

POINT of VIEW



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Point of View

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Search Warrant Special Procedures

Adapt yourself to changing circumstances.
—Chinese proverb

There is perhaps no profession that is more susceptible to changing circumstances than law enforcement. Which means that law enforcement officers must know how to adapt. One task in which adaptability is especially important (although frequently overlooked) is the writing of search warrants and affidavits. That is because every search warrant must be customized to fit the unique circumstances of the crime under investigation, the place being searched, the people who live or work in the location, the nature of the evidence being sought, and any difficulties that the search team might encounter.

For instance, officers may have well-founded concerns about their safety or evidence destruction that make it necessary to execute the warrant late at night, or to make a no-knock entry. Officers might also need to keep the contents of the affidavit secret to protect the identity of an informant or to prevent the disclosure of confidential information. Although less common, it is sometimes necessary to obtain a covert warrant or an anticipatory warrant, or a warrant to search something in another county or state, or a warrant to search the confidential files of a lawyer or physician.

All of these things are doable. But because they add to the intrusiveness of the search, they must be authorized by the judge who issues the warrant. And to obtain authorization, officers must know exactly what information judges require and how it must be presented.

Before we discuss these requirements, it should be noted that we have incorporated these and other special procedures into new search warrant forms that officers and prosecutors can download from our website. The address is: <http://le.alcoda.org> (click on Publications). To receive copies via email in Microsoft Word format, send a request from a departmental email address to POV@acgov.org.

Night Service

Officers are ordinarily prohibited from executing warrants between the hours of 10 P.M. and 7 A.M. That is because late night entries are “particularly intrusive,”¹ especially since officers may need to make a forcible entry if, as is often the case, the occupants are asleep and are thus unable to promptly respond to the officers’ announcement. Still, the courts understand there are situations in which the added intrusiveness of night service is offset by other circumstances, usually the need to prevent the destruction of evidence or to protect the search team from violence by catching the occupants by surprise. For this reason, California law permits judges to authorize an entry at any hour of the day or night if there is “good cause.”²

WHAT IS “GOOD CAUSE”? Good cause exists if there is reason to believe that (1) some or all of the evidence on the premises would be destroyed or removed before 7 A.M., (2) night service is necessary for the safety of the search team or others,³ or (3) there is some other “factual basis for a prudent conclusion that the greater intrusiveness of a nighttime search is justified.”⁴ Like probable cause, good

¹ *Rogers v. Superior Court* (1973) 35 Cal.App.3d 716, 720.

² See Pen. Code § 1533; *People v. Kimble* (1988) 44 Cal.3d 480, 494 [“a magistrate may authorize nighttime service of a warrant in a particular case for ‘good cause’”].

³ See Pen. Code § 1533; *Tuttle v. Superior Court* (1981) 120 Cal.App.3d 320, 329-30 [“Safety of police officers is of extreme importance and is a factor which may be considered in determining cause for night service.”]; *People v. Kimble* (1988) 44 Cal.3d 480, 495 [“in view of the nature of the homicides that were under investigation, the magistrate could reasonably conclude that there was an exceptionally compelling interest in permitting the police to expedite their investigation”].

⁴ *People v. Kimble* (1988) 44 Cal.3d 480, 494.

cause must be based on facts contained in the affidavit, or at least reasonable inferences from the facts.⁵ “[T]he test to be applied,” said the Court of Appeal, “is whether the affidavit read as a whole in a common sense manner reasonably supports a finding that such service will best serve the interests of justice.”⁶

Because specific facts are required, good cause to believe that evidence would be destroyed or removed cannot be based on generalizations or unsupported allegations. For example, the courts have rejected arguments that good cause existed merely because the affiant said “the property sought will be disposed of or become nonexistent through sale or transfer to other persons,”⁷ or because “drug distributors often utilize the cover of darkness to conceal their transportation and handling of contraband,”⁸ or because the warrant authorized a search for evidence (such as drugs) that can be quickly sold or consumed.⁹ Accordingly, the court in *People v. Mardian* ruled that “an affiant’s averment that in his experience (generally) particular types of contraband are easily disposed of does not, in itself, constitute a sufficient showing for the necessity of a nighttime search.”¹⁰

The question, then, is what types of circumstances will suffice? In the case of evidence destruction, the following have been deemed sufficient:

- The suspects were selling drugs or stolen property from the residence at night.¹¹
- The suspect had become aware that he was about to be arrested or that a search of his home was imminent, and it was therefore reasonably likely that he would immediately try to move or destroy the evidence.¹²
- The suspect was planning to vacate the premises early the next morning.¹³
- Stolen food, liquor, and cigarettes were consumed at a party in the residence the night before the warrant was executed.¹⁴
- The suspect had been released on bail in the early evening, the evidence in his house was “small in size and easily disposed of,” and the only way to keep him from destroying it would have been to assign “police resources in an all night vigil.”¹⁵
- The warrant authorized a search for valuable stolen property which the suspects had the ability and motive to quickly sell or abandon.¹⁶

As for officer safety, good cause must also be based on facts, not unsupported assertions. As the Court of Appeal explained, “[A]llegations in an affidavit with respect to safety of officers must inform the magistrate of specific facts showing why

⁵ See *People v. Watson* (1977) 75 Cal.App.3d 592, 598 [“the affidavit furnished the magistrate must set forth specific facts which show a necessity for [night] service”].

⁶ *People v. Flores* (1979) 100 Cal.App.3d 221, 234. ALSO SEE *People v. McCarter* (1981) 117 Cal.App.3d 894, 906-907.

⁷ *People v. Lopez* (1985) 173 Cal.App.3d 125, 136. ALSO SEE *In re Donald R.* (1978) 85 Cal.App.3d 23, 25-26 [generalized statement that the stolen property being sought was “primarily perishable items and easily disposed of”].

⁸ *Tuttle v. Superior Court* (1981) 120 Cal.App.3d 320, 328.

⁹ See *People v. Watson* (1977) 75 Cal.App.3d 592, 597 [night service “cannot be based solely on the nature of the contraband to be seized or the type of crime involved”]; *People v. Flores* (1979) 100 Cal.App.3d 221, 234 [“mere assertion of suspected unlawful drug activities in the place to be searched is insufficient to justify night service”].

¹⁰ (1975) 47 Cal.App.3d 16, 34.

¹¹ See *People v. Watson* (1977) 75 Cal.App.3d 592, 598; *Nunes v. Superior Court* (1980) 100 Cal.App.3d 915, 938; *People v. Grant* (1969) 1 Cal.App.3d 563, 567-68; *People v. Govea* (1965) 235 Cal.App.2d 285, 299.

¹² See *People v. Siripongs* (1988) 45 Cal.3d 548, 569-70 [following his arrest, the arrestee made a phone call from jail (speaking in Thai) to the residence in which stolen property was stored]; *People v. Cletcher* (1982) 132 Cal.App.3d 878, 883 [there was reason to believe the suspect was aware that artwork he had stolen had just been observed in his home by the victim]; *People v. Flores* (1979) 100 Cal.App.3d 221, 234 [warrant to search suspect’s motel room was issued after the suspect was arrested in the lobby at 8:30 P.M.]; *Galena v. Municipal Court* (1965) 237 Cal.App.2d 581, 592 [“It is common knowledge that those in the possession of contraband or stolen goods make every effort to effectuate its immediate disposition when they learn that persons connected with it have been apprehended by the authorities.”].

¹³ See *People v. Mardian* (1975) 47 Cal.App.3d 16, 35 [the occupants were planning to leave the residence at 6 A.M.].

¹⁴ See *In re Donald R.* (1978) 85 Cal.App.3d 23, 26.

¹⁵ See *People v. Lowery* (1983) 145 Cal.App.3d 902, 909-10 [“This is not a question of convenience to the police, but acknowledges the interest of the entire community in efficient use of police personnel.”]; *People v. Flores* (1979) 100 Cal.App.3d 221, 234.

¹⁶ See *People v. Kimble* (1988) 44 Cal.3d 480, 494-95; *People v. Lopez* (1985) 173 Cal.App.3d 125, 138 [“The affidavit disclosed that four persons committed the robbery, all of whom, it appeared, had continuing access to the property.”].

nighttime service would lessen a possibility of violent confrontation, e.g., that the particular defendant is prepared to use deadly force against officers executing the warrant.”¹⁷ Thus, in *Rodriguez v. Superior Court* the court ruled that good cause was not shown based merely on a statement that “any time you got people dealing in drugs there’s always a danger of being shot or hurt.”¹⁸

One other thing about night service: If officers enter before 10 P.M. they do not need authorization to continue the search after 10 P.M.¹⁹

HOW TO OBTAIN AUTHORIZATION: There are essentially four things the affiant must do to obtain authorization for night service:

- (1) **STATE THE FACTS:** The affiant must set forth the facts upon which “good cause” is based. Although the affidavit need not contain a separate section for this purpose, it is usually helpful to the judge; e.g., *For the following reasons, I hereby request authorization to execute this warrant at any hour of the day or night . . .*²⁰
- (2) **NOTIFY JUDGE:** When submitting the affidavit to the judge, the affiant should notify him or her that he is requesting night service authorization based on facts contained in the affidavit.
- (3) **JUDGE REVIEWS:** As the judge reads the affidavit looking for probable cause, he or she will also look for facts that tend to establish good cause for night service.
- (4) **AUTHORIZATION GIVEN:** If the judge finds that good cause exists, he or she will authorize night service on the face of the warrant,²¹ usually by checking an authorization box or by inserting words such as the following: *Good cause having been demonstrated, this warrant may be executed at any hour of the day or night.*

¹⁷ *Tuttle v. Superior Court* (1981) 120 Cal.App.3d 320, 329.

¹⁸ (1988) 199 Cal.App.3d 1453, 1468.

¹⁹ See *People v. Zepeda* (1980) 102 Cal.App.3d 1, 7 [“Once that execution began, it was unreasonable to require its cessation merely because the hour reached 10 P.M.”]; *People v. Maita* (1984) 157 Cal.App.3d 309, 322.

²⁰ See *People v. Cletcher* (1982) 132 Cal.App.3d 878, 882 [“[Pen. Code § 1533] does not require a separate statement of good cause for nighttime service.”].

²¹ See Pen. Code § 1533 [“Upon a showing of good cause, the magistrate may, in his or her discretion, insert a direction in a search warrant that it may be served at any time of the day or night.”].

²² *People v. Gonzalez* (1989) 211 Cal.App.3d 1043, 1048.

²³ **NOTE:** While the United States Supreme Court ruled in 1995 that knock-notice is not an absolute requirement—that the Fourth Amendment requires only that officers enter in a reasonable manner (*Wilson v. Arkansas* (1995) 514 U.S. 927, 934)—an unannounced entry is such a serious and dangerous intrusion that knock-notice will ordinarily be required unless there were exigent circumstances. See *United States v. Banks* (2003) 540 U.S. 31, 43 [“Absent exigency, the police must knock and receive an actual refusal or wait out the time necessary to infer one.”].

No-Knock Warrants

[Violent knocks on the front door]

“Police with a search warrant! Open the door or we’ll kick it in.”

Blanca ran into the bathroom and emptied a glassine envelope containing cocaine into the swirling bowl.

“Is that everything?” he said.

“I think so,” she said.

That was fiction. It was a scene from the novel *To Live and Die in L.A.* But similar scenes are played out every day in real life when officers knock, give notice, and wait for a “reasonable” amount of time before making a forcible entry. Because this delay provides the occupants with the time they need to destroy evidence or arm themselves, the knock-notice requirement has been a continuing source of friction between the courts and law enforcement. As the Court of Appeal observed:

[A]lthough one purpose of the [knock-notice] requirement is to prevent startled occupants from using violence against unannounced intruders, the delay caused by the statute might give a forewarned occupant exactly the opportunity necessary to arm himself, causing injury to officers and bystanders. . . . Since one has no right to deny entry to the holder of a search warrant in any event, critics ask, what public policy requires that entry be delayed while police engage in meaningless formalities?²²

While it is debatable whether the knock-notice requirements are “meaningless,” we are concerned here with explaining how officers can, when necessary, obtain authorization to enter without giving notice.²³

A judge who issues a search warrant may authorize a no-knock entry if there was “sufficient cause”²⁴ or “reasonable grounds”. As the United States Supreme Court explained:

When a warrant applicant gives reasonable grounds to expect futility or to suspect that one or another such exigency already exists or will arise instantly upon knocking, a magistrate judge is acting within the Constitution to authorize a “no-knock” entry.²⁵

WHAT ARE “REASONABLE GROUNDS”? Reasonable grounds for a no-knock warrant exist if the affidavit establishes reasonable suspicion to believe that giving notice would (1) be used by the occupants to arm themselves or otherwise engage in violent resistance, (2) be used by the occupants to destroy evidence, or (3) be futile.²⁶

Like good cause for night service, grounds for no-knock authorization must be based on facts, not unsupported conclusions or vague generalizations. Thus, in *Richards v. Wisconsin*²⁷ the United States Supreme Court ruled that an affidavit for a warrant to search a drug house was insufficient because it was based solely on the generalization that drugs can be easily destroyed. In contrast, the following circumstances have been deemed adequate:

- The suspect had a history of attempting to destroy evidence, including a “penchant for flushing toilets even when nature did not call.”²⁸
- The suspect told an informant that, if he knew the police “were around,” he would destroy the drugs he was selling and that “he would not get caught again with the evidence.”²⁹
- The premises, which contained a “large amount” of crack, were protected by a steel door.³⁰
- The house was a “virtual fortress.”³¹

- The house “was equipped with security cameras and flood lights.”³²
- The suspect displayed a firearm during previous drug sales and had “exhibited abnormal and unpredictable behavior—specifically, answering the door wearing only a pair of socks—while wielding a chambered semi-automatic pistol in a threatening manner.”³³
- The suspect’s rap sheet showed “assaultive” behavior in the past, possession of guns, and a prior altercation with an officer.³⁴

PROCEDURE FOR OBTAINING AUTHORIZATION: The usual procedure for obtaining a no-knock warrant is as follows:

- (1) **SET FORTH THE FACTS:** The affidavit must include the facts upon which the request is made. Although it need not contain a separate section for this purpose, it will be helpful to the judge; e.g., *I hereby request authorization for a no-knock entry for the following reasons...*
- (2) **NOTIFY JUDGE:** When submitting the affidavit to the judge, the affiant should notify him or her that he is requesting no-knock authorization.
- (3) **JUDGE REVIEWS:** As the judge reads the affidavit looking for probable cause, he or she will also look for facts establishing grounds for a no-knock entry.
- (4) **AUTHORIZATION GIVEN:** If the judge determines that grounds for a no-knock warrant exist, he or she will authorize a no-knock entry on the face of the warrant; e.g., *Good cause having been demonstrated in the affidavit herein, the officers who execute this warrant are authorized to make a forcible entry without giving notice unless a change in circumstances negates the need for non-compliance.*

²⁴ *Richards v. Wisconsin* (1997) 520 U.S. 385, 399, fn.7. **NOTE:** If a no-knock entry is authorized, officers may, if reasonably necessary, make a forcible entry. *United States v. Ramirez* (1998) 523 U.S. 65, 71.

²⁵ *United States v. Banks* (2003) 540 U.S. 31, 36.

²⁶ See *Richards v. Wisconsin* (1997) 520 U.S. 385, 394; *United States v. Banks* (2003) 540 U.S. 31, 37, fn.3 [“The standard for a no-knock entry stated in *Richards* applies on reasonable suspicion of exigency or futility.”].

²⁷ (1997) 520 U.S. 385.

²⁸ *People v. Alaniz* (1986) 182 Cal.App.3d 903, 906.

²⁹ *People v. Gonzales* (1971) 14 Cal.App.3d 881.

³⁰ *U.S. v. Stowe* (7th Cir. 1996) 100 F.3d 494, 499.

³¹ *People v. Thompson* (1979) 89 Cal.App.3d 425.

³² *U.S. v. Combs* (9th Cir. 2005) 394 F.3d 739, 745.

³³ *U.S. v. Bynum* (9th Cir. 2004) 362 F.3d 574, 581.

³⁴ *People v. Henderson* (1976) 58 Cal.App.3d 349, 356.

Two other things should be noted about no-knock warrants. First, although officers are not required to re-evaluate the circumstances before entering, they are not permitted to make a no-knock entry if, before entering, they become aware of circumstances that eliminated the need for it.³⁵ Second, if the judge refused to issue a no-knock warrant, officers may nevertheless make an unannounced entry if, upon arrival, they become aware of circumstances that constituted grounds to do so.³⁶

Sealing Orders

Search warrants, including their supporting affidavits and any incorporated documents, become a public record when they are returned to the court or, if not executed, ten days after they were issued.³⁷ But because public disclosure may have serious adverse consequences, the affiant may apply for a sealing order which would require that all or part of the affidavit be kept confidential until further order of the court.³⁸

GROUND FOR SEALING ORDERS: In most cases, sealing orders are issued for either of the following reasons:

- (1) **PROTECT INFORMANT'S IDENTITY:** If the warrant is based wholly or in part on information from a

confidential informant, the judge may seal the parts of the affidavit that would reveal or tend to reveal his identity.³⁹

- (2) **PROTECT "OFFICIAL INFORMATION":** An affidavit may be sealed if it tends to disclose "official information," which is defined as confidential information whose disclosure would not be in the public interest; e.g., information obtained in the course of an ongoing criminal investigation; information that would tend to reveal the identity of an undercover officer, a citizen informant, a confidential surveillance site, or the secret location of VIN numbers.⁴⁰

PROCEDURE: To obtain a sealing order, the affiant must do the following:

- (1) **DETERMINE SCOPE OF ORDER:** The first step is to determine whether it is necessary to request the sealing of only certain information, certain documents, or everything.⁴¹
- (2) **SEGREGATE CONFIDENTIAL INFORMATION:** If the affiant is requesting that only part of the affidavit be sealed, he will present the judge with two affidavits for review: one containing information that may be disclosed; the other containing information that would be subject to the sealing order.⁴² The latter affidavit should be clearly

³⁵ See *U.S. v. Spry* (7th Cir. 1999) 190 F.3d 829, 833.

³⁶ See *United States v. Banks* (2003) 540 U.S. 31, 36-37 ["even when executing a warrant silent about [no-knock authorization], if circumstances support a reasonable suspicion of exigency when the officers arrive at the door, they may go straight in"]; *Richards v. Wisconsin* (1997) 520 U.S. 385, 395-96, fn.7 ["[A] magistrate's decision not to authorize no-knock entry should not be interpreted to remove the officers' authority to exercise independent judgment concerning the wisdom of a no-knock entry at the time the warrant is being executed."]. **NOTE RE MOTORIZED BATTERING RAMS:** The following are the requirements for utilizing a motorized battering ram to make entry: (1) the issuing judge must have authorized the procedure; and (2) when the ram was utilized, officers reasonably believed that evidence inside the premises was presently being destroyed, or there was an immediate threat of resistance from the occupants which posed a serious danger to officers. *Langford v. Superior Court* (1987) 43 Cal.3d 21, 29-32.

³⁷ See Pen. Code § 1534; *Oziel v. Superior Court* (1990) 223 Cal.App.3d 1284, 1295.

³⁸ **NOTE:** Although a court may later lift the sealing order, officers and prosecutors retain control over the sealed information because they have the option of incurring sanctions rather than releasing it. See *People v. Hobbs* (1994) 7 Cal.4th 948, 959.

³⁹ See Evid. Code § 1041; *People v. Hobbs* (1994) 7 Cal.4th 948, 962 ["[I]f disclosure of the contents of the informant's statement would tend to disclose the identity of the informer, the communication itself should come within the privilege."].

⁴⁰ See Evid. Code § 1040(a); *County of Orange v. Superior Court (Feilong Wu)* (2000) 79 Cal.App.4th 759, 764 ["Evidence gathered by police as part of an ongoing criminal investigation is by its nature confidential."]; *Torres v. Superior Court* (2000) 80 Cal.App.4th 867, 872-73 [a person's name may constitute official information; e.g., name of undercover officer]; *PSC Geothermal Services Co. v. Superior Court* (1994) 25 Cal.App.4th 1697, 1714 [the "official information" privilege covers "information obtained by a public employee and which, if disclosed, is against the public interest."]; *In re Sergio M.* (1993) 13 Cal.App.4th 809 [nondisclosure of surveillance site]; *In re David W.* (1976) 62 Cal.App.3d 840, 847-48 [confidentiality of secret VIN location].

⁴¹ See *People v. Hobbs* (1994) 7 Cal.4th 948, 971 ["all or any part of a search warrant affidavit may be sealed if necessary to . . . protect the identity of a confidential informant"].

⁴² See *People v. Hobbs* (1994) 7 Cal.4th 948, 962-63 ["the courts have sanctioned a procedure whereby those portions of a search warrant affidavit which, if disclosed to the defense, would effectively reveal the identity of an informant, are redacted, and the resulting 'edited' affidavit furnished to the defendant"].

identified by assigning it an exhibit number or letter, then writing that number or letter in a conspicuous place at the top of the document; e.g., Exhibit A.

- (3) REQUEST ORDER: The affiant should state in the affidavit that he is seeking a sealing order; e.g., *For the following reasons, I am hereby requesting that Exhibit A be sealed pending further order of the court . . .*
- (4) PROVING CONFIDENTIALITY: The affiant must explain why the sealing is reasonably necessary. To prove that the sealed information would tend to disclose the identity of a confidential informant, the affiant should explain why the informant or his family would be in danger if his identity was revealed. To prove that sealed information is covered under the “official information” privilege, the affiant should set forth facts demonstrating that the information was “acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.”⁴³
- (5) JUDGE ISSUES ORDER: If the affiant’s request is granted, the judge will sign the sealing order. Although the order may be included in the warrant, it is better to incorporate it into a separate document so that it is not disclosed to the people who are served with the warrant. A sealing order is available on our website.
- (6) WHERE SEALED DOCUMENTS MUST BE KEPT: All sealed documents must be retained by the court, unless the judge determines that court security is inadequate.⁴⁴ In such cases, the documents may be retained by the affiant if he submits proof that the security precautions within his agency are sufficient, and that his agency has established procedures to ensure that the sealed affidavit is retained for ten years after final disposition of noncapital cases, and permanently in capital cases.⁴⁵

Nondisclosure Orders

Officers will frequently utilize a search warrant to obtain the records of a customer of a financial institution, phone company, or provider of an email or internet service. If, as in most cases, they do not want the customer to learn about it, they may ask the issuing judge for a temporary nondisclosure order. Such an order may ordinarily be issued if the affiant demonstrates that disclosure would seriously jeopardize an ongoing investigation or endanger the life of any person.⁴⁶

A nondisclosure order should appear on the warrant to help ensure that the people who are served with the warrant will be aware of it. The following is an example of such an order: *Pending further order of this court, the employees and agents of the entity served with the warrant] are hereby ordered not to disclose information to any person that would reveal, or tend to reveal, the contents of this warrant or the fact that it was issued.*

Out-of-Jurisdiction Warrants

It is not unusual for officers to develop probable cause to believe that evidence of the crime they are investigating is located in another county or state. If they need a warrant to obtain it, the question arises: Can the warrant be issued by a judge in the officers’ county? Or must it be issued by a judge in the county or state in which the evidence is located? The rules pertaining to out-of-jurisdiction warrants are as follows.

OUT-OF-COUNTY WARRANTS: A judge in California may issue a warrant to search a person, place, or thing located in any county in the state if the affidavit establishes probable cause to believe that the evidence listed in the warrant pertains to a crime that was committed in the county in which the judge sits. As the California Supreme Court explained, “[A] magistrate has jurisdiction to issue an out-of-county warrant when he has probable cause to believe that the evidence sought relates to a crime

⁴³ Evid. Code § 1040(a).

⁴⁴ See *People v. Galland* (2008) 45 Cal.4th 354, 368 [sealed search warrant affidavits “should ordinarily be part of the court record that is maintained at the court”].

⁴⁵ *People v. Galland* (2008) 45 Cal.4th 354, 359.

⁴⁶ See, for example, Gov. Code § 7475 [financial institutions]; 12 U.S.C. 3409 [financial records]; 18 U.S.C. 3123(b) [phone records].

committed within his county and thus pertains to a present or future prosecution in that county.”⁴⁷

For example, in *People v. Easley*⁴⁸ officers who were investigating a double murder in Modesto (Stanislaus County) obtained a warrant from a local judge to search for evidence of the crimes in Easley’s homes and cars in Fresno County. In ruling that the judge had the authority to issue the warrant, the California Supreme Court said:

[T]he search warrant sought evidence relating to two homicides committed in Stanislaus County. The magistrate had probable cause to believe that evidence relevant to those crimes might be found in defendant’s residences and automobiles. He therefore had jurisdiction to issue a warrant for an out-of-county search for that evidence.

Not surprisingly, out-of-county search warrants are especially common in drug trafficking cases because sellers seldom restrict their operations to a single county. Thus, in such cases a warrant may be issued by a judge in any county in which some illegal act pertaining to the enterprise was committed. For example in *People v. Fleming*⁴⁹ an undercover Santa Barbara County sheriff’s deputy bought cocaine from Bryn Martin in Santa Barbara. The deputy later learned that Martin’s supplier was Scott Fleming, who lived in Los Angeles County. The deputy then obtained a warrant from a Santa Barbara judge to search Fleming’s house, and the search netted drugs and sales paraphernalia.

Fleming, who was tried and convicted in Santa Barbara County, argued that the evidence should have been suppressed, claiming that the judge lacked the authority to issue the warrant. But the California Supreme Court disagreed, pointing out that because both sales were negotiated in Santa Barbara County, and because a person can be prosecuted in any county in which “some act of a continuing crime occurs,” the judge “acted within his jurisdiction in issuing the warrant in question.”

Two procedural matters. First, an out-of-county warrant must be directed to peace officers employed in the issuing judge’s county.⁵⁰ For example, a warrant to conduct a search in Santa Clara County issued by a judge in Alameda County should be headed, *The People of the State of California to any peace officer in Alameda County*. Second, although the warrant may be executed by officers in the issuing judge’s county, it is standard practice to notify and request assistance from officers in whose jurisdiction the search will occur.⁵¹

OUT-OF-STATE WARRANTS: California judges do not have the authority to issue warrants to search a person, place, or thing located in another state.⁵² Consequently, officers who need an out-of-state warrant must either travel to the other state and apply for it themselves or, more commonly, request assistance from an officer in that state. Because the officers who are requesting assistance should complete as much of the paperwork as possible, they should ordinarily do the following:

- (1) Write an affidavit establishing probable cause for the search and sign it under penalty of perjury. (As discussed below, this affidavit will become an attachment to the affidavit signed by the out-of-state officer.)
- (2) Write an affidavit for the out-of-state officer’s signature in which the out-of-state officer simply states that he is incorporating the California officer’s affidavit, and that it was submitted to him by a California officer; e.g., *Attached hereto and incorporated by reference is the affidavit of [name of California officer] who is a law enforcement officer employed by the [name of California officer’s agency] in the State of California. I declare under penalty of perjury that the foregoing is true.* (The reason the out-of-state officer must not sign the affidavit establishing probable cause is that will have no personal knowledge of the facts upon which probable cause was based.)

⁴⁷ *People v. Fleming* (1981) 29 Cal.3d 698, 707. ALSO SEE *People v. Galvan* (1992) 5 Cal.App.4th 866, 870; *People v. Redman* (1981) 125 Cal.App.3d 317; *People v. Dantzler* (1988) 206 Cal.App.3d 289, 293. **NOTE:** In identity theft cases, the warrant may also be issued by a judge in the county in which the victim lives. Pen. Code § 1524(j).

⁴⁸ (1983) 34 Cal.3d 858.

⁴⁹ (1981) 29 Cal.3d 698.

⁵⁰ See Pen. Code § 1528(a); *People v. Fleming* (1981) 29 Cal.3d 698, 703; *People v. Galvan* (1992) 5 Cal.App.4th 866, 870.

⁵¹ See *People v. Fleming* (1981) 29 Cal.3d 698, 704, fn. 4.

⁵² See *Calpin v. Page* (1873) 85 U.S. 366 [“The tribunals of one State . . . cannot extend their process into other States”].

- (3) Attach the California officer's probable-cause affidavit to the out-of-state officer's unsigned affidavit.
- (4) In a separate document, write the following:
 - (a) Descriptions of the person, place, or thing to be searched.
 - (b) Descriptions of the evidence to be seized.
 - (c) A suggested court order pertaining to the disposition of seized evidence; e.g., *All evidence seized pursuant to this warrant shall be retained by [name of California officer] of the [name of California officer's agency] in California. Such evidence may thereafter be transferred to the possession of a court of competent jurisdiction in California if it is found to be admissible in a court proceeding.*
- (5) Email, fax, or mail all of these documents to the out-of-state officer.

Upon receipt of these documents, the out-of-state officer should do the following:

- (1) Prepare a search warrant in accordance with local rules and procedures using the descriptions provided by the California officer, and incorporating the order that all seized evidence be transferred to the California officer.
- (2) Take the search warrant and affidavit (to which the California officer's affidavit has been attached) to a local judge.
- (3) In the judge's presence, sign the affidavit in which he swears that the incorporated and attached affidavit was submitted to him by a California law enforcement officer.

If the judge issues the warrant, it will be executed by officers in whose jurisdiction the search will occur. Those officers will then give or send the evidence to the California authorities.

Special Master Procedure

A search for documents in the office of a lawyer, physician, or psychotherapist (hereinafter "professional") is touchy because these papers often contain information that is privileged under the law. Still, officers can obtain a warrant to search for them if the search is conducted in accordance with a protocol—known as the "special master procedure"—that was designed to ensure that privileged communications remain confidential.⁵³

Before going further, it should be noted that the law in this area has changed. In the past, officers in California were required to implement this procedure only if the suspect was a client or patient of the professional; i.e., the professional was *not* the suspect. In 2001, however, the California Supreme Court essentially ruled that this procedure must be employed in all searches of patient or client files because, even if the professional was the suspect, he or his custodian of records is ethically obligated to assert the confidentiality privilege as to all files that officers intend to read.⁵⁴

As we will now discuss, under the mandated procedure the files must be searched by an independent attorney, called a "special master," who is trained in determining what materials are privileged. Accordingly, officers will ordinarily utilize the following protocol:

- (1) **AFFIANT REQUESTS SPECIAL MASTER:** The affiant will state in the affidavit that he believes the search will require the appointment of a special master; e.g., *It appears that the requested search will implicate the confidentiality of privileged communications. Accordingly, pursuant to Penal Code section 1524(c) I request that a special master be appointed to conduct the search.*

⁵³ See Pen. Code § 1524(c); *Fenwick & West v. Superior Court* (1996) 43 Cal.App.4th 1272, 1279. ALSO SEE Evid. Code § 952 ["As used in this article, 'confidential communication between client and lawyer' means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship."]; Evid. Code § 992 [sets forth the physician-patient privilege, essentially the same as Evid. Code § 952].

⁵⁴ *People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 713 ["Even if the custodian is suspected of a crime, when privileged materials in the custodian's possession are seized pursuant to a search warrant, he or she still owes a duty to take appropriate steps to protect the interest of the privilege holders in not disclosing the materials to law enforcement authorities or others."]. ALSO SEE *People v. Superior Court (Bauman & Rose)* (1995) 37 Cal.App.4th 1757, 1766 ["the attorney is professionally obligated to claim [the privilege] on his client's behalf whenever the opportunity arises unless he has been instructed otherwise by the client"].

- (2) **SPECIAL MASTER APPOINTED:** If the warrant is issued, the judge will appoint a special master whom the judge will select from a list of qualified attorneys compiled by the State Bar.
- (3) **SPECIAL MASTER EXECUTES WARRANT:** Officers will accompany the special master to the place to be searched. When practical, the warrant must be executed during regular business hours. Upon arrival, the special master will provide the professional (or custodian of records) with a copy of the warrant so that the professional will know exactly what documents the special master is authorized to seize. The special master must then give the professional an opportunity to voluntarily furnish the described documents. If he fails or refuses, the special master—not the officers—will conduct the search while the officers stand by.
- (4) **PRIVILEGED DOCUMENTS SEALED:** If the special master finds or is given documents that are described in the warrant, he will determine whether they are confidential. If not confidential, he may give them to the officers. But if they appear to be confidential, or if the professional claims they are, he must (a) seal them (e.g., put them in a sealed container); (b) contact the clerk for the issuing judge and obtain a date and time for a hearing to determine whether any sealed documents are privileged; and (c) notify the professional and the officers of the date, time, and location of the hearing.⁵⁵

Note that if a hearing is scheduled, officers should immediately notify their district attorney's office or city attorney's office so that a prosecutor can, if necessary, attend and represent the officers and their interests.

Search Conducted By An Expert

While most searches are conducted by officers, there are situations in which it is impossible or extremely difficult for officers to do so because the evidence is such that it can best be identified by a person with certain expertise. When this happens the affiant may seek authorization to have an expert in such matters accompany the officers and conduct the search himself.⁵⁶ For example, in *People v. Superior Court (Moore)*⁵⁷ officers were investigating an attempted theft of trade secrets from Intel and, in the course of the investigation, they sought a warrant to search a suspect's business for several items that were highly technical in nature; e.g., "magnetic data base tape containing Intel Mask data or facsimile for product No. 2147 4K Ram." The affiant realized that "he could not identify the property due to its technical nature without expert assistance," so he requested such assistance in the affidavit. The request was granted.

As the Court of Appeal explained, when the warrant was executed "none of the officers present actually did any searching, since none of them knew what the items described in the warrant looked like. Rather, at the direction of the officer in charge, they stood and watched while the experts searched"; and when an expert found any of the listed evidence, he would notify the officers who would then seize it. The court summarily ruled that such a procedure was proper.

Note that if the search will be conducted by officers, they do not need authorization to have an expert or other civilian accompany them and watch. And if the civilian sees any seizable property, he will notify the officers who will take it; e.g., burglary victim identifies stolen property.⁵⁸

⁵⁵ See Pen. Code § 1524(i); *People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 720; *People v. Superior Court (Bauman and Rose)* (1995) 37 Cal.App.4th 1757, 1765 ["In essence, the special master procedure . . . requires (1) that a search of premises owned or controlled by a nonsuspect privilege holder must be overseen by a special master; (2) that any item as to which the privilege holder asserts the privilege, or gives some other reason precluding disclosure, must be sealed on the spot; and (3) that a hearing must be held within three days of the service of the warrant, or as expeditiously as otherwise possible, on the privilege holder's assertion of the privilege or any issues which may be raised pursuant to [Pen. Code] Section 1538.5."].

⁵⁶ **NOTE:** Such authorization is not required under the Fourth Amendment, and may also be unnecessary under California law. See Pen. Code § 1530; *U.S. v. Bach* (8th Cir. 2002) 310 F.3d 1063, 1066. It is, however, a good practice if officers know ahead of time that it will be necessary for an expert to conduct the search.

⁵⁷ (1980) 104 Cal.App.3d 1001.

⁵⁸ See *Wilson v. Layne* (1999) 526 U.S. 603, 611-12 ["the presence of third parties for the purpose of identifying the stolen property has long been approved by the Court"]; Pen. Code § 1530 [the search may be conducted by a civilian "in aid of the officer"].

Anticipatory Search Warrants

Most search warrants are issued because officers have probable cause to believe that evidence of a crime is presently located in the place to be searched. There is, however, another type of warrant—known as an “anticipatory” or “contingent” warrant—that is issued *before* the evidence has arrived there. Specifically, an anticipatory search warrant may be issued when officers have probable cause to believe that the evidence—although not currently on the premises—will be there when a “triggering event” occurs.⁵⁹ In other words, the occurrence of the triggering event demonstrates that the evidence has arrived and, thus, probable cause now exists. As the Fourth Circuit put it, the triggering event “becomes the final piece of evidence needed to establish probable cause.”⁶⁰

The courts permit anticipatory warrants because, as the court noted in *U.S. v. Hugoboom*, without them officers “would have to wait until the triggering event occurred; then, if time did not permit a warrant application, they would have to forego a legitimate search, or, more likely, simply conduct the search (justified by exigent circumstances) without any warrant at all.”⁶¹

Although there are no restrictions on the types of evidence that may be sought by means of an anticipatory warrant, most are used in conjunction with controlled deliveries of drugs or other contraband.⁶² As the First Circuit observed:

Anticipatory search warrants are peculiar to property in transit. Such warrants provide a solution to a dilemma that has long vexed law enforcement agencies: whether, on the one hand, to allow the delivery of contraband to be completed before obtaining a search warrant, thus risking the destruction or disbursement of evidence in the ensuing interval, or, on the other hand, seizing the contraband on its arrival without a warrant, thus risking suppression.⁶³

Procedure

The procedure for obtaining an anticipatory warrant is essentially the same as that for a conventional warrant, except that the affidavit must also contain the following:

- (1) DESCRIPTION OF TRIGGERING EVENT: The affidavit must contain an “explicit, clear, and narrowly drawn” description of the triggering event;⁶⁴ i.e., the description should be “both ascertainable and preordained” so as to “restrict the officers’ discretion in detecting the occurrence of the event to almost ministerial proportions.”⁶⁵
- (2) TRIGGERING EVENT WILL OCCUR: The affidavit must establish probable cause to believe the triggering event will, in fact, occur; and that it will occur before the warrant expires.⁶⁶
- (3) PROBABLE CAUSE WILL EXIST: Finally, it must appear from the affidavit that the occurrence of the triggering event will give rise to probable cause to search the premises.⁶⁷

⁵⁹ See *People v. Sousa* (1993) 18 Cal.App.4th 549, 557 [“An anticipatory or contingent search warrant is one based on an adequate showing that all the requisites for a valid search will ripen at a specified future time or upon the occurrence of a specified event.”].

⁶⁰ *U.S. v. Andrews* (4th Cir. 2009) 577 F.3d 231, 237.

⁶¹ (10th Cir. 1997) 112 F.3d 1081, 1086. ALSO SEE *People v. Sousa* (1993) 18 Cal.App.4th 549, 557 [anticipatory warrants “recognize that the police often must act quickly, especially when dealing with the furtive and transitory activities of persons who traffic in narcotics”]; *U.S. v. Garcia* (2nd Cir. 1989) 882 F.2d 699, 703 [without anticipatory warrants, officers might be forced “to go to the scene without a warrant, and, if necessary, proceed under the constraints of the exigent circumstances exception”].

⁶² See *People v. Sousa* (1993) 18 Cal.App.4th 549, 558 [“It is true that most anticipatory warrant cases involve controlled deliveries of packages containing contraband. None of them, however, holds that anticipatory warrants are improper in other contexts.”].

⁶³ *U.S. v. Ricciardelli* (1st Cir. 1993) 998 F.2d 8, 10.

⁶⁴ See *U.S. v. Gendron* (1st Cir. 1994) 18 F.3d 955, 965; *U.S. v. Penney* (6th Cir. 2009) 576 F.3d 297, 310.

⁶⁵ *U.S. v. Ricciardelli* (1st Cir. 1993) 998 F.2d 8, 12. ALSO SEE *U.S. v. Brack* (7th Cir. 1999) 188 F.3d 748, 757.

⁶⁶ See *United States v. Grubbs* (2006) 547 U.S. 90, 96 [there must be “probable cause to believe the triggering condition *will occur*”]. **NOTE:** The triggering event must also occur before the warrant expires; i.e., within ten days after the warrant was issued. See Pen. Code § 1534(a); *Alvidres v. Superior Court* (1970) 12 Cal.App.3d 575, 581 [“This time period, of course, would be subject to the 10-day limitation which is set out in Penal Code section 1534.”].

⁶⁷ See *United States v. Grubbs* (2006) 547 U.S. 90, 94 [“It must be true [that] if the triggering condition occurs there is a fair probability that contraband or evidence of a crime will be found in a particular place”]; *U.S. v. Elst* (7th Cir. 2009) 579 F.3d 740, 744 [there must be “a fair probability that contraband or evidence of a crime will be found in the place to be searched if the triggering condition occurs”].

WHERE THE DESCRIPTION MUST APPEAR: Although the United States Supreme Court has ruled that the triggering event need not be described on the face of the warrant,⁶⁸ the warrant should at least indicate that the judge determined that it may be executed when the triggering event occurs, and not, as in conventional warrants, on any day before the warrant expires. Consequently, language such as the following should be added to the warrant: *Having determined that probable cause for this search will result when the triggering event described in the supporting affidavit occurs; and, furthermore, that there is probable cause to believe that this triggering event will occur; it is ordered that this warrant shall be executed without undue delay when the triggering event occurs.*

CONTROLLED DELIVERIES: As noted, most of the cases in which anticipatory warrants have been utilized involved controlled deliveries of drugs or other contraband, usually to the suspect's home. In these situations, the triggering event will commonly consist of a delivery of the evidence directly to the suspect's residence by the Postal Service, a delivery company such as UPS or FedEx, an undercover officer, or an informant under the supervision of officers.⁶⁹ Probable cause may also be found when there was strong circumstantial evidence that the contraband would be delivered to the premises; e.g., undercover officers had previously purchased drugs there,⁷⁰ or if intercepted contraband consisted of a quantity of drugs that was "too great an amount to be sent on a whim."⁷¹

THE "SURE AND IRREVERSIBLE COURSE" RULE: There is one other issue that must be addressed. Some courts have ruled that, when the triggering event is a controlled delivery, it is not sufficient that there is probable cause to believe the triggering event will occur; i.e., that there is a fair probability that the contraband will be taken to the place to be searched. Instead, it must appear that the contraband was on a "sure and irreversible course" to the location. The theoretical justification for this "requirement" is, according to the Seventh Circuit, "to prevent law enforcement authorities or third parties from delivering or causing to be delivered contraband to a residence to create probable cause to search the premises where it otherwise would not exist."⁷²

Based on the complete absence of any proof (or even a suggestion) that anyone had actually engaged in such blatantly illegal conduct, it appears the court's concern was based on nothing more than its overwrought imagination. Moreover, the "sure course" requirement is plainly contrary to the Supreme Court's ruling that only probable cause is required; i.e., that grounds for an anticipatory warrant will exist if "it is now probable that contraband, evidence of a crime, or a fugitive will be on the described premises when the warrant is executed."⁷³ It is therefore likely that, because the "sure and irreversible course" requirement establishes a standard higher than probable cause, it is a nullity.⁷⁴

Furthermore, there has never been a need for a "sure course" requirement because the cases in which it has been applied to invalidate a search

⁶⁸ *United States v. Grubbs* (2006) 547 U.S. 90, 98 ["[T]he Fourth Amendment does not require that the triggering condition for an anticipatory search warrant be set forth in the warrant itself"].

⁶⁹ See *United States v. Grubbs* (2006) 547 U.S. 90, 97 [delivery by USPS]; *U.S. v. Hugoboom* (10th Cir. 1997) 112 F.3d 1081, 1087 [delivery by undercover postal inspector]; *U.S. v. Ruddell* (9th Cir. 1995) 71 F.3d 331, 333 [delivery by undercover postal inspector]; *U.S. v. Vesikuru* (9th Cir. 2002) 314 F.3d 1116, 1122 [delivery by police agent posing as a commercial package carrier]; *U.S. v. Dennis* (7th Cir. 1997) 115 F.3d 524, 531 ["simply discovering the package in the mail stream and placing it back into the mail stream to effect a controlled delivery should satisfy the sure course requirement"]; *U.S. v. Leidner* (7th Cir. 1996) 99 F.3d 1423, 1429 ["the informant would personally deliver the marijuana to Leidner's residence, under the direction and supervision of the government"].

⁷⁰ See *U.S. v. Brack* (7th Cir. 1999) 188 F.3d 748, 757 ["Brack had been selling drugs out of Room 109"].

⁷¹ See *U.S. v. Lawson* (6th Cir. 1993) 999 F.2d 985, 988 [six ounces of cocaine "was too large an amount to be sent on a whim"]; *U.S. v. Dennis* (7th Cir. 1997) 115 F.3d 524, 530 [16 ounces of cocaine].

⁷² *U.S. v. Elst* (7th Cir. 2009) 579 F.3d 740, 745.

⁷³ *United States v. Grubbs* (2006) 547 U.S. 90, 96.

⁷⁴ **NOTE:** The "sure course" rule was announced in *U.S. v. Ricciardelli* (1st Cir. 1993) 998 F.2d 8. But just one year later, the court explained that, while its earlier opinion might be read as instituting a higher standard than probable cause, that was not the court's intention. Said the court, "But we know of no justification for a *stricter* standard in respect to specificity of time [when probable cause can be said to exist] than in respect to the other two (constitutionally referenced) search parameters. *Ricciardelli*, while stating that contraband must be on a 'sure and irreversible course' to the place to be searched, did not purport to set forth any *special* new rule requiring more specificity where time, rather than, say, place, is at issue." *U.S. v. Gendron* (1st Cir. 1994) 18 F.3d 955, 966.

could have been decided without it on grounds that the affidavit simply failed to establish probable cause to believe the evidence would be taken to the place to be searched. In fact, almost all cases in which the courts have invalidated searches based on a “sure course” transgression have involved controlled deliveries in which (1) the evidence was initially delivered to a location other than the suspect’s home (e.g., a post office box), or was intercepted before it reached the suspect’s home; (2) the affidavit failed to establish probable cause to believe it would be taken to the suspect’s home; and (3) there was no independent probable cause linking the suspect’s home to the criminal activity under investigation.⁷⁵ Thus, in these cases the affidavits would have failed irrespective of the “sure course” deficiency because they did not establish probable cause to believe the evidence would be taken to the place to be searched.

The case of *U.S. v. Rowland*⁷⁶ demonstrates the uselessness of the “sure course” concoction. In *Rowland*, postal inspectors intercepted child pornography that had been mailed to Rowland’s post office box. So they obtained an anticipatory warrant that authorized a search of Rowland’s home when the package was picked up and brought inside. The court ruled, however, that the warrant was invalid, not because of a “sure course” violation, but because the affidavit simply lacked facts that established a fair probability that the evidence would, in fact, be taken to Rowland’s house. As the court pointed out, “The affidavit stated: ‘It is anticipated that [Rowland], after picking up the tapes from the post office box, will go to his place of employment and after work to his residence.’ The affidavit contained no information suggesting that Rowland had previously transported contraband

from his private post office box to his home or that he had previously stored contraband at his home. Nor, did the affidavit provide any facts linking Rowland’s residence to suspected illegal activity.”

Warrants to Search Computers

Although computer searches are notoriously complex, the procedure for obtaining a warrant to search a computer is not much different than any other warrant. In fact, there are only three significant differences: (1) the manner of describing the hardware to be searched and the data to be seized (we covered those subjects in the Spring 2011 edition), (2) obtaining authorization for an off-site search, and (3) incorporating search protocols.

IS AN OFF-SITE SEARCH NECESSARY? As a practical matter, it will almost always be necessary to conduct a computer search off-site unless officers plan to conduct only a superficial examination; e.g., they will be trying to locate the listed information by conducting a simple word search or merely looking at the names of directories and files. As the federal courts have observed, because it is “no easy task to search a well-laden hard drive,”⁷⁷ the “practical realities of computer investigations preclude on-site searches.”⁷⁸

IS OFF-SITE AUTHORIZATION NECESSARY? Although some courts have ruled that officers do not need express authorization to conduct the search off site,⁷⁹ the better practice is to seek it. This is especially so when, as is usually the case, officers know when they apply for the warrant that an off-site search may be necessary.

HOW TO OBTAIN AUTHORIZATION: To obtain authorization for an off-site search, the affiant must explain why it is necessary.⁸⁰ Here’s an example:

⁷⁵ See, for example, *U.S. v. Hendricks* (9th Cir. 1984) 743 F.2d 653, 655; *U.S. v. Leidner* (7th Cir. 1996) 99 F.3d 1423, 1428; *U.S. v. Loy* (3d Cir. 1999) 191 F.3d 360, 365.

⁷⁶ (10th Cir. 1998) 145 F.3d 1194.

⁷⁷ *U.S. v. Upham* (1st Cir. 1999) 168 F.3d 532, 535. ALSO SEE *U.S. v. Brooks* (10th Cir. 2005) 427 F.3d 1246, 1251-52 [“Given the numerous ways information is stored on a computer, openly and surreptitiously, a search can be as much an art as a science.”].

⁷⁸ *U.S. v. Stabile* (3d Cir. 2011) 633 F.3d 219, 234.

⁷⁹ See, for example, *U.S. v. Horn* (8th Cir. 1999) 187 F.3d 781, 788; *U.S. v. Lamb* (N.D.N.Y. 1996) 945 F.Supp. 441, 462.

⁸⁰ See *U.S. v. Banks* (9th Cir. 2009) 556 F.3d 967, 973 [“[T]he affidavit explained why it was necessary to seize the entire computer system”]; *U.S. v. Hill* (9th Cir. 2006) 459 F.3d 966, 976 [“We do not approve of issuing warrants authorizing blanket removal of all computer storage media for later examination when there is no affidavit giving a reasonable explanation . . . as to why a wholesale seizure is necessary.”]; *U.S. v. Hay* (9th Cir. 2000) 231 F.3d 630, 637 [the affidavit “justified taking the entire system off site because of the time, expertise, and controlled environment required for a proper analysis”].

Request for Off-Site Search Authorization: For the following reasons, I request authorization to remove the listed computers and computer-related equipment from the premises and search them at a secure location:

- (1) *The amount of data that may be stored digitally is enormous, and I do not know the number or size of the hard drives and removable storage devices on the premises that will have to be searched pursuant to this warrant.*
- (2) *The listed data may be located anywhere on the hard drives and removable storage devices, including hidden files, program files, and “deleted” files that have not been overwritten.*
- (3) *The data may have been encrypted, it may be inaccessible without a password, and it may be protected by self-destruct programming, all of which will take time to detect and bypass.*
- (4) *Because data stored on computers can be easily destroyed or altered, either intentionally or accidentally, the search must be conducted carefully and in a secure environment.*
- (5) *To prevent alteration of data and to ensure the integrity of the search, we plan to make clones of all drives and devices, then search the clones; this, too, will take time and special equipment.*
- (6) *A lengthy search at the scene may pose a severe hardship on all people who [live][work] there, as it would require the presence of law enforcement officers to secure the premises while the search is being conducted.*

The affiant should then add some language to the proposed search warrant that would authorize an off-site search; e.g., *Good cause having been established in the affidavit filed herein, the officers who execute this warrant are authorized to remove the computers and computer-related equipment listed in this warrant and search them at a secure location.*

One other thing: If the warrant was executed within ten days after it was issued, officers do not need specific authorization to continue searching after the warrant expires.⁸¹ Officers must, however, conduct the search diligently.

UTILIZING PROTOCOLS: If officers expect to find seizable files intermingled with non-seizable files, they may—but are not required to⁸²—seek authorization to conduct the search pursuant to a protocol. Generally speaking, a protocol sets forth the manner in which the search must be conducted so as to minimize examinations and seizures of files that do not constitute evidence. For example, a protocol might require “an analysis of the file structure, next looking for suspicious file folders, then looking for files and types of files most likely to contain the objects of the search by doing keyword searches.”⁸³

Covert Search Warrants

Covert search warrants, commonly known as “sneak and peek” warrants, authorize officers to enter a home or business when no one is present, search for the listed evidence, then depart—taking nothing and, if all goes well, leaving no clue that they were there. Covert warrants are rarely necessary, but they may be useful if officers need to know whether evidence or some other items are on the premises, but the investigation is continuing and they do not want to alert the suspects that investigators are closing in. Covert warrants may also be helpful to identify the co-conspirators in a criminal enterprise before officers start making arrests.⁸⁴

THE “NOTICE” REQUIREMENT: The main objection to covert warrants is that the people whose homes and offices are searched are not immediately notified that a search has occurred. But the United States Supreme Court has described this objection as “frivolous,” pointing out that instant notification is not a

⁸¹ See *People v. Zepeda* (1980) 102 Cal.App.3d 1, 7 [“the warrant was actually served when the search began”]; *People v. Schroeder* (1979) 96 Cal.App.3d 730, 734 [“When the responding banks immediately indicated that it would take time for them to assemble the voluminous material called for in the warrants, the purpose of the [time limit] was met.”]; *People v. Superior Court (Nasmeth)* (2007) 151 Cal.App.4th 85, 99.

⁸² See *Dalia v. United States* (1979) 441 U.S. 238, 257 [“[T]he specificity required by the Fourth Amendment does not generally extend to the means by which warrants are executed.”]; *U.S. v. Hill* (9th Cir. 2006) 459 F.3d 966, 978 [“[W]e look favorably upon the inclusion of a search protocol; but its absence is not fatal.”]; *U.S. v. Cartier* (8th Cir. 2008) 543 F.3d 442, 447 [“the warrant need not include a search protocol to satisfy the particularity requirement”].

⁸³ *U.S. v. Burgess* (10th Cir. 2009) 576 F.3d 1078, 1094.

⁸⁴ See, for example, *U.S. v. Villegas* (2nd Cir. 1990) 899 F.2d 1324, 1330; *U.S. v. Pangburn* (2nd Cir. 1993) 983 F.2d 449.

constitutional requirement, as demonstrated by the delayed-notice provisions in the federal wiretap law.⁸⁵ Still, because notice must be given eventually, some federal courts have required that the occupants of the premise be given notice of the search within seven days of its execution, although extensions may be granted.⁸⁶ Note that the Ninth Circuit has ruled that a judge may authorize a delay of over seven days if the affiant makes a “strong showing of necessity.”⁸⁷ While California courts have not yet ruled on the legality of this procedure, it seems to provide a reasonable solution to the notification concerns.

TO OBTAIN AUTHORIZATION: The following procedure, adapted by the federal courts, should suffice to obtain a covert entry warrant in California:

- (1) **DEMONSTRATE REASONABLE NECESSITY:** In addition to establishing probable cause to search, the affidavit must demonstrate that a covert search is reasonably necessary.⁸⁸ Note that reasonable necessity does not exist merely because a covert search would facilitate the investigation or would otherwise be helpful to officers.⁸⁹
- (2) **ADD SPECIAL INSTRUCTIONS:** Instructions, such as the following, should be added to the warrant: *The evidence described in this warrant shall not be removed from the premises. An inventory of all evidence on the premises shall be prepared showing its location when discovered. Said evidence shall also be photographed or videotaped to show its location. Compliance with the receipt requirement of Penal Code § 1535 is excused until _____ unless an extension is granted by this court. Within two days after this warrant is executed, the following shall be filed with this court: (a) the inventory, and (b) the original or copy of all photographs and/or videotapes.*

Steagald Search Warrants

A *Steagald* warrant is a search warrant that authorizes officers to enter a home, business office, or other structure for the purpose of locating and arresting a person who (1) is the subject of an outstanding arrest warrant, and (2) does not live on the premises. For example, officers would need a *Steagald* warrant to search for the arrestee in the home of a friend or relative.⁹⁰ In contrast, only an arrest warrant (a conventional warrant or a *Ramey* warrant) would be necessary to enter the arrestee's home to make the arrest.

The reason that officers need a *Steagald* warrant (or consent or exigent circumstances) to enter a third person's home is that, otherwise, the homes of virtually everyone who knows the arrestee would be subject to search at any time until the arrestee was taken into custody.

As we will now discuss, a judge may issue a *Steagald* warrant if the affidavit demonstrates both probable cause to arrest and search.

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

- (1) **WARRANT OUTSTANDING:** If a conventional or *Ramey* arrest warrant is outstanding, the affiant can simply attach a copy to the affidavit and incorporate it by reference; e.g., *Attached hereto and incorporated by reference is a copy of the warrant for the arrest of [name of arrestee]. It is marked Exhibit A.*
- (2) **PROBABLE CAUSE:** If an arrest warrant has not yet been issued, the affidavit for the *Steagald* warrant must establish probable cause to arrest, as well as probable cause to search. (In such cases, the *Steagald* warrant serves as both an arrest and search warrant.)

⁸⁵ *Dalia v. United States* (1979) 441 U.S. 238, 247-48.

⁸⁶ See *U.S. v. Freitas* (9th Cir. 1986) 800 F.2d 1451, 1456.

⁸⁷ *U.S. v. Freitas* (9th Cir. 1986) 800 F.2d 1451, 1456.

⁸⁸ See *U.S. v. Villegas* (2nd Cir. 1990) 899 F.2d 1324, 1337 [“[T]he court should not allow the officers to dispense with advance or contemporaneous notice of the search unless they have made a showing of reasonable necessity for the delay.”]. **NOTE:** Although the Ninth Circuit has indicated that a showing of necessity is not a requirement under the Fourth Amendment (*U.S. v. Freitas* (9th Cir. 1986) 800 F.2d 1451, 1456 [“we do not hold that a showing of necessity is constitutionally required”]) it would seem that the overall reasonableness of the search may depend on whether the delayed notice was necessary. *Wilson v. Arkansas* (1995) 514 U.S. 927 982.

⁸⁹ See *U.S. v. Freitas* (9th Cir. 1986) 800 F.2d 1451, 1456 [the record “merely demonstrates that the search and seizure would facilitate the investigation of Freitas, not that it was necessary”].

⁹⁰ See *Steagald v. United States* (1981) 451 U.S. 204.

PROBABLE CAUSE TO SEARCH: There are two ways to establish probable cause to search.

- (1) **ARRESTEE IS INSIDE:** Establish probable cause to believe that the arrestee was inside the residence when the warrant was issued and would still be there when the warrant was executed.
- (2) **ANTICIPATORY SEARCH WARRANT:** Establish a fair probability that the arrestee would be inside the residence when a “triggering event” occurs (e.g., when officers see the arrestee enter), and that there is probable cause to believe the triggering event will occur; e.g., the arrestee has been staying in the house for a few days.⁹¹ The subject of anticipatory search warrants was covered earlier in this article.

Email Search Warrants

While most warrant applications are made by submitting hard copies of the affidavit and warrant to the issuing judge, California law has long permitted officers to seek warrants via telephone and fax. More recently, however, officers were given the added option of obtaining search warrants by email. And because the email procedure is so easy (and the others are so cumbersome), phone and fax warrants are now virtually obsolete.

Before setting forth the email procedure, it is necessary to define two terms that have been added to this area of the law:

Digital signature: The term “digital signature” means “an electronic identifier, created by computer, intended by the party using it to have the same force and effect as the use of a manual signature.”⁹²

Electronic signature: The term “electronic signature” means “an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record.”⁹³

The following is the procedure established by California statute that officers must implement to obtain a warrant by email:

- (1) **PREPARE AFFIDAVIT AND WARRANT:** Complete the affidavit and search warrant as an email message or in a word processing file that can be attached to an email message.
- (2) **PHONE JUDGE:** Notify the on-call judge that an affidavit and search warrant have been prepared for immediate transmission by email.
- (3) **OATH:** Before the documents are transmitted, the judge administers the oath to the affiant over the telephone.
- (4) **AFFIANT SIGNS:** Having been sworn, the affiant signs the affidavit via digital or electronic signature.
- (5) **AFFIANT TRANSMITS DOCUMENTS:** After confirming the judge’s email address, the affiant sends the following by email: (a) the affidavit (including any attachments), and (b) the warrant.
- (6) **CONFIRMATION:** The judge confirms that all documents were received and are legible. Missing or illegible documents must be re-transmitted. Affiant confirms that the digital or electronic signature on the affidavit is his.
- (7) **JUDGE READS AFFIDAVIT:** The judge determines whether the facts contained in the affidavit and any attachments constitute probable cause.
- (8) **JUDGE ISSUES WARRANT:** If the judge determines that probable cause to search exists, he or she will do the following: (a) sign the warrant digitally or electronically; (b) note the following on the warrant: (i) the date and time it was signed, and (ii) that the affiant’s oath was administered over the telephone; and (c) email the signed warrant to the affiant.
- (9) **AFFIANT ACKNOWLEDGES RECEIPT:** The affiant acknowledges that he received the warrant.
- (10) **AFFIANT PRINTS HARD COPY:** The affiant prints a hard copy of the warrant.
- (11) **DUPLICATE ORIGINAL CREATED:** The judge instructs the affiant over the telephone to write the words “duplicate original” on the hard copy.
- (12) **PROCESS COMPLETE:** The duplicate original is a lawful search warrant.⁹⁴

⁹¹ See *United States v. Grubbs* (2006) 547 U.S. 90, 96 [grounds for an anticipatory warrant will exist if “it is now probable that... a fugitive will be on the described premises when the warrant is executed”].

⁹² See Gov. Code § 16.5(d).

⁹³ See Civ. Code § 1633.2(h).

⁹⁴ See Pen. Code § 1526(b)(2).

Warrant Reissuance

A warrant is void if not executed within ten days after it was issued.⁹⁵ If the warrant becomes void, a judge cannot simply authorize an extension; instead, the affiant must apply for a new warrant, which includes submitting a new affidavit.⁹⁶ The required procedure is, however, relatively simple.

Specifically, if the information in the original affidavit is still accurate, the affiant can incorporate the original affidavit by reference into the new one—but he must explain why he believes the information is still correct;⁹⁷ e.g., *Affidavit for Reissuance of Search Warrant: On* [insert date of first warrant] *a warrant (hereinafter Warrant Number One) was issued by* [insert name of judge who issued it] *authorizing a search of* [insert place to be searched]. *A copy of the affidavit upon which Warrant Number One was based is attached hereto, incorporated by reference, and marked "Exhibit A". For the following reasons, Warrant Number One was not executed within 10 days of issuance:* [Explain reasons]. *I am not aware of any information contained in Exhibit A that is no longer accurate or current. Consequently, I believe that the evidence listed in Warrant Number One is still located at the place to be searched, and I am hereby applying for a second search warrant identical in all material respects to Warrant Number One. I declare under penalty of perjury that the foregoing is true and correct.*

If any information in the original affidavit is no longer accurate, it must be deleted. If there have been new developments or circumstances that may have undermined the existence of probable cause, the additional information must be included in the new affidavit.⁹⁸ If new developments have strengthened probable cause, officers should ordinarily include them in the new affidavit.

Other Special Procedures

RELEASING SEIZED EVIDENCE: When officers seize evidence pursuant to a search warrant, the evidence is technically in the custody and control of the judge who issued the warrant.⁹⁹ Consequently, the officers cannot transfer possession of the evidence to officers from another agency or any other person unless they have obtained a court order to do so. (We have posted such a court order on our website.) If, however, the property was seized by mistake, officers do not need court authorization to return it to the owner.¹⁰⁰

INSPECTION OF DOCUMENTS BY OTHER AGENCY: If officers from another agency want to make copies of documents seized pursuant to a warrant, they should seek an "Order to Examine and Copy Documents Seized by Search Warrant."¹⁰¹ (We have also posted a form for this purpose on our website.) This order should be supported by an affidavit establishing probable cause to believe the documents are evidence of a crime that the outside agency is investigating. The order should, if possible, be issued by the judge who issued the warrant.¹⁰²

SUBPOENA DUCES TECUM: Officers have occasionally asked whether they can obtain evidence by means of a subpoena duces tecum instead of a search warrant. Although the subpoena procedure may be quicker, a subpoena duces tecum is not a practical alternative for the following reasons. First, unless the subpoena is issued in conjunction with a criminal investigation conducted by a grand jury,¹⁰³ it may be issued only if (1) the defendant had already been charged with the crime under investigation, and (2) the officers are seeking evidence pertaining to that crime. Second, a person who is served with a subpoena must deliver the documents to the court—not to officers.¹⁰⁴

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⁹⁵ See Pen. Code § 1534(a).

⁹⁶ See *Srgo v. United States* (1932) 287 U.S. 206, 211; *People v. Sanchez* (1972) 24 Cal.App.3d 664, 682 [{"T}here is no statutory authority for the revalidation and reissuance of a search warrant."].

⁹⁷ See *Srgo v. United States* (1932) 287 U.S. 206, 211.

⁹⁸ See *People v. Sanchez* (1972) 24 Cal.App.3d 664, 681-82.

⁹⁹ See Pen. Code § 1536; *People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 713.

¹⁰⁰ See *Andresen v. Maryland* (1976) 427 U.S. 463, 482, fn.11.

¹⁰¹ See *Oziel v. Superior Court* (1990) 223 Cal.App.3d 1284, 1293, 1302.

¹⁰² See Pen. Code § 1536.

¹⁰³ Pen. Code § 939.2; *M.B. v. Superior Court* (2002) 103 Cal.App.4th 1384, 1388.

¹⁰⁴ Pen. Code §§ 1326 *et seq.*; Evid. Code § 1560.

Questioning Accomplices (*Aranda–Bruton*)

*Once partners in crime recognize that the “jig is up,” they tend to lose any identity of interest and immediately become antagonists.”*¹

When officers have arrested two or more accomplices to a crime, the odds of eliciting an incriminating statement from at least one of them are pretty good. That’s mainly because a suspect who knows that his accomplice has been arrested will not know whether his associate is talking to investigators and, if so, what he is saying. Consequently, he will not know what the investigators know, which gives them a big advantage. As the United States Supreme Court pointed out in *Richardson v. Marsh*, “[T]he probability of confession increases with the number of participants, since each has a reduced assurance that he will be protected by his own silence.”²

While this is undoubtedly a good thing, it can result in a serious problem for prosecutors if they want to try the accomplices together. This problem is the result of two significant cases—*People v. Aranda* and *Bruton v. United States*—which essentially provide that if part of a defendant’s statement incriminates his codefendant, prosecutors will not be permitted to use that part against either of them unless one of the exceptions to *Aranda-Bruton* applies.³

There are three reasons for this rule. First, statements by one accomplice that incriminate another are inherently unreliable because accomplices almost always try to make themselves appear less culpable by shifting as much blame as possible to their associates.⁴ Second, despite their questionable reliability, statements by accomplices tend to be “devastating” in the minds of the jurors.⁵ Third, and maybe most important, the attorney for a defendant who is incriminated by a codefendant’s statement will be unable to cross-examine the codefendant—and thus test the trustworthiness of his statement—if, as is often the case, he does not testify.⁶

There is, of course, an easy solution to the problem: prosecutors can try the defendants separately. But while this solves one problem, it creates several others. Of particular importance, it will almost always make it more difficult to obtain convictions. In addition, it’s hard on victims and witnesses, it’s expensive, and it wastes valuable court resources. In the words of the United States Supreme Court, separate trials “impair both the efficiency and the fairness of the criminal justice system” by “requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of

¹ *Lee v. Illinois* (1986) 476 U.S. 530, 544-45. Edited.

² (1987) 481 U.S. 200, 209-10.

³ **NOTE:** This rule was announced by the California Supreme Court in *People v. Aranda* (1965) 63 Cal.2d 518. Three years later, the U.S. Supreme Court essentially adopted the rule as a matter of constitutional law in *Bruton v. United States* (1968) 391 U.S. 128. Consequently, in California it is commonly known as the *Aranda-Bruton Rule*. ALSO SEE *People v. Boyd* (1990) 222 Cal.App.3d 541, 561 [“The premise of *Aranda* is essentially the same as that of *Bruton*”]. **NOTE:** *Aranda-Bruton* also applies when the declarant and the accomplice both make statements that, when considered together, incriminate the accomplice because they are inconsistent. See *People v. Fulks* (1980) 110 Cal.App.3d 609, 617 [inconsistent statements were highly incriminating because they “carried the unmistakable message that each was a hastily contrived fabrication”].

⁴ See *Lee v. Illinois* (1986) 476 U.S. 530, 541 [such statements are “presumptively unreliable”].

⁵ See *Bruton v. United States* (1968) 391 U.S. 123, 136.

⁶ See *Bruton v. United States* (1968) 391 U.S. 123, 136 [“The unreliability of such evidence is intolerably compounded when the alleged accomplice does not testify and cannot be tested by cross-examination.”]; *Lee v. Illinois* (1986) 476 U.S. 530, 541 [the “truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice’s confession is sought to be introduced against a criminal defendant without benefit of cross-examination”]; *People v. Burney* (2009) 47 Cal.4th 204, 230 [“If the declarant codefendant invokes the Fifth Amendment right against self-incrimination and declines to testify, the implicated defendant is unable to cross-examine the declarant codefendant regarding the content of the confession.”].

knowing the prosecution's case beforehand."⁷ On the other hand, said the Court, joint trials "generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability."⁸

So, what can officers do about this? In many cases, a lot. As noted, there are exceptions to the restrictions imposed by *Aranda-Bruton*—in fact, there are five. And, as we will discuss, in many cases the actions of the investigating officers will determine whether any of these exceptions are applicable. It will soon become apparent, however, that it is not easy for officers to navigate around *Aranda-Bruton*. On the contrary, it requires a good understanding of some complex legal rules, a lot of patience, and a little luck. But, given the alternatives, it is well worth the effort.

One other thing before we begin: to simplify our discussion, we will refer to the suspect who made the statement as the "declarant," and the suspect who was incriminated by the declarant's statement as the "accomplice."

Aranda Statements

A declarant's statement that incriminates an accomplice will be admissible under *Aranda-Bruton* in a joint trial if it constitutes an "Aranda statement." Simply put, an *Aranda* statement is one in which the declarant (1) explained only *his* role in planning and carrying out the crime, and (2) said nothing to suggest that he had an accomplice. For example, if Curley was giving a statement, and if he said "Moe and I went into Larry's Liquor Store and robbed it," the statement would not constitute an *Aranda* statement—and therefore could not be used by prosecutors if Curley and Moe were tried together—because Curley's statement also incriminated Moe. On the other hand, if Curley had said "I went into Larry's Liquor Store and robbed it," the statement would be admissible because Moe was not prejudiced by it.

To obtain an *Aranda* statement, it is usually best if investigators begin by trying to elicit complete statements from every arrestee who was involved in the planning or commission of the crime. Such a statement is necessary to help ensure that the investigators and prosecutors will have a complete picture of the incident, and also to provide prosecutors with the material they will need for an *Arandized* statement (discussed next) if the declarant does not give a usable *Aranda* statement. Then, after obtaining a complete statement, investigators will ask the declarant to give a second statement (the *Aranda* statement) in which he explains his role—and only his role.⁹

It must be acknowledged, however, that *Aranda* statements are notoriously difficult to obtain because it is unnatural for a suspect to describe a joint venture as if he were acting alone. It is especially hard to get them to avoid using the words "we," "he," "they" or some other reference to an accessory. To complicate matters, suspects who are asked to give such a statement will ordinarily be confused as to the objective of the officers' peculiar request, and the officers will seldom want to divulge their tactical reasons for seeking it. But even if the attempt fizzles, as we will discuss next, prosecutors may be able to convert an unsuccessful *Aranda* statement into a usable *Arandized* statement.

Arandized Statements

A so-called "*Arandized* statement"—also known as a "redacted" or "sanitized" statement—is a statement that originally contained information that incriminated the declarant's accomplice, but which was edited (usually by prosecutors or at the direction of the trial judge) so as to eliminate all direct and indirect references to the accomplice; i.e., there is nothing in the statement to indicate that an accomplice even existed. As the Supreme Court explained:

⁷ *Richardson v. Marsh* (1987) 481 U.S. 200, 210.

⁸ *Richardson v. Marsh* (1987) 481 U.S. 200, 210. **NOTE:** Before *Aranda-Bruton*, the courts often permitted the declarant's statement to be used at a joint trial if the court instructed the jurors that they must not consider anything in the statement as evidence against the accomplice. In *Bruton v. United States*, however, the Supreme Court ruled that this procedure was inadequate because of "the risk that the jury will not, or cannot, follow instructions," especially where "the powerfully incriminating extrajudicial statement of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial." (1968) 391 U.S. 123, 136.

⁹ See *People v. Mitcham* (1992) 1 Cal.4th 1027, 1047 ["[The officer] requested that [the declarant] provide another statement referring solely to his own involvement in the crimes and omitting any reference to [Mitcham]."].

[T]he Confrontation Clause is not violated by the admission of a nontestifying accomplice's confession with a proper limiting instruction when . . . the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence.¹⁰

Or, in the words of the Court of Appeal, "[I]f references to the participation of anyone else, whether directly or indirectly identified or not, are nonexistent, or are deleted, the trial may be joint, and the extrajudicial statement may be received against the declarant."¹¹

At the outset it should be noted that written *Arandized* statements were admitted in the past if all references to the accomplice were replaced with a blank space or a neutral term such as "deleted," "the other guy" or a pronoun.¹² But this proved to be unsatisfactory because, as the Supreme Court observed in *Gray v. Maryland*,¹³ jurors would quickly figure out that the purpose of these devices was to hide the identity of another person, and the most likely candidate was the declarant's codefendant. The Court offered this example: Assume that officers obtained the following confession from Bob Smith: "I, along with Sam Jones, robbed the bank." If prosecutors redacted the confession to read "I and blank robbed the bank," a juror who heard the confession and wondered to whom "blank" referred, "need only lift his eyes to Jones, sitting at counsel table, to find what will seem the obvious answer."

To avoid problems such as these, prosecutors would simply delete every word that could possibly be interpreted to mean that the declarant had an accomplice. But this didn't work either because it resulted in strange and awkward sentences that would just

befuddle the jurors; e.g., "Well, first broke open, opened up the lock with bolt cutters . . . and then opened the back of the car and got the body out and left the body near some rocks."¹⁴

Because of these problems, the Supreme Court ruled that edited or redacted statements will be admissible only if there was no "obvious indication of deletion."¹⁵ As the Ninth Circuit explained in *U.S. v. Parks*, "The combination of an obviously redacted statement with the language implying the existence of a third party reasonably could lead the jury to conclude that the unnamed third party must be the codefendant before them."¹⁶

It should be noted that an *Aranda-Bruton* violation will not result if the *Arandized* statement contained information that only became incriminating to the accomplice as the result of circumstantial evidence that was presented to the jury *after* the statement was admitted. This was the ruling of the United States Supreme Court in the case of *Richardson v. Marsh*.¹⁷ In that case, three people—Martin, Williams, and Marsh—robbed the occupants of a residence and killed two of them. Williams was arrested and gave a statement in which he identified Martin and Marsh as his accomplices. Among other things, Williams said they all drove to the house together, and that Martin had stated during the ride that he planned to kill all the occupants.

At the joint trial of Williams and Marsh (Martin was a fugitive), Williams' statement was read to the jury, except that all references to Marsh and Martin were deleted. Although the statement did not incriminate Marsh on its face, she later testified in her defense and acknowledged that she had accompanied Martin and Williams when they drove to the

¹⁰ *Richardson v. Marsh* (1987) 481 U.S. 200, 211.

¹¹ *People v. Manson* (1976) 61 Cal.App.3d 102, 151.

¹² See, for example, *Gray v. Maryland* (1998) 523 U.S. 185, 197 ["Question: Who was in the group that beat Stacey? Answer: Me, deleted, deleted, and a few other guys."]; *People v. Burney* (2009) 47 Cal.4th 203, 231 ["the other"]; *People v. Schmaus* (2003) 109 Cal.App.4th 846, 855 ["another guy"]; *People v. Fletcher* (1996) 13 Cal.4th 451, 457 ["a friend"].

¹³ (1998) 523 U.S. 185, 193. ALSO SEE *People v. Schmaus* (2003) 109 Cal.App.4th 846, 855 [Sixth Amendment violation occurs "if references to defendant's name are merely replaced by a symbol or by a blank space in place of defendant's name."]; *People v. Burney* (2009) 47 Cal.4th 203, 231 ["[W]hen, despite redaction, a codefendant's statement obviously refers directly to the defendant and implicates him or her in the charged crimes, the *Bruton* rule applies and introduction of the statement at a joint trial violates the defendant's rights under the confrontation clause."].

¹⁴ *People v. Archer* (2000) 82 Cal.App.4th 1380, 1390 ["While appellant's name is not mentioned in the statement, the existence of another participant is obvious from the statement itself."].

¹⁵ *Gray v. Maryland* (1998) 523 U.S. 185, 189, 197.

¹⁶ (9th Cir. 2002) 285 F.3d 1133, 1139.

¹⁷ (1987) 481 U.S. 200.

residence. In light of this testimony, Williams' *Arandized* statement was incriminating to Marsh for the following reason: Williams said in his statement that Martin had announced in the car that he was going to kill the occupants. Marsh testified that she was inside the car. Therefore, Marsh must have known that Martin planned to murder the occupants, and yet she did not withdraw from the conspiracy. Consequently, Marsh argued that the admission of Williams' statement constituted a violation of *Bruton*. But the United States Supreme Court disagreed, ruling that a violation does not result when, as here, the declarant's statement "was not incriminating on its face, and became so only when linked with evidence introduced later at trial."¹⁸

A similar issue arose during the 1970-71 murder trial of Charles Manson and three women who were members of the Manson Family. Specifically, the statements of the women were edited so that each woman explained only her role in carrying out the grisly Tate-LaBianca murders in Los Angeles. Nevertheless, the women contended on appeal that the statements of the others incriminated them—and thus violated the *Aranda* rule—because prosecutors had presented evidence to the jury that members of the Manson Family "ate together, slept together, had sex together, and functioned as a unit." In light of this testimony, they argued that the murderous actions of one member of the "unit" would naturally be viewed by the jurors as actions that were committed, encouraged, or at least approved by the others. Employing reasoning that the United States Supreme Court would adopt 11 years later in *Richardson v. Marsh*, the Court of Appeal ruled that an *Aranda* violation

does not result when, as occurred here, "each admission was edited to delete any explicit reference to anyone other than the declarant," and that the admissions only became incriminating to the others "by reason of circumstantial implications that might be drawn by the jury."¹⁹

Finally, it should be noted that, even if prosecutors were able to produce an *Arandized* statement, it will not be admissible at a joint trial if it was *more* incriminating to the declarant than the unedited version.²⁰ Still, in *People v. Lewis* the California Supreme Court ruled that the editing of one codefendant's statement from "We went to the mall" [where the codefendants kidnapped and later murdered a woman] to "I went to the mall" did not violate this rule because, although it "impliedly overstated" the declarant's role when considered in the abstract, there was substantial independent evidence that he did not act alone.²¹

Adoptive Admissions

A declarant's statement will be admissible under *Aranda-Bruton* if, before it was admitted into evidence, the accomplice acknowledged it was true. Such an acknowledgment renders the statement an "adoptive admission" which prosecutors may use in court because, as the California Supreme Court explained, "once the defendant has expressly or impliedly adopted the statements of another, the statements become *his own admissions*."²²

There are two ways in which a declarant's statement may be adopted by an accomplice. The most common is an express adoption, which occurs when officers tell the accomplice what the declarant claimed

¹⁸ ALSO SEE *People v. Hampton* (1999) 73 Cal.App.4th 710, 720 [no *Aranda-Bruton* violation because any incrimination resulting from the redacted statement "requires inference from the statement itself and linkage with other evidence"]; *People v. Bolden* (1996) 44 Cal.App.4th 707, 713-14 [declarant's statement that he "left the house with some friends" before committing an arson did not sufficiently identify the accomplice: "That [Bolden] was a friend of [the declarant]—along with countless others—was not a distinctive fact; the linkage was insignificant"]; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1047. ALSO SEE *People v. Orozco* (1993) 20 Cal.App.4th 1554, 1566 [the "incriminating link in this case was provided by the eyewitness identification"].

¹⁹ (1976) 61 Cal.App.3d 102, 151.

²⁰ See *People v. Lewis* (2008) 43 Cal.4th 415, 457 ["A defendant is prejudiced in [the context of *Aranda-Bruton*] when the editing of his statement distorts his role or makes an exculpatory statement inculpatory."].

²¹ (2008) 43 Cal.4th 415, 457.

²² *People v. Cruz* (2008) 44 Cal.4th 636, 672. ALSO SEE *People v. Castille* (2005) 129 Cal.App.4th 863, 876 ["The adoptive admission exception generally permits hearsay to be admitted against a party, when that party has adopted it or agreed that a statement, originally made by someone else, is true."]. NOTE: Because an adoptive admission is, as a matter of law, a statement by the accomplice (not the declarant), its admission into evidence does not violate *Crawford v. Washington* (2004) 541 U.S. 36. See *People v. Castille* (2005) 129 Cal.App.4th 863, 877-81; *People v. Combs* (2004) 34 Cal.4th 821, 842-43.

he had done, and the accomplice admits the statement is true; e.g., “Yeah, that’s what I did.”²³ The other is an implied adoption which may result if (1) the accomplice remained silent after hearing the part of the declarant’s statement that implicated him; and (2) the accomplice did not deny the allegation, even though he had an opportunity to do so.²⁴

While most adoptive admissions are obtained when investigators read or summarize the declarant’s statement to the accomplice, or play a recording of it, there is another method that should be considered. It works like this: Investigators bring the suspects together in a room and, through questioning and an exchange of comments between the suspects and officers, determine which details pertaining to the planning and commission of their crime they agree upon. A good example is found in *People v. Castille*.²⁵

In *Castille*, three men—Castille, Shields, and Brown—decided to rob Sharif’s Market in Oakland. While Brown waited outside in the getaway car, Castille and Shields entered wearing ski masks and armed with sawed-off shotguns. At first, everything went according to the plan: Shields stood guard at the door as Castille walked up to the clerk and brandished his shotgun. But then the clerk grabbed the gun and began to struggle with Castille. When Shields saw what was happening, he raised his shotgun and pointed it in the direction of the clerk. This caught the attention of Castille who ducked, thinking that Shields would hit him, too. As Castille ducked, Shields fired twice, killing the clerk. Castille and Shields then ran to the car and, as they sped off, the owner of the store, who had heard the commotion from his apartment upstairs, fired four or five shots at the vehicle.

For the next few weeks the investigation stalled. But then a man contacted officers and led them to the two shotguns, saying that Castille and Brown had given him the guns to sell. Shortly after that, officers located Brown’s car; it was parked on the street, the rear fender was peppered with bullet holes. About a

week later, officers arrested the three men for the murder and transported them to the Homicide Section for questioning.

Two homicide investigators were assigned to each suspect, and they interrogated them separately after obtaining *Miranda* waivers. All three essentially confessed. They were then put in a room together with the six investigators and the lead investigator, Lt. Ralph Lacer. Lacer testified that his objective was to try to obtain statements from everyone that would be admissible under *Aranda-Bruton*; and he figured that if all three suspects were interviewed together, the parts of the joint interview to which they agreed would constitute adoptive admissions.

The procedure that Lt. Lacer utilized, was described by the court as follows: “The officers frequently began their questions on a particular topic by addressing one defendant and then continuing the account with the other. As one defendant gave information, the officers asked the others to confirm certain statements.” Here’s an example:

CASTILLE: The clerk dude had the gun and everything. Remon [Shields] was like come on, so I let the gun go. I look at Remon and I see the gun pointing right at me so I’m like dang, if he pull the trigger it’s going to hit me in my head. So I ducked and ran out the store. As soon as I ducked, the shot went off.

SGT. BINGHAM: Okay Remon, you just heard what he said.

SHIELDS: Yes.

LT. LACER: Is what he said true? Remon, I know it’s hard but you need to answer me, son. Is what Clemeth just said true?

SHIELDS: If he say it’s true, it’s true.

LT. LACER: That’s your answer?

SHIELDS: You know, I don’t know for a fact though, I probably did, but I know when I went to turn and walk out of the store the gun went off. I know that. I know that. I can remember that. I, I won’t ever forget that.

²³ See *People v. Jennings* (2010) 50 Cal.4th 615, 663 [“defendant expressly admitted or accepted [the declarant’s statement] at the time the statement was made”]; *People v. Combs* (2004) 34 Cal.4th 821, 843. ALSO SEE *People v. Castille* (2005) 129 Cal.App.4th 863, 881 [a somewhat ambiguous adoption may suffice; “His response [‘If he says it’s true, it’s true’] is not free from ambiguity. However, permitting the jury to interpret his words, as juries are regularly called upon to do, presents no [constitutional] threat”].

²⁴ See CALCRIM 357; *People v. Jennings* (2010) 50 Cal.4th 615, 664 [“statements made by [the declarant] that were met by defendant’s silence, or by equivocal or evasive responses on his part, properly are viewed as adoptive admissions.”].

²⁵ (2005) 129 Cal.App.4th 863.

Before the officers concluded the joint interview, the court noted that “each defendant was asked directly whether he agreed with statements made by the others [they all did] and each had the further opportunity to clarify any statements to which he took exception.”

There were also certain things that the defendants did not agree on, such as when they first discussed robbing the store. Citing these conflicts, they contended their joint statement was inadmissible. But the court disagreed, ruling that an adoptive admission will not be suppressed merely because there were conflicts over matters that, in light of the entire statement, were immaterial. Accordingly, having determined that “[n]one of these differences in recollection are material in light of appellants’ admissions regarding the attempted robbery and murder,” the court ruled the recording was admissible as an adoptive admission.

One last thing: Officers should be very leery about putting the suspects together before they have each given fairly complete statements. That’s because a suspect who has not committed himself to a certain story may be able to concoct a plausible—but false—one by agreeing only to details that do not implicate him.

Other Aranda-Bruton Exceptions

There are two other situations in which a declarant’s statement implicating an accomplice may be admissible at a joint trial.

ACCOMPLICE MADE IDENTICAL STATEMENT: A declarant’s statement that incriminates an accomplice will be admissible in a joint trial if the accomplice gave a statement in which he essentially said the same thing.²⁶ This exception does not, however, apply merely because the accomplice’s statement

“interlocked” to some degree with that of the declarant; i.e., there were certain similarities. What counts is whether the accomplice expressly or impliedly acknowledged the truth of that part of the declarant’s statement that incriminated the accomplice.²⁷

For example, in *Lee v. Illinois*²⁸ police in East St. Louis arrested Lee and Thomas for committing a double murder. Both gave similar statements concerning many of the details surrounding the crime. There were, however, some discrepancies concerning the murders themselves. Specifically, their statements differed as to Lee’s awareness that Thomas had planned to kill the victims, and Lee’s role in carrying out the crimes. As the result of these discrepancies, the United States Supreme Court ruled that the admission of Thomas’s statement against Lee violated *Bruton*. Said the Court:

If those portions of the codefendant’s purportedly “interlocking” statement which bear to any significant degree on the defendant’s participation in the crime are not thoroughly substantiated by the defendant’s own confession, the admission of the statement poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment. In other words, when the discrepancies between the statements are not insignificant, the codefendant’s confession may not be admitted.

STATEMENT BY CO-CONSPIRATOR: Finally, under the co-conspirator exception to the hearsay rule, a declarant’s statement will be admissible in a joint trial if (1) the declarant and accomplice were co-conspirators in the crime, (2) the statement was made while the two were participating in the conspiracy, and (3) the statement was made in furtherance of the objective of the conspiracy.²⁹ POV

²⁶ See *Lee v. Illinois* (1986) 476 U.S. 530, 545 [“Obviously, when accomplices’ confessions are identical in all material respects, the likelihood that they are accurate is significantly increased.”]

²⁷ See *Lee v. Illinois* (1986) 476 U.S. 530, 545.

²⁸ (1986) 476 U.S. 530.

²⁹ See CALCRIM 418; Evid. Code § 1223; *People v. Gann* (2011) __ Cal.App.4th __ [2011 WL 1049786]; *U.S. v. Delgado* (5th Cir. 2005) 401 F.3d 290, 299; *U.S. v. Rashid* (8th Cir. 2004) 383 F.3d 769, 777. ALSO SEE *U.S. v. Allen* (9th Cir. 2005) 425 F.3d 1231, 1235 [“[C]o-conspirator statements are not testimonial and therefore beyond the compass of *Crawford’s* [*Crawford v. Washington* (2004) 541 U.S. 36] holding.”]. **NOTE:** Admission of a declarant’s statement will not constitute error under *Aranda-Bruton* if the declarant testifies at the joint trial and he (1) denies or admits making the statement incriminating his accomplice and (2) is subject to “full and effective cross-examination” by the accomplice’s attorney. *Nelson v. O’Neill* (1971) 402 U.S. 622, 627.

Recent Cases

Camreta v. Greene

(2011) __ U.S. __ [2011 WL 2039369]

Issue

Must officers obtain either a court order or parental consent before interviewing a child at school about a report of parental abuse?

Discussion and Comment

In 2010, the Ninth Circuit announced its ruling in the case of *Camreta v. Greene*,¹ a dubious decision in which the court concluded that (1) a child is “detained” when she is escorted to a school office by a guidance counselor for the purpose of speaking with officers about suspected parental abuse, and (2) officers are prohibited from questioning the child unless they obtain parental consent or a court order.

In addition to its brazen senselessness, the court’s decision raised eyebrows because it made it difficult or impossible for officers to investigate these types of crimes since (a) a parent who has abused a child is unlikely to consent to such an interview, and (b) there is no apparent authority by which courts can order a child to participate in one.

On October 12, 2010, the United States Supreme Court announced it would review the ruling, and on May 26, 2011 it published its decision. But, for reasons that seem trivial in light of the horrible implications of the Ninth Circuit’s decision, the Supreme Court elected not to overturn it in the usual manner. Instead, it simply vacated it, rendering it a nullity but leaving nothing in its place. As the Court explained, its ruling “strips the decision below of its binding effect.” While it was disappointing that the case was not given a more graphic annihilation, the Supreme Court did the next best thing by abolishing it, an action it has rarely taken.²

So the question now is whether the Ninth Circuit’s discredited opinion will have any residual effect. Especially important is whether school administrators will now, as before, routinely permit officers to interview children at school about suspected abuse. (Sadly, we have heard that some schools within the Ninth Circuit’s jurisdiction responded to its decision by refusing to permit such interviews without a court order, having apparently determined that avoiding potential lawsuits was more important than protecting their students from physical or sexual abuse.)

While we won’t know for some time how California’s schools will respond to the Supreme Court’s action, here are a few things that should be noted. First, schools cannot prohibit officers from interviewing children who are believed to have been the victims of parental abuse. On the contrary, the Penal Code specifically states that these children “may be interviewed during school hours, on school premises.”³

Second, even though it is absurd to suggest that a student is “detained” if he is escorted to an office by a school employee, officers should naturally take steps to reduce any stress resulting from such an interview and to establish a more comfortable atmosphere in which to speak with the child. To this end, interviews should ordinarily be conducted by school resource officers, as they are a familiar presence to most students and, just as important, are generally viewed as protective—not threatening.⁴ If, however, a resource officer is not available, the interview should be conducted by only one or—at most—two officers, and they should be in plain clothes.⁵ Third, a member of the school staff should be present. In fact, a student who is interviewed by officers at school has a legal right to have a staff member present, and the Penal Code requires that officers notify the student of this right.⁶

¹ (9th Cir. 2009) 588 F.3d 1011.

² See *U.S. v. Munsingwear, Inc.* (1950) 340 U.S. 36.

³ See Pen. Code § 11174.3(a).

⁴ Ed. Code § 49350.5 [school resource officer program demonstrates “a collaborative and integrated approach for implementing a system of providing safe and secure school environments between the school districts and local law enforcement agencies”].

⁵ **NOTE:** It should be noted that some counties have special facilities at which trained personnel conduct these types of interviews in a cheerful and friendly environment; e.g., Alameda County’s CALICO center.

⁶ See Pen. Code § 11174.3(a).

Fourth, officers should begin by making it clear to the student that she is not in trouble, that they just want to talk with her, and that she can leave whenever she wants. Finally, officers should consider recording these interviews (secretly, if possible, so as not to heighten the anxiety level) in order to have proof of the following: (1) they did not employ coercive or suggestive interviewing methods, (2) they advised the child that she did not have to talk with them, (3) they informed the child of her right to have a member of the school staff present, and (4) the precise duration of the interview.

Kentucky v. King

(2011) __ U.S. __ [2011 WL 1832821]

Issue

If officers make a warrantless entry into a home to prevent the destruction of evidence, under what circumstances will the entry be deemed unlawful on grounds that it was the officers, themselves, who created the threat?

Facts

In the course of a controlled buy operation outside an apartment complex in Lexington, Kentucky, an undercover officer purchased crack cocaine from a man who immediately started “moving quickly” toward the breezeway in one of the buildings in the complex. When officers arrived in the breezeway, they saw there were two apartments into which the man might have entered. Having smelled a “very strong” odor of marijuana coming from one of the apartments, the officers decided it would be a good place to start so they “banged” on the door and loudly announced “This is the police” or “Police, police, police.” Immediately afterwards, they heard the sounds of “people inside moving” and other indications that the occupants were about to destroy the drugs. So, after announcing they were going to enter, they kicked in the door.

Upon entering, the officers detained three people in the front room, then conducted a protective sweep

of the apartment. During the sweep, they found marijuana and cocaine which resulted in criminal charges against one of the occupants, Hollis King.⁷ The Kentucky Supreme Court, however, ordered the evidence suppressed under the doctrine known as “police-manufactured” (or “do-it-yourself”) exigent circumstances. Specifically, the court ruled that, even if officers reasonably believed that the occupants of a residence were about to destroy evidence, a warrantless entry violates the Fourth Amendment if the threat to the evidence was produced by the actions of the officers themselves; i.e., the officers knew, or should have known, that their actions would have motivated the occupants to immediately destroy the evidence.

The court then concluded that the exigency here was “police-manufactured” because the officers should have known that drug traffickers would try to destroy their drugs upon hearing officers banging on the door. Accordingly, it ruled the entry was unlawful. The State of Kentucky appealed to the United States Supreme Court.

Discussion

Under the doctrine of exigent circumstances, officers may forcibly enter a residence if they reasonably believed that the occupants were about to destroy evidence of a crime. Over the years, however, courts throughout the country—including California—have generally refused to apply this rule if the threat to the evidence was largely due to the actions of the officers; i.e., the threat was “police-manufactured.”⁸ In most cases, the courts would rule that threats were manufactured when (1) the officers had probable cause to believe there was evidence on the premises; (2) they announced their presence without having an overriding reason for doing so; and (3) they knew, or should have known, that their announcement would provide the occupants with a motive to immediately destroy the evidence.

As noted earlier, the Kentucky Supreme Court essentially applied this test and ruled that the threat to the evidence had, in fact, been manufactured by

⁷ NOTE: It turned out that the man who sold drugs to the undercover officer had entered the other apartment; he was arrested later.

⁸ See, for example, *People v. Bellizzi* (1995) 34 Cal.App.4th 1849, 1852 [“The officers resorted to a ruse with a hotel employee in order to get the door open, then observed appellant go into a panic at the sight of an armed stranger in plain clothes”].

the officers because it was reasonably foreseeable that their act of “banging” on the door and loudly announcing “This is the police” or “Police, police, police” would have motivated the occupants to destroy the drugs.

Although the U.S. Supreme Court agreed that a manufactured threat to evidence cannot justify a warrantless entry, it disagreed with the Kentucky court’s ruling that a threat will be deemed “manufactured” whenever the officers’ words or actions were reasonably likely to cause the occupants to destroy the evidence. Instead, the Court essentially ruled that a threat is “manufactured” by officers only if (1) they announced or implied that they were about to enter the premises, and (2) such an entry would have been unlawful under the Fourth Amendment. Said the Court:

[T]he exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable [within the meaning of the Fourth Amendment]. Where, as here, the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed.

The Court added that it was rejecting Kentucky’s “reasonable foreseeability” test because, among other things, “whenever law enforcement officers knock on the door of premises occupied by a person who may be involved in the drug trade, there is *some* possibility that the occupants may possess drugs and may seek to destroy them.”

The question, then, was whether the officers’ banging” on the door and loudly announcing their presence constituted a threat to make an unlawful entry. The Court ruled it did not, saying “we see no evidence that the officers either violated the Fourth Amendment or threatened to do so prior to the point when they entered the apartment.” Of particular importance, the Court pointed out that “[t]here is no evidence of a ‘demand’ of any sort, much less a demand that amounts to a threat to violate the Fourth Amendment.” The Court did, however, remand the case to Kentucky for a determination of whether, based on the sounds emanating from the apartment when they knocked, the officers reasonably believed that the occupants were about to destroy drugs.

People v. Troyer

(2011) 51 Cal.4th 599

Issue

Did officers reasonably believe that a warrantless entry into a residence was necessary to locate a shooting victim?

Facts

At about noon, police in Elk Grove (Sacramento County) received a 911 call that a shooting had just occurred at a house. The caller reported that one man had “possibly been shot twice,” and that the shooters had fled. The first officer to arrive found a woman on the front porch; she had been shot several times. Also on the porch was a man, Adrien Abeyta, who had a wound on the top of his head. The officer had trouble obtaining any information from the victims because the woman was in an “altered level of consciousness” and Abeyta was “excited and agitated.”

The officer then noticed blood on the front door; specifically, “smudge marks and blood droplets in multiple areas, including near the handle side of the door.” Although this indicated that one or both of the victims had touched the door, the officer could not tell whether they did so as they left the house (indicating the shooting had occurred inside) or whether they did so as they attempted to enter (indicating the shooting had occurred outside). In any event, he *did* know that he needed to find out if there were any other victims inside.

And so he asked Abeyta if anyone was inside the house. Abeyta did not respond for 15-20 seconds, so the officer repeated the question. Again, Abeyta just “stared” at the officer, but finally said he “did not think” that anyone was inside. Needing a definitive answer, the officer asked once more. Another long pause, then Abeyta said “no.” Nevertheless, the officer decided to enter, mainly because of the life-or-death consequences of his decision, Abeyta’s hesitancy in answering the question, his strange responses to the officer’s questions, and his agitated mental state.

After making an announcement at the door, the officer and others entered and conducted a cursory inspection of the downstairs. Finding no one, they went upstairs. They didn’t find anyone there either, but one of the bedroom doors was locked. So, after

making another announcement, an officer kicked the door open and immediately saw “quarter size balls” of marijuana and an electronic scale. Officers then secured the house, obtained a search warrant and, in the course of the search, seized firearms, \$9,000 in cash, and marijuana. As the result of the seizure, Albert Troyer, one of the residents of the house, was charged with possession of marijuana for sale.

When Troyer’s motion to suppress the evidence was denied, he pled no contest. Later, he appealed on grounds that both the entry into the house and the entry into the bedroom were unlawful because there were insufficient facts demonstrating that someone inside the house had been shot. Although the Court of Appeal ruled the initial entry was lawful, it ruled the entry into the bedroom was unlawful because the officers saw nothing downstairs (such as blood or signs of a struggle) to indicate that anyone else needed immediate aid. The People appealed to the California Supreme Court.

Discussion

Troyer argued that a warrantless entry based on the emergency aid component of exigent circumstances is lawful only if officers have *probable cause* to believe that someone on the premises needs immediate assistance. The California Supreme Court disagreed.

At the outset, it should be noted that there is some confusion over this issue. On the one hand, the United States Supreme Court has repeatedly instructed the lower courts to utilize a balancing test to determine whether exigent circumstances exist. Specifically, the courts are required to uphold a search if the need for it outweighed its intrusiveness. As the Court explained in *Illinois v. McArthur*, “[W]e balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable.”⁹

It is therefore apparent that probable cause is *not* a requirement because, under the balancing test, a reduced level of necessity would suffice if the intrusion was relatively insignificant. Moreover, as the California Supreme Court observed in *Troyer*, it would be inappropriate to import the doctrine of probable cause (a concept pertaining to criminal investigations) into the field of exigent circumstances (a concept pertaining to the saving of lives and property). Thus, the court reiterated the rule that, in determining the existence of exigent circumstances, “we balance the nature of the intrusion on an individual’s privacy against the promotion of legitimate governmental interests.”

On the other hand, however, probable cause—or something approaching it—will always be necessary whenever the intrusion consists of a warrantless entry or, especially, a search of a home. That’s because such an intrusion is simply too weighty to be justified by anything less. As the result, there are several cases in which the courts have ruled flat out that a warrantless entry or search of a home based on exigent circumstances requires probable cause to believe the intrusion was necessary.¹⁰

Although the court in *Troyer* rejected the argument that probable cause is an absolute requirement, it acknowledged that an entry or search of a home cannot be upheld under an exigent circumstances theory unless there was an “objectively reasonable basis” for the intrusion. So, the issue in *Troyer* was whether the officers were aware of facts that satisfied this requirement.

As for the initial entry, the court ruled it plainly passed this test. Among other things, it pointed out that the blood on the front door “indicated that a shooting had occurred mere feet from or within the doorway area. Bloodstains on the door signaled that a bleeding victim had come into contact with the door, either by entering or by exiting the residence.” In addition, the 911 caller had reported that a man

⁹ (2001) 531 U.S. 326, 331. ALSO SEE *Illinois v. Lidster* (2004) 540 U.S. 419, 426 [“[I]n judging reasonableness, we look to the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.”].

¹⁰ See, for example, *Huff v. City of Burbank* (9th Cir. 2011) 632 F.3d 539, 545 [“In addition to exigency, officers must have probable cause [to enter].”]; *Murdock v. Stout* (9th Cir. 1995) 54 F.3d 1437, 1441 [“Although exigent circumstances relieve the police officer of the obligation of obtaining a warrant, they do not relieve an officer of the need to have probable cause to enter the house.”]; *U.S. v. Socey* (D.C. Cir. 1988) 846 F.2d 1439, 1444, fn.5 [“Exigent circumstances justify a warrantless entry into a home only where there is also probable cause to enter the residence.”].

had “possibly been shot twice,” but the only man on the scene was Abeyta, and he could not possibly have been shot twice because he was suffering from a head wound that, if caused by two gunshots, would undoubtedly have been fatal.

Having ruled that the initial entry was lawful, the court addressed the Court of Appeal’s conclusion that the entry into the bedroom was unlawful because the officers saw no blood or anything else in the downstairs area to indicate the shootings (or even a disturbance) had occurred inside the house. While that was, in fact, the situation downstairs, the Supreme Court ruled it did not nullify the convincing force of the circumstances that indicated another shooting victim might be in the bedroom. Especially important were Abeyta’s “inconsistent and evasive responses to [the officer’s] inquiries as to whether anyone was inside the residence.”¹¹ The court also observed that when the officers searched the downstairs area they were looking for people, not blood. As one of them testified, their attention was focused on discovering “a body,” not blood. In any event, the court pointed out that bloodstains “are not prerequisites to a finding of exigency.”

For these reasons, the court ruled that the officers’ entry into the downstairs area and their forcible entry into the bedroom were lawful.

People v. Rios

(2011) 193 Cal.App. 4th 584

Issue

While conducting a probation search of a residence, did officers have sufficient grounds to detain a visitor?

Facts

At about 9:30 A.M., Terry Morris and five other Kern County probation officers went to the home of a “high risk” juvenile probationer (identified here as “R.R.”) to conduct a probation search. Morris knew that one of the conditions of R.R.’s probation was that he not associate with gang members.

As Morris entered the house, he noticed Florencio Rios sitting on a sofa in the living room. There were

two other things he noticed about Rios: (1) he was wearing “layers of clothing” although the day was already hot; and (2) he was sporting two gang-related tattoos: one read “One way in, One way out,” and the other consisted of three dots on the web of one hand. Morris asked Rios several questions about his identity and his reason for being in the house, but Rios either refused to answer or responded with obscenities. More troublesome, Rios kept contorting his body so as to prevent Morris from getting a good look of his midsection, an area where firearms are ordinarily concealed. In fact, at one point Rios turned his back on Morris and “leaned his upper body down on the couch with his right arm pressed against his stomach.”

Having concluded that Rios was attempting to hide something—most likely a firearm—Morris notified him that he was being detained and would be pat searched for weapons. Rios responded with a clever “Fuck you” and attempted to pull away. Morris then took him to the ground, handcuffed him, and conducted the pat search. The search netted a handgun and a switchblade.

When his motion to suppress the evidence was denied, Rios pled no contest to, among other things, possessing a weapon after having served four prison terms. He was sentenced to 25 years to life.

Discussion

Rios contended that the evidence should have been suppressed because Morris lacked grounds to detain and pat search him. The court disagreed. At the outset, it should be noted that both the detention and pat search could have been upheld simply because it reasonably appeared that Rios was attempting to hide something that, given his layered clothing and gang tattoos, was probably a handgun.¹² But the court did not consider this theory because it assumed for the sake of argument that Rios had been detained before he started trying to hide his handgun.

THE DETENTION: Rios contended that the detention was unlawful because Morris had no reason to believe at the outset that he had committed, or was committing, a crime. There is, however, another type of detention—known as a “special needs detention”—

¹¹ ALSO SEE *Michigan v. Fisher* (2009) __ U.S. __ [130 S.Ct. 546, 549] [“Officers do not need ironclad proof of a likely serious, life-threatening injury to invoke the emergency aid exception.”].

¹² See *People v. Armenta* (1968) 268 Cal.App.2d 248, 249; *People v. Wigginton* (1973) 35 Cal.App.3d 732, 737-38.

that is defined as a temporary seizure of a person that serves a public interest other than the need to determine if the detainee committed a crime.¹³ And here, the officers did, in fact, have a good reason to detain Rios: they needed to know if he was a gang member because, as noted, one of the terms of R.R.'s probation was that he not hang out with such people.

An almost identical issue was raised in 2000 in the case of *People v. Matelski*.¹⁴ In *Matelski*, officers were about to enter a house to conduct a probation search when a visitor, Matelski, opened the door and started to leave. Although the officers had no reason to believe that Matelski was involved in criminal activity, they detained him because they knew that the probationer was prohibited from associating with felons, and they wanted to find out if Matelski was one. When the officers ran Matelski's name, they learned he was arrestable on a warrant, and this led to the discovery of drugs. Like Rios, Matelski argued that the officers had no legal basis to detain him, but the court disagreed, saying "there was a need to determine [his] connection to the probationer because the probationer was prohibited by his general terms of probation from consorting with convicted felons."

The court in *Rios* was persuaded by this logic and concluded that, because Morris knew that R.R. "was subject to gang and drug conditions," he "could briefly detain [Rios] to ascertain his identity and relationship to the probationer and the probationer's residence."

THE PAT SEARCH: As for the pat search, it is settled that such a precaution is permitted if officers reasonably believe that a detainee was armed or dangerous.¹⁵ And here there were ample circumstances that supported this conclusion. As the court observed, "Morris was dealing with a probable gang member who was overly dressed for the weather, belligerently refused to answer his questions or cooperate with him, and continued to make evasive movements even after Morris asked him to stop."

For these reasons, the court ruled that Rios's motion to suppress the firearm was properly denied.

U.S. v. Cuevas-Perez

(7th Cir. 2011) __ F.3d __ [2011 WL 1585072]

Issue

Must officers obtain a search warrant to conduct GPS surveillance of a vehicle if the surveillance will be protracted?

Facts

Having become aware that Cuevas-Perez might be trafficking in heroin, ICE agents and city police officers installed a pole camera outside his home in Phoenix. Their suspicions were heightened when the camera recorded him "manipulating" the hatch and rear door panels on his Jeep Laredo. Because this indicated that Cuevas-Perez was utilizing a secret compartment in his Jeep to transport heroin, officers decided to conduct intensive surveillance. So they attached a GPS tracking unit to the undercarriage while the Jeep was parked in a public place, and they programmed the unit to transmit text messages of the vehicle's whereabouts every four minutes.

A day or so later, Cuevas-Perez drove his Jeep from Phoenix to Illinois. The GPS unit tracked him through New Mexico, Texas, Oklahoma, and Missouri. But before he arrived in Illinois the batteries on the tracker started running low, so ICE agents in Missouri began conducting visual surveillance until he entered Illinois, at which point they reverted to visual surveillance conducted by the Illinois State Police. At this point, the GPS surveillance—which had lasted about 60 hours—was terminated.

As Cuevas-Perez drove through Illinois, ICE agents asked the state police to "find a reason" to stop the Jeep and, having observed a minor traffic violation, an officer pulled it over. During the course of the stop, a drug detecting dog alerted to the vehicle, at which point officers searched it and found heroin secreted in the doors and above the headliner.

Cuevas-Perez was arrested and charged with possessing heroin with intent to distribute. When his motion to suppress the heroin was denied, he pled guilty.

¹³ See *Illinois v. Lidster* (2004) 540 U.S. 419, 424 ["special law enforcement concerns will sometimes justify [detentions] without individualized suspicion"]; *Indianapolis v. Edmond* (2000) 531 U.S. 32, 37 ["[We have] upheld certain regimes of suspicionless searches where the program was designed to serve 'special needs,' beyond the normal need for law enforcement."].

¹⁴ (2000) 82 Cal.App.4th 837.

¹⁵ See *Arizona v. Johnson* (2009) 555 U.S. 323.

Discussion

On appeal to the Seventh Circuit, Cuevas-Perez argued that his motion to suppress should have been granted on grounds that the GPS surveillance constitutes a “search,” and that it is an unlawful search if officers failed to obtain a search warrant. At first glance, this argument would seem to have been foreclosed by the United States Supreme Court’s 1983 decision in *United States v. Knotts*.¹⁶ In *Knotts*, the Court ruled that the tracking of a drum of methamphetamine precursor by means of a hidden electronic beeper did not constitute a search because the beeper merely permitted officers to follow the drum as it was transported on public streets. Said the Court, “A person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.”

Last year, however, a panel of the District of Columbia Circuit made news when it ruled in *U.S. v. Maynard*¹⁷ that, despite the plain wording of *Knotts*, a “search” results if the electronic surveillance was too lengthy. In *Maynard*, it lasted 28 days, and the court ruled that surveillance of such a duration constituted a “virtually limitless intrusion into the affairs of private citizens,” and was therefore a “search.”

Citing *Maynard*, Cuevas-Perez argued that the GPS surveillance of his Jeep also constituted a search because it lasted for 60 hours. But the court ruled that, even if it were to agree with *Maynard*’s reasoning, “the surveillance here was not lengthy and did not expose, or risk exposing, the twists and turns of Cuevas-Perez’s life, including possible criminal activities, for a long period.” Consequently, the court ruled that Cuevas-Perez’s motion to suppress was properly denied, and it affirmed his conviction.

Comment

Three other things should be noted. First, on April 15, 2011, the U.S. Department of Justice filed a petition for certiorari, asking the United States Supreme Court to review the D.C. Circuit’s decision in *Maynard*. Second, there will be continued uncer-

tainty in this area of the law if the Supreme Court does not resolve this issue. As the court observed in *Cuevas-Perez*, “The use of GPS by law enforcement is a Fourth Amendment frontier. Undoubtedly, future cases in the tradition of *Maynard* will attempt to delineate the boundaries of the permissible use of this technology—a technology surely capable of abuses fit for a dystopian novel.” Third, the court in *Cuevas-Perez* suggested that because the courts have, to date, provided only “piecemeal guidance” in this area of the law, officers should consider applying for a search warrant if they anticipate lengthy electronic surveillance.

Garcia v. County of Merced

(9th Cir. 2011) __ F.3d __ [2011 WL 1680388]

Issues

(1) Did officers have probable cause to arrest an attorney for smuggling drugs into the Merced County Jail? (2) In obtaining a warrant to search the attorney’s office, did officers misrepresent an informant’s criminal record?

Facts

An inmate in the Merced County Jail told sheriff’s investigators that a local attorney, John Garcia, was smuggling methamphetamine into the facility. The inmate, Robert Plunkett, said he learned about the smuggling operation from one of Garcia’s clients, a fellow inmate named Alfonso Robledo. According to Plunkett, Robledo told him that a woman named Sylvia Brown was Garcia’s “usual source” of methamphetamine, and that Garcia would hide the drugs in a Bugler tobacco pouch which he would deliver to Robledo during their attorney-client meetings at the jail. Robledo had also suggested to Plunkett that he could also supply Garcia with drugs on those occasions when Plunkett was out of jail on a pass.

After meeting with Plunkett, the investigators attempted to corroborate his story and were able to confirm that Garcia was Robledo’s attorney, that Plunkett had an “in-custody relationship” with Robledo, that Robledo was in jail on drug charges,

¹⁶ (1983) 460 U.S. 276.

¹⁷ (D.C. Cir. 2010) 615 F.3d 544.

and that Plunkett was not in a computer database of unreliable informants. More importantly, an investigator monitored a phone call from Plunkett to Sylvia Brown during which Brown appeared to welcome the news that Plunkett had obtained drugs for Garcia to deliver to Robledo.

Next, the investigators decided to make a controlled delivery of drugs from Plunkett to Garcia. After obtaining approval of the operation from a Superior Court judge and a representative of the District Attorney's Office, they provided Plunkett with a Bugler tobacco pouch containing methamphetamine which was "clearly visible to anyone opening the pouch." The investigators then followed Plunkett and watched as he met with Garcia and handed him the Bugler bag which Garcia opened in Plunkett's presence. Garcia then took the bag to his office.

Later that day, officers arrested Garcia and obtained a warrant to search his law office.¹⁸ During the search, they found the following:

- IN THE BATHROOM: A small amount of methamphetamine in a plastic bag.
- IN GARCIA'S OFFICE: A small amount of methamphetamine and six packages of Bugler tobacco.

Garcia later told the officers that his investigator had flushed the methamphetamine from the tobacco pouch down the toilet before they arrived, and that the methamphetamine they found in the bathroom was "spillage."

The results of the investigation and search were forwarded to the California Attorney General's Office which, for reasons that are not immediately apparent, declined to prosecute Garcia.¹⁹ He then filed a federal civil rights lawsuit against Merced County, the officers, and a long list of other people, alleging that he was arrested without probable cause, and that the officers engaged in "deliberate falsehood or reckless disregard for the truth" because they omitted from the affidavit certain details pertaining to Plunkett's criminal background. When a federal district judge refused to grant qualified immunity to the officers, they appealed to the Ninth Circuit.

Discussion

The main issue on appeal was whether the officers had probable cause to arrest Garcia for possession of methamphetamine and smuggling drugs into the jail. As the court explained, probable cause exists if, based on a consideration of the totality of circumstances, there was a "fair probability" that the arrestee committed a crime.²⁰ The court then took note of the circumstances upon which the arrest was based:

- (1) Plunkett had notified officers that Robledo told him that Garcia was smuggling drugs into the county jail. Plunkett also provided the officers with details about the smuggling operation as related by Robledo.
- (2) The officers had reason to believe that Plunkett was a reliable informant because (a) they had corroborated the relationships between Garcia, Robledo, and Plunkett, and (b) they overheard the telephone conversation between Plunkett and Sylvia Brown during which Brown seemed to confirm Robledo's account of Garcia's smuggling operation.
- (3) The officers saw Plunkett give the tobacco bag containing methamphetamine to Garcia.
- (4) The methamphetamine "was clearly visible to anyone opening the pouch."
- (5) Garcia opened the pouch.
- (6) The officers saw Garcia take the methamphetamine to his office.

Based on these circumstances, the court determined that Garcia's act of accepting and opening the pouch provided the officers with (1) probable cause to arrest Garcia for possession of methamphetamine, (2) probable cause to arrest him for being "actively involved in smuggling a controlled substance and contraband into the jail," and (3) probable cause to search his office.

Consequently, the court ruled that, not only were the officers entitled to qualified immunity, there was no factual basis for Garcia's lawsuit. Said the court, "[T]here can be no doubt that Garcia's acceptance of the Bugler tobacco pouch from a person known to

¹⁸ NOTE: Information as to the timing of the arrest and search was obtained from the *Merced Sun-Star*. The warrant was served in accordance with the special master procedure. See Pen. Code § 1524(c).

¹⁹ NOTE: This information was obtained from the *Merced Sun-Star*.

²⁰ See *Illinois v. Gates* (1983) 462 U.S. 213, 244 ["probable cause requires only a probability or substantial chance of criminal activity"].

him to be a fellow inmate of his client, to be delivered to that client in jail, served unmistakably, without any more, as adequate confirmation and corroboration of the informant's detailed information."

As noted, Garcia also argued that the officer who applied for the search warrant misrepresented Plunkett's criminal record because he neglected to reveal in the affidavit that Plunkett had an extensive criminal record. It is, however, settled that when an affiant makes it clear that a source was a garden variety informant, it is unnecessary to provide details as to why his information might be unreliable.²¹ As the court explained in *Garcia*, "[I]t has long been clear beyond doubt to anyone in the criminal justice system that the word of a jailhouse informant alone—any jailhouse informant—is suspect and ordinarily requires corroboration before it can be accepted as probable cause." Thus, said the court, the "precise details of an informant's problems with the law" are not normally necessary if, as occurred here, it was apparent from the affidavit that the source was a person with "suspect and shaky character."

In addition to ordering the lawsuit dismissed, the court pointed out that "[t]his is not a case of rogue officers disregarding the plaintiff's constitutional rights." On the contrary, the officers "carefully evaluated Plunkett's information, checked it against known facts," "consulted with two deputy district attorneys who approved of the procedure they planned to use," and "did not take Garcia into custody on the informant's information alone, but waited to see what Plunkett's contact with Garcia would produce."

Comment

This was a patently frivolous lawsuit. It is therefore incomprehensible that the trial court failed to weed it out at the early stages.²² It should also be noted that, according to the State Bar's website, Mr. Garcia was not disciplined for his actions in this matter, and he continues to practice law in Merced.

U.S. v. Ludwig

(10th Cir. 2011) __ F.3d __ [2011 WL 1533520]

Issues

(1) Did an officer have sufficient grounds to stop a car for speeding? (2) Did the officer develop reasonable suspicion to detain the driver to investigate the possibility he was transporting drugs? (3) Was the officer's K9 sufficiently reliable so that his alert generated probable cause to search?

Facts

A Wyoming state trooper, David Chatfield, was parked on the median of a highway when he saw a car approaching at an estimated 10 m.p.h. over the speed limit. When his radar gun confirmed the vehicle's speed, Chatfield pulled in behind it and turned on his emergency lights. The driver—later identified as Sergei Ludwig—slowed down and moved onto the shoulder—but he continued to drive slowly for 44 seconds before coming to a stop.

As Chatfield was walking up to the car, Ludwig rolled down his window, at which point the officer was engulfed in an overpowering odor of cologne. He considered this somewhat suspicious because, as he later testified, he was aware that cologne is "often used to mask the smell of illegal drugs." Chatfield also noticed that Ludwig appeared to be "very, very, very nervous"; so nervous, in fact, that "his hands were trembling and he had difficulty retrieving his wallet from his pocket."

While writing a speeding ticket, Chatfield asked Ludwig about his travel plans. Ludwig said he was an "IT administrator," and that he was returning to his home in New Jersey from San Jose where he had been sent by his employer to fix a "server problem." He explained that he had decided to drive across the country (rather than fly), even though his assignment in San Jose took only four days. He also said he had slept in his car.

²¹ See *People v. Kurland* (1980) 28 Cal.3d 376, 394 ["Even if [the omitted] facts might support an inference of Z's dishonesty or vulnerability to police pressure, that inference was already inherent in Z's status as a confidential tipster."]; *People v. Webb* (1993) 6 Cal.4th 494, 522 ["we deem it unrealistic to require that a warrant affidavit include an informant's detailed drug and psychiatric history, or every past act that can be considered unlawful or dishonest"].

²² NOTE: One possible reason for the district court's lapse was provided by the Ninth Circuit: "The mistake made by the district court in its analysis of probable cause was to use Garcia's *subsequent* self-serving denial that he *knowingly* accepted methamphetamine in the pouch as a reason, in a qualified immunity context, to conclude that probable cause *at the time of Garcia's arrest* was a disputed factual issue."

All of these circumstances suggested to the officer that Ludwig might be transporting drugs. So, after issuing him the ticket, he asked Ludwig if he would be willing to answer a few more questions. Ludwig said no. Believing that he had reasonable suspicion to detain Ludwig further, Chatfield told him to wait while his drug detecting dog checked the outside of his car. The dog quickly alerted, so Chatfield began searching the vehicle and eventually noticed a “recently welded metal patch that seemed to conceal a compartment.” So, after backup arrived, he opened the compartment and found 11 pounds of ecstasy.

Ludwig was charged with possession of ecstasy with intent to distribute and, when his motion to suppress the evidence was denied, he pled guilty.

Discussion

On appeal, Ludwig argued that his motion to suppress should have been granted because (1) Chatfield lacked grounds to stop him for speeding, (2) Chatfield did not have grounds to detain him to investigate the possibility of drug trafficking, and (3) the alert by Chatfield’s K9 did not constitute probable cause to search because the dog had a dubious track record.

GROUND TO STOP: Ludwig attacked the legality of the traffic stop by presenting evidence that proved, or so he claimed, that Chatfield’s radar gun could not be trusted due to Chatfield’s “shoddy maintenance habits.” The court responded that, even if that were true, Chatfield had also visually estimated Ludwig’s speed, and that it has “long been the case that an officer’s visual estimation can supply probable cause to support a traffic stop for speeding.”

GROUND TO DETAIN: As noted, Ludwig also argued that Chatfield lacked grounds to continue the detention to investigate his suspicion that Ludwig was transporting drugs. The court disagreed, pointing to the following suspicious circumstances. First, there was Ludwig’s driving on the shoulder for 44 seconds before stopping. Said the court, “The trooper testified that he thought this behavior ‘unusual.’ Recognizing as much ourselves, this court has repeatedly held that a driver’s failure to stop his vehicle promptly is a factor that can contribute to reasonable suspicion of criminal activity.”

Second, there was the overpowering odor of cologne that “hit Chatfield in the face” when Ludwig

rolled down his window of his car. It is true, of course, that the law does not prohibit people from wearing lots of cologne (although the idea should not be casually dismissed). Nevertheless, the court observed that “our cases have acknowledged that [cologne] is commonly used to mask the odor of drugs and so can contribute to a reasonable suspicion calculus.” (It would seem that this circumstance would take on added significance in light of Ludwig’s failure to stop promptly, as it would indicate that he was using the time to unleash his cologne.) Third, there was Ludwig’s extreme nervousness; and Fourth he was driving a car that was not registered to him. Addressing the latter circumstance, the court explained that it “is a factor we have often held may indicate a stolen vehicle or drug trafficking.”

Finally, there was Ludwig’s strange story about driving his car across the United States to help a company in San Jose repair a server. Noting that “[b]izarre travel plans may, by themselves, contribute to reasonable suspicion,” the court said it was indeed “curious” that a company in San Jose—“a hub of the computer industry”—would require the assistance of an IT administrator from New Jersey. But even assuming for the sake of argument that Ludwig was a brilliant computer wiz whose talents were in demand throughout the country, the court pointed out that the trooper might justifiably wonder why such an illustrious personage would go to a job 3,000 miles away in his car—and even sleep in it.

In light of these suspicious circumstances, the court ruled that Chatfield had sufficient grounds to detain Ludwig to investigate the possibility that he was transporting drugs.

GROUND TO SEARCH: Although an alert by a trained drug-detecting dog ordinarily constitutes probable cause to search, Ludwig claimed that Chatfield lacked probable cause because his dog was incompetent. Specifically, Ludwig pointed out that, based on the records of the dog’s performance during his seven years of service, his alerts identified a seizable quantity of drugs only 58% of the time. The court pointed out, however, that because probable cause requires only about a 50% chance, the dog had nothing to be ashamed of.

Consequently, the court ruled that the detention and search were lawful, and that Ludwig’s 11 pounds of ecstasy were admissible.

POV

The Changing Times

ALAMEDA COUNTY DISTRICT ATTORNEY'S OFFICE

Inspectors **C.D. Williams** and **Phil Dito** retired, each having served the office for over ten years. Deputy DA **Joni Leventis** was selected as PROSECUTOR OF THE YEAR by the California District Attorney's Association. We were saddened to learn that retired judge **Ben Travis** had died. He was 79 years old.

ALAMEDA COUNTY NARCOTICS TASK FORCE

Steve Angeja retired after a 37-year career in law enforcement that began at Oakland PD. All told, Steve spent over 22 years in drug enforcement between the task force and ACSO. Transferring out: Sgt. **Kyle Ritter** (ACSO) and **Dawn Sullivan-Adams** (ACSO). Transferring in: Sgt. **Shawn Peterson** (ACSO), **Jerry Ribeira** (OHAPD), and **Shaun O'Conner** (BART PD). **Armida Dixon** of the DA's Office is the new Office Manager.

ALAMEDA COUNTY SHERIFF'S OFFICE

Lt. **Greg Morgado** was promoted to captain. Sgt. **Phillip Weinstein** was promoted to lieutenant. The following deputies were promoted to sergeant: **Daniel Dixon**, **Stephen Akacsos**, **Terry Carson**, and **Camilla Hart**. The following deputies have retired: Assistant Sheriff **James Baker** (21 years), Cmdr. **LaDonna Harris** (30 years), Capt. **Glenn Melanson** (29 years), Lt. **Jeffery Bromstead** (29 years), Sgt. **Scott Dudek** (27 years), Sgt. **Bruce McVey** (25 years), Sgt. **Charles Scott** (21 years), Sgt. **Lesla Wadleigh** (8 years), and Dep. **Steve Angeja** (15 years). New recruits: **Adelaida Bocanegra**, **Tiffany Buschhueter**, **Ventura Diaz**, **Shaun Eng**, **Justin Gebelein**, **Sharde Johnson**, **Olga Lacey**, **Tammy Molleson**, **Anthony Pagliari**, **Jacob Swalwell**, **Eric Timney**, **Karla Valera**, and **Jeffery Zuniga**.

Retired deputy **George Carvalho** died on April 3, 2011 at the age of 62. George retired in 2006 after 28 years of service. Retired sergeant **Bob Lindstrom** died on May 11, 2011 at the age of 84. Lindy joined ACSO in 1949 and retired in 1984.

ALAMEDA POLICE DEPARTMENT

Lt. **Mark Landes** retired after 29 years of service. Sgt. **Joe McNiff** was promoted to acting lieutenant.

Rick Bradley and **Jeff Emmitt** were promoted to acting sergeant. Transfers: Sgt. **Tony Munoz** from Special Investigations to Patrol, Sgt. **Jennifer Basham** from Patrol to Special Investigations, Sgt. **Ron Simmons** from Patrol to Traffic, **Erik Klaus** from Patrol to Special Investigations, and **Dave Pascoe** from Special Investigations to Patrol. **Yvonne Cropp** was hired as Records Supervisor.

BART POLICE DEPARTMENT

The department announced the appointment of three deputy chiefs: **Daniel Hartwig**, formerly BART PD commander; **Jan Glenn-Davis**, formerly chief of the California State University, East Bay PD; and **Benson Fairow**, formerly a captain at Oakland PD.

The following sergeants were named acting lieutenants: **David Chlebowski**, **Keith Smith**, **Eugene Wong**, and **Keith Justice**. The following officers were named acting sergeants: **Mike Maes**, **Brando Cruz**, **Michael Zendejas**, **Joel Enriquez**, and **Tracy Gurecki**.

The following officers have retired: **Dennis Dutra** (35 years), **Hakeem Shabazz** (31 years), **Robert Heiney** (29 years), and **Robert Seymore** (10 years).

Sgts. **Karen Kreitzer** and **Aaron Togonon** were named Field Training Officer sergeants. Transfers: **Anisa McNack** and **Jon Woffinden** to Detectives; **Shaun O'Conner** to the Alameda County Narcotics Task Force; **Chris Vogan** to the Alameda County SAFE Task Force; **Crystal Raine** to CSO. New officers: **Christina Strickfaden**, **Jefferson Rosete**, **Russell Medeiros**, **Julie Liu**, and **Justin Ross**. **Carolyn Perea** was selected Officer of the Year.

BERKELEY POLICE DEPARTMENT

Kevin Reece was promoted to sergeant. The following officers retired: **Kevin Mah** (20 years), **James Counts** (14 years), and **Scott O'Donnell** (7 years). Office Specialist II **Irene McWhorter** retired after 30 years of service. **Brenda Velasquez** was hired as the BPD Communications Center Manager. She was formerly the Communications Manager for the City of South San Francisco. **Leon McDaniels** was hired as a Community Services Officer. **Sara Murray**, **Carmen Robinson**, **Kirsten Woods**, and **Janel Lloyd** were hired as Public Safety Dispatchers.

CALIFORNIA HIGHWAY PATROL

OAKLAND AREA: Lt. **B.J. Whitten** was promoted to captain and assigned to the San Francisco CHP. **Lovell Edwards** retired after 25 years of service.

HAYWARD AREA: Sgt. **Keith Crane** retired after 29 years of service. Keith was part of the "CHP Motor Squad" and proudly rode a CHP enforcement motorcycle for over 20 years in both the Oakland and Hayward CHP Areas. New officers: **Michael Fuentez** and **Robert Opsal**.

DUBLIN AREA: Sgt. **Mike Allen** retired after serving over 28 years with the CHP in Hayward, Dublin, and Tracy commands. Transferring in: Sgt. **John Martinho**, **Adan Garcia**, **Aldo Garcia**, **Bryan Grant**, **Richard Murrieta**, **Khalid Rashid**, **Derek Reed**, and **Kevin Willingham**. Transferring out: Sgt. **Jim Williams** (Golden Gate Division Commercial Enforcement Team), **Lianne Barbour** (Marin Area), **Keith Peeso** (Mission Grade Inspection Facility), **James Paabst** and **Jason Rasmussen** (Nimitz Inspection Facility), and **David Barnett** (Tracy Area). The CHP did well at this year's California Law Enforcement Challenge which the CHP hosts each year. The Dublin Area took second place, and the Castro Valley Area took third place.

EAST BAY REGIONAL PARKS POLICE DEPT.

Ken Wong was promoted to sergeant and assigned to Patrol. Sgt. **Dale Davidson** retired with 33 years in law enforcement, 27 years with the department. Lateral appointment: **Lloyd Cardone** (San Jose PD).

FREMONT POLICE DEPARTMENT

The following officers have retired: **Dan Clark** (26 years) and **John Morillas** (26 years). Dispatch Supervisor **Diana Davis** retired (combined 33 years with Hayward PD and Fremont PD). **Mandi Parker** was promoted to dispatch supervisor.

HAYWARD POLICE DEPARTMENT

Two retired officers have died. **Eugene Johns** died on January 15, 2011 at the age of 88. Eugene retired from the department in 1980 after 26 years of service. **Ken Gowin** passed away on March 3, 2011 at 81 years of age. Ken retired in 1986, after serving the department for more than 22 years.

NEWARK POLICE DEPARTMENT

Jeff Revay was hired as a police officer after having worked as a Police Services Aide.

OAKLAND HOUSING AUTHORITY POLICE DEPT.

New hires: **Terry Thomas**, **Stephanie Chan**, **David Cache** (Reserves), **Jason Rodriguez** (Reserves), and **Robert Rowe** (Reserves). Transfers: **Jerry Ribeira** from Patrol to Narcotics Task Force, and **Ramon Jacobo** from Narcotics Task Force to Patrol.

OAKLAND POLICE DEPARTMENT

The department reinstated ten officers who were laid off as the result of the budget crisis. The following officers have retired: Sgt. **David Cronin** (19 years), and Sgt. **Joseph Seale** (29 years) The following officers have taken disability retirement: Sgt. **Bruce Garbutt**, Sgt. **John Parkinson**, **Andrew Trenev**, **Mark Hicks**, **Carlos Gonzalez**, **Hung Nguyen**, **Ingo Mayer**.

The following officers left to accept positions with other agencies: Capt. **Ben Fairrow** (BART PD), **Russell Medeiros** (BART PD), **Jeffrey Galaviz** (Richmond PD), **Oscar Abucay** (SFPD), **Ronald Freeman** (SFPD), **Donald Lockett** (SFPD), **Patrick Woods** (SFPD), **John Cunnie** (SFPD), **Kevin Reynolds**, (Livermore PD), **Keith Ballard-Geiger** (San Leandro PD).

PLEASANTON POLICE DEPARTMENT

Capt. **David Spiller** was appointed Chief of Police. Before joining Pleasanton PD in 2003, Chief Spiller was an officer with the San Diego PD and later a sergeant with the Mountain View PD. He received his Master of Arts from Saint Mary's College and his Bachelor of Science from the University of San Francisco. He is also a graduate of the California Command College and the Senior Management Institute for Police at Harvard's Kennedy School of Government.

SAN LEANDRO POLICE DEPARTMENT

Sgt. **Jerry Codde** retired after 24 years of service. Administrative Specialist Police **Gerald Pickett** retired after 33 years of service. New hires: **Keith Ballard-Geiger** and **Jonathan Remulla**. Lateral transfers: **Anthony Morgan** to vice/narcotics, **Jason Bryan** to K9 officer, **Louie Guillen** to bike officer, **Shane Nelson** to Tac Unit, Public Safety Dispatcher **Teresa Loconte** to Support Services.

UNIVERSITY OF CALIFORNIA, BERKELEY POLICE DEPARTMENT

Acting lieutenant **Eric Tejada** was promoted to lieutenant. Newly appointed officers: **Dynelle Jones** and **William Mendoza**.

POV

War Stories

Trying to outsmart the DEA

Some drug dealers in Oakland figured that the feds were tapping their cell phones, so they devised a code for placing and receiving their crack cocaine orders over their pager displays. It turned out the dealers were right: the DEA agents *were* tapping their phones. But they were also tapping their pagers.

One day, the agents noticed that one of the drug dealers had just received a pager message from a known supplier. The message said “4-7-66-98-12.” A few minutes later, this drug dealer phoned his supplier on his tapped cell phone and said, “I forgot the fucking code. What do all those fucking numbers mean?” The supplier explained, “It’s when I’m gonna deliver the shit to you, fool. Tomorrow at noon. Your place.” The arrests were made at the fool’s place without incident.

Speaking of fools

A CHP officer in Oakland stopped a man for speeding on I-580. When she asked him for his vehicle registration, he opened his glove box and a gun fell out. Figuring he was about to be arrested, he sped off. The officer chased him, but he bailed out a few blocks away and escaped. While searching the man’s car, the officer recovered the gun, some cocaine, and the man’s ID. A few days later, CHP officers arrested the man at his home on a warrant and were cuffing him when the officer who had chased him confirmed, “Yep, that’s the guy.” The man yelled, “That’s a lie! She’s just saying that ‘cause she’s still mad at me for runnin’ from her.”

Arrested and defriended

A 19-year old man, Rodney Knight, burglarized a home in Washington D.C. and took, among other things, the victim’s laptop, a jacket, and cash. Feeling the need to boast about his criminal exploits, Rodney posted a picture of himself on the victim’s Facebook page. It was a lovely picture of Rodney sneering into the camera and taunting the victim by wearing his jacket and holding the cash he stole. It took less than a day for police to identify Rodney and arrest him.

Burglary school dropouts

Early one morning, two teenagers in Scotts Valley broke into the Valley Six Cinema and stole the safe. Although the safe weighed over 250 pounds, they had a plan, of sorts: First, they lifted it onto an office chair that was on rollers, then they started rolling the chair to their getaway car which, for some idiotic reason, they had parked over a half mile away. As the burglars were pushing the chair through the quiet residential neighborhood at 3 A.M., it made a terrible racket, which prompted several residents to phone the sheriff’s office and complain. Deputies spotted the teens trying to wrestle the safe into their car, so they detained them. When asked if there was any conceivable explanation they could offer, the burglars invoked their right to remain silent which, as one deputy observed, they should have done before embarking on their excursion with a 250 pound safe.

The prosecution rests

A man in Sunnyvale was charged with hitting a man over the head with a metal pole. As the preliminary hearing was about to begin, the arresting officer entered the courtroom carrying the pole, at which point the defendant stood up and yelled, “That’s not the pole I hit him with! My pole was way bigger than that!” At the urging of the man’s public defender, he pled guilty a few minutes later.

A traffic accident in the making

When Newark police arrived at the scene of a single-car accident, witnesses said that the driver got out of his car wearing roller blades, and that he immediately fled, last seen skating down the street. After notifying their dispatcher that this was a hit-and-run accident (technically a hit-and-skate accident), they found the driver a few blocks away and quickly determined that he was very drunk. “How did the wreck happen?” asked one of the officers. “Well,” replied the driver, “for one thing, as you can see, I’m obviously quite drunk. And then there’s the fact that I was trying to drive my car wearing these damn roller blades.”

A cop wannabe

A man in Solano County had been going around impersonating an officer, sporting a badge and carrying handcuffs and a semiautomatic pistol. So when he saw a person he recognized as a fugitive, he naturally arrested him. He then used his cell phone to call for backup from real officers who, after taking the fugitive into custody, arrested the wannabe for impersonating an officer and being a felon in possession of a handgun.

Good (but disgusting) police work

After seeing a rape suspect spit on the sidewalk, an officer in St. Petersburg, Florida grabbed a Kleenex, jumped out of his patrol car, and blotted the spittle—thus providing the crime lab with enough DNA to link the rapist to a series of attacks.

Dead gang members need not apply

The National Law Enforcement Institute distributed a flyer around the country announcing a “Gang Seminar” in San Francisco. According to the flyer, “A *live* gang member will be available to candidly answer your questions.”

No sale

FBI agents in Oakland arrested Cecil for robbing the World Savings Bank on Lakeshore. How did they identify him as the robber? As he sped off in his car, a “For Sale” sign attached to the rear window fell to the ground, and the sign included Cecil’s phone number.

A twofer

A San Leandro police officer was driving past a bus stop when he spotted a man who matched the description of a burglar who had just fled from a house nearby. After arresting the man, the officer detained another man at the bus stop to determine if he was involved in the crime. The man was wearing a security guard’s uniform, and he was holding two garbage bags that were filled to the top with car stereos. The officer quickly determined that, although the man had nothing to do with the burglary (he was just waiting for a bus), he had stolen the stereos from the electronics supply company which had employed him as a guard.

Flunking big time

Two young men had just completed an Anti-Theft program for first-time offenders at Laney College in Oakland. As their instructor was walking out to his car with about \$600 in fees he had collected from the students, the two men robbed him. Of course, the instructor knew their names and addresses, so they were quickly arrested. The school also notified them that they had flunked the course.

Welcome to the real world

At Castro Valley High School, the seniors came up with a great idea for Senior Prank Day. About 25 of them blocked the entrance to the teachers’ parking lot with their cars so the teachers had to park out on the street. It was great fun. They were even hassling their School Resource Officer, yelling such things as, “What are you gonna do? Tow us all away? Ha Ha.”

Well, the officer didn’t tow any cars, but he did write down their license numbers. And a week later at the senior graduation ceremony, each of the pranksters found a little something extra attached to their diplomas: a \$40 parking ticket. Later, the School Resource Officer told a group of them, “You’ve just learned your first lesson in the real world: There’s no such thing as a free lunch.”

The War Story Hotline

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