnett* (7th Cir. 2005) 415 F.3d 690, 691 [the Court in *Knights* "left open the question whether the waiver alone could justify the search"]. But, as noted, the California Supreme Court has ruled that judges have such an option. See *People* v. *Medina* (2007) 158 Cal.App.4th 1571, 1580 ["[U]ntil the United States Supreme Court provides direct authority, we are bound to follow the law of the California Supreme Court."].

[72] See *In re Jaime P.* (2006) 40 Cal.4th 128; *People* v. *Medina* (2007) 158 Cal.App.4th 1571, 1577 ["[T]he officer must be aware of the search condition before conducting the search; after-acquired knowledge will not justify the search."].

[73] *People* v. *Robles* (2000) 23 Cal.4th 789, 797.

which he was a suspect;[74] or (2) to make sure he was not in violation of the terms of probation by, for example, possessing drugs or weapons.[75]

As with parole searches, this requirement is now usually framed in the negative; i.e., the search must not have been arbitrary, capricious, or harassing.[76] Likewise, a search does not lose its probationary purpose merely because the probationer was in custody or because his probation had been summarily revoked. A search may not, however, have a probationary purpose if the officers' *sole* objective was to obtain evidence against someone other than the probationer. The limitation was covered in section on parole searches ("Rehabilitative or law enforcement motivation" and "Pretext searches").

SCOPE AND INTENSITY: The third requirement for probation searches is that they must be reasonable in their scope and intensity. See "Scope and Intensity of the Search," below

"ON REQUEST" SEARCH CONDITIONS: Judges will sometimes—usually inadvertently—insert language into probation orders that requires the probationer to submit to warrantless searches "on request" or "whenever requested to do so" by an officer. In a strained interpretation of this language, some courts have ruled that it means officers must notify the probationer that the search was about to occur,[77] even though he cannot refuse their "request."[78]

Post-arrest and pretext searches

Officers may conduct probation searches even though the suspect had been arrested or his probation had been summarily revoked. This is because the terms of probation do not terminate until probation expires or has been revoked by a judge following a hearing.[79] The subject of pretext searches was covered in the section on parole searches.

Scope and Intensity of the Search

As noted, another requirement for both parole and probation searches is that they must be reasonable in their scope and intensity. Fortunately, the permissible scope and intensity of all parole searches and most probation searches are the same.[80]

What can be searched

Determining the scope of parole searches is easy because it's the same for all parolees. Specifically, the California Administrative Code states that officers may search, (1) the parolee, (2) his residence, and (3) any property under his control.[81]

In contrast , the scope of probation searches varies because it depends on the terms of the sentencing judge's probation order.[82] The most common search condition—which goes by various names, such as the "four-way"—authorizes searches of, (1) the probationer, (2) his residence, (3) any vehicle under his control, and (4) any other property under his control. Note that the scope of a four-way is essentially the same as the scope of parole searches; the only difference being that a vehicle search is implied by the terms of parole (i.e., property under the parolee's control), while it is expressly authorized by the terms of probation.

A probation search condition will sometimes permit officers to search the probationer and property under his control, but omit specific authorization to search his home and vehicle. In the absence of evidence to the contrary appearing in the court's probation order, this can be interpreted as a four-way because the category "property under his control" would plainly include his vehicle and home. In fact, the California Supreme Court ruled that a probation order that permitted officers to search only the

[74] See *People* v. *Robles* (2000) 23 Cal.4th 789, 799; *People* v. *Bravo* (1987) 43 Cal.3d 600, 611 [the search may be conducted for "legitimate law enforcement purposes"].
[75] See *People* v. *Robles* (2000) 23 Cal.4th 789, 799 ["routine monitoring" is permissible].
[76] See *People* v. *Medina* (2007) 158 Cal.App.4th 1571, 1576.
[77] See *People* v. *Mason* (1971) 5 Cal.3d 759, 763; *People* v. *Superior Court (Stevens)* (1974) 12 Cal.3d 858, 861.
[78] See *People* v. *Mason* (1971) 5 Cal.3d 759, 763.
[79] See *People* v. *Barkins* (1978) 81 Cal.App.3d 30, 32-33 ["Actual revocation of probation cannot occur until the probationer has been afforded the due process hearing rights provided [by law]. Thus, until [then], the terms of probation remain in effect."].
[80] See *U.S.* v. *Davis* (9th Cir. 1991) 932 F.2d 752, 758 ["We do not believe the distinction between the status of parolee and that of a probationer is constitutionally significant for purposes of evaluating the scope of a search."].
[81] 15 CCR § 2511(b) ["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."].
[82] See *People* v. *Woods* (1999) 21 Cal.4th 668, 682; *People* v. *Bravo* (1987) 43 Cal.3d 600, 607.

probationer's "person and property" impliedly authorized a search of his residence.[83]

Although not as common, probation orders will sometimes authorize searches of only the probationer, his home and vehicle, but not other property under his control.[84] Even less common is the "one-way" which authorizes a search of only the probationer's person.[85]

SEARCHING HOMES: DOES HE "LIVE" THERE? Officers may search a home pursuant to the terms of parole or probation only if the parolee or probationer lives there.[86] This requirement can be troublesome because many parolees and probationers move around a lot or stay in several residences—sometimes for the purpose of making it difficult for officers to find them. Still, it is strictly enforced.

Technically, a search is permitted whenever officers have "reason to believe" that the parolee or probationer lives in the residence, either alone or with others.[87] While it could be argued that this "reason to believe" standard is essentially the same as mere reasonable suspicion, the Ninth Circuit has consistently interpreted it to mean probable cause.[88] Thus, in *United States* v. *Howard* the court explained:

> We have applied a relatively stringent standard in determining what constitutes probable cause that a residence belongs to a person on supervised release. It is insufficient to show that the parolee may have spent the night there occasionally. Instead, the facts known to the officers at the time of the search must have been sufficient to support a belief, in a man of reasonable caution, that [he] lived [there].[89]

Although the California courts have not yet ruled on the issue, it is likely that, because of the high privacy expectations in homes, they will also rule that probable cause is required.[90]

SEARCHING HOMES: SEARCHABLE ROOMS AND AREAS: Officers may search the parolee's or probationer's bedroom, all common areas, (such as the living room, kitchen, bathroom, and garage), all other rooms in which the parolee or probationer has exclusive or joint control,[91] and all other places to which he "normally had access," such as a locked room to which he had a key.[92]

SEARCHING PROPERTY: WHAT IS "CONTROL?" As noted earlier, officers can usually search all personal property that is under the parolee's or probationer's "control." At the outset, two things should be noted

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[83] *People* v. *Bravo* (1987) 43 Cal.3d 600, 607. **NOTE**: Even a search condition that authorized a search of only the probationer's "person and property" has been interpreted to include a search of the probationer's home. See *People* v. *Bravo* (1987) 43 Cal.3d 600, 603, fn.1 [Probation order stated: "Submit his person and property to search or seizure . . ." Discussing the search of the probationer's home, the court ruled, "We think the wording of appellant's probation search condition authorized the instant search." At p. 607].

[84] See, for example, *In re Marcellus L.* (1991) 229 Cal.App.3d 134, 137.

[85] See, for example, *In re Binh L.* (1992) 5 Cal.App.4th 194, 199.

[86] See15 CCR § 2511(b) [officers may search "your residence"].

[87] See *People* v. *Palmquist* (1981) 123 Cal.App.3d 1, 11 [officers "may search a residence reasonably believed to be the probationer's"]; *Motley* v. *Parks* (9th Cir. en banc, 2005) 432 F.3d 1072, 1079; *People* v. *Fuller* (1983) 148 Cal.App.3d 257, 264 [the record was "devoid of any substantial evidence" that the probationer lived there]; *U.S.* v. *Howard* (9th Cir. 2006) 447 F.3d 1257, 1262 ["[B]y its own clear and explicit language, the search clause only applies if the West Bonanza apartment was Howard's residence."]; *U.S.* v. *Taylor* (5th Cir. 2007) 482 F.3d 315, 318-19. ALSO SEE *Payton* v. *New York* (1980) 445 US 573, 602 ["[F]or Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within."].

[88] See *U.S.* v. *Mayer* (9th Cir. 2008) 530 F.3d 1099, 1104 ["Before law enforcement officers may conduct a warrantless probation search, they must also have probable cause to believe that the probationer actually lives at the residence searched."]; *Cuevas* v. *De Roco* (9th Cir. 2008) 531 F.3d 726, 732; *Motley* v. *Parks* (9th Cir. en banc, 2005) 432 F.3d 1072, 1080 ["Law enforcement officers are allowed to search a parolee's residence, but they must have probable cause to believe that they are *at* the parolee's residence."]; *U.S.* v. *Howard* (9th Cir. 2006) 447 F.3d 1257, 1262 [probable cause is required].

[89] (9th Cir. 2006) 447 F.3d 1257, 1262.

[90] See *People* v. *Tidalgo* (1981) 123 Cal.App.3d 301, 307.

[91] See *People* v. *Robles* (2000) 23 Cal.4th 789, 798 ["[I]f persons live with a probationer, common or shared areas of their residence may be searched"]; *People* v. *Smith* (2002) 95 Cal.App.4th 912, 916 [probation searches "may extend to common areas, shared by nonprobationers, over which the probationer has common authority"]; *People* v. *Pleasant* (2005) 123 Cal.App.4th 194, 197 ["Persons who live with probationers cannot reasonably expect privacy in areas of a residence that they share with probationers."].

[92] *People* v. *Pleasant* (2005) 123 Cal.App.4th 194, 197.

about the term "control." First, either sole or joint control is sufficient. Consequently, it is immaterial that someone other than the parolee or probationer also controls the item that was searched. Second, the required level of proof that the parolee or probationer controlled personal property is only reasonable suspicion, not probable cause.[93]

Reasonable suspicion may be based on direct evidence, circumstantial evidence, or reasonable inference. Direct evidence that a parolee or probationer controlled a car would exist, for example, if officers knew that he was listed on the vehicle registration or rental documents, or if he admitted that he owned it. Similarly, a marking on a container or other personal property might constitute direct evidence that it was owned by a parolee or probationer; e.g., "These burglar tools are the property of Paul Prowler."

Examples of circumstantial evidence include an attempt by the parolee or probationer to hide or grab the item,[94] or the discovery of a key in his possession that unlocks the place or thing.[95]

If there is no direct or circumstantial evidence of "control," officers may rely on reasonable inference. The most common inference is that, in the absence of evidence to the contrary, parolees and probationers have sole or joint control over all containers in the rooms and vehicles that are under their sole or joint control.[96] For example, the courts have ruled that officers reasonably believed that parolees or probationers had sole or joint control of the following property:

- A jewelry box on the dresser in a female probationer's bedroom.[97]
- A "gender neutral" handbag on a bed in a home occupied by a male parolee and his girlfriend.[98]
- A pouch lying on the floor of the probationer's bedroom.[99]
- A paper bag in the closet of the parolee's bedroom.[100]
- A dresser in the parolee's one-bedroom apartment.[101]
- A stationery box in a drawer in the living room.[102]
- Papers in a desk in the living room.[103]
- Trash under the kitchen sink.[104]
- The refrigerator in the kitchen.[105]

On the other hand, parolees and probationers will not have control over things that obviously belonged exclusively to someone else. For example, the California Court of Appeal recently ruled that it was unreasonable for officers to believe that a purse at the feet of a female passenger in a vehicle was controlled by the driver, a male parolee. Said the court, "Here, there is nothing to overcome the obvious presumption that the purse belonged to the sole female occupant of the vehicle who was not subject to a parole-condition search."[106]

It is possible that any container on the premises may be searched if it reasonably appeared that the location was "permeated with criminality," meaning there was so much incriminating evidence all over the premises that it was reasonable to believe that all

[93] See *People* v. *Baker* (2008) 164 Cal.App.4th 1152, 1159; *People* v. *Boyd* (1990) 224 Cal.App.3d 736, 749; *U.S.* v. *Davis* (9th Cir. 1991) 932 F.2d 752, 758 ["police must have reasonable suspicion that an item to be searched is owned, controlled, or possessed by probationer"].

[94] See *People* v. *Alders* (1978) 87 Cal.App.3d 313, 317 ["[Probationer's] very act of reaching demonstrated that he exercised control, joint or otherwise, over the bed."].

[95] See *People* v. *Pleasant* (2005) 123 Cal.App.4th 194, 197; *U.S.* v. *Davis* (9th Cir. 1991) 932 F.2d 752, 759.

[96] See *People* v. *Icenogle* (1977) 71 Cal.App.3d 576. 586 [suppression would be required if "the portion of the bedroom where the two balloons were found constituted an area under the sole dominion and control of defendant"].

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

[98] *People* v. *Boyd* (1990) 224 Cal.App.3d 736, 745.

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

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

[101] *People* v. *Icenogle* (1977) 71 Cal.App.3d 576.

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

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

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

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

[106] See *People* v. *Baker* (2008) 164 Cal.App.4th 1152, 1160. ALSO SEE *People* v. *Palmquist* (1981) 123 Cal.App.3d 1, 13 ["Presumably the parka was not 'distinctly female'"]; *People* v. *Alders* (1978) 87 Cal.App.3d 313, 317-18 ["there was no reason to suppose that a distinctly female coat was jointly shared by her and [the probationer]."].

of the occupants were jointly controlling all of the containers on the premises in which such evidence might have been stored.[107]

For example, in *People* v. *Smith*[108] officers in Placerville went to the home of a probationer named John Kelsey to conduct a probation search. When they arrived they spoke with Pamela Smith who said that she and Kelsey shared the rear bedroom. During a search of the bedroom, officers found drugs and paraphernalia on several shelves and in a desk. They also found a safe in the bedroom closet. Smith said there was a gun in the safe, and that the key to the safe was in her purse. When officers opened her purse to get the key, they found methamphetamine.

Smith contended that her purse could not be searched under the terms of Kelsey's probation because there was insufficient proof that Kelsey had joint control over it. The court disagreed, saying, "[O]nce it was determined the bedroom Kelsey and defendant shared was being used for a criminal enterprise, there was no reason for the officers not to believe the purse, regardless of its appearance, was one being jointly used, even if not jointly owned, by the probationer subject to search."

THE NEED TO ASK QUESTIONS: If there exists a legitimate question as to whether there is reasonable suspicion to believe that a certain item is controlled solely or jointly by the parolee or probationer, officers must question the occupants or take other steps to resolve the matter.[109] Officers are not, however, required to accept a parolee's or probationer's denial that he controls certain places or things.[110] As the Court of Appeal observed, "An officer could hardly expect that a parolee would claim ownership of an item which he knew contained contraband."[111]

Nor are officers required to accept the word of other people on the premises that the parolee or probationer did not control something. Still, it is a circumstance that should be considered if the person had no apparent motive to lie.

What officers can look for

There are no restrictions on what things officers may look for when they are conducting parole searches.[112] That's also true for most probation searches, but sometimes a sentencing judge will throw a curve and permit a search for only certain things, such as drugs, weapons, or stolen property.[113] This can cause problems if officers are only permitted to search for fairly large items, in which case they could not search areas and containers in which such items could not reasonably be found. This is another reason why officers need to know the terms and conditions of probation.

Intensity of the search

The term "intensity" of the search is used to denote the permissible intrusiveness of the search. Because there are few cases pertaining directly to the intensity of parole and probation searches, we have looked to cases covering search warrants, consent searches and searches incident to arrest.

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[107] **NOTE**: Our use of the term "permeated with criminality" is based on a rule in the law of search warrants that a warrant may authorize a search of *all* records or documents in a business if the affidavit establishes that the business is so corrupt—so "permeated with fraud"—that there is probable cause to believe that all, or substantially all, of the documents on the premises are evidence. See *U.S.* v. *Smith* (9th Cir. 2005) 424 F.3d 992, 1006; *In re Grand Jury Investigation* (9th Cir. 1997) 130 F.3d 853, 856; *U.S.* v. *Sawyer* (11th Cir. 1986) 799 F.2d 1494, 1508.

[108] (2002) 95 Cal.App.4th 912.

[109] See *People* v. *Boyd* (1990) 224 Cal.App.3d 736, 749 ["Depending upon the facts involved, there may be instances where an officer's failure to inquire, coupled with all of the other relevant facts, would render the suspicion unreasonable and the search invalid."]. ALSO SEE *U.S.* v. *Davis* (9th Cir. 1991) 932 F.2d 752, 760 ["We interpret *Boyd* as holding that the police should inquire into the ownership, possession, or control of an item sought to be searched when the totality of the circumstances do not otherwise give rise to reasonable suspicion that the item to be searched belongs to, or is under control of, the parolee."].

[110] See *People* v. *Boyd* (1990) 224 Cal.App.3d 736, 749 ["The officer should not be bound by the [parolee's] reply in the face of overwhelming evidence of its falsity."].

[111] *People* v. *Britton* (1984) 156 Cal.App.3d 689, 701.

[112] See 15 CCR § 2511(b) ["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."].

[113] See *People* v. *Gomez* (2005) 130 Cal.App.4th 1008, 1016 [the officer "could lawfully search in any area of the house or shed that might contain narcotics, firearms, or weapons"].

MANNER OF ENTRY: Officers must enter the premises in a "reasonable" manner.[114] It would appear, therefore, that in most cases they should comply with the knock-notice requirements unless compliance is excused for good cause. As the Court of Appeal explained in *People* v. *Urziceanu*, "[T]he remaining policies and purposes underlying the statutory knock-notice provisions must be satisfied in the execution of a probation search of a residence."[115]

PROTECTIVE SWEEPS: Officers may conduct protective sweeps of all common areas in the residence and all rooms in which the parolee or probationer has exclusive or joint control.[116] As for rooms that are under the exclusive control of someone else, it appears that a protective sweep would be permitted only if officers reasonably believed there was someone inside who posed a threat to them.[117]

THOROUGH SEARCH: Probation and parole searches may be reasonably thorough because, as one court put it, if a search is not thorough "it is of little value."[118] Thus officers who are searching a parolee or probationer may conduct a "full" search,[119] but it must not be "extreme or patently abusive."[120]

NO DAMAGE OR DESTRUCTION: Although the search may be thorough, it must not be destructive.[121]

LENGTH OF SEARCH: The permissible length of the search will depend on the number and nature of the places and things that will be searched, the amount and nature of the evidence the officers are seeking, and any problems that reasonably extended the length of the search.[122]

SEARCHES CONDUCTED BY K-9S: Officers may use a trained dog (e.g., drug sniffing, explosives-sniffing) to help with the search. This is because a dog's sniffing does not materially increase the intensity of the search.[123]

PLAIN VIEW SEIZURES: If, while conducting a parole or probation search, officers develop probable cause to believe that an item in plain view is evidence of a crime, they may seize it.[124]

ARRESTING OCCUPANTS: Finally, officers who have entered a residence to conduct a parole or probation search may arrest anyone on the premises if there is probable cause to do so, regardless of whether it existed at the time of entry or developed in the course of the search. In other words, neither a conventional arrest warrant nor a *Ramey* warrant is required to arrest a person inside a residence if officers have lawfully entered to conduct a parole or probation search.[125]

POV

We would like to thank Doris Calandra of the California Attorney General's Office for her assistance with this article.

[114] See *Wilson* v. *Arkansas* (1995) 514 U.S. 927, 934 [manner of entry is "among the factors to be considered in assessing the reasonableness of a search or seizure"].
[115] (2005) 132 Cal.App.4th 747, 790.
[116] See *People* v. *Ledesma* (2003) 106 Cal.App.4th 857; *U.S.* v. *Lopez* (9th Cir. 2007) 474 F.3d 1208, 1213 ["Because a protective sweep is a less extensive search than a parole search, *Samson* necessarily makes both the protective sweep, and the parole search, lawful."].
[117] See *Maryland* v. *Buie* (1990) 494 U.S. 325, 333; *U.S.* v. *Nascimento* (1st Cir. 2007) 491 F.3d 25, 49.
[118] *U.S.* v. *Torres* (10th Cir. 1981) 663 F.2d 1019, 1027. ALSO SEE *People* v. *Crenshaw* (1992) 9 Cal.App.4th 1403, 1415.
[119] See *United States* v. *Robinson* (1973) 414 US 218, 235; *Gustafson* v. *Florida* (1973) 414 US 260, 266; *People* v. *Avila* (1997) 58 Cal.App.4th 1069, 1075; *People* v. *Guajardo* (1994) 23 Cal.App.4th 1738, 1742; *People* v. *Boren* (1987) 188 Cal.App.3d 1171, 1176-77. *People* v. *Dennis* (1985) 172 Cal.App.3d 287, 290; *People* v. *Cressy* (1996) 47 Cal.App.4th 981, 988 ["Deputy Howe would have been derelict in his duties had he failed to search defendant before putting him in his patrol car and transporting him to jail."]. **NOTE**: California's old restrictive rule governing searches of containers was based primarily on principles announced in *United States* v. *Chadwick* (1977) 433 U.S. 1. See *People* v. *Minjares* (1979) 24 Cal.3d 410, 417-21). The *Chadwick* rationale was repudiated in *California* v. *Acevedo* (1991) 500 U.S. 565.
[120] See *United States* v. *Robinson* (1973) 414 U.S. 218, 236; *People* v. *Laiwa* (1983) 34 Cal.3d 711, 726.
[121] See *U.S.* v. *Strickland* (11th Cir. 1990) 902 F.2d 937, 941-42; *People* v. *Crenshaw* (1992) 9 Cal.App.4th 1403; *U.S.* v. *Gutierrez-Mederos* (9th Cir. 1992) 965 F.2d 800, 804.
[122] See *People* v. *$48, 715* (1997) 58 Cal.App.4th 1507, 1515.
[123] See *People* v. *$48,715* (1997) 58 Cal.App.4th 1507, 1516 ["[U]se of the trained dog to sniff the truck . . . did not expand the search to which the [suspect] had consented . . ."]; *People* v. *Bell* (1996) 43 Cal.App.4th 754, 770-71, fn.5; *U.S.* v. *Gonzalez-Basulto* (5th Cir. 1990) 898 F.2d 1011,1013; *U.S.* v. *Perez* (9th Cir. 1994) 37 F.3d 510, 516
[124] See *Arizona* v. *Hicks* (1987) 480 U.S. 321, 326; *People* v. *Miller* (1999) 69 Cal.App.4th 190, 203.
[125] See *People* v. *Lewis* (1999) 74 Cal.App.4th 662, 673; *People* v. *Palmquist* (1981) 123 Cal.App.3d 1, 15; *People* v. *McCarter* (1981) 117 Cal.App.3d 894, 908.

Testifying in Court

What makes an officer an effective witness in court? That was the question we posed to several experienced and highly regarded judges, prosecutors, private defense attorneys, and officers. Their answers, which are the subject of this article, were particularly interesting because they were so similar. There was virtually total agreement on what helps—and what hurts—an officer's effectiveness in court. It was also interesting, but not surprising, that everyone we interviewed stressed one characteristic in particular that gives weight to an officer's testimony: professionalism.

It is apparent that the qualities associated with professionalism in the courtroom setting can be developed. Although a particular officer's personality may make him more likeable, the overall impact of his testimony seems to depend more on attributes that can be cultivated. In fact, the officers we interviewed—all of whom are known as effective witnesses—emphasized that they have worked, and continue to work, to develop their courtroom skills.

Be prepared

Everyone we interviewed stressed the importance of preparedness. Said one officer, "I think many of the problems with officers' testimony are caused by the officers themselves—they're just not prepared."

The amount of preparation will depend on the complexity and seriousness of the case and the importance of the officer's testimony. For example, a homicide detective said he routinely takes his case files home at least one week before trial and reviews everything. A robbery detective said he likes to study the file and "try to plan how to respond to questions I think will be asked. It's like chess: What move is the defense attorney going to make?" While such extensive preparation is not always necessary, there are certain things that every officer should do before taking the witness stand.

Read police reports: According to one prosecutor, "An officer can't be an effective witness unless he has a command of the facts in his police report." This does not mean that officers should be able to repeat everything verbatim. As one officer pointed out, "You don't want to memorize things like license plate numbers and quotes from the victim or the defendant. It sounds rehearsed. Phony. If somebody asks me to quote something the defendant said, I want to look at my report so the jurors know they're getting exactly what he said, not my best recollection."

A defense attorney told us that the most ineffective witness he had ever cross-examined was an officer who took the stand without even scanning his report. "He came in late, so the DA didn't have time to talk to him. He kept confusing the facts in my case with the facts in another case. It wasn't pretty."

Note that an officer who is testifying in court may be permitted to review his police report before he answers a question if it would help refresh his memory. Officers must not, however, simply start reading the report whenever the answer to a question might be found there. Instead, they should ask for permission; e.g., "May I refer to my report?"

Read transcripts: If officers have given testimony in the case previously at, for example, a preliminary hearing or suppression hearing, they should obtain a copy of the transcript from the prosecutor and read it over carefully. This serves two purposes: It will help refresh their memory, and they may see something that was incorrect. If so, they should be sure to tell the prosecutor so that jurors will hear about the mistake from the prosecution, not the defense.

Impartiality

An officer's testimony will have significantly greater weight if he demonstrates an impartial, unbiased attitude. Conversely, an officer's credibility will suffer if it appears he has a personal interest in the outcome of the case. This does not mean that officers should appear uninterested, bored, or passive. It simply means they should convey the sense that their only objective is to present the facts. As a judge suggested, "Just state the facts and let the chips fall where they may." Another judge said, "Don't go into the courtroom carrying a torch or a spear. Just tell the truth. If an officer sticks to the truth, a defense attorney can cross-examine him until the building falls down—he won't accomplish anything."

This means, among other things, that officers must answer each question truthfully and completely even if it might hurt the prosecution's case. Said a prosecutor, "If an officer fudges on something he thinks will hurt the case, it will probably come out from other witnesses. Then the officer's credibility is shot." Following up on this theme, an officer said, "Don't worry about the verdict. Your main concern should be your credibility. When I'd testify as a expert in a drug case, if the DA asked, 'In your opinion does possession of six rocks of cocaine indicate possession for sale?' I'd say no, even if it meant the possession for sale charge was lost." Another officer said, "A defense attorney will sometimes ask a hypothetical question that could be answered either A (which helps the prosecution) or B (which helps the defense). Some officers will only answer A even if A and B are both plausible. This causes a loss of credibility."

EQUAL TREATMENT: Officers can also demonstrate impartiality by treating the prosecutor and defense attorney in the same manner. A detective noted that officers sometimes appear friendly and relaxed on direct examination, "but then the cross-examination starts and they suddenly become defensive. There may be a change in the tone of voice. They may move around in the chair, sort of squirming. This is body language. Don't do this. Speak to the defense attorney with the same demeanor and attitude as the DA."

A judge said he noticed that "some officers say 'yes, sir' to the DA, but with the defense attorney they'll say 'that's correct, counselor.' They're more stiff with the defense attorney." He added, "If the DA misstates something, the officer should correct him just as he would correct the defense attorney."

DON'T BE EVASIVE: An officer's credibility may also be hurt if he attempts to avoid answering an unambiguous question. Judges and jurors usually see this as an indication that the officer has an interest in the outcome of the case, and that the truth might help the defense. As a defense attorney explained, "If I'm trying to get an answer out of an officer and he won't give me one, he's doing me a favor." Another defense attorney said, "When an officer is evasive, he looks defensive. I will keep asking the question until I get a direct answer. I've asked the same question four times in a row. Eventually, I'll get an answer, but it makes a bad impression when an officer won't give me a straight answer."

DO NOT VOLUNTEER INFORMATION: Volunteering information, like trying to avoid answering a question, may hurt an officer's credibility because it may indicate to the jury that he is trying to "help" the prosecutor. According to a defense attorney, "An effective police witness just answers the questions then gets out. He doesn't get into long explanations. I like to think that when an officer goes beyond what is asked, I can accomplish something." A judge had this advice: "Don't overdo it. Answer the question, then stop. I truly feel that if an officer has three words to say it's better to say two than four."

EXPLAINING AN ANSWER: Although officers should not volunteer information which was not requested, they may seek permission to explain an answer if an explanation is necessary to prevent misunderstanding. Suppose a robbery victim told the officer that the perpetrator was "about six feet tall." He then looked closely at the officer, who was six feet tall, and added, "he was about two or three inches shorter than you." At the robber's trial, the defense attorney asks the officer, "Isn't it a fact that the victim told you that the robber was six feet tall?" Technically, the answer is yes. So, how should the officer respond? The people we interviewed emphasized that the officer should *not* say "yes," then quickly try to explain the rest of the victim's statement. Instead he should say something like, "The answer is yes, but with the court's permission I'd like to explain this answer to prevent misunderstanding." It would also be appropriate to simply answer "yes" and wait for the prosecutor to request an explanation on redirect.

DON'T DEMONSTRATE ANGER: Here is one of the most important things an officer can do on the witness stand: Don't demonstrate anger toward the defense attorney. It can be brutally difficult sometimes, but poise and self control are qualities that judges and jurors like to see in officers.

If the attorney is really obnoxious, here is something to keep in mind that might help resist the impulse to let it fly: Some defense attorneys will *try* to generate anger as a trial tactic. In the words of a judge, "Don't ever get angry with a defense attorney. They're doing this for a purpose. They're trying to bait you." Said another judge, "When an attorney is making you mad, don't give in. He's now going to manipulate you by building on your emotions. Your anger will keep you from thinking clearly. If he can

get your goat, he's winning. But if he gets angry and you don't, *you* win. Another judge put it this way, "If a defense attorney gets argumentative, keep cool. There's no point in having two fools in the courtroom."

DON'T GET SARCASTIC: Instead of demonstrating outright anger, officers will sometimes respond by getting sarcastic or irritable. This, too, must be avoided. "Where officers get into trouble," said a judge, "is when they start answering a defense attorney by saying something like, 'Of course I did,' or 'As I've already told you.' Or, if the attorney asks a question like, 'Why did your partner go into the store?' answering, 'Well, I don't know. You'd better ask *him*.'"

"I DON'T KNOW": An officer who does not know the answer to a question should just say so. There is nothing wrong with answering, "I don't know" or "I can't remember." As a judge explained, "Some officers I don't trust. Others I tend to trust because they've said, 'I don't know' or 'I didn't see it.'" A prosecutor put it this way, "There's a myth that an officer on the stand has to answer every question, has to know everything."

A defense attorney agreed, saying, "I remember a case where there'd been a lot of muggings in a park, so this officer was sent in as a decoy, dressed as a bum. He was leaning against a tree when my client grabbed a $20 bill from his pocket. I didn't have much of a defense, so at the trial I asked him, 'You say you were leaning against a tree. What kind of tree was it?' It didn't matter, of course, but instead of just saying 'I don't know,' he became totally unglued and stammered, 'It . . . it . . . it was a *wooden* tree!'"

"I DON'T UNDERSTAND": Attorneys frequently ask confusing questions. Sometimes they do it on purpose to try to confuse the witness. An inspector pointed out that some officers will not say they do not understand a question because "they think it sounds foolish. They're concerned that the attorney will belittle them by responding, 'Well, what part of my question don't you understand?' or 'Will the court reporter please read back my question for the officer?' But it's still better to say 'I don't understand' than try to guess. Besides, the jurors probably didn't understand either, so the attorney's attempt to belittle the officer will usually backfire."

Avoiding traps

There are various ways in which defense attorneys might try to reduce an officer's effectiveness as a witness. The following are fairly common.

CROSS-EXAMINATION ABOUT POLICE REPORTS: Defense attorneys often try to undermine an officer's credibility by pointing to differences between his testimony in court and something he wrote in his police report. Or they might note that the officer testified to something that was not included in his report. This happens a lot because police reports are not intended to provide a comprehensive narrative of something that happened or was said. As the Court of Appeal observed, "What trial judge cannot attest that officers often remember facts on the stand which they neglected to put in their police reports?"[1]

So when this happens the thing to remember is this: Don't become defensive. If there was an error in the police report, admit it. If something was inadvertently omitted, say so. It might be difficult to do this in open court, but it's a lot better than trying to cover up or make excuses. An inspector observed, "One of the hardest things for officers is to admit a mistake. Why? One reason is they're afraid the jurors or the judge won't believe anything they say. But everyone makes mistakes." A defense attorney put it this way, "All important facts should be in the police report. If not, it may look like the officer is inventing it. If something was omitted which turned out to be important, be humble. 'I screwed up.'" Another attorney said, "Of course officers don't put everything in their police reports. It's not meant to be a report of every jot and tittle that came along. I don't think an officer should be defensive about putting everything in."

An inspector noted that officers sometimes "lose it" when attorneys start questioning them about their police reports. "The attorney may say, 'Now you received training in writing police reports. This is a copy of your report. Can you show me where I can find the information you just testified to?' If it's not in the report and it's not vital information, I'll try to explain that the purpose of the report is simply to describe basically what happened, to provide enough information to establish PC or to get the case charged. And we put in enough so we can recall what happened." A judge agreed: "It's okay for an officer to explain that the purpose of a police report is to cover

[1] *People* v. *Wilson* (1986) 182 Cal.App.3d 742, 752.

the important details, not every conceivable detail. But if you really made a mistake, admit it. Everyone can sympathize with a mistake, but not a cover-up."

"DID YOU TALK TO THE DA?" Some defense attorneys routinely ask officers if they talked to the prosecutor or other officers before testifying in court. They usually do this to suggest that the officer was coached by the prosecutor, or that he met with other officers to "get their stories straight." Again, the thing to remember is don't get defensive. There is nothing wrong with talking to prosecutors and other officers about a case. So if the answer is yes, say so—and do not feel compelled to offer any explanations or excuses. According to a defense attorney, "It's okay to talk to the prosecutor and other officers about a case before testifying. There's nothing sinister about it."

REPEATED QUESTIONS: An attorney might try to cause an officer to give an inconsistent answer by asking the same question several times with minor changes. According to an inspector, "Some attorneys will ask a question three or four times. Essentially it's the same question but there's a little change in the language. They're trying to get a 'yes' answer to a question which was previously answered 'no.'"

REPEATED ANSWERS: An attorney might ask a series of questions which, for one reason or another, the officer cannot answer. In these situations, officers should try to avoid giving the same response to each question. For example, an officer who immediately responds "I don't recall" or "I don't remember" to a series of questions may be viewed as being evasive or uncooperative. Instead, officers should give each question some thought and try to respond as directly as possible. For example, instead of saying "I don't recall," they might say "I wasn't looking at that."

SUMMARIZING PREVIOUS TESTIMONY: Officers should be alert when a defense attorney asks a question that begins with a summary of their previous testimony; e.g., "Earlier you testified that . . ." The danger is that the attorney may deliberately or negligently misstate the officer's earlier testimony. If so, and if the officer answers the attorney's question, it may appear that he agrees with the attorney's summary. As a prosecutor observed, "A defense attorney will sometimes paraphrase what the officer said earlier, but it's somewhat incorrect. So listen carefully, and if he misstates it say, 'That's not what I said.' Don't think, 'Well, that's close enough.'" An officer remembered a 1538.5 hearing in which he testified that he stopped a car because it matched the description of a getaway car in a robbery. "I had testified I stopped the car because it was a blue Cadillac with a red stripe. On cross-examination the attorney said, 'You testified that you stopped my client because he was riding in a blue car.' I responded, 'That's not what I said.'"

Plain English

There is virtually nothing that turns off a judge or jury as much as hearing an officer testify in that stuffy, military-type style known a "police-speak." This point was raised—and emphasized—by every person we interviewed. It's *that* important.

This manner of speaking is characterized by the use of words and phrases that are unnatural and too formal, in place of words and phrases that are simple and direct. Thus, in *United States* v. *Marshall* it was apparent that the judges who decided the case had become frustrated having to read a transcript filled with "police-speak." Said the court:

> The agents involved speak an almost impenetrable jargon. They do not get into their cars; they enter official government vehicles. They do not get out of or leave their cars, they exit them. They do not go somewhere; they proceed. They do not go to a particular place; they proceed to its vicinity. They do not watch or look; they surveil. They never see anything; they observe it. No one tells them anything; they are advised.[3]

Some other examples:

- "I exited my patrol car." (I got out of my car.)
- "I proceeded northbound." (I went north.)
- "I activated my emergency equipment." (I turned on my red lights and siren.)
- "I effectuated a right turn." (I turned right.)
- "That is correct." (Yes.)

As a judge pointed out, "It helps if an officer is relaxed on the stand, talking like a real human being. Jurors don't warm up to officers who talk in this strange language. An officer comes across as cold, lacking personality and feeling." POV

[3] (9th Cir. 1973) 488 F.2d 1169,1171, fn.1. ALSO SEE *People* v. *Morrongiello* [nonpublished decision originally at (1983) 145 Cal.App.3d 1, 8 ["We do not know if the police academy teaches officers to speak in such stilted language or whether they are infected with a flair for the circumlocutory once they take to the field."]. **NOTE**: This article first appeared in 1991 and was reprinted in 1997.

Recent Cases

People v. Stier

(2008) 168 Cal.App.4th 21

Issue

Did an officer have sufficient grounds to handcuff a detainee?

Facts

After witnessing a narcotics transaction involving the occupants of a pickup truck, DEA agents asked two San Diego police officers to make a traffic stop on the truck if the driver committed a Vehicle Code violation. The officers located the truck in a "high gang, high narcotics" area and, having noticed an equipment violation, they signaled the driver to stop.

As the car pulled over, the front passenger immediately got out and started walking away. One of the officers detained her and asked if she was carrying anything illegal. She said she was carrying drugs. The officer seized the drugs and notified his partner who asked the driver, Todd Stier, to step out. As he did so, the officer was "taken aback" by Stier's height, 6'6". The officer, who was about 6'1", testified that he "felt uncomfortable" with the height differential because, even though Stier was "very easygoing," he knew that drug users and dealers sometimes carry weapons. So he handcuffed him.

The officer then obtained Stier's consent to search his person. In the course of the search, he found a "large amount" of methamphetamine in Stier's pocket. After Stier's motion to suppress the evidence was denied, he was convicted of transporting methamphetamine.

Discussion

Stier argued that the methamphetamine should have been suppressed because, although the traffic stop was lawful, and although he had consented to the search, the detention became an illegal de facto arrest when the officer handcuffed him. The court agreed.

Officers who have detained a person may, of course, take reasonable precautions for their safety. But if a court finds that their precautions were not reasonably necessary, the detention may be deemed a de facto arrest, which is an illegal arrest unless probable cause existed. Summarizing the rule, the Eighth Circuit said, "[A] de facto arrest occurs when the officers' conduct is more intrusive than necessary."[1]

Consequently, handcuffing a detainee will not convert a detention into a de facto arrest unless it was unnecessary under the circumstances. As the court in *Stier* noted, "[B]ecause a police officer may take reasonable precautions to ensure safe completion of the officer's investigation, handcuffing a suspect during a detention does not necessarily transform the detention into a de facto arrest. The issue is whether the handcuffing was reasonably necessary for the detention."

The court then ruled that handcuffing Stier was not reasonably necessary because, according to the court, the officer did so "primarily because Stier was four to five inches taller than [the officer] and [the officer] 'felt uncomfortable' about the height differential." Consequently, it ruled the methamphetamine in Stier's possession should have been suppressed.

Comment

The court in *Stier* began its discussion by saying that a lawful investigative detention will become an unlawful de facto arrest unless, in the words of the court, the officers utilized the "least intrusive means available under the circumstances." It appears the court was unaware that the United States Supreme Court abandoned the "least intrusive means" test almost 25 years ago. As the Court explained in *United States* v. *Sharpe,* "The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it."[2] More recently, the Court pointed out that the "least-restrictive-alternative limitation" is

[1] *U.S.* v. *Bloomfield* (8th Cir. 1994) 40 F.3d 910, 916-17. ALSO SEE *Dunaway* v. *New York* (1979) 442 U.S. 200, 212.
[2] (1985) 470 U.S. 675, 687.

"generally thought inappropriate in working out Fourth Amendment protection."[3]

Because the court in *Stier* was apparently unaware of this rule, it concluded that the detention was unlawful because it had discovered a less intrusive means by which the officer could have protected himself from Stier—*he could have pat searched him*. Said the court, "[The officer] did not pat Stier down for weapons before deciding whether to use handcuffs during the detention. A pat down, while also intrusive, would have been less intrusive than handcuffing . . . ." (The court did not, however, provide any authority or analysis for its pronouncement that temporarily handcuffing a detainee is more intrusive than pat searching him.)

It appears the court in *Stier* was also unaware of the principle that, in assessing the dangerousness of a detention, the courts should view the circumstances through the eyes of the officer who actually faced the danger—not through the eyes of someone who is reading about it in a transcript. As the U.S. Supreme Court pointed out:

> A court making this assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing. A creative judge engaged in post hoc evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished.[4]

Having also been unfamiliar with this principle, the court dismissed the officer's testimony that he "felt uncomfortable" about the height differential.[5] Instead, it focused on the officer's testimony that Stier appeared to be "very easygoing" and "very mellow" which, in the eyes of this court, rendered him harmless. Even more absurd than the court's conclusion that easygoing and mellow suspects are unlikely to pose a threat to the officers who are detaining them, the court failed to comprehend that Stier's "mellowness" was nothing but an act. After all, he was carrying a "large amount" of methamphetamine which, if discovered, could have landed him in prison. Thus, while the court viewed Stier as a harmless and "easygoing" fellow, in reality he was a panic-stricken felon who would have viewed the officer as an severe threat.

There's more. In its analysis, the court considered only the officer's stated reason for handcuffing Stier; i.e., "Because of [his] height." Yet, the United States Supreme Court has repeatedly instructed the lower courts that the reasonableness of an officer's conduct must be based on all of the objective circumstances confronting the officer—not just the circumstances cited by the officer at a hearing on a motion to suppress. As the Court observed in *Brigham City* v. *Stuart*, "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."[6] Or, as the Second Circuit recently noted in *U.S.* v. *Klump*, "Thus, even if the agents' subjective motives in entering the warehouse could be so neatly unraveled, they simply do not matter."[7]

If the court in *Stier* had examined the various objective circumstances surrounding the detention, it might have been more understanding of the officer's predicament: there were three people in the truck, they had just taken part in a drug transaction wit-

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[3] *Atwater* v. *City of Lago Vista* (2001) 532 U.S. 318, 350. ALSO SEE *United States* v. *Sokolow* (1989) 490 U.S. 1, 11 ["The reasonableness of the officer's decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques."]; *People* v. *Bell* (1996) 43 Cal.App.4th 754, 761, fn.1 [the U.S. Supreme Court has "repudiated any 'least intrusive means' test for commencing or conducting an investigative stop"].

[4] *United States* v. *Sharpe* (1985) 470 U.S. 675, 686-67.

[5] **NOTE**: The court even made a snide comment in a footnote that Stier was "thin" and that "[n]othing in the record indicates [the officer] was concerned about Stier's weight or bulk."

[6] (2006) 547 U.S. 398, 404. ALSO SEE *Terry* v. *Ohio* (1968) 392 U.S. 1, 21-22 ["[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?"]; *Maryland* v. *Macon* (1985) 472 U.S. 463, 470-1 ["Whether a Fourth Amendment violation has occurred turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time, and not on the officer's actual state of mind at the time the challenged action was taken."].

[7] (2nd Cir. 2008) 536 F.3d 113, 119.

nessed by DEA agents, and one of them had just attempted to flee with a quantity of illegal drugs. The court might even have taken note that drug users and dealers are often violent, often armed, and often unpredictable. As the California Supreme Court pointed out, "In the narcotics business, firearms are as much 'tools of the trade' as are most commonly recognized articles of narcotics paraphernalia."[8]

We can only hope the California Supreme Court sees fit to review this dreadful opinion.

People v. Sweig

(2008) 167 Cal.App.4th 1145

Issues

(1) After taking the defendant into custody on a 5150 hold, did officers have sufficient grounds to enter his home to seize a rifle? (2) Can officers obtain a warrant to search a residence for firearms because a 5150 hold has been placed on an occupant?

Facts

Shasta County sheriff's deputies were dispatched to a 911 hangup call from a mobile home occupied by Sweig. The deputies had encountered Sweig before, and they knew he was mentally unstable. In fact, his mother had reported earlier that he believed that law enforcement officers had "done him wrong" and that if he was "pulled over by the cops" he was going to "take them out."

When they arrived at the home, the deputies found Sweig standing on the porch holding a rifle. They ordered him to drop it, but instead he went inside for awhile, then walked back out—without the rifle.

After detaining him, the deputies quickly determined that he was deranged. Among other things, he said he had called 911 because some people were "banging" on the side of his home and shooting him with "laser lights" which emitted radiation. He also said he had fired his rifle to "make the people leave," but one of them was still somewhere on the premises. "There's one now with the flashlight" he shouted, as he pointed at empty space.

Having concluded that Sweig presented a danger to himself or others, and thus qualified for a commitment under section 5150 of the Welfare and Institutions Code, the deputies convinced him to voluntary accompany them to the hospital. But first, they decided to confiscate his rifle. So they entered the home, seized the weapon in the kitchen, and looked around for other firearms. There were several, including an illegal assault rifle under the bed.

Sweig was subsequently charged with possession of the assault rifle, but the charge was dismissed when the court granted his motion to suppress it on grounds that the deputies' warrantless entry into his home was unlawful.

Discussion

The People contended that the deputies' entry was lawful under the "community caretaking" exception to the warrant requirement. The court disagreed.

COMMUNITY CARETAKING: The courts use the term "community caretaking" to describe a type of exigent circumstance that, while not a true emergency, requires an immediate response by officers, oftentimes an entry into a residence. Examples include welfare checks, insecure buildings, unattended children on the premises, and water leaks.[9] As might be expected, there is no simple test for determining whether a situation justifies an entry or search under the community caretaking rationale. Instead, the courts seem to permit them if the following circumstances existed:

(1) **Legitimate need**: There must have been a legitimate "caretaking" need for entering.
(2) **Not a pretext**: The officers' motivation for entering or searching must have been to defuse the situation, not to obtain evidence of a crime.[10]
(3) **Measured response**: The officers must have limited their actions to those that were reasonably necessary.

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[8] *People* v. *Glaser* (1995) 11 Cal.4th 354, 367. ALSO SEE *People* v. *Thurman* (1989) 209 Cal.App.3d 817, 822.

[9] See *Cady* v. *Dombrowski* (1973) 413 U.S. 433, 441 [officers must "engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."]; *Illinois* v. *McArthur* (2001) 531 US 326, 330 ["When faced with special law enforcement needs ... the Court has found that certain general, or individual circumstances may render warrantless search or seizure reasonable."].

[10] See *Brigham City* v. *Utah* (2996) 547 US 398, 405 ["[I]n the context of programmic searches conducted without individualized suspicion . . . an inquiry into *programmic* purpose is sometimes appropriate."].

In *Sweig*, it was the first requirement that presented a problem. "As we understand the community caretaking exception," said the Court of Appeal, "there must be some *necessity* for a warrantless entry into a residence to fulfill a purpose of the exception." But in this case there was no immediate necessity because Sweig no longer had access to any weapons. As the court pointed out:

> [Sweig] was detained outside the residence and placed in a patrol car for transportation to a mental health facility where he would be held in custody for a minimum of 72 hours. Nothing suggested to the officers that it was necessary for them to make a warrantless entry into the residence to confiscate the rifle and additional firearms or other deadly weapons, rather than seek a warrant to do so.

Consequently, the court ruled the deputies' warrantless entry into Sweig's home could not be upheld under the community caretaking exception, and therefore the rifle should have been suppressed.

A 5150 SEARCH WARRANT? Under California law, the deputies were required to seize all of Sweig's firearms. Specifically, section 8102 of the Welfare and Institutions Code states that if officers place a 5150 hold on a person, and if the person "is found to own, have in his or her possession or under his or her control, any firearm whatsoever, or any other deadly weapon," the officers must confiscate it. But section 8102 does not authorize judges to issue warrants to enter the person's home to search for or seize such weapons. Nor does the Penal Code.[11] Thus, the deputies who had detained Sweig were caught in a classic Catch-22 situation.

Calling this state of affairs an "obvious oversight," the court urged the legislature to fix it. "The flaw in the statutes," explained the court, "is that the legislative scheme does not provide a constitutionally permissible way for law enforcement to confiscate a firearm or other deadly weapon when it is in the residence of the mentally disordered person who is detained outside the residence and there is no exigent circumstance or other basis for a warrantless entry into the residence."

U.S. v. Boskic

(1st Cir. 2008) 545 F.3d 69

Issue

Did federal agents engage in a coercive interview tactic by lying to the defendant about the purpose of their interview?

Facts

A war crimes investigator obtained information that Boskic, while serving with the 10th Sabotage Detachment of the Serb Republic, had participated in the so-called "military farm massacre" of over 8,000 people in Bosnia and Herzegovina. He also learned that Boskic had immigrated to the United States and was currently living in Massachusetts. The investigator notified federal agents who were assigned to the Joint Terrorism Task Force in Boston.

Hoping to obtain a confession or admission, the agents devised a plan whereby they would meet with Boskic in the federal building to ostensibly discuss his immigration status. Then, at some point during the meeting, they would confront him with the evidence against him. Meanwhile, they determined that Boskic had lied on his immigration application when he failed to disclose his criminal record and service with the Sabotage Detachment.

During the interview, Boskic denied that he had a criminal record in Bosnia, and he denied fighting in the Bosnian war. When an agent told him that he knew about his criminal record, Boskic responded by saying the charges had been fabricated by Muslims. About then, the war crimes investigator entered the room, said he was investigating the military farm massacre, and explained that he knew Boskic had served with the Sabotage Detachment. And to prove it, he showed him a videotape of Boskic participating in one of the Detachment's awards ceremonies. The investigator then told Boskic that he was not the target of his investigation, at which point Boskic decided to cooperate by describing his involvement in the massacre.

Boskic's statements were used against him at his trial on charges of making false declarations on immigration documents, and he was convicted.

[11] See Pen. Code § 1524(a).

Discussion

Boskic contended that his statements should have been suppressed because they were involuntary. What made them involuntary, he said, was that the agents and war crimes investigator "misled him as to the true nature of their investigation," and that they engaged in a "carefully contrived and executed plan" to deceive him into believing he was not the target of any investigation. While Boskic was certainly deceived, the court ruled it did not render his statements involuntary.

A statement is involuntary if officers obtained it by means of coercion, such as violence or threats. Thus, the United States Supreme Court explained that a statement is involuntary and will be suppressed if it was obtained "by techniques and methods offensive to due process, or under circumstances in which the suspect clearly had no opportunity to exercise a free and unconstrained will."[12]

Mere deception, however, seldom has this effect because tricking someone into making a statement is a far cry from coercing him into doing so. As the Court explained in *Illinois* v. *Perkins,* there is nothing inherently coercive about "mere strategic deception."[13] Similarly, the California Supreme Court noted that "[n]umerous California decisions confirm that deception does not necessarily invalidate a confession."[14] For example, the courts have ruled that the following lies were not coercive:

- A witness saw the suspect leaving the victim's home on the night of the murder.[15]
- The suspect's fingerprints had been found on the victim's neck.[16]
- The victim positively identified the suspect.[17]
- The suspect's accomplice had confessed.[18]

Deception may, however, result in an involuntary statement if the nature of the deception was such that it was reasonably likely to have produced a false admission or confession.[19] But this will not happen unless the suspect's mind was so disordered that he was unusually susceptible to the influences of others. Under those circumstances, the suspect's lack of confidence in his mind's ability to apprehend reality may cause him to eventually accept the officers' repeated lies as the truth.[20]

In light of these principles, it was apparent that the deception utilized by the agents and investigator in *Boskic* were not likely to produce an untrue statement, especially considering Boskic's lucid mental state. As the court pointed out:

> Here, there were no such extrinsic factors that distorted Boskic's judgment . . . . Although the fact that the agents allowed him to believe that he was not under investigation may have made him less guarded and self-protective, that deception alone did not make his statements involuntary.

Accordingly, the court ruled that Boskic's statements were properly admitted into evidence.

Doody v. Schriro

(9th Cir. 2008) __ F.3d __ [2008 WL 4937964]

Issues

(1) Was the defendant's confession to nine murders obtained in violation of *Miranda*? (2) Was the confession voluntary?

Facts

Johnathan Doody, Alessandro Garcia, and possibly one other young man armed themselves with a rifle and other firearms; broke into a Buddhist temple

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[12] *Oregon* v. *Elstad* (1985) 470 U.S. 298, 304.
[13] (1990) 496 U.S. 292, 297.
[14] *People* v. *Thompson* (1990) 50 Cal.3d 134, 167. ALSO SEE *People* v. *Maury* (2003) 30 Cal.4th 342, 411 ["Deception does not necessarily invalidate an incriminating statement."].
[15] *People* v. *Richardson* (2008) 43 Cal.4th 959, 992.
[16] *People* v. *Farnam* (2002) 28 Cal.4th 107, 181-82; *People* v. *Musselwhite* (1998) 17 Cal.4th 1216, 1240.
[17] *People* v. *Pendarvis* (1961) 189 Cal.App.2d 180, 186; *Amaya-Ruiz* v. *Stewart* (9th Cir. 1997) 121 F.3d 486, 495.
[18] *Frazier* v. *Cupp* (1969) 394 U.S. 731, 739.
[19] See *People* v. *Farnam* (2002) 28 Cal.4th 107, 182 ["Where the deception is not of a type reasonably likely to procure an untrue statement, a finding of involuntariness is unwarranted."]; *People* v. *Lee* (2002) 95 Cal.App.4th 772, 785 ["[D]eception which produces a confession does not preclude admissibility of the confession unless [it] is of such a nature to produce an untrue statement."].
[20] See *People* v. *Hogan* (1982) 31 Cal.3d 815; *People* v. *Esqueda* (1993) 17 Cal.App.4th 1450, 1485-87.

near Phoenix, Arizona; herded the residents—six monks, an elderly nun, and two male followers—into the living room; lined them up and started shooting. They were all killed. As one Arizona newspaper described it, "Perhaps not since the Manson family crawled out of the desert has there been a crime scene as horrible."

Having recovered the rifle, detectives with the Maricopa County Sheriff's Department learned that Doody, then 17-years old, had borrowed it from a friend before the murders. They located Doody that evening at a high school football game, and he agreed to accompany them to the sheriff's station to discuss the matter.

The interview began at 9:25 P.M. Before advising Doody of his *Miranda* rights, one of the two detectives in the interview room explained the purpose of the *Miranda* warning:

> [S]ince we're in kind of a formal setting . . . what I'd like to do is before we, we go into that is read something to you and, so that you understand some of the protections and things that, that you have. It's not meant to scare you or anything like that. Don't, don't take it out of context, okay? . . . I don't want you to feel that because I'm reading this to you that we necessarily feel that you're responsible for anything. It's for your benefit, it's for your protection and for ours as well.

After the detective read each right, he confirmed with Doody that he understood that right. Doody then initialed a *Miranda* waiver form and agreed to speak with the detectives without a parent or attorney present.

At first, Doody denied that he had borrowed the murder weapon, but after about an hour he said he thought that Garcia might have borrowed it. About one hour after that, he admitted that both he and Garcia had borrowed the rifle, but claimed he had returned it before the murders. He continued to deny any involvement in the killings.

For about 45 minutes—between 2:45 A.M. and 3:30 A.M.—Doody stopped answering questions. Although he did not invoke his right to remain silent, he just stopped answering. During this time, according to the court, the detectives did the following:

- Asked him 12 times who had planned the murders: No response.
- Asked him 14 times whether one of his friends had planned it: A denial to one of the questions, no response to the others.
- Asked him 25 times whether he was present at the temple: No response.

In urging Doody to respond, the detectives were, according to the Arizona Court of Appeal, "courteous, [and] almost pleading," although the Ninth Circuit said "their tones at times were far from pleasant. Indeed, their tones varied from 'pleading' to scolding to sarcastic to demeaning to demanding." In any event, during the period in which Doody was not answering their questions, the detectives said such things as:

- You have to tell us.
- We have to know; you have to let us know.
- Answer, Johnathan, answer.
- I'm going to stay here until I get an answer.
- You've got to answer me.
- Now, you start talking to me.
- Tell me, John. Talk to me, John.
- Don't sit there like that, talk to me.

At about 3:30 A.M., a detective asked Doody once again if he had been "involved" in the murders—but this time he said "yes." As the interview continued, Doody continued to ignore some questions, and would answer others with just one word. But then, at about 4 A.M., he began talking about the murders "in narrative fashion." Among other things, he admitted that he, Garcia, and one other person herded the monks, the nun, and the others from their rooms to the living room where they murdered them.

Doody's statements were used against him at his trial, and he was convicted of nine counts of first-degree murder.

Discussion

On appeal to the Ninth Circuit, Doody argued that his statements should have been suppressed because, (1) they were obtained in violation of *Miranda*, and (2) they were involuntary. Although the court was highly critical of the manner in which the detectives obtained a *Miranda* waiver from Doody, it ultimately ruled that the detectives' conduct did not warrant reversal of the state court's ruling that they had complied with *Miranda*. It did, however, rule that Doody's statements were involuntary, and that they should have been suppressed.

MIRANDA: Although Doody was advised of his *Miranda* rights, said he understood them, and expressly waived them, the court felt there was a "troubling subtext" throughout the warning process that would have caused Doody to believe that the warnings "were merely a formality" and "a meaningless bureaucratic step." This conclusion was based on the detectives having told Doody the following:

- The warnings are "not meant to scare you."
- "[You] should not take [the warnings] out of context."
- "I don't want you to feel that because I'm reading this to you that we necessarily feel that you're responsible for anything."

The court also said the detectives delivered the *Miranda* warnings in an "excessively casual" manner, and they implied that Doody was not a suspect.

In the court's view, all of these things sent Doody a "clear message" that he "need not take the warnings seriously and should waive his rights." Nevertheless, it concluded that the detectives' conduct was not so objectively unreasonable as to warrant a reversal on that ground alone.

VOLUNTARINESS: A statement is involuntary if it was obtained "by techniques and methods offensive to due process, or under circumstances in which the suspect clearly had no opportunity to exercise a free and unconstrained will."[21] But because the purpose of the *Miranda* procedure is to reduce the coerciveness that is inherent in police interrogations, the courts rarely suppress statements on grounds of involuntariness if the officers had obtained a valid waiver. Thus, the United States Supreme Court observed that *Miranda* waivers have "generally produced a virtual ticket of admissibility," and "litigation over voluntariness tends to end with the finding of a valid waiver."[22]

Nevertheless, the court ruled that Doody's statements were involuntary for the following reasons:

(1) **Lax *Miranda* compliance**: The detectives' compliance with *Miranda* was "weak."
(2) **Length of interview**: Doody was questioned for several hours before he confessed.
(3) **Threat to continue questioning**: By telling Doody he was required to answer their questions, the detectives led him to believe "they would continue relentlessly questioning him until he told them what they wanted to hear."
(4) **Doody was "vulnerable"**: Doody was "particularly vulnerable" because he was 17 years old, he claimed he had never been arrested before, and there were no "friendly" adults in the room.

Thus, the court reversed Doody's conviction, saying his statements should have been suppressed.

Comment

As noted, the court was highly critical of the manner in which the detectives advised Doody of his *Miranda* rights. Although the court acknowledged that "each required warning was technically delivered correctly," it felt there existed a "troubling subtext" in which the detectives downplayed the importance of the *Miranda* protections. As the result of this "subtext," the court said it had "little comfort" that Doody actually understood "what was at stake."

In particular, the court complained that the detectives delivered a "flimsy version" of the warnings by telling Doody that the warnings were "not meant to scare you"; that he should not take them "out of context"; and that he should not feel that, by giving him a *Miranda* warning, they believed he was guilty. But not only were each of these statements unquestionably true, the only apparent "subtext" is that the detectives were trying to make Doody feel more relaxed. That the court would view this as "troubling" is bizarre, especially considering that the court spent most of its opinion complaining that detectives said things that might have made him anxious.

The court also claimed that the *Miranda* warnings given to Doody "did little actually to inform him, a seventeen-year-old who had never heard of *Miranda,* of the importance of his rights." Although Doody acknowledged that he understood each of his rights and had expressly waived them, the court felt that the detectives should have taken additional steps to make him "more acutely aware that he is faced with

[21] *Oregon* v. *Elstad* (1985) 470 US 298, 304.
[22] *Missouri* v. *Seibert* (2004) 542 U.S. 600, 608.

a phase of the adversary system—that he is not in the presence of persons acting solely in his interest." Other than the three judges who decided this case, there is probably no one on the planet who would have believed that Doody was under the impression that the detectives were "acting solely in his interest."

Furthermore, the court's act of rewriting the established *Miranda* warning—to require an additional admonition if the suspect is tense or thinks he might be in the presence of adversaries—constitutes a display of judicial arrogance that is stunning, even for a court with a sordid history of presumptuous conduct.

In ruling that Doody's statements were involuntary, the court said that the interview lasted for "more than twelve unbroken hours, embracing an entire night." This was nothing but melodrama. After only one hour or so, Doody admitted that he knew about the murder weapon (i.e., he knew Garcia might have borrowed it), and about one hour after that he admitted that he—Doody—had borrowed the weapon before the murders. Then, at about 4 A.M., he began discussing his participation in the murders. Thus, while the entire interview lasted about 12 hours, Doody made his most incriminating admissions after about six hours. Furthermore, as the court acknowledged, Doody was offered "food, drink, and bathroom breaks several times during the night."

One recurring theme in the court's decision was that Doody was a "sleep-deprived juvenile" who was experiencing "inevitable fatigue" at 3 A.M. While a federal judge might be "inevitably fatigued" at that hour, that is hardly the case for a 17-year old. Furthermore, any fatigue that Doody might have experienced would have been offset by the inevitable adrenaline rush that would have begun early on when his statements about the murder weapon were exposed as lies, and he suddenly realized that he would probably spend the rest of his life in prison.

Thus, one of the detectives testified that Doody never "displayed any real overt sign of being fatigued or tired," and another testified that, when Doody first confessed his involvement in the murders, he was "alert" and was "sitting upright and erect." Unlike the Ninth Circuit, the Arizona Court of Appeals credited this testimony, concluding that Doody "remained alert and responsive throughout the interrogation and did not appear overtired or distraught."

Admittedly, there were some troubling aspects to the interrogation. Officers should not *insist* that suspects answer their questions. But if Doody had wanted to stop the interview, he could have said so. He knew he had that right.

Throughout its opinion, the Ninth Circuit attempted to portray Doody as the defenseless victim of police overreaching. In fact, its ruling was based mainly on its conclusion that Doody was, in the court's words, "particularly vulnerable." *Vulnerable?*

For one thing, it would have been more fitting for the court to have used the word "vulnerable" to describe the nine innocent people who were slaughtered by Doody. But more to the point, this remorseless killer had planned and participated in the cold-blooded execution of nine men and a woman in a Buddhist temple!Any person who is capable of such a monstrous crime is fully capable of enduring a few hours of "pleading" by officers.[23]

People v. Munoz

(2008) 167 Cal.App.4th 126

Issue

Did the occupants of a motel room have a right to privacy after paying for the room with counterfeit money?

Facts

The manager of a motel in Garden Grove called the police and reported that one of his guests had just passed a counterfeit $20 bill. He explained to the responding officers that a woman named Alma Munoz had rented a room on a day-to-day basis about six days earlier, and that he had just gone to the room to collect the day's rent of $45. He said that Munoz paid with two $20s and one $5 but, as he was walking back to the office, he noticed that one of the $20s appeared to be counterfeit. An officer confirmed the manager's

[23] **NOTE**: Even in the absence of Doody's confession, there was sufficient proof that he was the killer for this circumstance to be considered in determining the voluntariness of his confession. For example, his accomplice (Garcia) testified that Doody planned the killings to get money to buy a car. Shortly after the murders, Doody did, in fact, buy a car. Three other witnesses testified that Doody told them he had committed the murders. ALSO SEE *U.S.* v. *Matlock* (1974) 415 U.S. 164, 178 ["[T]he controlling burden of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence."].

suspicions, although he testified that the bill "did not look obviously counterfeit."

The officers then went to Munoz's room and knocked on the door. They could hear water running inside and "some talking," but no one responded. So, after about two minutes of knocking and announcing, they entered with a passkey. It turned out that Munoz and a man named Gilbert Prado had been showering.

After getting dressed, Munoz said that she had obtained the currency from Prado, and that she didn't notice the counterfeit bill. She and Prado then consented to a search of the room. In the pocket of a pair of pants, the officers found $210 in cash, mostly $10s and $20s. It was apparent that three of the $20s were counterfeit as they all had the same serial number, which was also the same as the bill Munoz had given the manager. Consequently, Munoz and Prado were charged with possession of counterfeit currency. But the charges were dismissed when their motion to suppress the evidence was granted on grounds that the officers' entry into the room was unlawful.

Discussion

On appeal, prosecutors argued that the motion should have been denied because people who pay for motel rooms with counterfeit currency cannot reasonably expect privacy in the room. The court disagreed.

It is settled that people who rent motel rooms have the same privacy rights as the occupants of homes. But their expectation of privacy may be lost if, (1) it reasonably appeared that they knew their payment for the room was bogus, and (2) motel management had decided to evict the guest and had taken some affirmative step to do so.[24] Thus, the issue in *Munoz* was whether these two requirements were satisfied.

ROOM OBTAINED FRAUDULENTLY: The first requirement is that the guest must have known that the innkeeper would probably not receive payment for the room. In the case of debit and credit cards, this requirement will usually be satisfied if the guest was not authorized to use the card, in which case the card company might not be required to honor it.

For example, in *People* v. *Satz*[25] the court ruled that the defendant had obtained a motel room fraudulently because she paid with an American Express card that she was not authorized to use; and, when confronted by the manager, she admitted she had no money to pay for the room. Similarly, in *United States* v. *Cunag*[26] the court ruled that Cunag obtained a motel room fraudulently when he paid for it with a MasterCard belonging to a woman who was dead.

But if the guest pays with counterfeit currency, it can be difficult to prove that he knew it was fake, especially if it looked real. Thus, the court in *Munoz* ruled that the defendant's act of making a partial payment with a counterfeit $20 bill did not, in and of itself, demonstrate that she knew the bill was phony because, as noted, the bill "did not look obviously counterfeit" and, thus, it was reasonably possible that Munoz had passed it innocently. As the court explained, "A motel occupant who unknowingly pays for her lodging with counterfeit money, and without any intention to defraud, does not lose her reasonable expectation of privacy in the room."

EVICTION: Even if the bill was obviously counterfeit, the court noted that the officers' entry still might have been unlawful because the manager had not taken steps to evict Munoz by, for example, asking the officers to stand by while he ordered her to leave. As the court noted, the motel manager's knowledge that he had grounds to evict her "was not the same thing as the motel actually choosing to do so. Even knowing that she had used a counterfeit bill for part of her payment, the motel could also have chosen to let her stay and make other payment arrangements."

Consequently, the court ruled that Munoz and Prado had a reasonable expectation of privacy in the room, and that the evidence was properly suppressed.

People v. Lucatero

(2008) 166 Cal.App.4th 1110

Issue

Under what circumstances may an officer pose as a prospective home buyer in order to see the interior of a suspect's home?

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[24] See *People* v. *Satz* (1998) 61 Cal.App.4th 322, 326; *U.S.* v. *Cunag* (9th Cir. 2004) 386 F.3d 888, 895; *U.S.* v. *Bautista* (9th Cir. 2004) 362 F.3d 584, 590; *U.S.* v. *Allen* (6th Cir. 1997) 106 F.3d 695, 699; *U.S.* v. *Dorais* (9th Cir. 2001) 241 F.3d 1224, 1228.

[25] (1998) 61 Cal.App.4th 322.

[26] (9th Cir. 2004) 386 F.3d 888.

Facts

After being arrested for possession of methamphetamine, a man told Porterville police that the seller lived in a pink house on Larson Street. He also said there were bags containing about four pounds of methamphetamine in the trunk of a green Nissan Altima parked in the detached garage. Although the house was currently vacant, he said that a man had been sleeping in the garage, and that he was using a sleeping bag that he kept on a wooden shelf.

An officer drove by the house and noticed a "For Sale" sign out front. So he called the real estate agent and, posing as a prospective buyer, arranged for a viewing. Accompanied by the agent, the officer took a tour through the house and confirmed there was a green Altima in the garage and a sleeping bag on a wooden shelf. As this information tended to demonstrate the reliability of the informant, the officer was able to obtain a warrant to search the premises.

Lucatero, who was apparently a guest, was inside when officers arrived. He was arrested after they found methamphetamine on his person and in an airbag compartment in the Altima. When his motion to suppress the evidence was denied, Lucatero pled guilty to possession of methamphetamine for sale, and using a false compartment with intent to conceal a drugs.

Discussion

Lucatero argued that the search warrant was defective because it was based on information that the officer had obtained illegally. Specifically, he contended that the real estate agent's consent to enter the house was invalid since the officer had concealed his true identity and purpose. But the court ruled that, despite the misrepresentation, the entry was lawful because a person who opens up his home to anyone who claims to be a prospective buyer impliedly consents to an entry by any such person, regardless of that person's secret intent.

One reason for the court's ruling was that people who list their homes are fully aware that some of the people who respond will not be good-faith buyers. As the court pointed out, "[N]ot all persons who ask to see a listed house are seriously considering a purchase of the home. Some are doing market comparisons; some are doing research for future home-purchasing decisions; some know they cannot afford the home viewed; and some are acting on a whim or are simply curious."

In addition, Lucatero did not have standing to challenge the officer's entry because the owner had effectively opened the house to anyone who accepted his invitation to look around. In the words of the court, the homeowner "undoubtedly contemplated that members of the public interested in the house, whether bona fide potential buyers or not, could and would be entering the home in the company of a realtor to view the house and its interior."

Consequently, the court ruled that the consent to enter given by a real estate agent to an officer posing as a prospective buyer is adequate so long as the officer confines his tour of the premises to areas and rooms that are reasonably believed to be open for inspection. Said the court, "We believe an investigating officer may pose as a potential buyer and enter a home under this misrepresentation, assuming the officer's actions do not exceed the scope of the consent." Thus, the court ruled the search warrant was valid and the evidence was admissible.

Comment

There is a technical glitch in the law that should be noted. If an officer identifies himself truthfully to the real estate agent and says he wants to look around a listed home for evidence, the officer's entry would be unlawful. This is because he would have known that the agent was exceeding the scope of owner's consent, which is impliedly limited to people who appear to be prospective buyers.

Also note that if an occupant allows an undercover officer to enter for a specific *lawful* purpose the consent is ineffective. For example, the courts have invalidated entries by undercover officers who claimed to be repairmen, deliverymen, building inspectors, and property managers.[27] As for those situations in which an occupant allows an undercover officer to enter for a criminal purpose, such as to buy drugs, the consent is valid because the courts have consistently taken the position that defendants who open their homes to people they think are fellow crooks must assume the risk of a setup.[28] POV

[27] See *Mann* v. *Superior Court* (1970) 3 Cal.3d 1, 9; *People* v. *Reyes* (2000) 83 Cal.App.4th 7, 10.
[28] See *Lopez* v. *United States* (1963) 373 U.S. 427, 438.

The Changing Times

Alameda County District Attorney's Office

Retired Assistant District Attorney **Bill Baldwin** died on November 19, 2008 following a battle with cancer. He was 67 years old. Through most of Bill's 34-year career with the office, he was in charge of the Law and Motion Department. And, over the years, he became an authority on all facets of pretrial motions in criminal cases, especially 995 motions. The thousands of scholarly and often funny legal briefs he wrote—and which we still use—are testimony to his intelligence and wonderful sense of humor. When his mind wasn't occupied with legal matters, he would amuse himself by fixing computers and clocks. We will miss him very much.

Inspector III **Bob Conner** was promoted to lieutenant and assigned to the Special Operations Unit. Inspector III **Cindy Hall** was promoted to lieutenant and assigned to South County Trial Teams.

Alameda Police Department

Capt. **Craig Ojala** retired after 29 years of service. New officer: **Bryan Soots**.

BART Police Department

Officers **Dominic Boutain** and **John Vuong** were selected as SWAT tactical operators. Officers **Jonathan Guerra** and **John Power** were selected as detectives. Sgt. **Randy Gregson** was selected as Revenue Protection Unit supervisor. Later appointment: **Ravi Sandhu** (Concord PD). New officers: **Scott Barendrick**, **Rohn Rumehagen**, and **Jon Tougas**.

California Highway Patrol

Hayward Area: Lt. **Ruben Leal** was promoted to captain and transferred to Hayward from South Sacramento. Officer **Kevin Briggs** was promoted to sergeant and transferred to Hayward from Marin. Transferring out: **Matthew Massod** (Tracy) and **Federico Lazo** (Willows). Transferring in: Sgt. **Stephen True** (IA Sacramento). New academy graduates assigned to Hayward: **Eliseo Alatorre**, **James Dunbar**, **Brian Galley**, **Zachary Hunter**, **Bryan Marshall**, and **Justin Rickertsen**.

East Bay Regional Parks Police Department

Erin O'Neill transferred from Patrol to the Alameda County Narcotics Task Force. **Bill Granados** transferred from Patrol to the SAFE Task Force. **Patricia Gershaneck** was promoted to Dispatch Supervisor.

Emeryville Police Department

Barbara Madarang left to become a Special Investigator with the California Horse Racing Board. **Arnold Salaiz** transferred to the Traffic Division.

Hayward Police Department

Sergeants **Jason Martinez** and **Darin Nishimoto** were promoted to lieutenant. The following officers were promoted to sergeant: **Chad Olthoff**, **Angela Averiett**, **Michael Beal**, **Michael Scott**, **Linda Slaughter**, **Antonio Puente**, and **Mark Ducker**. Officer **Lori Bonawitz** was promoted to Inspector.

The following officers have retired. Capt. **Phil Ribera** (31 years), Lt. **Tom Perry** (31 years), Lt. **Robert Weldon** (29 years), Sgt. **Michael Hopfe** (27 years), Sgt. **MacGreagor Wright** (24 years), Sgt. **Larry Bird** (28 years), Sgt. **Ted Muniz** (20 years), Inspector **Stanley Brandon** (34 years), and Officer **Arthur Owens** (23 years). The following officers have taken disability retirements: **Brian Rankin** (11 years), **Carlos Martinez** (8 years), **Eric Hutchinson** (9 years), and **Jon Mills** (6 years).

Newly-appointed officers: **Angela Irizarry**, **Ray Bugarin**, **Jason Mosby**, **Marco Ayala**, **Joseph Rubalcava**, **Joshua Puga**, **Joshua Cannon**, **Vincent Celes**, and **Matthew Shea**.

Newark Police Department

Sgt. **Bob Douglas** was promoted to lieutenant. **Mike Carroll** and **Manuel DeSerpa** were promoted to sergeant. Sgt. **Fred Zachau** retired after 24 years of service. Sgt. **Dave Parks** transferred from Investigations to Patrol. The following officers rejoined the department: **David Higbee** (from Fremont PD), **Britain Jackman** and **Sam Ackerman** (from San Jose PD).

Officer **Salvador Sandoval** received a Distinguished Service Medal for the negotiation tactics he employed

while dealing with a distraught subject who threatened to harm himself and officers on scene. Sgt. **Steve Holbert** and Officer **Tony Heckman** received a Medal of Valor for the sound tactical decisions they made during an officer-involved shooting that threatened innocent bystanders.

Roger Bacon passed away unexpectedly at the age of 60. Roger joined the department in 2004 as a volunteer, but was not recently assigned to monitor the Redflex Traffic Systems. The department is deeply saddened by this tragic loss.

OAKLAND HOUSING AUTHORITY POLICE DEPT.

New officers: **Michael Morris** and **Joshua Ruiz**. New reserve officer: **Eric Williams**. Officer **Paul Malech** returned from a leave of absence and has been assigned to the Fraud Investigation Unit. Sgt. **Proverb Jacobs** was assigned as Firearms Instructor. Sgt. **Todd Farris** was assigned to Backgrounds and Recruiting. Sgt. Farris and Officer **David Watson** each received the California Highway Patrol's 5th Master 10851 Awards.

OAKLAND POLICE DEPARTMENT

Lt. **Maverick Grier** and Officer **Felix Aberouette** have taken disability retirements. Officer **Collin Wong** retired after 26 years of service. The following officers resigned: **Jeffrey Gimenez**, **Brooklyn Hann**, and **Edward Barrientos.**

New officers: **Jeffrey Anaya**, **Michael Arsanis**, **Melissa Baddie**, **Aaron Ball**, **Mikale Bell**, **Jason Belligan**, **John Breden**, **Randell Brown**, **Stephen Choi**, **Robert Connolly**, **James Cordero**, **Jennifer Cortez**, **Ross Curtin**, **Robert DeMarco**, **Adam DiGiusto**, **Kevin Dillon**, **Mark Douglas II**, **Joaquin Duarte**, **Christopher Eggers**, **David Ernst**, **Jay Factora**, **William Febel**, **Bryan Franks**, **Timothy Gougeon**, **Kyle Hay**, **Karl Henwood**, **Arzo Homayun**, **Christopher Inami**, **Naomi Johnson**, **Qiana Johnson**, **John Keating**, **Jennifer Krump**, **Christopher Kuhr**, **Jesse Lawless**, **Tyler Layfield**, **Terry Lewis**, **Victor Li**, **Thomas Lopez**, **Brendan McGovern**, **Samuel Meyer**, **Billy Moore**, **Gerald Moriarty**, **Michael Morris**, **Brett Muratori**, **Alexis Nash**, **Francisco Negrete**, **Todd O'Connor**, **Joshua O'Mary**, **Keith Perea**, **Gerald Pertoso Jr.**, **Christopher Peters**, **Daniel Pineda**, **Michael Quijano**, **Brenton Reeder**, **Michael Ricchiuto**, **Christopher Rochette**, **John Romero**, **James Rowbotham**, **John Scheuring**, **Mark Shokair**, **James Smith**, **Jason Smoak**, **Darrell Soriano**, **Derek Souza**, **Leah Summerlin**, **Delmar Tompkins**, **Oscar Vargas Jr.**, **Audyama Williams**, **and Sor Yang**.

PIEDMONT POLICE DEPARTMENT

Officer **Tamara Cundy** has completed K-9 training with her new partner, "**Nico**."

PLEASANTON POLICE DEPARTMENT

The following officers have retired: Lt. **Robert Lyness** (29 years), Sgt. **Kris Phelps** (25 years), **Suzanne Soberanes** (26 years), **Paul Phillips** (27 years), and **Harry McIntosh** (24 years). Sgt. **Jeff Bretzing** was promoted to lieutenant. The following officers were promoted to sergeant: **Mark Reimer**, **Robert Leong**, **Scott Rohovit**, and **Penelope Tamm**. Sgt. **Stephanie Scofield** resigned and accepted a consultant position with POST. New officers: **Rudy Granados**, **Jason Hunter**, **Brandon Stocking**, and **Barry Boccasile**.

SAN LEANDRO POLICE DEPARTMENT

Chief of Police **Dale Attarian** retired after 30 years with the department and almost two years as chief. New officers: **Joseph Bacon**, **Darren Pasut**, **Ian Ordinario**, and **Christopher Albert**. **Norma Gordoa** was promoted to Administrative Specialist.

UNION CITY POLICE DEPARTMENT

Brigid Dinneen has joined the department from the San Francisco State University PD. Officer **Mike Rucker** joined the Brentwood PD.

UNIVERSITY OF CALIFORNIA, BERKELEY POLICE DEPARTMENT

Officer **Ken Moody** was promoted to sergeant. The following officers were promoted to corporal: **Lee Harris**, **Dan Labat**, **Cris Olivet**, **Nicole Sanchez**, **Hans Williams**, **Joey Williams**, and **Tim Zuniga**. Officer **Chester Chichester** retired after 19 years of service. The following officers were appointed Field Training Officers: **Wade MacAdam**, **Deanna Ruiz**, and **Allison Jacobs**. **John Lechmanik** was appointed Special Events Officer and **Kevin Vincent** was appointed Threat Management Detective. Lateral appointment: **Kenneth Doughty** (Napa County SO).

War Stories

Alibis R Us

A man who had been arrested for robbing the Mervyn's store in Livermore called his girlfriend the next day and said, "I'm in jail for a robbery yesterday, and I need an alibi." The girlfriend said she'd be happy to give him one. But she later told Livermore robbery investigators that she hadn't seen him at all on the day of the holdup. Not surprisingly, when she showed up at the jail a few days later to visit her boyfriend, he was irate: "Why the hell didn't you give me an alibi?" "Don't you worry, baby," she said, "I'll get you a real nice one. Just tell me what they are and where I can buy them."

A shaky defense witness

At a murder trial in Oakland, the DA was cross-examining the defendant's girlfriend, pointing out the many inconsistencies between her testimony on direct examination and the information she had given to officers shortly before the shooting two years earlier.

Witness: I can explain that. My memory is much sharper now than it was then.

DA: So you have a clearer memory today than you had then, over two years ago?

Witness: That's what I said.

DA: So, what were you wearing that day?

Witness: [lengthy pause] I can't remember that—it's been so long.

At least he steals nice cars

A man was on trial in Marin County for stealing a $120,000 Porsche. While the jury was deliberating, sheriff's deputies received a report that five dogs had just jumped out of a Lexus SUV parked in the Civic Center parking lot. When the deputies ran the plate, they learned that the Lexus had been reported stolen in San Francisco.

Just then, the defendant—who was free on bail—ran up to a deputy and said he had heard about the dogs. "Are they okay?" he asked. The deputy asked why he wanted to know, and he explained they were his dogs and he had left them inside his SUV. After confirming that the defendant was referring to the stolen Lexus, the deputy arrested him and brought him back to the courtroom— just in time to get some more bad new: the jury had reached a verdict.

Nice try

A chiropractor named Robert Cavins was convicted of failing to pay federal income tax for two years. On appeal, he argued that the charge should have been dismissed because filling out those lengthy IRS forms wastes paper, is bad for the environment, and violates the federal Paperwork Reduction Act. The Eighth Circuit was sympathetic. Although it affirmed his conviction, its discussion of the issue was so short that it hardly wasted any paper at all.

A tale of a frog hunter and his frog-loving wife

In Arkansas, two men were driving home at night after spending the day hunting frogs. Suddenly, the fuse in their pickup truck shorted out, causing the headlights to go dark. Although the men didn't have a replacement fuse, they figured that a .22 caliber bullet would fit perfectly into the fuse box. So they inserted one (they had lots), the headlights went back on, and they continued on down the highway. That is, until the bullet overheated and fired, striking the driver in the right testicle. With the driver's attention diverted downward, the pickup truck crashed into a tree, causing additional, but minor, injuries.

Later, when a trooper phoned the driver's wife from the hospital and told her what had happened, her first question was, "So how many frogs did the boys catch?"

A man's man

Fremont police officers were taking a statement from a young man who had been arrested for shoplifting at a department store. Said the suspect: "I admit it. I took them and I got caught. I'm being a *man* about this." The loss? Two bras.

A big bang, but a net loss

Police in Norway reported that a gang of dynamite thieves used four sticks of dynamite to blow open a safe containing nothing but three sticks of dynamite.

A tale of guns and SportsCenter

Here's an excerpt from an Oakland police report: "My partner and I entered Rumors Lounge, a local tavern often plagued by the ill effects of its overly-intoxicated clientele. As my partner contacted the friendly barkeep, I retreated to the men's restroom to use its facilities. When I opened the door I encountered one man snorting cocaine, and another who was carrying a handgun. After arresting both of them, and recovering the cocaine and gun, I decided to summon my partner to help me. I peeked out of the restroom only to see him still firmly ensconced on a barstool, enjoying the waning moments of ESPN's SportsCenter and engaging in small talk with the barkeep. When he finally became aware of my adventure in the restroom, he came to my aid."

One more time

A public defender in a robbery trial was cross-examining a prosecution witness who happened to be a prostitute:

PD: Ma'am, isn't it true that you sell your ass for $15 on the street?

DA: Objection.

Judge: Sustained as to the form of the question. Counsel will phrase the question within the realm of proper court demeanor.

PD: OK judge. Ma'am, isn't it a fact that on this particular occasion you were selling your ass on the street for $15?

More cross-examination follies

In a murder trial in Oakland, the defense attorney was trying to discredit a key witness for the prosecution:

Defense attorney: Isn't it true that you once had an hallucination about a hyena and a grotesque dwarf, that they were on your back?

Witness: I don't know nothin' about no hyena. But I certainly *do* remember that grotesque dwarf.

A robber's dilemma

A man armed with a handgun walked up to a man who was sitting in his car in Hayward and said, "Give me all your money." When the victim complied, the robber said, "Stay in your car for 15 minutes after I leave or I'll shoot you." The victim said okay. "One more thing," said the robber, "give me your watch." The victim responded, "But if I give you my watch, how will I know when the 15 minutes are up?" After thinking about it for a while, the robber said, "Okay, you can keep the watch."

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