

POINT of VIEW



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In this issue

- "Standing"
- Implied Miranda waivers
- Miranda in county jails
- Lineups
- Investigating crimes in progress
- Vehicle inventory searches
- Probation Searches
- Consent searches
- How to anger a judge

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Point of View

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Contents

ARTICLES

1 "Standing"

To understand the law of search and seizure, it is helpful—make that *essential*—to understand the concept of "standing."

RECENT CASES

21 *Berghuis v. Thompson*

The United States Supreme Court rules that *Miranda* waivers may be implied under certain circumstances.

22 *U.S. v. Ellison*

Were officers required to obtain a *Miranda* waiver before questioning a county jail inmate?

23 *People v. Johnson*

The court discusses the required procedure for conducting physical and photo lineups.

25 *U.S. v. Struckman*

Did officers have sufficient grounds to enter a backyard to investigate a neighbor's report of a possible burglary in progress?

29 *People v. Shafir*

If an officer's decision to tow a vehicle was reasonable, is the towing nevertheless unlawful if he did not first consider a standard list of towing criteria?

30 *U.S. v. Franklin*

(1) Can a motel room be searched pursuant to the terms of the guest's probation? (2) Did officers have probable cause to believe that the probationer was living in the motel room they searched?

30 *U.S. v. King*

Consent searches and the rule of *Georgia v. Randolph*.

32 *People v. Navarette*

What happens when an officer intentionally violates a court's order not to inform a jury about something?

FEATURES

33 *The Changing Times*

35 *War Stories*

“Standing”: The Foundation of Search and Seizure Law

“We use ‘standing’ as a shorthand term.”¹

While there are many “shorthand terms” in the field of criminal law, none of them have more significance than “standing.” That is because it is the central principle upon which the law of search and seizure is based. In fact, an intrusion by officers into a place or thing will not constitute a “search” unless somebody had it. For instance, if an officer looks inside the glove box of a car and finds evidence that incriminates a passenger who did not have standing, the evidence cannot be suppressed because, as far as the Fourth Amendment is concerned, nothing happened.

This principle can be quite helpful to prosecutors who can often prevent the suppression of evidence by invoking it. It can also be useful to officers because it may enable them to determine whether an intrusion they need to make would constitute a search and, therefore, whether they will need a warrant or some exception to the warrant requirement. This issue is especially apt to arise when officers are engaged in physical and electronic surveillance, walking on private property, requesting records from a business, or opening a container after the suspect says, “That’s not mine!”

What is “Standing”?

A defendant has standing—which means a “search” can occur—only if he had a reasonable expectation of privacy in the place or thing that officers explored.² It doesn’t matter whether the place or thing was a home, a motel room, a car, a suitcase, a pack of cigarettes, or a garbage can—the law does not consider it “searched” unless the per-

son who is challenging the intrusion reasonably believed that it, or its contents, would be private. In the words of the United States Supreme Court:

The Fourth Amendment protects legitimate expectations of privacy rather than simply places. If the inspection by police does not intrude upon a legitimate expectation of privacy, there is no “search” subject to the Warrant Clause.³

The test for determining whether a defendant has standing is fairly straightforward. As we will discuss in this article, standing exists if, (1) the defendant actually believed that the evidence would not be observed, and (2) this belief was objectively reasonable.⁴ “[W]e ask two threshold questions,” said the California Supreme Court. “First, did the defendant exhibit a subjective expectation of privacy? Second, is such an expectation objectively reasonable, that is, is the expectation one that society is willing to recognize as reasonable?”⁵

Although these are technically two separate requirements, the first one is so easily satisfied that it is seldom a contested issue. After all, virtually every criminal who has ever served time in jail or prison actually believed the evidence that sent him there would not have been discovered by the authorities. Consequently, the only real issue in most cases is whether the defendant’s subjective expectation of privacy was objectively reasonable.

Basic principles

Before we look at how the courts analyze the privacy expectations in those places and things in which officers usually find evidence, there are some basic principles that should be kept in mind.

¹ *U.S. v. Taketa* (9th Cir. 1991) 923 F.2d 665, 670. Edited.

² See *U.S. v. Salvucci* (1980) 448 US 83, 91-92 [“[A]n illegal search only violates the rights of those who have a legitimate expectation of privacy in the invaded place.”]; *Maryland v. Macon* (1985) 472 US 463, 469 [“A search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.”]; *California v. Greenwood* (1988) 486 US 35, 39-40 [“An expectation of privacy does not give rise to Fourth Amendment protection unless society is prepared to accept that expectation as objectively reasonable.”]; *People v. Roybal* (1998) 19 Cal.4th 481, 507 [“An illegal search or seizure violates the federal constitutional rights only of those who have a legitimate expectation of privacy in the invaded place or the seized thing.”].

³ *Illinois v. Andreas* (1983) 463 US 765, 771.

⁴ See *Rakas v. Illinois* (1978) 439 US 128, 143, fn.12.

⁵ *People v. Camacho* (2000) 23 Cal.4th 824, 830-31.

STANDING DEPENDENT ON AREA INTRUDED UPON: A defendant will not have standing merely because he reasonably expected privacy in the vicinity of the place or thing in which the evidence was discovered. Instead, he must prove that his expectation of privacy encompassed the precise place or thing that was breached by officers. “The legitimate expectation of privacy,” explained the California Supreme Court, “must exist in the particular area searched or thing seized in order to bring a Fourth Amendment challenge.”⁶

STANDING DEPENDENT ON PLAUSIBLE VANTAGE POINT: If the evidence could have been seen from a vantage point that officers could have occupied without violating the defendant’s Fourth Amendment rights, the defendant will probably not have standing to challenge the observation—even if officers viewed the evidence from another place. That’s because it is the *existence* of a plausible vantage point, not the officers’ actual use of it, that bears on the reasonableness of an expectation of privacy.⁷

(The qualification that the vantage point must be “plausible” essentially means that officers could have seen the evidence with the naked eye, or at least without using unusually intrusive types of visual aids and without engaging in extreme measures. This subject is discussed in the section “Difficulty of Observation.”)

STANDING DEPENDENT ON MEANS OF INTRUSION: A defendant who reasonably believed that a place or thing could not be seen by a certain means may not have standing if officers utilized another method

that was reasonably foreseeable.⁸ For example, while a person might reasonably expect that no one on the ground would be able to see the marijuana plants in his backyard, he would likely not have standing if officers observed it from a helicopter or from atop an adjoining building.⁹

STANDING DEPENDENT ON WHO INTRUDED: Even if there was a plausible vantage point from which someone might have seen the evidence, a defendant might have standing if he reasonably believed it would not have been seen *by officers*. As the D.C. Circuit noted, a person “may invite his friends into his home but exclude the police, he may share his office with coworkers without consenting to an official search.”¹⁰ Similarly, the California Court of Appeal ruled that, while it might be unreasonable for a college student to believe that his dorm room would not be inspected by university officials, he could certainly expect that police officers would not walk in and look around.¹¹

DEFENDANT ATTEMPTED TO PREVENT DISCOVERY: The fact that the defendant tried (albeit unsuccessfully) to hide or prevent discovery of the evidence may prove that he subjectively expected privacy. But it does not prove that his expectation was objectively reasonable.¹² As the United States Supreme Court commented in *California v. Ciraolo*, “Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer’s observations from a public vantage point where he has a right to be and which renders the activities clearly visible.”¹³

⁶ *People v. McPeters* (1992) 2 Cal.4th 1148, 1171. ALSO SEE *People v. Ooley* (1985) 169 Cal.App.3d 197, 202.

⁷ See *U.S. v. Knotts* (1983) 460 US 276, 285; *Burkholder v. Superior Court* (1979) 96 Cal.App.3d 421, 426 [“if the purpose of the optically aided view is to permit clandestine police surveillance of that which could be seen from a more obvious vantage point without the optical aid, there is no unconstitutional intrusion”]; *Dillon v. Superior Court* (1972) 7 Cal.3d 305, 311 [“The view of the backyard was vulnerable to observation by any of petitioner’s neighbors, in essence, open to public view.”].

⁸ See *Dow Chemical Co. v. United States* (1986) 476 US 227, 237, fn.4 [Dow took precautions against ground surveillance but not aerial surveillance]; *Katz v. United States* (1967) 389 US 347, 352 [although Katz could not reasonably expect that he would not be seen when he entered a phone booth, he could reasonably expect that his conversation would not be intercepted]; *People v. Camacho* (2000) 23 Cal.4th 824, 835 [court noted that a child chasing a ball or a meter reader may have implied consent to enter a side yard for a limited purpose, but not a police officer whose purpose was to look through a window].

⁹ See *Burkholder v. Superior Court* (1979) 96 Cal.App.3d 421, 425; *Dillon v. Superior Court* (1972) 7 Cal.3d 305, 311.

¹⁰ *U.S. v. Most* (D.C. Cir. 1989) 876 F.2d 191, 198. ALSO SEE *U.S. v. Lyons* (D.C. Cir. 1983) 706 F.2d 321, 325.

¹¹ *People v. Superior Court (Walker)* (2006) 143 Cal.App.4th 1183, 1211.

¹² See *Dow Chemical Co. v. U.S.* (1986) 476 US 227, 236-37 [that “Dow’s inner manufacturing areas are elaborately secured to ensure they are not open or exposed to the public from the ground” did not prevent aerial surveillance]; *People v. Venghiattis* (1986) 185 Cal.App.3d 326, 331 [“His efforts at hiding the garden from passers-by do not serve to protect him from overflights.”].

¹³ (1986) 476 US 207, 213.

“PRIVATE” PLACES: The fact that the place or thing intruded upon could be characterized as “private” does not prove that the owner or possessor reasonably expected that it or its contents would not be disclosed. As the D.C. Circuit explained in *U.S. v. Lyons*, “[T]he question we must answer is not whether the room and closet were somehow ‘private spaces’ in the abstract, but whether Lyons had a reasonable expectation of privacy therein.”¹⁴

OWNERSHIP, POSSESSION, CONTROL: While many suspects who owned, lawfully possessed, or controlled the place or thing that was intruded upon will have standing, these circumstances may be offset by other factors.¹⁵ “Ownership,” said the California Supreme Court, “does not necessarily signify a legitimate expectation of privacy,” although it is “one factor to be considered in the analysis.”¹⁶

WHAT IS NOT “STANDING”: Over the years, many defendants who lacked a reasonable expectation of privacy in a certain item of evidence would urge the courts to grant them standing anyway, arguing that several other circumstances ought to be considered. And the courts have consistently refused.¹⁷ For example, they have rejected arguments that defendants automatically acquired standing whenever prosecutors sought to use the evidence against them in court (the “target” theory),¹⁸ or because the defendants had a right to be on the premises that were intruded upon (the “legitimately on the premises” theory),¹⁹ or because the evidence was discovered during a search of property that belonged to the defendant’s accomplice (the “co-conspirator” theory).²⁰

It should be noted that California used to be a “target theory” state, meaning that defendants could challenge the admissibility of any evidence that prosecutors wanted to use against them. That changed, however, in 1982 when the voters passed Proposition 8 (“The Victims’ Bill of Rights”) which, among other things, eliminated California’s “vicarious exclusionary rule” and prohibited the suppression of evidence unless the defendant could prove he had standing.²¹

Preliminary matters

Before we explore the core issues, there are a couple of other things about standing that should be noted.

STANDING: MORE ENDURING THAN FREDDY KRUEGER: In 1978, the United States Supreme Court made the mistake of trying to purge the term “standing” from the legal lexicon.²² In its place, the justices said they wanted everyone to start saying “reasonable expectation of privacy.” (It’s hard to understand *why*, considering that “standing” was widely used and understood throughout the legal profession. And best of all, it has ten fewer syllables than its designated replacement.) In any event, here we are 32 years later and the term “standing” is alive and well. Taking note of this unheard-of situation (perhaps the only time the Supreme Court did not have the last word), the Court of Appeal pointed out that the term “standing” has “demonstrated a vampiric persistence,” adding that “if the United States Supreme Court cannot drive a stake through its heart, we doubt that we can.”²³

¹⁴ (D.C. Cir. 1983) 706 F.2d 321, 325. ALSO SEE *Katz v. U.S.* (1967) 389 US 347, 350 [“[T]he Fourth Amendment cannot be translated into a general constitutional ‘right to privacy.’”].

¹⁵ See *Rawlings v. Kentucky* (1980) 448 US 98, 105 [“[We have] emphatically rejected the notion that ‘arcane’ concepts of property law ought to control the ability to claim the protections of the Fourth Amendment.”]; *U.S. v. Salvucci* (1980) 448 US 83, 91 [“legal possession of a seized good is not a proxy for determining whether the owner had a Fourth Amendment interest”].

¹⁶ *People v. McPeters* (1992) 2 Cal.4th 1148, 1172. ALSO SEE *Rakas v. Illinois* (1978) 439 US 128, 143, fn.12 [Court notes it “has not altogether abandoned use of property concepts” in determining the whether an expectation of privacy was reasonable]; *Mancusi v. DeForte* (1968) 392 US 364, 367 [“[The Fourth] Amendment does not shield only those who have title to the searched premises.”].

¹⁷ See *U.S. v. Salvucci* (1980) 448 US 83, 86 [“attempts to vicariously assert violations of the Fourth Amendment rights of others have been repeatedly rejected by this Court”].

¹⁸ See *U.S. v. Salvucci* (1980) 448 US 83, 90 [DA “may simultaneously maintain that a defendant criminally possessed the seized good, but was not subject to a Fourth Amendment deprivation without legal contradiction.”].

¹⁹ See *Rakas v. Illinois* (1978) 439 US 128, 142; *Minnesota v. Carter* (1998) 525 US 83, 90.

²⁰ See *U.S. v. Padilla* (1993) 508 US 77, 82; *People v. Madrid* (1992) 7 Cal.App.4th 1888, 1897.

²¹ See *In re Lance W.* (1985) 37 Cal.3d 873, 885-89; *In re Rudy F.* (2004) 117 Cal.App.4th 1124, 1131.

²² *Rakas v. Illinois* (1978) 439 US 128, 139.

²³ *People v. Cartwright* (1999) 72 Cal.App.4th 1362, 1368, fn.8.

COURT PROCEDURE: If prosecutors want to challenge a defendant's standing to challenge a search, they must so notify the court at the start of the hearing on a motion to suppress. If they fail to do so, they will be deemed to have waived the issue.²⁴ But if they provide the court and defendant with notice, it becomes the defendant's burden to prove—by a preponderance of the evidence—that he reasonably expected privacy in the place or thing in which the evidence was discovered.²⁵

Although this is considered a “threshold question” at suppression hearings,²⁶ judges may postpone ruling on the the standing issue and, instead, require that prosecutors first prove that the search was lawful. The apparent purpose of this rule is speed up the hearing because if prosecutors succeed (and they usually do) the standing issue would become moot.²⁷

One other thing: If the defendant testifies at the hearing, his testimony may not be used at trial to prove his guilt.²⁸ Although the Supreme Court has not ruled on whether prosecutors may use his testimony to impeach him,²⁹ it appears they may.³⁰

TOTALITY OF CIRCUMSTANCES: In determining whether a defendant has standing, the courts will consider the totality of circumstances.³¹ But, as we will discuss in the remainder of this article, there are

four circumstances that are especially important: (1) the nature of the place or thing that was intruded upon by officers, (2) the defendant's relationship to that place or thing, (3) the difficulty of observation, and (4) whether the defendant relinquished standing by doing or saying something that made it unreasonable to expect that the evidence would remain private.

The Place Intruded Upon

The most important circumstances in determining whether a search occurred and whether the defendant has standing are the nature of the place that was intruded upon and the defendant's connection to it.³² This is because people naturally view some places as highly private (e.g., homes), somewhat private (e.g., cars), or not private at all (e.g., things in plain view). In other words, there exists a “hierarchy of protection” based on a “fundamental understanding that a particular intrusion into one domain of human existence seriously threatens personal security, while the same intrusion into another domain does not.”³³ Or, as the Alaska Supreme Court put it, “Expectations of privacy are not all of the same intensity,” and “distinctions may be made in the varying degrees of privacy retained in different places and objects.”³⁴

²⁴ See *Steagald v. U.S.* (1981) 451 US 204, 209 [the Government may lose its right to contest standing if “it has failed to raise such questions in a timely fashion during the litigation”]; *People v. Henderson* (1990) 220 Cal.App.3d 1632, 1641.

²⁵ See *People v. McPeters* (1992) 2 Cal.4th 1148, 1172; *U.S. v. Matlock* (1974) 415 US 164, 178.

²⁶ See *Illinois v. Andreas* (1983) 463 US 765, 771; *In re Baraka H.* (1992) 6 Cal.App.4th 1039, 1044.

²⁷ See *People v. Contreras* (1989) 210 Cal.App.3d 450, 456 [“The trial judge acted well within her discretion in requiring the prosecution to proceed first.”]; *People v. Williams* (1992) 3 Cal.App.4th 1535, 1539, fn.2 [“A trial court has the discretion to determine whether standing should be determined prior to entertaining evidence addressed solely to the reasonableness of the search.”]. **NOTE:** If prosecutors go first and the search is ruled unlawful, the defendant may rely on the prosecution's evidence to prove he has standing. See *People v. Dees* (1990) 221 Cal.App.3d 588, 595.

²⁸ See *Simmons v. U.S.* (1968) 390 US 377, 393 [defendant's testimony at suppression hearing “may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection.”].

²⁹ See *U.S. v. Salvucci* (1980) 448 US 83, 94 [“That issue need not be and is not resolved here”].

³⁰ See *U.S. v. Beltran-Gutierrez* (9th Cir. 1994) 19 F.3d 1287, 1289-90.

³¹ See *Oliver v. United States* (1984) 466 US 170, 177 [“No single factor determines whether an individual legitimately may claim under the Fourth Amendment that a place should be free of government intrusion not authorized by warrant.”]; *In re Rudy F.* (2004) 117 Cal.App.4th 1124, 1132 [“There is no set formula for determining whether a person has a reasonable expectation of privacy in the place searched, but the totality of the circumstances are considered.”].

³² See *Oliver v. United States* (1984) 466 US 170, 178 [“certain areas deserve the most scrupulous protection from government invasion”]; *Rakas v. Illinois* (1978) 439 US 128, 143, fn.12 [privacy expectations must be based on “understandings that are recognized and permitted by society”]; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1015 [“The determining factor is whether common habits in the use of property result in a reasonable expectation of privacy in a given situation.”]; *Sacramento County Deputy Sheriffs' Association v. County of Sacramento* (1996) 51 Cal.App.4th 1468, 1479 [the setting “remains a consideration”].

³³ *People v. Dumas* (1973) 9 Cal.3d 871, 882-83.

³⁴ *State v. Myers* (1979) 601 P.2d 239, 242.

Inside homes

We will start with the most private of all private places: a person's home. It does not matter whether it is a house, a condominium, or an apartment—it is at the top of the list of “private” places.³⁵ “At the risk of belaboring the obvious,” said the Supreme Court, “private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable.”³⁶

This does not mean that every observation into a home constitutes a search. On the contrary, the courts have consistently ruled that people cannot reasonably expect privacy as to things or conditions in their homes that can be readily observed from the outside.³⁷ In the words of the Tenth Circuit, “Although privacy in the interior of a home and its curtilage are at the core of what the Fourth Amendment protects, there is no reasonable expectation that a home and its curtilage will be free from ordinary visual surveillance.”³⁸

For this reason, people cannot ordinarily expect that officers would not observe things inside their homes if, (1) the observation was made through an open door or a window that was uncovered or only partially covered; and (2) the officers made the observation from a sidewalk, pathway, or any other place they could have occupied without violating the defendant's reasonable expectation of privacy.

For example, in *People v. Superior Court (Reilly)*³⁹ two San Jose police officers were driving by a local motel when they happened to notice a car parked in front of one of the rooms. It caught their attention because it belonged to a suspected drug dealer. So they decided to investigate. From the walkway in front of the room they could see inside through a three-inch gap in the curtains; and what they saw

was a man photographing something that appeared to be false ID documents. As a result, the officers arrested the man and another occupant, the defendant. The defendant argued that the officers' observation was unlawful, but the court disagreed, pointing out that “[a]nyone passing by could observe [the man's] strange nocturnal activity.”

On the other hand, the more effort that was necessary to see the evidence, the greater the likelihood that that effort will convert the observation into a search. For example, the courts have ruled that officers conducted a search when, in order to see through a window or open door, they had to:

- step onto “a small planter area between the building and the parking lot”⁴⁰
- traverse some bushes that constituted a “significant hindrance”⁴¹
- climb over a fence, onto a trellis, then walk along the trellis for a considerable distance⁴²

Even if officers saw the evidence from a place they had a right to occupy, a search may result if the observation was made by using visual aids from a considerable distance. For example, in *People v. Arno*⁴³ LAPD officers learned that Arno was selling illegal pornographic movies out of his office in the Playboy Building. In the course of the investigation, an officer stationed himself on a hilltop about 250 yards away. With the naked eye, he could see only the shapes and shadows of people inside the office. But with a pair of high-powered binoculars he could see, among other things, Arno and others handling a “distinctively marked” container of pornography. Based on this information, the officers conducted a warranted search of the office and found illegal pornography. But the court ruled the evidence should have been suppressed because the defendant's suspicious activity was “not observable to anyone not using an optical aid.”

³⁵ See *Kyllo v. U.S.* (2001) 533 US 27, 40 [“[T]he Fourth Amendment draws a firm line at the entrance to the house.”].

³⁶ *U.S. v. Karo* (1984) 468 US 705, 714.

³⁷ See *People v. Camacho* (2000) 23 Cal.4th 824, 834 [“Had [the officers] been standing on a public sidewalk, they could have observed defendant [in his home] for as long as they wished.”]; *People v. Stevens* (1974) 38 Cal.App.3d 68-69 [lawful observation into home through a “defectively closed door”]; *Ponce v. Craven* (9th Cir. 1969) 409 F.2d 621, 625 [“If [the defendant] did not wish to be observed, he could have drawn his blinds.”].

³⁸ *U.S. v. Hatfield* (10th Cir. 2003) 333 F.3d 1189, 1196.

³⁹ (1975) 53 Cal.App.3d 40, 45.

⁴⁰ *Jacobs v. Superior Court* (1973) 36 Cal.App.3d 489.

⁴¹ *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 636.

⁴² *Pate v. Municipal Court* (1970) 11 Cal.App.3d 721, 724.

⁴³ (1979) 90 Cal.App.3d 505.

Similarly, in *United States v. Kim*⁴⁴ FBI agents were informed that Kim was operating a “major” book-making operation from his high-rise apartment in Hawaii. So they began watching the apartment from the only available vantage point: a building about a quarter of a mile away. Using a telescope, they were able to see Kim talking on a telephone while reading a certain sports sheet that was considered indispensable among Hawaii’s bookies, and this information was used to help establish probable cause for a wiretap. But the court ruled that the agents’ use of the telescope rendered their observations an illegal search. Said the court, “It is inconceivable that the government can intrude so far into an individual’s home that it can detect the material he is reading and still not be considered to have engaged in a search.”

Although privacy expectations inside homes are high, not everyone who happens to be inside a home when a police intrusion occurred will have standing to challenge it. Instead, it depends on their relationship to the premises.

FAMILY MEMBERS: All members of the family will ordinarily have standing to challenge a search of any room or area on the premises. Thus, the court noted in *In re Rudy F.*:

As against government intrusion, family members have an expectation of privacy in their entire home. It would be intrusive, unwise, and impractical to make expectation of privacy against government intrusion turn on the various family uses of different areas in the home.⁴⁵

OVERNIGHT HOUSEGUESTS: Overnight houseguests have will standing to challenge a search of their own property and those places and things in the house over which they had been given temporary control,

such as a bedroom.⁴⁶ As the Supreme Court observed in *Minnesota v. Olson*, “To hold that an overnight guest has a legitimate expectation of privacy in his host’s home merely recognizes the everyday expectations of privacy that we all share.”⁴⁷

PERSON IN TEMPORARY CONTROL: A person who has been given temporary exclusive control over the premises by the owner (such as a babysitter or caretaker) will ordinarily have standing to challenge a warrantless entry of the premises, in addition to a search of his personal property. In the words of the Court of Appeal, a person has a “protectable expectation of privacy” if he is “a permissive occupant who temporarily controls a residence, while performing functions recognized as valuable by society.”⁴⁸

INVITEES WITH GENERAL PRIVILEGES: An invitee who is allowed to use certain rooms or areas in the residence at will may have a protectable privacy interest in those places even though he does not stay overnight. For example, in *U.S. v. Haydel*⁴⁹ the court ruled that the homeowner’s adult son had standing to challenge a search of an area because he was permitted to store his things there, and because he had been given a key to the premises. On the other hand, in *People v. Cowan*⁵⁰ the court ruled that, although the defendant had a “standing invitation” to visit the occupants, he failed to prove “he had authority to be in the apartment alone [or] to enter without permission.”

CASUAL VISITORS: People who have been invited inside—including, of course, guests who came to plan or engage in criminal activity—will not have standing to challenge a search of anything other than their own property.⁵¹ As the California Supreme Court observed, “Occasional presence on the

⁴⁴ (D. Hawaii 1976) 415 F.Supp. 1252.

⁴⁵ (2004) 117 Cal.App.4th 1124, 1134. ALSO SEE *Guest v. Leis* (6th Cir. 2001) 255 F.3d 325, 333.

⁴⁶ See *People v. Henderson* (1990) 220 Cal.App.3d 1632, 1641-42; *U.S. v. Davis* (9th Cir. 2003) 332 F.3d 1163, 1168. COMPARE *People v. Hernandez* (1988) 199 Cal.App.3d 1182, 1189-90 [no standing to challenge search of a bedroom in a home in which the defendant was an overnight guest in another bedroom].

⁴⁷ (1990) 495 US 91, 98.

⁴⁸ *People v. Moreno* (1992) 2 Cal.App.4th 577, 587. ALSO SEE *People v. Stewart* (2003) 113 Cal.App.4th 242, 252 [“appellant clearly had permissive temporary control over the premises searched”].

⁴⁹ (5th Cir. 1981) 649 F.2d 1152, 1155.

⁵⁰ (1994) 31 Cal.App.4th 795, 800.

⁵¹ See *Minnesota v. Carter* (1998) 525 US 83, 90 [respondents “were essentially present for a business transaction”]; *People v. Welch* (1999) 20 Cal.4th 701, 747-48 [defendant was merely “a transient guest”]; *People v. Koury* (1989) 214 Cal.App.3d 676, 686 [“the mere legitimate presence there by invitation or otherwise, without more, is insufficient to create a protectable expectation”].

premises as a mere guest or invitee is insufficient to confer such an expectation [of privacy].”⁵² Thus, in *People v. Dimitrov* the court ruled that the defendant did not have standing to challenge a search of a high-volume drug house in Hollywood because he did not live there, he had no key, and he candidly admitted that he really couldn’t expect any privacy while visiting because people were always “coming and going.”⁵³

Outside homes (the “curtilage”)

The land immediately outside a home is known in the law as the “curtilage”; and it ordinarily consists of the front, back, and side yards, plus the driveway.⁵⁴ Because the curtilage is considered ancillary to the house itself, the residents can ordinarily expect that officers will not search it for evidence without a warrant or consent.

What about walking onto the curtilage and looking at things in plain view? The rule is that officers may do so if it reasonably appeared that visitors were invited to enter the area.⁵⁵ As the Court of Appeal explained:

[A] police officer who makes an uninvited entry onto private property does not per se violate the occupant’s Fourth Amendment right of privacy. The criterion to be applied is whether entry is made into an area where the public has been implicitly invited . . . ⁵⁶

Before going further, it is important to understand that, even if officers entered an area that was not impliedly open to visitors (and thus they technically conducted a search), their search will not be deemed unlawful unless its intrusiveness outweighed the public interest that was served by the entry.⁵⁷ To put it another way, the courts balance the degree of intrusion “against the public concern for the prevention of crime and the concern to maintain peace and security.”⁵⁸ For example, uninvited entries into the curtilage for the following reasons have been deemed justified:

- officers reasonably believed that the entry was necessary to investigate a crime⁵⁹
- officers had grounds to detain or arrest someone in a yard⁶⁰
- officers reasonably believed that property in a yard was stolen⁶¹

NORMAL ACCESS ROUTES: Officers may walk along any pathway from the street because, as the California Supreme Court explained, “A sidewalk, pathway, common entrance or similar passageway offers an implied permission to the public to enter which necessarily negates any reasonable expectation of privacy in regard to observations made there.”⁶² Or, as the Court of Appeal aptly put it, “An officer is permitted the same license to intrude as a reasonably respectful citizen.”⁶³

⁵² *People v. Ayala* (2000) 24 Cal.4th 243, 279.

⁵³ (1995) 33 Cal.App.4th 18, 27-28.

⁵⁴ See *Oliver v. U.S.* (1984) 466 US 170, 182, fn.12 [“[F]or most homes, the boundaries of the curtilage will be clearly marked; and the conception defining the curtilage—as the area around the home to which the activity of home life extends—is a familiar one easily understood from our daily experience.”].

⁵⁵ See *People v. Zichwic* (2001) 94 Cal.App.4th 944, 953 [“Just like any other visitor to a residence, a police officer is entitled to walk onto parts of the curtilage that are not fenced off.”]; *People v. Chavez* (2008) 161 Cal.App.4th 1493, 1500 [“The existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated.”].

⁵⁶ *In re Gregory S.* (1980) 112 Cal.App.3d 764, 775.

⁵⁷ See *People v. Camacho* (2000) 23 C4 824, 836; *U.S. v. Reyes* (2nd Cir. 2002) 283 F.3d 446, 465 [“legitimate law enforcement business”]; *In re Gregory S.* (1980) 112 Cal.App.3d 764, 776 [“the officer had a right and commensurate duty to deal with the problem at hand”]; *U.S. v. Daoust* (1st Cir. 1990) 916 F.2d 757, 758 [“The legal question is whether the police had a right to be at the back of the house where they saw the gun, or whether they were simply snooping.”].

⁵⁸ *People v. Thompson* (1990) 221 Cal.App.3d 923, 944 .

⁵⁹ See *People v. Camacho* (2000) 23 Cal.4th 824, 836; *People v. Gemmill* (2008) 162 Cal.App.4th 958, 967.

⁶⁰ See *People v. Thompson* (1990) 221 Cal.App.3d 923, 945 [“The police would have an unreasonably difficult time protecting citizens and the property from the criminal actions of third parties if police were restricted to walkways, driveways, and other normal access routes when the third parties whom the officers seek to detain do not restrict themselves to such areas.”]; *People v. Manderscheid* (2002) 99 Cal.App.4th 355, 363-64 [entry into backyard lawful in connection with the arrest of a “potentially armed parolee”].

⁶¹ See *People v. Superior Court (Stroud)* (1974) 37 Cal.App.3d 836, 841 [stolen car parts in the backyard].

⁶² *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 629. ALSO SEE *People v. Edelbacher* (1989) 47 Cal.3d 983, 1015 [“The tracks were apparently visible on the normal route used by visitors”]; *People v. Chavez* (2008) 161 Cal.App.4th 1493, 1500 [“The officer walked on the paved walkway only a short distance from the front door to the side gate.”].

⁶³ *People v. Thompson* (1990) 221 Cal.App.3d 923, 943.

Furthermore, officers may ordinarily depart somewhat from a normal access route if the departure was neither substantial nor unreasonable.⁶⁴ Said the Court of Appeal, “The Fourth Amendment prohibits unreasonable searches and seizures, not trespasses.”⁶⁵ Thus, the Ninth Circuit pointed out that “officers must sometimes move away from the front door when they are attempting to contact the occupants of a residence.”⁶⁶

What about “No Trespassing” signs? Although a relevant circumstance, signs are seldom viewed as a serious effort to prevent entry, especially when they were posted in areas where privacy expectations were minimal or nonexistent; e.g., at the front of the house. In the words of the Supreme Court, “[E]fforts to restrict access to an area do not generate a reasonable expectation of privacy where none would otherwise exist.”⁶⁷

FRONT YARD, PORCH: Walking on the front yard or porch is not considered intrusive because “a front yard is likely to be crossed at any time by door-to-door solicitors, delivery men and others unknown to the owner of the premises.”⁶⁸

DRIVEWAYS: Even if a driveway was not used as a normal or alternate access route, people can seldom expect that officers and others will not walk on them, especially if they were visible from the street.⁶⁹ According to the First Circuit, “[A] person does not

have a reasonable expectation of privacy in a driveway that was visible to the occasional passersby.”⁷⁰ For example, the courts routinely rule that officers do not need a warrant to walk onto a defendant’s driveway to install a tracking device under his car, or to record the license or VIN number of his car.⁷¹

SIDE YARDS: Unless there was a normal access route or walkway along the side of the house, the courts tend to view side yards as somewhat private. And they may become more private the further back the officers go (especially late at night).⁷² For example, in *People v. Camacho*⁷³ officers in Ventura County were dispatched at about 11 P.M. to investigate a complaint of a “loud party disturbance” at Camacho’s home. But when they arrived, they heard neither loud noise nor signs of a party. Still, they decided to look around; and one of the places they checked out was the side yard, which the court described as follows:

[A]n open area covered in grass. No fence, gate or shrubbery suggested entrance was forbidden. Neither, however, did anything indicate the public was invited to enter; there was neither a path nor a walkway, nor was there an entrance to the house accessible from the side yard.

While looking around, one of the officers noticed an uncovered window, so he looked inside and saw Camacho packaging cocaine. This ultimately led to

⁶⁴ See *People v. Thompson* (1990) 221 Cal.App.3d 923, 944 [“the intrusion was not a substantial and unreasonable departure from a normal route of access”]; *People v. Chavez* (2008) 161 Cal.App.4th 1493, 1499 [“[A]fter getting no response at the front door, [the officer] walked from the front door, along a concrete walkway, a short distance over to a gate”]; *U.S. v. Taylor* (4th Cir. 1996) 90 F.3d 903 [“search” did not result when “officers proceeded from the driveway, crossed the lawn, and climbed the stairs of the front porch” and from there saw incriminating evidence through a picture window].

⁶⁵ *Cohen v. Superior Court* (1970) 5 Cal.App.3d 429, 434. ALSO SEE *People v. Zichwic* (2001) 94 Cal.App.4th 944, 953 [“[N]ot every technical trespass onto the curtilage amounts to a search.”].

⁶⁶ *U.S. v. Garcia* (9th Cir. 1993) 997 F.2d 1273, 1279.

⁶⁷ *New York v. Class* (1986) 475 US 106, 114. ALSO SEE *Oliver v. U.S.* (1984) 466 US 170, 182, fn.13.

⁶⁸ *People v. Superior Court (Stroud)* (1974) 37 Cal.App.3d 836, 840. ALSO SEE *U.S. v. Santana* (1976) 427 US 38, 42 [defendant could not reasonably expect privacy at the threshold to house]; *Illinois v. McArthur* (2001) 531 US 36, 336 [“[A] person standing in the doorway of a house is in a public place”].

⁶⁹ See *U.S. v. McIver* (9th Cir. 1999) 186 F.3d 1119, 1126 [the driveway and the apron in front of the garage were open to observation from persons passing by]; *U.S. v. Smith* (6th Cir. 1986) 783 F.2d 648, 651 [“The fact that a driveway is within the curtilage of a house is not determinative if its accessibility and visibility from a public highway rule out any reasonable expectation of privacy.”]; *U.S. v. Ventling* (8th Cir. 1982) 678 F.2d 63, 66 [a driveway “can hardly be considered out of public view”]; *U.S. v. Hatfield* (10th Cir. 2003) 333 F.3d 1189, 1194 [“[P]olice observations made from the driveway do not constitute a search.”].

⁷⁰ *Rogers v. Vicuna* (1st Cir. 2001) 264 F.3d 1, 5.

⁷¹ See *People v. Zichwic* (2001) 94 Cal.App.4th 944, 953.

⁷² See *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 635 [the side yard “is covered with dirt and grass” and “there is no sidewalk or pathway leading past the window from any direction”]; *People v. Gemmill* (2008) 162 Cal.App.4th 958, 966 [“No substantial evidence supported an implied invitation to be on the east side of the house where the officer looked through the window.”].

⁷³ (2000) 23 Cal.4th 824.

a search of the premises and the seizure of cocaine. But the California Supreme Court ruled the evidence should have been suppressed because the officer's initial observation was unlawful. Said the court, "Most persons, we believe, would be surprised, indeed startled, to look out their bedroom window at such an hour to find police officers standing in their yard looking back at them."

BACKYARDS: Privacy expectations in most backyards are usually higher—often much higher—than those in the front and side yards. This is mainly because backyards are not usually visible to the public, they are ordinarily fenced in, and normal access routes seldom go through them. Thus, the court ruled in *People v. Winters* that "[a] person who surrounds his backyard with a fence and limits entry with a gate, locked or unlocked, has shown a reasonable expectation of privacy."⁷⁴

Still, privacy expectations in backyards may be reduced or eliminated if the physical layout or other circumstances made it reasonable for officers to believe that visitors were permitted to use the yard to contact the occupants. For example, in *People v. Willard* the court ruled there was "nothing unreasonable in [the officers] proceeding to the rear door which appears to have been a normal means of access to and egress from that part of the house. The gate was open and the rear door, actually on the side of the house, would probably be more public than a door at the back of the structure."⁷⁵

YARDS VIEWED FROM ADJOINING PROPERTY: Even if a defendant could reasonably expect that visitors would not walk into his back or side yard, a search may not result if the officers made their observation

from a neighbor's property.⁷⁶ Thus, in *People v. Superior Court (Stroud)* the Court of Appeal pointed out that "[t]he observation made by the officers looking over the five-foot fence from the neighbor's yard disclosed no more than what was in plain view of the neighboring householders and anyone else who might be on their premises."⁷⁷ Similarly, the court in *Dillon v. Superior Court*⁷⁸ ruled that the officers' observation of marijuana plants in the defendant's backyard did not constitute a search because the officers saw the plants from the second floor of the house next door whose owner had consented to their entry.

What if the officers did not have the neighbor's permission to be on his property? It would not affect the admissibility of evidence against the defendant because the "victim" of the trespass would have been the neighbor, not the defendant. As the Court of Appeal pointed out:

"[A] search does not violate the Fourth Amendment simply because police officers trespassed onto a neighbor's property when making their observations."⁷⁹

"Open fields"

The courts use the term "open field" to designate any undeveloped private property outside the curtilage of a home; i.e., beyond the immediate side and back yards.⁸⁰ As a practical matter, most "open fields" consist of large parcels of land located in rural areas.

It is easy to determine when officers need a warrant to walk onto an open field: never.⁸¹ The reason, said the Supreme Court, is that "open fields do not provide the setting for those intimate activi-

⁷⁴ (1983) 149 Cal.App.3d 705, 707. ALSO SEE *People v. Lovelace* (1981) 116 Cal.App.3d 541, 548 [reasonable expectation of privacy because the fence surrounding the backyard "was repaired and tightened up in order to shield the backyard from public view"].

⁷⁵ (1965) 238 Cal.App.2d 292, 307. ALSO SEE *U.S. v. Raines* (8th Cir. 2001) 243 F.3d 419, 421 [unable to contact the occupant at the front door, the officer did not violate the Fourth Amendment "when he, in good faith, went unimpeded" to the back yard].

⁷⁶ See *People v. Vermouth* (1974) 42 Cal.App.3d 353, 362 ["plain and unobstructed view from a neighbor's backyard."]; *People v. Shaw* (2002) 97 Cal.App.4th 833 [with permission of a neighbor, officers standing behind a fence looked into the common area of defendant's apartment]; *People v. Smith* (1986) 180 Cal.App.3d 72, 83-84.

⁷⁷ (1974) 37 Cal.App.3d 836, 839.

⁷⁸ (1972) 7 Cal.3d 304, 311.

⁷⁹ *People v. Claeys* (2002) 97 Cal.App.4th 55, 59. ALSO SEE *People v. Superior Court (Stroud)* (1974) 37 Cal.App.3d 836, 839.

⁸⁰ See *People v. Barbarick* (1985) 168 Cal.App.3d 731, 741, fn.3 ["To the extent the garden was outside the curtilage it was an open field"]; *People v. Freeman* (1990) 219 Cal.App.3d 894, 901 ["An open field need be neither 'open' nor a 'field'"].

⁸¹ See *U.S. v. Dunn* (1987) 480 US 294, 304 ["there is no constitutional difference between police observations conducted while in a public place and while standing in the open fields"]; *People v. Shaw* (2002) 97 Cal.App.4th 833, 838 ["A warrantless observation made by law enforcement from an open field enjoys the same constitutional protection as the one made from a public place."].

ties that the Fourth Amendment is intended to shelter from governmental interference or surveillance.”⁸² This holds true even if the field was surrounded by fencing and posted with “No Trespassing” signs.⁸³

For example, in *U.S. v. Dunn*⁸⁴ DEA agents entered a 198-acre field that was “completely enclosed by a perimeter fence” and “several interior fences” with “multiple strands of barbed wire.” After climbing the fences, the agents saw Dunn’s PCP lab in a barn, and this led to his arrest. On appeal to the Supreme Court, Dunn argued that the sighting constituted a search, but the Court disagreed, noting that it had previously “rejected the argument that the erection of fences on an open field—at least of the variety involved in those cases and in the present case—creates a constitutionally protected privacy interest.” “It follows,” said the Court, “that no constitutional violation occurred here.”

Apartments and motels

The residents and registered guests of apartments, condominiums, motels, and hotels have the same privacy expectations as do people in single family homes.⁸⁵ Likewise, casual guests and “mere visitors” can expect no privacy in the living areas except for their personal belongings.⁸⁶ Furthermore, neither a

resident nor a guest can reasonably expect privacy in common areas, such as hallways, garages, and recreation areas.⁸⁷

Two questions arise: Can motel and hotel guests have standing if they obtained the room by fraud? And do they maintain standing after checkout time? The answer to both is that the occupants retain their privacy rights until management has taken affirmative steps to reassert exclusive control. As the Ninth Circuit explained in *U.S. v. Cunag*, “[E]ven if the occupant of a hotel room has procured that room by fraud, the occupant’s protected Fourth Amendment expectation of privacy is not finally extinguished until the hotel justifiably takes affirmative steps to repossess the room”⁸⁸

This does not mean that the occupants may continue to expect privacy until management actually begins legal eviction proceedings. Instead, it is sufficient that management, (1) was aware that grounds to evict existed, (2) had decided to evict the occupants, (3) had asked officers to assist with the eviction or at least stand by while a manager did so, and (4) had notified the occupants that they were being evicted.⁸⁹ “The critical determination,” said the Ninth Circuit, “is whether or not management had justifiably terminated [the guest’s] control of the room through private acts of dominion.”⁹⁰

⁸² *Dow Chemical v. U.S.* (1986) 476 US 227, 235.

⁸³ See *Oliver v. U.S.* (1984) 466 US 170, 179 [Court notes that “fences or ‘No Trespassing’ signs” do not ordinarily “effectively bar the public from viewing open fields”]; *U.S. v. Rapanos* (6th Cir. 1997) 115 F.3d 367, 372 [“The rather typical presence of fences, closed or locked gates, and ‘no trespassing’ signs on an otherwise open field therefore has no constitutional import.”].

⁸⁴ (1987) 480 US 294.

⁸⁵ See *U.S. v. Bautista* (9th Cir. 2004) 362 F.3d 584, 589 [Fourth Amendment “extends to such places as hotel or motel rooms”].

⁸⁶ See *U.S. v. Williams* (8th Cir. 2008) 521 F.3d 902, 906; *U.S. v. Sturgis* (8th Cir. 2001) 238 F.3d 956, 958.

⁸⁷ See *People v. Szabo* (1980) 107 Cal.App.3d 419, 429 [apartment garage]; *People v. Galan* (1985) 163 Cal.App.3d 786, 793 [condominium garage]; *People v. Arango* (1993) 12 Cal.App.4th 450 455 [“open carport area”].

⁸⁸ (9th Cir. 2004) 386 F.3d 888, 895.

⁸⁹ See *U.S. v. Cunag* (9th Cir. 2004) 386 F.3d 888, 895 [“[A] justifiable affirmative act of repossession by the lessor is the factor that finally obliterates any cognizable expectation of privacy a lessee might have.”]; *U.S. v. Young* (9th Cir. 2009) 573 F.3d 711, 716-17 [guest retained a reasonable expectation of privacy in his hotel room and the luggage he left there “because hotel staff had not evicted him from the room”]; *U.S. v. Bautista* (9th Cir. 2004) 362 F.3d 584, 590 [“The critical determination is whether or not management had justifiably terminated Bautista’s control of the room through private acts of dominion.”]; *U.S. v. Dorais* (9th Cir. 2001) 241 F.3d 1124, 1128 [“[A] defendant has no reasonable expectation of privacy in a hotel room when the rental period has expired and the hotel has taken affirmative steps to repossess the room.”]; *People v. Satz* (1998) 61 Cal.App.4th 322 [motel manager asked police “to assist in appellant’s eviction”]. COMPARE *U.S. v. Young* (9th Cir. 2009) 573 F.3d 711, 716-17 [“The hotel had not taken any affirmative act that was a clear and unambiguous sign of eviction.”]; *U.S. v. Molsbarger* (8th Cir. 2009) 551 F.3d 809, 812 [“Any right Molsbarger had to be free of government intrusion into the room ended when the hotel manager, properly exercising his authority, decided to evict the unruly guests and asked the police to help him do so.”]; *People v. Minervini* (1971) 20 Cal.App.3d 832, 840; *People v. Munoz* (2008) 167 Cal.App.4th 126, 133 [“we cannot infer that Munoz actually knew she was passing counterfeit currency” and thus “we cannot conclude she intended to defraud the motel”].

⁹⁰ *U.S. v. Bautista* (9th Cir. 2004) 362 F.3d 584, 590.

Motor vehicles

The registered owner may ordinarily challenge a search of the vehicle, even if he was not present when the search occurred. As for other occupants, they are permitted to challenge car stops and vehicle searches under the following circumstances:

STANDING TO CHALLENGE THE CAR STOP: When officers make a car stop, everyone in the vehicle has standing to challenge the justification for the stop and whether the officers carried out the detention in a reasonable manner.⁹¹ As the Sixth Circuit observed, “[E]ven in cases where no reasonable expectation of privacy exists, a passenger may still challenge the stop and detention.”⁹²

PASSENGERS: STANDING TO CHALLENGE SEARCHES: A person who was merely a passenger will, of course, have standing to challenge an intrusion into his personal belongings. He may not, however, challenge searches of other places and things in the vehicle, such as the glove box, under the seats, or the trunk.⁹³ Thus, in the landmark case of *Rakas v. Illinois*, the United States Supreme Court ruled that the passengers lacked standing to challenge a search under the front passenger seat because they “asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized.”⁹⁴

BORROWERS: STANDING TO CHALLENGE SEARCHES:

When the owner of a vehicle permits another person to use it temporarily, that person will have standing to challenge the legality of any search.⁹⁵ As the court noted in *People v. Leonard*, “A person who has the owner’s permission to use a vehicle and is exercising control over it has a legitimate expectation of privacy in it.”⁹⁶ A borrower will, however, lack standing if he absconded with the vehicle and the registered owner requested that officers assist in recovering it.⁹⁷

RENTAL CARS: A person who rents a car and any authorized drivers may challenge a search of it unless the rental period had expired and the rental company had requested police assistance in recovering the vehicle.⁹⁸ As for unauthorized drivers, there are two views: The majority view is that they do not have standing.⁹⁹ Thus, one of the courts in the majority, the Tenth Circuit, ruled in *United States v. Roper* that Roper lacked standing because the vehicle “had been rented by Griffin’s common law wife in California. Neither Roper nor Griffin was listed as an additional driver in the rental contract.”¹⁰⁰ In contrast, the Eighth and Ninth Circuits have ruled that unauthorized drivers may have standing if they were driving with the consent of the person who rented the vehicle.¹⁰¹

⁹¹ See *Brendlin v. California* (2007) 551 US 249; *U.S. v. Diaz-Castaneda* (9th Cir. 2007) 494 F.3d 1146, 1150.

⁹² *U.S. v. Torres-Ramos* (6th Cir. 2008) 536 F.3d 542, 549.

⁹³ See *People v. Valdez* (2004) 32 Cal.4th 73, 122 [passenger “lacked a reasonable expectation of privacy in the area under the driver’s side seat”]; *People v. Jackson* (1992) 7 Cal.App.4th 1367, 1370 [“Appellant was merely a guest-passenger”]; *People v. Nelson* (1985) 166 Cal.App.3d 1209, 1214 [passenger had no reasonable expectation of privacy in the glove compartment or under the seats].

⁹⁴ (1978) 439 US 128, 148.

⁹⁵ See *People v. Carvajal* (1988) 202 Cal.App.3d 487, 495 [borrower had standing because he “was driving the vehicle with the owner’s permission, and apparently possessed keys to the [vehicle]”]; *U.S. v. Soto* (10th Cir. 1993) 988 F.2d 1548, 1554 [“Because defendant presented evidence that he was in lawful possession of the car at the time of the stop, his expectation of privacy in the contents of the car [including secret compartment] was objectively reasonable.”].

⁹⁶ (1987) 197 Cal.App.3d 235, 239.

⁹⁷ See *U.S. v. Bouffard* (1st Cir. 1990) 917 F.2d 673, 676-77 [defendant retained possession “beyond the bailment term” and the owner “requested and received police assistance in recovering the vehicle”].

⁹⁸ See *U.S. v. Bouffard* (1st Cir. 1990) 917 F.2d 673, 676-77.

⁹⁹ See *U.S. v. Smith* (6th Cir. 2001) 263 F.3d 571, 586 [“We acknowledge that as a general rule, an unauthorized driver of a rental vehicle does not have a legitimate expectation of privacy in the vehicle, and therefore does not have standing to contest the legality of a search of the vehicle.”]; *U.S. v. Wellons* (4th Cir. 1994) 32 F.3d 117, 119 [“appellant, as an unauthorized driver of the rented car, had no legitimate privacy interest in the car”]; *U.S. v. Boruff* (5th Cir. 1990) 909 F.2d 111, 117 [“Boruff had no legitimate expectation of privacy in the rental car. Under the express terms of the rental agreement, Lawless was the only legal operator”].

¹⁰⁰ (10th Cir. 1990) 918 F.2d 885, 887-88.

¹⁰¹ See *U.S. v. Thomas* (9th Cir. 2006) 447 F.3d 1191, 1198 [unauthorized driver “may still have standing to challenge a search, upon a showing of ‘joint control’ or ‘common authority’ over the property searched.”]; *U.S. v. Best* (8th Cir. 1998) 135 F.3d 1223, 1225 [“If [the renter] had granted Best permission to use the automobile, Best would have a privacy interest giving rise to standing.”].

STOLEN CARS: Although the occupants of a stolen car have standing to challenge the propriety of their detention, they do not have standing to challenge a search of the vehicle.¹⁰² As the court observed in *People v. Melnyk*, “[A]n auto thief, like a second-story man apprehended in the victimized premises, has no standing to assert a reasonable expectation of privacy in the stolen car.”¹⁰³

Businesses

The principles that apply to searches of businesses and the personal workspaces of owners and employees are essentially the same as any other place: the person will have standing if he reasonably expected privacy in workspace or thing that was intruded upon.

AREAS OPEN TO THE PUBLIC: No one can reasonably expect privacy in areas that are open to the public.¹⁰⁴ Thus, in *Maryland v. Macon* the Supreme Court ruled that officers did not conduct a search when they entered the defendant’s bookstore and examined some books on display to determine if they contained pornography. This was because, said the Court, the owner “did not have any reasonable expectation of privacy in areas of the store where the public was invited to enter and to transact business.”¹⁰⁵

PRIVATE ENCLOSED AREAS: A corporate or business owner may reasonably expect privacy in all buildings that are not expressly or impliedly open to the public. Thus, in *Dow Chemical v. United States*, the Supreme Court summarily ruled that Dow “plainly has a reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings.”¹⁰⁶

COMMERCIAL CURTILAGE: As a general rule, an owner or employee cannot reasonably expect privacy as to things and conditions on the private property immediately surrounding a business (i.e., the “commercial curtilage”). Consequently, officers may ordinarily enter parking lots and other adjoining commercial land unless the owner had taken reasonable steps to prevent entry.¹⁰⁷

EMPLOYEE’S PERSONAL PROPERTY: Employees may reasonably expect privacy as to the contents of their personal belongings in the workplace.¹⁰⁸

EMPLOYEES’ WORKSPACES: The most problematic situation pertaining to standing in the workplace occurs when an employer authorizes officers to search places or things that are owned by the employer but used by the employee-suspect. The reason these situations present problems is that privacy expectations will necessarily depend on the nature

¹⁰² See *People v. Carter* (2005) 36 Cal.4th 1114, 1141 [“To accept defendant’s assertion that he had a legitimate expectation of privacy while driving a stolen vehicle would be to overlook the word ‘unreasonable’ in the Fourth Amendment’s proscription against ‘unreasonable searches and seizures.’”]; *People v. Shepherd* (1994) 23 Cal.App.4th 825, 828 [“[D]efendant had no legitimate expectation of privacy in the stolen truck.”]; *U.S. v. Tropicano* (2nd Cir. 1995) 50 F.3d 157, 161 [“[W]e think it obvious that a defendant who knowingly possesses a stolen car has no legitimate expectation of privacy in the car.”].

¹⁰³ (1992) 4 Cal.App.4th 1532, 1533.

¹⁰⁴ See *Donovan v. Dewey* (1981) 452 US 594, 598-99 [“[T]he expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual’s home”]; *Vega-Rodriguez v. Puerto Rico telephone Co.* (1st Cir. 1997) 110 F.3d 174, 178-79 [“Generally speaking, business premises invite lesser privacy expectations than do residences. Still, deeply rooted societal expectations foster some cognizable privacy interests in business premises.”].

¹⁰⁵ (1985) 472 US 463, 469.

¹⁰⁶ (1986) 476 US 227, 236. ALSO SEE *U.S. v. Hall* (11th Cir. 1995) 47 F.3d 1091, 1096 [“[T]he owner of commercial property has a reasonable expectation of privacy in those areas immediately surrounding the property only if affirmative steps have been taken to exclude the public.”]; *U.S. v. Leary* (10th Cir. 1988) 846 F.2d 592, 596 [“[A] corporate defendant has standing with respect to searches of corporate premises”]; *U.S. v. SDI Future Health, Inc.* (9th Cir. 2009) 568 F.3d 684, 698 [small business owners have standing throughout when they exercise “daily management and control”].

¹⁰⁷ See *Dow Chemical Co. v. U.S.* (1986) 476 US 227, 236 [“The intimate activities associated with family privacy and the home and its curtilage simply do not reach the outdoor areas or spaces between structures and building of a manufacturing plant.”]; *U.S. v. Reed* (8th Cir. 1984) 733 F.2d 492, 501 [“[T]here was no indication that the back parking lot was ‘private’ to the owners or to those specifically authorized to use it . . . [I]t served as a common loading area for C.D.Y. and a carpet business located to the immediate west of C.D.Y.”]; *U.S. v. Edmonds* (5th Cir. 1980) 611 F.2d 1386, 1388 [no reasonable expectation of privacy in loading dock/parking lot area of a business].

¹⁰⁸ See *O’Connor v. Ortega* (1987) 480 US 709, 716; *U.S. v. Anderson* (10th Cir. 1998) 154 F.3d 1225, 1231 [“It may be significant, therefore, that this item is a personal possession of the defendant and not something connected with the operation of the business.”].

of the area or thing, its function in the workplace, the extent to which other employees also use it, and the particular circumstances surrounding the intrusion. As the Supreme Court pointed out, because of the “great variety of work environments,” this issue must be decided “on a case-by-case basis.”¹⁰⁹

Before going further, it should be noted that there are essentially two legal issues in these situations. First, did the employee have a reasonable expectation of privacy over the place or thing that was intruded upon? If not, he cannot challenge the intrusion. Second, if the employee had a reasonable expectation of privacy, the employer may nevertheless consent to a search of it if it reasonably appeared that the employer had “common authority” over it.¹¹⁰ (The subject of common authority and apparent authority were covered in the article on consent searches in the Summer 2007 edition.)

Back to standing. If a court rules that the employer’s consent was ineffective because he did not have common authority over the place or thing that was searched, the evidence will ordinarily be suppressed unless the employee could not have reasonably expected privacy in the place or thing.

As a general rule, employees can expect privacy as to the contents of their desks, file cabinets, and other containers in their offices and other enclosed places that they use exclusively. “It is well established,” said the Tenth Circuit, “that an employee has a reasonable expectation of privacy in his office.”¹¹¹ Thus, in *U.S. v. SDI Future Health, Inc.*, the court summarily ruled that two managers of the corporate defendant had standing to challenge a search of “their own personal, internal offices.”¹¹²

An employee might also reasonably expect privacy in an office or thing that he uses jointly with a small number of other employees. For example, in *United States v. Taketa* the Ninth Circuit ruled that a DEA agent retained a reasonable expectation of privacy in his office even though other agents would enter now and then on official business. Said the court:

[E]ven private business offices are often subject to the legitimate visits of coworkers, supervisors, and the public, without defeating the expectation of privacy.¹¹³

However, an employee in a more bustling or centralized office may be denied standing if the “operational realities of the workplace” made his privacy expectations unreasonable.¹¹⁴ For example, in *Sacramento County Deputy Sheriffs’ Assn. v. County of Sacramento* the Court of Appeal ruled that a sheriff’s deputy could not reasonably expect privacy from video surveillance in the county jail’s “release office” because the office “was not exclusively assigned to him” and it was “accessible to any number of people, including other jail employees, inmates on cleaning detail and outside personnel.”¹¹⁵

Finally, an employee who had been given exclusive, or nearly exclusive, use or control of an area in the workplace may be denied standing if both of the following circumstances existed: (1) he was given notice of a company policy or practice by which intrusions “of the type to which he was subjected might occur from time to time for work-related purposes”;¹¹⁶ and (2) intrusions of that sort did, in fact, occur periodically and were thus not merely a remote possibility.

¹⁰⁹ *O’Connor v. Ortega* (1987) 480 US 709, 718.

¹¹⁰ See *U.S. v. Matlock* (1974) 415 US 164, 171, fn.7 [“The authority which justifies third-party consent [rests] on mutual use of the property by persons generally having joint access or control for most purposes.”]; *Illinois v. Rodriguez* (1990) 497 US 177, 185; *People v. Welch* (1999) 20 Cal.4th 701, 748 [“The person in control of the premises may consent to a search thereof.”]; *People v. Clark* (1993) 5 Cal.4th 950, 979 [“[O]bjects left in any area of common use or control may be within the scope of the consent given by a third party”].

¹¹¹ *U.S. v. Anderson* (10th Cir. 1998) 154 F.3d 1225, 1230.

¹¹² (9th Cir. 2009) 568 F.3d 684, 699. ALSO SEE *Schowengerdt v. General Dynamics, Inc.* (9th Cir. 1987) 823 F.2d 1328, 1335.

¹¹³ (9th Cir. 1991) 923 F.2d 665, 673. NOTE: An employee cannot expect privacy over a place merely because he had access, even if he worked there regularly with others. See *U.S. v. SDI Future Health, Inc.* (9th Cir. 2009) 568 F.3d 684, 696 [“[M]ere access to, and even use of, the office of a co-worker does not lead us to find an objectively reasonable expectation of privacy.”]; *U.S. v. Taketa* (9th Cir. 1991) 923 F.2d 665, 671 [mere access “does not lead us to find an objectively reasonable expectation of privacy”].

¹¹⁴ *O’Connor v. Ortega* (1987) 480 US 709, 717.

¹¹⁵ (1996) 51 Cal.App.4th 1468, 1482.

¹¹⁶ *Schowengerdt v. General Dynamics, Inc.* (9th Cir. 1987) 823 F.2d 1328, 1335. ALSO SEE *Veda-Rodriguez v. Puerto Rico Telephone Co.* (1st Cir. 1997) 110 F.3d 174, 180 [“PRTC notified its work force in advance that video cameras would be installed and disclosed the cameras’ field of vision.”].

Difficulty of Observation

Until now, we have been discussing the legitimate privacy expectations inherent in certain places and things. But even if a certain place or thing was not technically “private” because there was a vantage point from which it could be seen, the defendant may have standing nevertheless if the observation could only have been made with great difficulty or (with increasing frequency) by means of high-tech electronic devices. As the Supreme Court remarked in *Dow Chemical, Inc. v. U.S.*:

It may well be that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant.¹¹⁷

So, what is the test for determining whether the difficulty of observation was so great that, despite a nearby vantage point, the defendant could nevertheless expect privacy? It appears to be as follows: A search will result if the amount of required effort was beyond that which a moderately inquisitive person—utilizing generally available resources—would have expended.

EVIDENCE IN PLAIN VIEW: By its very nature, an officer’s observation of evidence in plain view requires little or no effort. For that reason, a search will not result if the evidence could be readily seen from a place that officers accessed without violating the defendant’s Fourth Amendment rights.¹¹⁸ For

example, an officer’s use of an electronic tracking device on a vehicle will not constitute a search (even if the driver utilized countersurveillance measures¹¹⁹) so long as the driver stayed on streets, sidewalks, parking lots, and other places in public view.¹²⁰ Furthermore, even if a place or thing was not fully exposed, it may be deemed in plain view if it could have been seen with little effort; e.g., bending down, standing on tiptoes.¹²¹

EVIDENCE MAGNIFIED: Using a common visual aid to magnify or clarify evidence that could have been seen without it (albeit less clearly) does not constitute a search because such an intrusion is reasonably foreseeable. As the Court of Appeal explained in *People v. St. Amour*:

So long as the object which is viewed is perceptible to the naked eye, the person has no reasonable expectation of privacy and as a consequence, the government may use technological aid of whatever type without infringing on the person’s Fourth Amendment rights.¹²²

Thus, the Supreme Court has explained that “the use of bifocals, field glasses or the telescope to magnify the object of a witness’ vision is not a forbidden search or seizure.”¹²³ (As for the use of magnification devices to look inside homes, see “Inside homes” on page 5.)

EVIDENCE ILLUMINATED: Using a flashlight or spotlight “to illuminate a darkened area simply does not constitute a search, and thus triggers no Fourth Amendment protection.”¹²⁴

¹¹⁷ (1986) 476 US 227, 238.

¹¹⁸ *People v. Deutsch* (1996) 44 Cal.App.4th 1224, 1229 [“Information or activities which are exposed to public view cannot be characterized as something in which a person has a subjective expectation of privacy.”].

¹¹⁹ See *U.S. v. Knotts*, (1983) 460 US 276, 285 [“Insofar as respondent’s complaint appears to be simply that scientific devices such as the beeper enabled the police to be more effective in detecting crime, it simply has no constitutional foundation.”].

¹²⁰ See *U.S. v. Knotts* (1983) 460 US 276, 281 [“A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.”]; *U.S. v. Dubrofsky* (9th Cir. 1978) 581 F.2d 208, 211.

¹²¹ See *People v. Chavez* (2008) 161 Cal.App.4th 1493, 1501 [“tip toes”]; *U.S. v. Elkins* (6th Cir. 2002) 300 F.3d 638, 654 [“Any contortions [the officer] made to peer through the opening did not change the ‘plain view’ character of his observation”].

¹²² (1980) 104 Cal.App.3d 886, 893.

¹²³ *On Lee v. U.S.* (1952) 343 US 747, 754. ALSO SEE *People v. Arno* (1979) 90 Cal.App.3d 505, 509 [“[I]f the purpose of the optically aided view is to permit clandestine police surveillance of that which could be seen from a more obvious vantage point without the optical aid, there is no unconstitutional intrusion.”]; *Burkholder v. Superior Court* (1979) 96 Cal.App.3d 421, 426 [binoculars merely provided “greater detail”].

¹²⁴ *Texas v. Brown* (1983) 460 US 730, 740. ALSO SEE *U.S. v. Dunn* (1987) 480 US 294, 305 [“[T]he officers’ use of the beam of a flashlight, directed through the essentially open front of respondent’s barn, did not transform their observations into an unreasonable search”]; *People v. Superior Court (Mata)* (1970) 3 Cal.App.3d 636, 639 [“Observation of that which is in view is lawful, whether the illumination is daylight, moonlight, lights with the vehicle, lights from street lamps, neon signs, or lamps, or the flash of lights from adjacent vehicles.”].

ELECTRONIC VISUAL SURVEILLANCE: Although electronic surveillance technology can be highly intrusive, it is constantly becoming more affordable and more readily available to the general public. For that reason, the law is having to periodically adjust its idea of how much privacy people can reasonably expect from electronic surveillance and, therefore, what types of surveillance will require a warrant or other court authorization.¹²⁵

At present, the prevalent view seems to be that people must expect that officers will utilize technology that is in “general use,”¹²⁶ provided it was not used to look at something in a private place. For example, not long ago night-vision binoculars and Forward Looking Infrared (FLIR) technology would have been deemed too intrusive to be permitted without a search warrant. But nowadays they are considered fairly common, so that their use is not apt to be deemed a search if officers were looking at a place in which privacy expectations were minimal or nonexistent.¹²⁷

On the other hand, in *Kyllo v. United States* the Supreme Court ruled that officers conducted a search when they used a thermal imaging device to locate and measure the heat sources inside a residence. Said the Court, “Where, as here, the Government uses a device that is not in general public use,

to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant.”¹²⁸

What about video cameras? Because overt and hidden cameras are so prevalent, their use does not constitute a search if they only cover places that cannot support a reasonable expectation of privacy; e.g., places open to the public, non-private workspaces. Thus, the Tenth Circuit ruled that a warrant was not required where the cameras “were incapable of viewing inside the houses, and were capable of observing only what any passerby would easily have been able to observe.”¹²⁹

This holds true even if it is unlikely that covert cameras are in operation. Thus, the court in *United States v. McIver* ruled that the defendant could not reasonably expect that he would not be watched as he tended to a marijuana garden in a national forest. Said the court:

We reject the notion that the visual observation of the site became unconstitutional merely because law enforcement chose to use a most cost-effective “mechanical eye” to continue the surveillance.¹³⁰

AUDIO ELECTRONIC SURVEILLANCE: Although low-cost electronic eavesdropping devices (e.g., para-

¹²⁵ See *Kyllo v. U.S.* (2001) 533 US 27, 33-34 [“It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology.”]; *Dean v. Superior Court* (1973) 35 Cal.App.3d 112, 116 [“Judicial implementations of the Fourth Amendment need constant accommodation to the ever-intensifying technology of surveillance.”]; *U.S. v. Hill* (9th Cir. 2006) 459 F.3d 966, 979 [“Technology is rapidly evolving and the concept of what is reasonable for Fourth Amendment purposes will likewise have to evolve.”]; *U.S. v. Kim* (D. Haw. 1976) 415 F.Supp 1252, 1257 [“[A]s the technological capability of law enforcement agencies increases, the Fourth Amendment must likewise grow in response.”].

¹²⁶ See *Kyllo v. U.S.* (2001) 533 US 27, 39, fn.6 [in determining whether the use of electronic surveillance technology constitutes a search, the courts may consider whether the technology was in “general public use”]; *Dow Chemical v. U.S.* (1986) 476 US 227, 238 [“It may well be that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant.”]; *U.S. v. Ishmael* (5th Cir. 1995) 48 F.3d 850, 855 [“[T]he mere fact that the police have employed relatively sophisticated forms of technological surveillance does not render the surveillance unconstitutional. While technology certainly gives law enforcement a leg up on crime, the Supreme Court has never equated police efficiency with unconstitutionality.”]; *U.S. v. Scott* (1st Cir. 1992) 975 F.2d 927, 930 [“There is no constitutional requirement that police techniques in the detection of crime must remain stagnant while those intent on keeping their nefarious activities secret have the benefit of new knowledge.”].

¹²⁷ See *U.S. v. Dellas* (N.D. Cal. 2005) 355 F.Supp.2d 1095, 1107 [“[N]ight vision goggles merely amplify ambient light to allow the wearer to see in relative darkness.”]; *Oregon v. Wacker* (1993) 317 Or. 419, 429 [no reasonable expectation of privacy when officers used night-vision binoculars to observe narcotics activity inside a car in a public parking lot].

¹²⁸ (2001) 533 US 27, 40. ALSO SEE *People v. Deutsch* (1996) 44 Cal.App.4th 1224, 1231.

¹²⁹ *U.S. v. Jackson* (10th Cir. 2000) 213 F.3d 1269, 1281. ALSO SEE *Vega-Rodriguez v. Puerto Rico Telephone Co.* (1st Cir. 1997) 110 F.3d 174, 181; *Sacramento County Deputy Sheriff's Assn. v. County of Sacramento* (1996) 51 Cal.App.4th 1468, 1478-84 [concealed camera in jail release office]; *U.S. v. Gonzalez* (9th Cir. 2003) 328 F.3d 543, 548 [covert video surveillance of hospital mailroom].

¹³⁰ (9th Cir. 1999) 186 F.3d 1119, 1125.

bolic microphones, sonic wave detectors) are widely available, the courts have never suggested that people who communicate privately must expect that their conversations will be intercepted by such means. On the contrary, the court in *People v. Henderson* ruled that “the use of equipment to hear what the unaided ear cannot hear violates reasonable expectations of privacy.”¹³¹

AERIAL SURVEILLANCE: People cannot reasonably expect that officers will not see things that could be observed from an airplane or helicopter (with or without visual aids) provided the aircraft, (1) was flown in accordance with FAA regulations, and (2) was not flown in an intrusive manner.¹³² The latter requirement is directed at police helicopters, mainly because they can hover at low altitudes. In fact, one of the many frightening images from George Orwell’s *1984* was the following: “In the far distance a helicopter skimmed down between the roofs. [I]t was the Police Patrol, snooping into people’s windows.” Although it turned out that this image was farfetched, a search is apt to result if a helicopter pilot engages in “interminable hovering,” “persistent overfly,” or “treetop observation.”¹³³

CANINE SNIFFING: Although modern technology cannot match the smelling capability of even the most unaccomplished mutt, it is settled that a search does not result when officers use a dog to detect drugs or explosives in a place in which the officers have a right to be.¹³⁴

Standing Forfeited

A defendant who has standing may lose it if he did or said something before the evidence was discovered that eliminated his privacy expectations in the evidence or in the place in which the evidence was found. Standing can be relinquished in the following ways.

Evidence abandoned

The most common way in which defendants lose standing is by abandoning the evidence before officers seized it. As used here, the term “abandonment” means relinquishing possession of evidence (permanently or temporarily) under circumstances that make it unreasonable to expect that others will not see or take it.¹³⁵ As the court observed in *People v. Daggs*, “[N]o one has a reasonable expectation of privacy in property that has been abandoned.”¹³⁶

Before we discuss how evidence is usually abandoned, it should be noted that, while most abandonment is intentional, an intent to abandon is not a requirement that prosecutors must prove. Instead, evidence will be deemed abandoned if it *reasonably appeared* that the defendant intended to do so.¹³⁷ “Whether an abandonment has occurred,” said the court in *United States v. Tugwell*, “is determined on the basis of the objective facts available to the investigating officers, not on the basis of the owner’s subjective intent.”¹³⁸ As we will now discuss, abandonment can occur in several ways.

¹³¹ (1990) 220 Cal.App.3d 1632, 1644.

¹³² See *California v. Ciraolo* (1986) 476 US 207, 215 [“The Fourth Amendment simply does not require the police traveling in the public airways at this altitude [1,000 feet] to obtain a warrant in order to observe what is visible to the naked eye.”]; *People v. Romo* (1988) 198 Cal.App.3d 581, 586 [“the helicopter was operating lawfully . . . *Ciraolo* requires no more”].

¹³³ *People v. Sabo* (1986) 185 Cal.App.3d 845, 854. COMPARE *Florida v. Riley* (1989) 488 US 445, 452 [“[T]here was no undue noise, and no wind, dust, or threat of injury.”]; *People v. Romo* (1988) 198 Cal.App.3d 581, 587 [“[The helicopter] did not hover over defendant’s backyard . . . No maneuvering was required”]; *Dean v. Superior Court* (1973) 35 Cal.App.3d 112, 117 [“When the police [in a helicopter] have a plain view of contraband from a portion of the premises as to which the occupant has exhibited no reasonable expectation of privacy, there is no search in a constitutional sense”].

¹³⁴ See *Illinois v. Caballes* (2005) 543 US 405, 410; *Indianapolis v. Edmond* (2000) 531 US 32, 40.

¹³⁵ See *Abel v. U.S.* (1960) 362 US 217, 241.

¹³⁶ (2005) 133 Cal.App.4th 361, 365. ALSO See *People v. Parson* (2008) 44 Cal.4th 332, 345 [“a person has no reasonable expectation of privacy in [abandoned] property”].

¹³⁷ See *People v. Parson* (2008) 44 Cal.4th 332, 347 [“abandonment is primarily a question of the defendant’s intent, as determined by objective factors such as the defendant’s words and actions.”]; *People v. Daggs* (2005) 133 Cal.App.4th 361, 365 [“[T]he intent to abandon is determined by objective factors, not the defendant’s subjective intent.”]; *In re Baraka H.* (1992) 6 Cal.App.4th 1039, 1048 [court rejects argument that abandonment does not occur “unless the actor intends to permanently relinquish control over the object”]; *U.S. v. Alexander* (7th Cir. 2009) 573 F.3d 465, 472 [“We consider only the external manifestations of the defendant’s intent as judged by a reasonable person possessing the same knowledge available to the searching officer.”].

¹³⁸ (8th Cir. 1997) 125 F.3d 600, 602.

ORDINARY ABANDONMENT: The most common form of abandonment occurs when a person intentionally leaves the evidence in a public place, or in a private place over which he had no control. Examples include leaving evidence in a garbage can at the curb for pickup;¹³⁹ leaving evidence in a motel room after check out or after the guest demonstrated by words or actions that he did not intend to return.¹⁴⁰ (As for unintentional abandonment, see “Lost property” on page 18.)

POST-PURSUIT ABANDONMENT: This type of abandonment occurs at the end of a car chase when the suspect bails out and leaves the evidence inside the vehicle. Thus, when this occurred in *United States v. Edwards*, the Fifth Circuit ruled that the “[d]efendant’s right to Fourth Amendment protection came to an end when he abandoned his car to the police, on a public highway, with engine running, keys in the ignition, lights on, and fled on foot.”¹⁴¹ (As noted on page 12, if it turns out that the abandoned car was stolen, the suspect will never have had a reasonable expectation of privacy in its contents.)

PRE-ARREST ABANDONMENT: If often happens that a suspect, having suddenly become aware that he is about to be arrested, detained, or searched, will toss the evidence away or leave it unattended in a place

he does not control.¹⁴² This is another form of abandonment. “It is, of course, well established,” said the Court of Appeal, “that property is abandoned when a defendant voluntarily discards it in the face of police observation, or imminent lawful detention or arrest, to avoid incrimination.”¹⁴³ The following are some examples:

- As officers approached the defendant, he stopped “busying himself with the contents of the gym bag” and left the bag “on the floor of a public hallway.”¹⁴⁴
- Having seen that a drug-sniffing dog had alerted to his suitcase, a bus passenger made an “abrupt departure.”¹⁴⁵
- While officers were executing a search warrant in a liquor store, the clerk kicked several bindles of cocaine under a counter.¹⁴⁶

DENIABILITY ABANDONMENT: Deniability abandonment occurs when a defendant hides the evidence (usually drugs) in a place he does not control in order to provide himself with deniability if it happened to be discovered by officers. For example, the courts have ruled that a street-level drug dealer had abandoned his stash by keeping it in a bag behind some bushes;¹⁴⁷ or when the defendant put drugs in a hole in the ground behind an apartment complex;¹⁴⁸ or when he hid stolen jewelry “in a cinder

¹³⁹ See *California v. Greenwood* (1988) 486 US 35, 40-41; *U.S. v. Scott* (1st Cir. 1992) 975 F.2d 927, 929 [defendant abandoned shredded documents he put in a garbage can outside his home]; *U.S. v. Hall* (11th Cir. 1995) 47 F.3d 1091, 1096.

¹⁴⁰ See *Abel v. U.S.* (1960) 362 US 217, 241; *U.S. v. De Parias* (11th Cir. 1986) 805 F.2d 1447, 1458 [defendant left the evidence in an apartment after moving out]; *People v. Parson* (2008) 44 Cal.4th 332, 346 [defendant vacated his hotel rooms without checking out, leaving some items behind]; *People v. Ingram* (1981) 122 Cal.App.3d 673, 680 [“All appearances created by defendant himself pointed to the fact that the room had been vacated.”]; *U.S. v. Dent* (1st Cir. 2010) __ F.3d __ [“Dent had instead left his pack behind in a house in which he had no property interest and no clearly defined social place.”].

¹⁴¹ (5th Cir. 1971) 441 F.2d 749, 751. ALSO SEE *U.S. v. Allen* (10th Cir. 2000) 235 F.3d 482, 489 [defendant abandoned his car when he bailed out during a pursuit].

¹⁴² See *People v. Brown* (1990) 216 Cal.App.3d 1442, 1451 [defendant dropped a paper bag containing rock cocaine “before making a last-ditch effort to evade the police”]; *People v. Thompson* (1988) 205 Cal.App.3d 1503, 1508 [defendant kicked bindles of cocaine underneath a counter in a liquor store]; *People v. Taylor* (1986) 178 Cal.App.3d 217, 230 [defendant tossed jewelry to the ground just before he was apprehended]; *People v. Haines* (1981) 123 Cal.App.3d 861, 868 [when he saw the officers, the suspect hid the evidence in a storage bin in his carport].

¹⁴³ *People v. Daggs* (2005) 133 Cal.App.4th 361, 365; *U.S. v. Paradis* (1st Cir. 2003) 351 F.3d 21, 31.

¹⁴⁴ *U.S. v. Thomas* (D.C. Cir. 1989) 864 F.2d 843, 846.

¹⁴⁵ *U.S. v. Tugwell* (8th Cir. 1997) 125 F.3d 600, 603.

¹⁴⁶ *People v. Thompson* (1988) 205 Cal.App.3d 1503, 1509.

¹⁴⁷ *In re Baraka H.* (1992) 6 Cal.App.4th 1039, 1045-46 [defendant “had taken pains to put out of his apparent possession and control, for the manifest purpose of maintaining deniability”]. ALSO SEE *U.S. v. Hayes* (2nd Cir. 2008) 551 F.3d 138 [defendant left drugs in a bag hidden in scrub brush on his property, but 65 feet from his house in an unfenced area].

¹⁴⁸ *People v. Shaw* (2002) 97 Cal.App.4th 833, 839. ALSO SEE *People v. Ketchum* (1975) 45 Cal.App.3d 328, 330 [“The box was found in a stranger’s yard where Ketchum had attempted to hide it.”].

block on top of a peripheral wall separating her backyard from other properties”;¹⁴⁹ or when he transferred drugs to an associate, telling her that he would deny knowing her if she was detained, and that he would not associate with her on their trip.”¹⁵⁰

In contrast, the courts have ruled that deniability abandonment did not occur when, after a plain-clothes officer told the defendant to “come here a minute,” he threw the bag on the hood of his car and turned to face the officer;¹⁵¹ or when the defendant, upon seeing officers approach, put his drugs in a storage bin in his carport.¹⁵²

EVIDENCE LEFT AT CRIME SCENE: A defendant who fled the scene of his crime will ordinarily be deemed to have abandoned any evidence he left behind because it is highly unlikely that he will return to claim it (“Excuse me, but I forgot my burglar tools.”) The following are some examples:

- Defendant left his fingerprint-laden property at the scene of a murder he committed.¹⁵³
- Defendant left evidence at scene of a rape.¹⁵⁴
- Defendant left her purse in the truck she had stolen.¹⁵⁵
- Defendant accidentally dropped his cell phone at the scene of a robbery.¹⁵⁶

Lost property

A defendant cannot ordinarily expect privacy as to property that he lost or mislaid in a public place or

other location in which he could not reasonably expect privacy. Thus, in *People v. Juan* the court ruled that the defendant lacked standing to challenge a search of a jacket he had “left draped over a chair at an empty table in a restaurant.”¹⁵⁷

Property conveyed to third person

A defendant may forfeit standing to challenge a search of property that he had conveyed to a third person, especially if the third person had no duty to return the property or care for it. Some examples:

- Defendant “dumped” drugs into the purse of a woman he had known for only a few days.¹⁵⁸
- Defendant left an unsealed bag containing drugs in a drug buyer’s car.¹⁵⁹
- Defendant put drugs in a friend’s package of cigarettes.¹⁶⁰
- Defendant put an incriminating letter in the pocket of a fellow jail inmate.¹⁶¹
- Defendant gave a murder weapon to his cousin to hold for him, “knowing it would be kept by [his cousin] in a place both unknown to him and over which he had no control.”¹⁶²

A defendant may, however, retain a privacy interest in property that he had temporarily given to a third person for safekeeping or under other circumstances in which a continued expectation of privacy would be reasonable.¹⁶³ As the D.C. Circuit observed:

¹⁴⁹ *People v. Roybal* (1998) 19 Cal.4th 481, 507

¹⁵⁰ *U.S. v. McKennon* (11th Cir. 1987) 814 F.2d 1539, 1543. ALSO SEE *People v. Tolliver* (2008) 160 Cal.App.4th 1231, 1241 [defendant “took all of the steps” to disassociate himself from a vehicle containing drugs by not registering it in his name and planning to have someone else drive it]; *U.S. v. Boruff* (5th Cir. 1990) 909 F.2d 111, 116.

¹⁵¹ *Smith v. Ohio* (1990) 494 US 541, 543.

¹⁵² *People v. Haines* (1981) 123 Cal.App.3d 861, 867.

¹⁵³ *People v. Ayala* (2000) 24 Cal.4th 243, 279.

¹⁵⁴ *U.S. v. James* (8th Cir. 2008) 534 F.3d 868, 873.

¹⁵⁵ *People v. Shepherd* (1994) 23 Cal.App.4th 825.

¹⁵⁶ *People v. Daggs* (2005) 133 Cal.App.4th 361.

¹⁵⁷ (1985) 175 Cal.App.3d 1064, 1069.

¹⁵⁸ *Rawlings v. Kentucky* (1980) 448 US 98, 105. ALSO SEE *People v. Clark* (1993) 5 Cal.4th 950, 979 [defendant left his clothing in a friend’s car]; *U.S. v. Fay* (9th Cir. 2005) 410 F.3d 589 [defendant left gun in open bag on a shelf in his girlfriend’s apartment]; *U.S. v. Crowder* (7th Cir. 2009) 588 F.3d 929, 935 [defendant turned his car over to a shipper who had the keys; “it was clear that the driver was authorized to act in direct contravention to Crowder’s privacy interest”].

¹⁵⁹ *People v. Root* (1985) 172 Cal.App.3d 774, 778.

¹⁶⁰ *People v. Guajardo* (1994) 23 Cal.App.4th 1738, 1742.

¹⁶¹ *People v. Burns* (1987) 196 Cal.App.3d 1440, 1453.

¹⁶² *People v. McPeters* (1992) 2 Cal.4th 1148, 1172.

¹⁶³ See *People v. Ybarra* (1991) 233 Cal.App.3d 1353, 1362; *U.S. v. Basinski* (7th Cir. 2000) 226 F.3d 829, 837 [“he entrusted the locked briefcase to a life long friend”].

We leave our bags with clerks at stores, museums, and restaurants; we check our luggage when we travel by train or by air; we park our cars at commercial garages. The suggestion that police in these situations may conduct warrantless searches of our belongings finds no support in precedent or in logic.¹⁶⁴

Transfer of information

Under the Fourth Amendment, people who send or otherwise reveal information to friends, relatives, associates, and businesses cannot reasonably expect that the recipient will not disclose it to officers.¹⁶⁵ Thus, the Supreme Court pointed out:

This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in a third party will not be betrayed.¹⁶⁶

For example, people cannot expect privacy as to personal and credit card information included on motel registration forms,¹⁶⁷ or information on sales transaction records, or information on mail covers (i.e., the information on the outside of an envelope

placed in the mail),¹⁶⁸ or internet subscriber information,¹⁶⁹ or information that people have made readily available to others on the internet; e.g., via file sharing, on a computer network.¹⁷⁰

Note, however, there are federal and state laws that restrict the disclosure of certain types of revealed information so that the possessor will often refuse to reveal it without a warrant; e.g., information transmitted to banks,¹⁷¹ and phone records, stored email, voicemail, and text messages.¹⁷²

Disclaimers and denials

It often happens that a suspect will tell officers that he does not own, possess, or control a container in which drugs or other evidence was found. The question arises: Does such a disclaimer deprive him of standing to challenge a search of the container? The answer depends on two things: (1) whether the disclaimer occurred before or after the evidence was found, and (2) whether the defendant merely denied ownership or whether he denied having any interest in it.

As for when the disclaimer occurred, a disclaimer will have no effect if it occurred *after* the officers discovered the evidence.¹⁷³ This is because a rule that deprived defendants of standing if they denied that

¹⁶⁴ *U.S. v. Most* (D.C. Cir. 1989) 876 F.2d 191, 198.

¹⁶⁵ See *Smith v. Maryland* (1979) 442 US 735, 743-44 ["This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."]; *California v. Greenwood* (1988) 486 US 35, 41 ["[A] person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."]; *People v. Workman* (1989) 209 Cal.App.3d 687, 696 [defendant sent an incriminating letter to an accomplice].

¹⁶⁶ *United States v. Miller* (1976) 425 US 435, 443.

¹⁶⁷ See *U.S. v. Cormier* (9th Cir. 2000) 220 F.3d 1103, 1108 ["a guest has no reasonable expectation of privacy in guest registration records"]; *U.S. v. Willis* (11th Cir. 1985) 759 F.2d 1486, 1498 ["We hold that Willis lacks standing to challenge the officers' examination of the motel records."].

¹⁶⁸ See *U.S. v. Hinton* (9th Cir. 2000) 222 F.3d 664, 674 ["A 'mail cover' is a term of art within the postal system 'by which a nonconsensual record is made of any data appearing on the outside cover of any sealed or unsealed class of mail matter'"]; *People v. Reyes* (2009) 178 Cal.App.4th 1183, 1190 [private post office box mail cover].

¹⁶⁹ See *U.S. v. Bynum* (4th Cir. 2010) __ F.3d __ [2010 WL 1817763] ["Bynum voluntarily conveyed all this information to his internet and phone companies. In doing so, Bynum assumed the risk that those companies would reveal that information to police."].

¹⁷⁰ See *U.S. v. Ganoe* (9th Cir. 2008) 538 F.3d 1117, 1127 ["we fail to see how this expectation [of privacy] can survive Ganoe's decision to install and use file-sharing software"]; *U.S. v. Stults* (8th Cir. 2009) 575 F.3d 834, 842 ["Several federal courts have rejected the argument that an individual has a reasonable expectation of privacy in his or her personal computer when file-sharing software, such as LimeWire, is installed." Citations omitted.]; *U.S. v. Heckenkamp* (9th Cir. 2007) 482 F.3d 1142, 1147 ["[P]rivacy expectations may be reduced if the user is advised that information transmitted through the network is not confidential"]; *U.S. v. Meek* (9th Cir. 2004) 366 F.3d 705, 711 ["[E]ither party to a chat room exchange has the power to surrender each other's privacy interest to a third party."]; *U.S. v. King* (11th Cir. 2007) 509 F.3d 1338, 1342 [files shared on network].

¹⁷¹ See Gov. Code § 7485-7487.

¹⁷² See 18 USC § 2703(a), (d), (g); Pen. Code § 1524.3.

¹⁷³ See *People v. Dachino* (2003) 111 Cal.App.4th 1429, 1432.

they possessed evidence that had already been discovered would require them to either confess or stand mute in order to challenge the search.

As for the nature of the disclaimer, a defendant will automatically forfeit standing if he denied having any interest in the container; e.g., “I’ve never seen that backpack before.” When this happens, the defendant has, in effect, given officers “the green light” to search.¹⁷⁴ As the court explained in *People v. Dasilva*, “We will not extend California law to permit a defendant who disclaims possession of an object to take a contrary position in an effort to attain standing.”¹⁷⁵

For example, in *People v. Vasquez*¹⁷⁶ the court ruled that the defendants did not have standing to challenge the search of pillowcases that were filled with stolen property because, when the defendants saw the officers, they put the pillowcases on the ground and then claimed they had just found them in some bushes.

Similarly, in *United States v. Decoud*¹⁷⁷ a CHP officer in Riverside had just arrested Decoud for driving on a suspended license and was conducting an inventory search of his car when he saw a locked metal briefcase. When he asked Decoud about the briefcase, he claimed it did not belong to him, that he had borrowed the car, and that the briefcase “belonged to the owner.” The officer then forced it open and found a handgun and a “large supply” of cocaine. On appeal, the court ruled that Decoud lacked standing because he “gave up any expectation of privacy in the briefcase by unequivocally disclaiming ownership.”

On the other hand, if the defendant merely denied that he owned the container, he may have standing depending on the surrounding circumstances—but

his denial will be deemed a “strong indication” that he didn’t.¹⁷⁸ The reason a denial of ownership is not a death blow to standing is that a person who does not own an item may nevertheless have a reasonable expectation of privacy by virtue of his right to possess or control it; e.g., he had borrowed the car in which the evidence was found.¹⁷⁹

A denial of ownership will, however, render a defendant’s expectation of privacy unreasonable if he thereafter consented to a search of the place or thing. For example, in *U.S. v. Williams*¹⁸⁰ the defendant admitted FBI agents into his motel room to question him about a series of bank robberies. When an agent asked Williams about a briefcase sitting next to a nightstand, Williams said it did not belong to him, and he had no objection if the agent wanted to search it. Inside the briefcase, agents found dozens of credit cards and identification documents of people “from all parts of the country.” Although Williams had not denied having a possessory interest in the briefcase, the court ruled that his disclaimer was “analogous to abandonment.”

Contents disclosed

Finally, a person who owns or possesses a container cannot reasonably expect privacy as to its contents if it had been previously opened by a private party or a common carrier who saw the contents and notified officers. Said the Supreme Court, “Once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now-nonprivate information.”¹⁸¹ For the same reason, a defendant will lose standing to challenge a search of a container if he admitted to officers that it contained drugs or other evidence of a crime.¹⁸²

POV

¹⁷⁴ See *People v. Dees* (1990) 221 Cal.App.3d 588, 595. ALSO SEE *People v. Stanislawski* (1986) 180 Cal.App.3d 748, 757 [“It is settled law that a disclaimer of proprietary or possessory interest in the area searched or the evidence discovered terminates the legitimate expectation of privacy over such area or items.”]; *U.S. v. Adams* (6th Cir. 2009) 583 F.3d 457, 466 [While conducting a lawful search of a motel room with the consent of the renter, an officer asked all of the occupants of the room if a jacket on the floor belonged to any of them. Defendant answered no, and the officer searched it and found a gun].

¹⁷⁵ (1989) 207 Cal.App.3d 43, 49.

¹⁷⁶ (1983) 138 Cal.App.3d 995.

¹⁷⁷ (9th Cir. 2006) 456 F.3d 996.

¹⁷⁸ See *U.S. v. Hawkins* (11th Cir. 1982) 681 F.2d 1343, 1346; *U.S. v. Zapata* (1st Cir. 1994) 18 F.3d 971, 978.

¹⁷⁹ See *People v. Allen* (1993) 17 Cal.App.4th 1214, 1223; *People v. Dasilva* (1989) 207 Cal.App.3d 43, 48.

¹⁸⁰ (4th Cir. 1976) 538 F.2d 549, 550-51. ALSO SEE *U.S. v. Han* (4th Cir. 1996) 74 F.3d 537, 544.

¹⁸¹ *U.S. v. Jacobsen* (1984) 466 US 109, 117. ALSO SEE *Illinois v. Andreas* (1983) 463 US 765, 771.

¹⁸² See *People v. Haugland* (1981) 115 Cal.App.3d 248, 257; *U.S. v. Monghur* (9th Cir. 2009) 588 F.3d 975, 980.

Recent Cases

Berghuis v. Thompson

(June 1, 2010) __ U.S. __ [2010 WL 2160784]

Issue

Must officers obtain an express *Miranda* waiver before questioning a suspect in custody? Or is an implied waiver sufficient?

Facts

Thompson was arrested for murder after he shot and killed a man outside a mall in Michigan. Before questioning him in a police interview room, an officer gave him a written copy of the *Miranda* warning and, having determined that Thompson could read and understand English, gave him some time to read it. The officer also provided Thompson with a supplemental warning saying, “You have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned.” The officers then began to question Thompson about the shooting. They did not ask him if, having his *Miranda* rights in mind, he had decided to waive them.

During the interview, Thompson admitted nothing and was “largely silent,” although he would sometimes nod his head and give “limited verbal responses” such as “yeah,” “no,” or “I don’t know.” This went on for about three hours. But then, when asked “Do you pray to God to forgive you for shooting that boy down?” he said, “Yes.” His admission was used against him at trial, and he was convicted of, among other things, first degree murder.

Discussion

On appeal to the United States Supreme Court, Thompson argued that his admission should have been suppressed because he did not expressly waive his *Miranda* rights. The Court ruled, however, that an express waiver is not required—that an implied waiver will suffice under certain circumstances.

By way of background, there are two types of waivers: express and implied. An express waiver occurs when the suspect is advised of his *Miranda* rights and thereafter responds in the affirmative when asked something like, “Having these rights in mind, do you want to talk to us?” In contrast, an implied waiver results when the suspect responds to the officers’ questions after having been advised of his rights and having indicated by word or conduct that he understood his rights.

Although California courts have long ruled that implied waivers are sufficient,¹ the United States Supreme Court has not directly ruled on the matter—until now. In *Thompson*, the Court concluded that an implied *Miranda* waiver is sufficient, and it also explained the circumstances under which a waiver will be implied by the courts:

- (1) **Mirandized:** The suspect must have been correctly informed of his *Miranda* rights.
- (2) **Rights understood:** There must have been sufficient reason to believe that the suspect understood his rights.
- (3) **No invocation:** The suspect must not have invoked his rights.
- (4) **No coercion:** The suspect’s subsequent statement must not have been coerced.

In the words of the Court, “[A] suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives [his *Miranda* rights] by making an uncoerced statement to the police.”

The question, then, was whether these four requirements were satisfied in *Thompson*. It was apparent that Thompson had not been coerced, that he had been correctly advised of his rights, and that he had not invoked them.² But did he understand them? He claimed there was insufficient proof that he had, pointing to some conflicting testimony as to whether he had specifically stated that he understood.

¹ See *People v. Lessie* (2010) 47 Cal.4th 1152, 1169 [“While defendant did not expressly waive his *Miranda* rights, he did so implicitly by willingly answering questions after acknowledging that he understood those rights.”]; *People v. Johnson* (1969) 70 Cal.2d 541, 558 [“Once the defendant has been informed of his rights, and indicates that he understands those rights, it would seem that his choosing to speak and not requesting a lawyer is sufficient evidence that he knows of his rights and chooses not to exercise them.”].

The Court ruled, however, that an express statement of understanding is not an absolute requirement. Instead, the suspect's understanding can be inferred and, moreover, the following circumstances pertaining to the interview with Thompkins supported such an inference: (1) Thompkins had "received a written copy of the *Miranda* warnings," (2) the officers determined that he "could read and understand English," and (3) he had been "given time to read the warnings." In addition, an officer had informed him that he could invoke his *Miranda* rights "at any time before or during questioning." Accordingly, the Court concluded that "[t]here is no basis in this case to conclude that [Thompkins] did not understand his rights."

Because all four of the requirements for an implied waiver were satisfied, the Court ruled that Thompkins had implicitly waived his rights and, as a result, his admission was properly received in evidence.

U.S. v. Ellison

(1st Cir. 2010) __ F.3d __ [2010 WL 1493847]

Issue

Were officers required to obtain a *Miranda* waiver before questioning a county jail inmate about a crime for which he was not in custody?

Facts

Richard Ellison was being held at a county jail in New Hampshire, having been charged with attempting to set fire to the house of his ex-girlfriend, Robin Theriault. While awaiting trial, Ellison sent word that he wanted to talk to Concord, New Hampshire police about two robberies that had occurred in that city.

The meeting took place in the jail's library. After Ellison's handcuffs were removed, a police detective told him that he did not have to answer any questions, and that he could leave the library whenever he

wanted. Ellison then consented to a recorded interview. The detective did not *Mirandize* him.

In the course of the interview, Ellison described a robbery and an attempted robbery that were, in fact, under investigation by Concord police. He then said that the perpetrator was Theriault, his ex-girlfriend, and he recounted how the crimes had occurred. As he did so, Ellison essentially confessed to being an accessory. As a result, he was charged with both crimes and, when his motion to suppress his statement was denied, he pled guilty.

Discussion

Ellison contended that his statement was obtained in violation of *Miranda*. Specifically, he argued that a person who is "in custody" at a county jail should automatically be deemed "in custody" for *Miranda* purposes. And because officers are required to obtain a *Miranda* waiver before interrogating any suspect who is in custody, the detective's failure to obtain a waiver rendered his statement inadmissible.

Ellison is the latest in a series of cases in which the courts have had to determine whether an incarcerated suspect was "in custody" for *Miranda* purposes when he was questioned about a crime committed before he was jailed or a crime committed in the institution. In most cases, the suspect was serving time in prison, and the courts have almost always ruled that the inmate is not "in custody" for *Miranda* purposes so long as his freedom of movement was not restricted to an extent greater than that which is inherent in the facility.³

These courts have reasoned that state prison inmates live in a custodial atmosphere that is quite unlike the intimidating environment that the *Miranda* procedure was designed to alleviate; i.e., "police-dominated" and "unfamiliar surroundings" controlled by officers who "appear to control [the suspect's] fate."⁴ Recently, the United States Supreme Court

² **NOTE:** The Court rejected Thompkins' argument that he had effectively invoked his right to remain silent when he did not freely respond to questioning; i.e., "by not saying anything for a sufficient period of time." But the Court ruled that, like invocations of the *Miranda* right to counsel invocations of the right to remain silent can occur only if the suspect says or does something that demonstrated an *unambiguous* and *unequivocal* intent to remain silent. It then ruled that Thompkins' conduct did not demonstrate such an intent. See *Davis v. United States* (1994) 512 US 452, 459.

³ See *People v. Fradiue* (2000) 80 Cal.App.4th 15, 21.

⁴ *Miranda v. Arizona* (1966) 384 US 436, 445, 456, 450. ALSO SEE *People v. Clark* (1993) 5 Cal.4th 950, 985; *Saleh v. Fleming* (9th Cir. 2008) 512 F.3d 548, 551; *U.S. v. Turner* (9th Cir. 1994) 28 F.3d 981, 983 ["We have declined to establish a per se rule that a defendant is in 'custody' for *Miranda* purposes simply because that defendant is in prison."].

gave its approval to this approach, saying that “lawful imprisonment imposed upon conviction of a crime does not create the coercive pressures identified in *Miranda*.”⁵

The question in *Ellison*, then, was whether this reasoning also applies when officers question someone in jail. Ellison argued it did not because, unlike prison inmates, the fates of jailed prisoners—at least those who are awaiting trial—are still in the hands of local authorities. “It is true,” said the court, “that the condition of someone being held while awaiting trial, like Ellison, is not exactly the same as the convict’s position, since the suspect might reasonably perceive that the authorities have a degree of discretion over pretrial conditions, at least to the point of making recommendations to a court.”

Nevertheless, the court concluded—as did the California Court of Appeal in 2007⁶—that there is no logical reason for ruling that all county jail inmates who are awaiting trial must be deemed “in custody” as the term is used in *Miranda*. Instead, as in the state prison cases, it ruled that the question must be decided by examining the surrounding circumstances to determine whether they “would be likely to create the atmosphere of coercion subject to *Miranda* concern.”

Although this decision is made by considering all relevant circumstances, the courts have almost always ruled that inmates were not in custody when the following circumstances existed:

- The questioning took place in familiar and uncoercive surroundings such as a library, hospital, or visiting area; as opposed to an interview room or private office.
- During questioning, the suspect was not handcuffed or otherwise restrained to a degree beyond that which is inherent in the facility.
- The officers informed him that he could terminate the interview at any time, and that he could leave the room in which the interview was occurring whenever he wanted.⁷

Having noted that all three of these circumstances existed, the court in *Ellison* ruled “[t]here is no reason to find the concern of coercion behind *Miranda* implicated here.” Accordingly, it ruled that Ellison’s confession was not obtained in violation of *Miranda* and was, therefore, admissible.

People v. Johnson

(2010) 183 Cal.App.4th 253

Issues

(1) Did investigators utilize impermissibly suggestive photo and physical lineup procedures? (2) Did they obtain a valid *Miranda* waiver from one of the defendants?

Facts

During a two-week crime spree in 2005, defendants Joseph Johnson and Jessica Holmes, along with Corey Schroeder, robbed or attempted to rob at least eight gas stations in the Sacramento area. Their method of operation was essentially as follows: Schroeder would case the station, Johnson would rob the attendant, and Holmes would drive the getaway car. During the last holdup, Johnson shot and killed the attendant.

The court did not say how Johnson became a suspect. But he did, and he was identified as the robber by victims in the course of several pretrial lineups. Of importance to the appeal was the manner in which he was identified in the following robberies:

Robbery #1: The victim failed to identify Johnson from a photo lineup. But five days later, he identified him at a physical lineup. Johnson was the only person in the physical lineup whose picture had been included in the photo lineup.

Robbery #5: Just before conducting a photo lineup, investigators showed the victim a surveillance video of the holdup that included shots of the perpetrator. At trial, the victim identified Johnson as the robber.

⁵ *Maryland v. Shatzer* (2010) __ US __ [130 S.Ct. 1213, 1224].

⁶ See *People v. Macklem* (2007) 149 Cal.App.4th 674.

⁷ See *California v. Beheler* (1983) 463 US 1121; *People v. Macklem* (2007) 149 Cal.App.4th 674, 696 [“Macklem was given the opportunity to leave the room if he requested to do so”]; *Cervantes v. Walker* (9th Cir. 1978) 589 F.2d 424, 427-28; *U.S. v. Turner* (9th Cir. 1994) 28 F.3d 981, 983-84.

Robbery #6: Officers showed the victim a surveillance photograph of Johnson that was taken while he was committing Robbery #8 (this was the robbery-murder). They then asked the victim if this was the same person who had robbed her. She said yes. One week later, she identified Johnson at a live lineup.

At trial, victims or witnesses who had ID'd Johnson in pretrial lineups in six of the robberies positively identified him as the perpetrator. In addition to the in-court and lineup identifications, there was substantial additional evidence; e.g., the murder weapon was found in his bedroom.

Sacramento County sheriff's detectives also arrested the getaway driver, Jessica Holmes. Before questioning her, they gave her a *Miranda* warning which included the admonition that "anything you say can be used against you in a court of law." Holmes said that she understood her rights, at which point the detectives began to question her. They did not ask if she wanted to waive her rights. Holmes freely answered the investigators' questions and confessed to driving Johnson's getaway car.

Johnson and Holmes were tried separately. During Johnson's trial, victims and witnesses in six of the robberies positively ID'd Johnson as the perpetrator. The jury also heard testimony as to the pretrial photo and physical lineup identifications. Both Johnson and Holmes were convicted of murder and multiple counts of robbery. Both were sentenced to life without the possibility of parole.

Discussion

JOHNSON'S APPEAL: Johnson argued that the pretrial and in-court identifications pertaining to robberies 1, 5, and 6 should have been suppressed because the victims had previously viewed a photo or video of him.

In 2007, the California Supreme Court ruled that a pretrial identification procedure is impermissibly suggestive if it caused the defendant to "stand out"

from the others "in a way that would suggest the witness should select him."⁸ The fact that a witness had previously seen the defendant's photograph in a photo lineup is, of course, a relevant circumstance in determining whether he "stood out." But, as the court in *Johnson* noted, the California Supreme Court has also ruled that "the fact that the defendant alone appeared in both a photo lineup and a subsequent live lineup does not per se violate due process."⁹

Consequently, the court ruled that because there was no reason to believe that the identifications pertaining to robberies 1 and 6 were "impermissibly suggestive," those identifications were properly presented to the jury.

The court also ruled that the identification by the victim in robbery number 5 was admissible even though an officer had shown him a surveillance video just before the photo lineup. The court reasoned that, "[u]nlike the recollections and descriptions of a human witness, the recorded memory of the video surveillance camera has little serious potential to mislead. Indeed, its opposite potential to correct and enhance the reliability of an eyewitness identification in cases like the present would appear greater than its potential to cause an incorrect result."

HOLMES' APPEAL: Holmes argued that her statements were obtained in violation of *Miranda* for two reasons. First, she contended that the detective's *Miranda* admonition was misleading because he did not tell her that anything she said "can and will" be used against her. But the court summarily rejected the argument, saying that a *Miranda* warning is sufficient if the suspect was told that his statements "could" be used in court.¹⁰ (It should be noted that it is misleading to tell suspects that anything they say "will" be used against them. This is because some of the things they say are not incriminating, and some things will not be used by prosecutors for various reasons; e.g., irrelevant, cumulative.)

Second, Holmes argued that her *Miranda* waiver was ineffective because she had not expressly waived

⁸ *People v. Cook* (2007) 40 Cal.4th 1334, 1355.

⁹ *Ibid.*

¹⁰ ALSO SEE *Oregon v. Elstad* (1985) 470 US 298, 315, fn.4; *Thompson v. Keohane* (1995) 516 US 99, 107 [suspects must be told "that anything they say may be used against them in court."]; *People v. Valdivia* (1986) 180 Cal.App.3d 657, 664.

her rights. The court ruled, however, that an implied waiver is sufficient. It turned out that the ruling was sound in light of the Supreme Court's subsequent decision in *Berghuis v. Thompson*, discussed above.

Consequently, the convictions of both Johnson and Holmes were affirmed.

U.S. v. Struckman

(9th Cir. 2010) 603 F.3d 731

Issue

Did officers have sufficient grounds to enter a backyard to investigate a neighbor's report of a possible burglary in progress?

Facts

At 11:45 A.M., Wendy Grimes phoned 9-1-1 in Portland, Oregon and reported that she had just seen a man jump the fence into her neighbors' backyard. She said the man was white, wearing a black jacket, and carrying a red backpack. Although she could not see what the man was doing in the backyard, she said she thought he was trying to break into the house because her neighbors were not at home—they were at work.

The first two officers who arrived headed for the backyard: one walked along the west side of the house, the other took the east side. Before entering the backyard, one of them looked over the fence and the other looked into the yard through a hole in the fence. They both saw a man—later identified as Struckman—who matched the description of the suspected burglar. They also saw the red backpack on the ground. When they first saw Struckman he was just "walking inside the backyard," but when he saw one of the officers he responded by removing or "shaking off" his jacket.

At that point, the officer drew his firearm and ordered Struckman to get down on his knees. He complied. The officers then entered the backyard and handcuffed Struckman who was now cursing at them and trying to pull away. After forcing Struckman to the ground, one of the officers conducted a pat search and found an unloaded handgun magazine. So he asked Struckman if there was a gun inside the backpack. Struckman was evasive, responding, "I don't know. It's not mine." The officer then searched the

backpack and found a handgun. He also searched Struckman's jacket and found methamphetamine, a digital gram scale, and another unloaded magazine.

As things progressed, the officers learned that Struckman lived in the house with his parents, that he was high on methamphetamine, that he possessed methamphetamine, and that he was a convicted felon. He was charged in federal court with being a felon in possession of a firearm and, when his motion to suppress the gun was denied, he was found guilty by a jury. He appealed to the Ninth Circuit.

Discussion

The court ruled that the officers' entry into the backyard constituted an unlawful search and, therefore, the gun should have been suppressed. Specifically, it ruled that the officers did not have probable cause to enter for the purpose of arresting Struckman for burglary or attempted burglary because, before climbing over the fence, they had not seen any signs that someone had actually entered or attempted to enter the house; and also because the court felt that Ms. Grimes' report was not sufficiently specific to justify the entry without further investigation.

The court then announced a new Fourth Amendment rule: In determining whether probable cause exists, "officers may not solely rely on the claim of a citizen witness, but must independently investigate the basis of the witness' knowledge or interview other witnesses."

The court did, however, agree to assume—but it said the assumption was "weak"—that the officers might have had probable cause to arrest Struckman for trespassing. But even if so, said the court, their entry into the backyard would still have been unlawful because they could have determined that Struckman was not a trespasser if, before climbing the fence, they had questioned him about his unusual activities. Consequently, the court reversed Struckman's conviction.

Comment

Enquiring minds are probably wondering how, in light of all the classic signs of a residential burglary in progress, the court was able to reach the conclusion that the officers did not even have grounds to detain Struckman to investigate that possibility. There are actually two reasons.

First, the judge who wrote this opinion, Marsha Berzon, is the same judge who recently penned the senseless opinion in *Green v. Camreta*¹¹ in which she ruled, among other things, that a child in elementary school was “detained”—just like a criminal—when a school employee escorted her from her classroom to meet with a social services worker. She also ruled that officers must obtain a court order to speak with a child in school about a report that the child had been sexually abused by her parents.

Second, as we will now discuss, Judge Berzon was able to reach her legal conclusions in *Struckman* by distorting the facts, violating several basic tenets of Fourth Amendment analysis, and concocting a new rule that the Supreme Court rejected in 1983.¹²

Spin, not analysis

It is settled that, in determining whether probable cause exists, the courts must consider the overall force of all relevant circumstances.¹³ This means that judges must not evaluate the circumstances by isolating each one, looking for ways to trivialize its significance, and then announcing that probable cause did not exist because none of the individual circumstances were very incriminating.¹⁴ Another Ninth Circuit judge put it this way: “Individual factors that may appear innocent in isolation may constitute suspicious behavior when aggregated together.”¹⁵

It appears, however, that Judge Berzon was unfamiliar with this principle, as she either ignored, belittled, or tried to explain away every circumstance upon which the officers’ judgment was based. Here, in her own words, is how she viewed each one:

- “[T]he officers knew only that a neighbor had reported seeing a white male wearing a black jacket throw a red backpack over a fence and climb over the fence into the backyard when the owners were reportedly not home.” Note Judge Berzon’s use of the word “only” as a device to scoff at the impor-

tance of these circumstances. But scoffing is a poor substitute for reasoning which, had she employed it, would have produced a highly suspicious combination of circumstances: (1) burglars prefer to make their forcible entries from the backyard in order to avoid being observed by passersby, (2) burglars often carry containers (such as backpacks) for carrying burglar tools and loot from their burglaries, and (3) burglars almost always commit their crimes when the residents are not at home.

- “*Ms. Grimes’ report was very general; she did not say that she knew who all the occupants of the house were.*” For one thing, Ms. Grimes’ report was *not* general. She described the suspect, his race, the color of his jacket, the color of his backpack, his precise location, and his activities. But the judge was not satisfied with merely misrepresenting the facts. She decided to concoct a preposterous rule, to wit: When a citizen phones 9-1-1 and reports that a stranger had just entered the yard or home of her next-door neighbors who are not at home, officers must assume the following: (1) that the caller was a blithering idiot who was incapable of recognizing the people who live next door; or (2) the stranger was actually a family member who, for some mysterious reason, had heretofore been kept under wraps.
- “[I]nnocent reasons could have explained what [Ms. Grimes] did see, including the actual explanation—a family member who lived at the house did not have his key. Indeed, many of us can recount tales about getting locked out of his or her own house, or the house of a relative where one is staying, and having to devise some creative way to get into the house.” It is noteworthy that Judge Berzon admitted—although inadvertently—that Struckman’s actions were consistent with those of a person who was looking for “some creative way

¹¹ (9th Cir. 2009) 588 F.3d 1011.

¹² **NOTE:** It is true that two other Ninth Circuit judges signed this opinion. But because of the opinion’s blatant distortions of fact, and because the opinion was based on an assortment of principles that the Supreme Court has rejected, and because Judge Berzon purported to announce a new rule that the Supreme Court has expressly repudiated, and because neither judge filed a concurring opinion acknowledging at least some of Judge Berzon’s transgressions, it is possible that they were merely inattentive.

¹³ See *U.S. v. Arvizu* (2002) 534 US 266, 273.

¹⁴ See *U.S. v. Arvizu* (2002) 534 US 266, 276; *Massachusetts v. Upton* (1984) 466 U.S. 727, 732.

¹⁵ *U.S. v. Diaz-Juarez* that (9th Cir. 2002) 299 F.3d 1183, 1141.

to get into the house.” It apparently did not occur to her that many of the people who look for creative ways to get into houses after jumping fences are burglars. In any event, the Supreme Court has expressly rejected Judge Berzon’s premise that the possibility of an innocent explanation will defeat, or even undermine, probable cause or reasonable suspicion.¹⁶ As the Court observed in *New Jersey v. T.L.O.*, “[I]t is irrelevant that other [innocent] hypotheses were also consistent” with the facts.”¹⁷ Or, as another Ninth Circuit judge aptly explained, “It is of no moment that the acts of [the defendant] and his confederates, if viewed separately, might be consistent with innocence.”¹⁸

- “[One of the officers] testified that there were no indications that Struckman had entered or attempted to enter the home, as there were no signs of forced entry or the presence of any tools consistent with a possible burglary.” Let us step back for a moment and visualize the scene: Two police officers have just spotted a suspected burglar in the backyard of a home. One officer is looking over a six foot tall fence; the other is looking through a hole in the fence. The officers are, of course, focusing all of their attention on the suspect to make sure he does not draw a gun and shoot them. Nevertheless, Judge Berzon decided that officers in such a situation should take no action until they had focused all of their attention on the various doors and windows, looking for some sign of a burglary, or at least some kind of burglar tool. She also ignored the fact that the officers were hardly in a position to conduct such an examination from their precarious vantage points atop and behind a fence.
- “Struckman’s presence in the backyard and his reaction to abruptly seeing [one of the officers] unannounced and peering over his six-foot tall fence—stopping, looking surprised, and shrugging off or allowing his jacket to fall to the ground—have no bearing on whether Struckman was attempting a burglary at the home.” Note how Judge Berzon

attempts to downplay the suspicious nature of Struckman’s response by insinuating that he might have merely “allowed” his jacket to fall to the ground, as if the sudden appearance of a police officer naturally causes a person’s apparel to descend. Back to the real world: Struckman did not “allow” his jacket to fall. As one of the officers testified, Struckman “took off his jacket” and the other testified that he “shook his jacket off his shoulders.” Despite the testimony of these two officers (whose credibility was never questioned), Judge Berzon dodged the issue by saying the record is “murky” as to whether Struckman actually took off his jacket.

- “It is unclear why Struckman shrugged off his jacket.” It does not matter *why* he took off his jacket—what matters is that he did it; that it was an unusual reaction under the circumstances; and that it supported the officers’ belief that Struckman was, in fact, a burglar because, as one of the officers testified, his actions were consistent with those of a burglar who was getting ready to “flee or fight the officers free of an encumbrance.” Judge Berzon also ruled that the officers’ belief as to Struckman’s reasons for removing his jacket was inconsequential. Said the judge, “[A]n officer’s subjective motivation for his actions is irrelevant in determining whether his actions are reasonable under the Fourth Amendment.” This was blatant sophistry as the officer’s testimony was not offered to prove his motivation—it was properly offered to prove the reasonableness of his belief that Struckman was a burglar. As the United States Supreme Court explained in the landmark case of *Illinois v. Gates*, “The evidence must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.”¹⁹ By the way, there is one other reason why Struckman might have reacted in such an unusual way, although Judge Berzon buried it in a footnote: Struckman testified that he was “high on methamphetamine.”

¹⁶ See *U.S. v. Arvizu* (2002) 534 US 266, 277; *People v. Ledesma* (2003) 106 Cal.App.4th 857, 863.

¹⁷ (1985) 469 US 325, 346.

¹⁸ *U.S. v. Del Vizo* (9th Cir. 1990) 918 F.2d 821, 827.

¹⁹ (1983) 462 US 213, 232. ALSO SEE *U.S. v. Arvizu* (2002) 534 US 266, 273; *Ornelas v. U.S.* (1996) 517 US 690, 699.

Unrealistic second-guessing

In addition to Judge Berzon's failure to evaluate the circumstances as required by the Supreme Court, she ignored another fundamental principle: When reviewing the actions of officers in the field who reasonably believe they are in imminent danger (as when they come upon a burglary in progress), judges are not supposed to engage in unrealistic second-guessing. As the Supreme Court observed in *U.S. v. Sharpe*, "A creative judge engaged in post hoc evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished."²⁰ Thus, in *People v. Osuna* the court pointed out, "Of course, from the security of our lofty perspective, and despite our total lack of practical experience in the field, we might question whether or not those who physically confronted the danger in this instance, selected the 'best' course of action available."²¹

These principles were lost on Judge Berzon who blithely dismissed the various circumstances and concluded that the officers were negligent because there was "much else the officers could have done to investigate the reported activity" before climbing over the fence. What was this "much else" they should have done? Well, she suggested that they do nothing until they had interviewed Ms. Grimes and "asked her questions in order to gain information beyond her cursory and conclusory statements." For one thing, Ms. Grimes' report was not "cursory and conclusory." As noted, she provided a description of the suspect, his clothing, and backpack; and she recounted his actions in detail. More to the point, there is nothing that Ms. Grimes could have told the officers that would have dispelled their suspicions. After all, her decision to phone 9-1-1 and report a possible burglary in progress demonstrates that she did not recognize the man, and there is nothing that the officers could have said to her that could have changed that.

Judge Berzon also faulted the officers for not questioning Struckman about the suspicious circumstances before entering the backyard. Said the judge, "[T]he officers could have asked Struckman a few simple questions, such as 'What's your name?' 'Do you live here?' 'What are you doing in the backyard?'" Let's imagine how the judge's proposed scenario would have played out:

Struckman: Yeah, man, my name's Struckman. I live here with my parents. I locked myself out and I'm trying to find some way to get inside.

Officer: Oh. Well, we're sorry to have bothered you. Have a nice day.

Judge Berzon's new rule is unconstitutional

In addition to ignoring basic Fourth Amendment principles, Judge Berzon devised another brand new rule: Probable cause can no longer be based on information from an eyewitness who simply reports to officers what she saw or heard. Instead, according to the judge, such information cannot be considered unless officers "independently investigate the basis of the witness' knowledge or interview other witnesses." She went on to say that "[s]tatements from a witness, without further investigation by the police, are insufficient to support probable cause."²²

Judge Berzon's new rule might be of interest to the United States Supreme Court inasmuch as it expressly rejected it in 1983. Specifically, in *Illinois v. Gates* the Court ruled that "if an unquestionably honest citizen comes forward with a report of criminal activity—which if fabricated would subject him to criminal liability—we have found rigorous scrutiny of the basis of his knowledge unnecessary."²³ The court's new rule is also contrary to Ninth Circuit precedent. In *Ewing v. City of Stockton*²⁴ the court ruled that "citizen informants, identified bystanders, victims and crime scene witnesses may generally be presumed credible by police in a way that professional informants are not."

²⁰ (1985) 470 US 675, 686-87.

²¹ (1986) 187 Cal.App.3d 845, 855. ALSO SEE *U.S. v. Russell* (9th Cir. 2006) 436 F.3d 1086, 109.

²² Quoting *Hopkins v. Bonvicino* (9th Cir. 2009) 573 F.3d 752, 767.

²³ (1983) 462 U.S. 213, 233 [citing *Adams v. Williams* (1972) 407 US 143, 146].

²⁴ (9th Cir. 2009) 588 F.3d 1218, 1225.

We decided to report on this case for two reasons. One is that it provided an opportunity to review some important principles of search and seizure law. The other—the main reason—was that the public needs to know when judges disregard or distort facts and the law, and decide cases based on their extreme ideology—regardless of the nature of that ideology. Although it doesn’t happen often, it is deplorable because, in addition to perverting justice, it degrades the courts and undermines respect for the rule of law.

People v. Shafrir

(2010) 183 Cal.App.4th 1238

Issue

If an officer’s decision to tow a vehicle was reasonable, is the towing nevertheless unlawful if he did not first consider a standardized list of towing criteria?

Facts

At about 3:40 A.M., CHP officers Michael Tenney and Leo Smith were patrolling the San Francisco-Oakland Bay Bridge and were entering the span from Treasure Island when a new Mercedes sped past them toward Oakland. They eventually caught up with the car (having clocked its speed at over 110 m.p.h.) and signaled the driver to stop. The driver and sole occupant, Gideon Shafrir, complied by exiting the freeway and stopping at the corner of MacArthur Boulevard and Market Street, which was known to the officers as a “high crime area.” Shafrir was arrested after the officers determined he was under the influence of alcohol.

Before transporting Shafrir to jail, the officers decided to tow his car from the scene pursuant to, (1) Vehicle Code § 22651(h) which authorizes towing when an officer makes a custodial arrest of the driver, and (2) CHP policy which requires towing of an arrestee’s car when towing is necessary for “safekeeping.” Here, the officers determined that towing was necessary because it would have been unsafe to

simply park and lock a “brand new Mercedes” in “a neighborhood in which auto theft and other crimes were common.”

Because CHP policy requires that officers inventory the contents of vehicles before they are impounded or towed for safekeeping, Officer Smith conducted an inventory search and, while inventorying the contents of the trunk, found three pounds of marijuana in bags, and another bag containing \$50,000 in cash. As a result, Shafrir was charged with, among other things, transportation and possession of marijuana for sale.

Discussion

Although Shafrir conceded that the officers’ decision to tow his Mercedes was objectively reasonable, he contended that officers should not be permitted to tow vehicles unless the decision to do so was both objectively reasonable and based on a standardized list of criteria. And because the CHP does not require that its officers consider such a list, he argued that the evidence should have been suppressed.

Shafrir’s argument was based on the Supreme Court’s decision in *Colorado v. Bertine*²⁵ in which the Court, in the course of upholding an inventory search of a car, pointed out that nothing in its prior cases “prohibits the exercise of police discretion so long as that discretion is *exercised according to standard criteria* and on the basis of something other than suspicion of evidence of criminal activity.”²⁶ Shafrir interpreted this language to mean that, even when towing was plainly necessary, officers may not do so unless they first mentally review a list of relevant circumstances compiled by their departments.

The court disagreed, ruling that towing is lawful if the officer’s decision to move the vehicle to a safe location was objectively reasonable. “[T]he ultimate determination,” said the court, “is properly whether a decision to impound or remove a vehicle pursuant to the community caretaking function, was reasonable under all the circumstances.”²⁷ Consequently,

²⁵ (1987) 479 U.S. 367.

²⁶ Emphasis added.

²⁷ **NOTE:** The court also pointed out that both California and federal courts have interpreted the quoted language in *Bertine* as merely saying “that an impoundment decision made pursuant to standardized criteria is more likely to satisfy the Fourth Amendment than one not made pursuant to standardized criteria.” Citing *People v. Needham* (2000) 79 Cal.App.4th 260; *People v. Steeley* (1989) 210 Cal.App.3d 887; *U.S. v. Coccia* (1st Cir. 2006) 446 F.3d 233; *U.S. v. Smith* (3d Cir. 2008) 522 F.3d 305.

because Shafrir had been arrested, and because of the obvious threat to his car if it were left unprotected in a high-crime area, the court ruled the search was lawful, and that the evidence discovered in the trunk was admissible.²⁸

U.S. v. Franklin

(9th Cir. 2010) 603 F.3d 652

Issues

(1) Can a motel room be searched pursuant to the terms of the guest's probation? (2) Did officers have probable cause to believe that the probationer was living in the motel room they searched?

Facts

Franklin was on probation in Washington and was subject to a search condition. He told his probation officer that he was homeless, but the PO received a phone call from a woman who said that he was staying with another man in a certain motel in Spokane. She also said that Franklin had a handgun and ten rounds of ammunition. Based on "previous dealings" with the woman, and the fact that Franklin was the father of her child, the PO believed she was reliable. Still, he wanted to confirm her report so he asked a Spokane police officer to go to the motel and speak with the desk clerk. The officer showed the clerk a booking photo of Franklin and he confirmed that Franklin was the registered guest in Room 254.

The PO, accompanied by Spokane officers, arrived at the motel room at 9:45 A.M. and knocked. A man inside asked, "Who is it?" The PO recognized Franklin's voice. Franklin opened the door, and the officers conducted a search. They found the gun.

Franklin was charged in federal court with being a felon in possession of a firearm. When his motion to suppress the gun was denied, he pled guilty.

Discussion

Franklin contended that the probation search was unlawful, asserting that a probationer who is temporarily staying in a motel is not "living" there. And even

if a probationer's brief stay in a motel room can render it his "residence," he argued that the search was unlawful because the PO did not have probable cause to believe that he was staying in the room. The court disagreed with both arguments.

First, the court ruled that a motel room does, in fact, constitute the "residence" of a probationer who is a registered guest, such as Franklin. The court explained that "[r]esidential arrangements take many forms. A 'residence' does not have to be an old ancestral home," nor must it be the probationer's main residence or even a long-term residence. "The temporary nature of the occupancy," said the court, "does not change the fact that for the night or nights that Franklin rented Room 254, he was legally entitled to use the room and to control access to it. For that time period, the room was his residence."

Second, the court acknowledged that, even though a motel room may serve as the "residence" of a probationer or parolee, officers may not search it unless they have probable cause to believe that he is currently staying there. Although Franklin argued that probable cause was lacking, the court disagreed, summarily ruling that the facts cited above "overwhelmingly support" the lower court's probable cause determination." Thus, the court ruled that Franklin's motion to suppress was properly denied.

U.S. v. King

(3rd Cir. 2010) __ F.3d __ [2010 WL 1729733]

Issue

If a person consents to a search of personal property in her home, is the search invalid under the rule of *Georgia v. Randolph* if, (1) the property is co-owned by a spouse or other person who resides in the house, and (2) the co-owner notified officers beforehand that he objected to the search?

Facts

In the course of an investigation into child pornography in Texas, officers searched a suspect's computer and found, among other things, pornographic

²⁸ NOTE: The court pointed out that, even if officers were required to consider a standardized list of circumstances, it appears that officers Tenney and Smith did so. For one thing, they considered that Vehicle Code § 22651(h) authorizes towing when an officer makes a custodial arrest of "a person driving or in control of a vehicle." Said the court, "In this case, the reliance on section 22651, subdivision (h), is sufficient to satisfy *Bertine*" because that reliance was "coupled with testimony indicating a reasonable community caretaking justification"; e.g., high-crime area, there was no passenger in the vehicle who could have driven it away.

images of a two-year old girl. Officers determined that the girl was the daughter of Angela Larkin who was living in Reading, Pennsylvania with Richard King. The matter was referred to an FBI agent in Pennsylvania who learned that Larkin was wanted on a local bench warrant. So he requested that state troopers go to Larkin's house and arrest her.

After the troopers arrived and arrested Larkin, they obtained her consent to take her computer. She also provided them with her passwords. When King heard that Larkin had consented, he told the troopers that he objected to the seizure, explaining that the hard drive belonged to him, and saying that he wanted to remove it before they took the computer. The troopers took it anyway.

A few days later, the FBI agent reviewed Larkin's emails and chats and found "incriminating conversations" between her and King. As a result, the agent obtained a warrant to search the computer which, as it turned out, contained evidence that he had sexually abused the little girl. The agent also found thousands of images of child pornography.

Before or after the agent searched the computer, King phoned him and agreed to meet with him at the FBI office in Williamsport. The meeting occurred on a Saturday. Because the FBI office was closed, the front doors were locked and the FBI agent had to open the door from him. After King entered, the agent pat searched him and took him to an unlocked interview room. He then told King that he "was free to leave at any time." He did not seek a *Miranda* waiver. (Because there were no other agents in the building who could act as witnesses to the interview, an agent in Philadelphia listened in over the phone.)

As the interview progressed, King admitted to sexually abusing Larkin's daughter. At the conclusion of the interview, King was allowed to leave, but he was subsequently indicted on charges of, among other things, aggravated sexual abuse of a child and disseminating child pornography through interstate commerce. When his motion to suppress the evi-

dence on the computer and his confession to the agent were denied, he pled guilty and was sentenced to 30 years in federal prison.

Discussion

King contended that the evidence discovered on his hard drive should have been suppressed because his computer had been seized over his objection. He also argued that his confession was obtained in violation of *Miranda* because he had not waived his *Miranda* rights.

SEIZURE OF COMPUTER: Although Larkin had consented to the seizure of her computer, King argued that the seizure of his hard drive was unlawful under the rule of *Georgia v. Randolph*.²⁹ In *Randolph*, the U.S. Supreme Court ruled that, even if one spouse consents to a search of the family home, officers are prohibited from searching it if the other spouse is present and announces that he objects to the search. In *King*, however, the court ruled that the *Randolph* rule is limited to situations in which officers had obtained consent to search a residence—it does not apply if officers obtained consent to search a particular item of personal property, such as a computer. Said the court, "the rule of law established in *Randolph* does not extend beyond the home," and it "does not apply to personal effects."³⁰

MIRANDA: King argued that his confession should have been suppressed because it was obtained in violation of *Miranda*. Specifically, he contended that the agent should have obtained a waiver before questioning him because he was "in custody" at the time. It is, of course, settled that officers must obtain a *Miranda* waiver before interrogating a suspect who is in custody. Furthermore, a suspect who has not yet been arrested may be deemed "in custody" if he was questioned under circumstances that were so coercive or intimidating as to constitute the functional equivalent of an arrest.³¹

Citing these principles, King argued that, although he was not under arrest, the interview should be

²⁹ (2006) 547 US 103.

³⁰ NOTE: The court acknowledged that its decision is contrary to the Ninth Circuit's decision in *U.S. v. Murphy* (9th Cir. 2008) 516 F.3d 1117 in which the court ruled that *Randolph* was not limited to searches of residences, but applied equally to a search of a storage shed in which the defendant and his accomplice were manufacturing methamphetamine. As we reported at the time, *Murphy* was the result of this particular panel's extreme ideology rather than an honest examination of the facts and legal issues. In any event, the court in *King* refused to apply *Murphy* saying that it disagrees with its reasoning.

³¹ See *California v. Beheler* (1983) 463 US 1121, 1125 ["the ultimate inquiry" is whether there has been a "restraint on freedom of movement of the degree associated with a formal arrest"].

deemed custodial because, (1) it occurred in a FBI office, and (2) it had lasted several hours. Although these two circumstances are certainly relevant in determining whether a suspect was in custody for *Miranda* purposes, the court pointed out that the overall tenor of the interview was noncustodial. Specifically, it noted that King came to the office voluntarily, he was not arrested, the door to the interview room was not locked, the agent did not use any coercive interview tactics, and (probably most important) the agent notified King that he could leave at any time.³² Accordingly, the court ruled that King was not in custody for *Miranda* purposes, and that his motion to suppress his confession was properly denied.

People v. Navarrete

(2010) 181 Cal.App.4th 828

Issue

During the trial of a man charged with lewd conduct on a child, should the trial judge have declared a mistrial after a detective intentionally violated the court's order not to inform the jury that the defendant's statement to officers had been suppressed?

Facts

Navarrete was charged with lewd conduct on a four year old girl in Maywood, California. At the close of a *Miranda* hearing, the trial judge ruled that an incriminating statement that Navarrete had made to officers must be suppressed because they neglected to *Mirandize* him. In making his ruling, the judge also questioned the credibility of a detective who had testified at the hearing.

In the course of the trial, a nurse testified that she had taken several swabs from various parts of the girl's body, and that she had given the swabs to Maywood police. The next witness was the detective who had testified at the *Miranda* hearing. He said he decided not to have the swabs tested, and the prosecutor asked why. "Well, for several reasons," he said, "the first of which it's a court rule that the defendant's statement is inadmissible. So I can't state the first reason."

Literally "standing up from the bench," the judge called a recess, and the defendant's attorney moved for a mistrial. The motion was denied, but the judge ordered the detective removed from the courtroom, saying "Your decision to make statements of the nature that you have made has delayed, disrupted, and jeopardized any result that may now be reached in this case. Your decision to do so was rash and wholly improper." The judge also instructed the jurors to disregard his testimony.

Later that day, the prosecutor told the judge that she had learned that the detective, just before he testified, had told another prosecutor, Robert Britton, that he was upset by the suppression order and that he was "going to show" the court. Britton warned him "not to do anything stupid on the stand." When Britton learned what the detective had done during the trial, he notified the trial prosecutor who informed the judge. The trial continued on, and Navarrete was convicted.

Discussion

The defendant contended that his motion for a mistrial should have been granted, and the Court of Appeal agreed. Although the detective did not testify that Navarrete had "confessed" to the crime (he said that Navarrete had made a "statement"), the court ruled that the jurors might well have believed he had confessed because it would have appeared to them that the reason the detective felt it was unnecessary to test the swabs was because Navarrete had already confessed.

The court's ruling was also based on the fact that the detective's misconduct "was neither ambiguous nor inadvertent; it was deliberate, triggered seemingly by his apparent pique at the court's wondering the previous day about [the detective's] credibility." Said the court, "He *intended* to tell the jury about appellant's statement because he *intended* to prejudice the jury against appellant." The court concluded, "On one point we agree with the detective: His misconduct more likely than not achieved the effect he sought. But for the price of his success, [he] cost the court, the parties, and the public the time and expense of a retrial."

POV

³² See *California v. Beheler* (1983) 463 US 1121, 1122 ["Beheler voluntarily agreed to accompany police to the station house"]; *Oregon v. Mathiason* (1977) 429 US 492, 495 ["He came voluntarily to the police station"].

The Changing Times

ALAMEDA COUNTY DISTRICT ATTORNEY'S OFFICE

Inspector II **Kim Tejada** was promoted to Inspector III and assigned to the Hayward Hall of Justice. Kim started her career with the Berkeley Police Department before joining the District Attorney's Office in 1998.

Deputy DA **Lisa Faria** retired after 31 years of service. Inspector III **Ray Alsdorf** and Inspector II **Bill Cooper** retired in April. Ray started his career with the Hayward Police Department before coming to the DA's Office in 1989. Before joining the DA's Office in 1999, Bill had been an officer with Berkeley PD and Hayward PD.

ALAMEDA COUNTY NARCOTICS TASK FORCE

Transferring in: **Oskar Reyes** (ACSO), **Aaron Runolfson** (HPD), and **Eric Gatty** (CHP).

ALAMEDA POLICE DEPARTMENT

Chief of Police **Walt Tibbet** has accepted a position as Chief of Fairfield Police Department. Capt. **Mike Noonan** has been named Acting Chief. Chief Tibbet was named Chief of the department in 2006. He will succeed former Fairfield Police Chief **Kenton Rainey** who was appointed Chief of the BART Police Department.

BART POLICE DEPARTMENT

Former Fairfield Police Chief **Kenton Rainey** was appointed Chief of the BART Police Department. Chief Rainey left Fairfield PD last year to accept a position as commander with the San Antonio Airport Police Department in Texas. Following the retirement of BART Chief **Gary Gee**, the interim chief had been retired Berkeley Chief **Dash Butler**.

Commander **Maria White** retired after 28 years of service. The following officers have also retired: **Ethridge Marks** (34 years), **Mandy Moran** (12 years), **Jerry Aguirre** (36 years), and **Terry Foreman** (23 years). Lateral appointments: **Scott Edwards** (Sacramento County SO), **James Crowell** (Sacramento County SO), **Lester Contreras** (Richmond PD), **Richard Wanzie** (Vallejo PD), **Richard Strang** (Vallejo PD), **Jeffrey Herrington** (Pleasant

Hill PD), and **Joshua Perez** (San Francisco PD). New officer: **Timothy Eads**.

Officer **Hakeem Shabazz** was selected as BART Police Officer of the Year. Officers **Victor Dulong** and **Justin Hawkins** have been selected as TSA canine handlers. The following officers were selected as field training officers: **Tanzanika Carter**, **Brando Cruz**, **Shaunte Barnes**, **Wendy Sanchez**, **Shaun O'Connor**, **Tracy Gurecki**, and **Jonathan Ichimaru**.

BERKELEY POLICE DEPARTMENT

The following officers have retired: Capt. **Eric Gustafson** (29 years), Officer **Rob Westerhoff** (26 years), Officer **Michael Haley** (25 years), and Officer **Henry Wellington** (23 years). Officer **Brian Hartley** has resigned to accept a position as Deputy with the Kern County SO. Lateral appointments from U.C. Berkeley PD: **Thomas Syto** and **Sean Tinney**. Emeryville Police Department

Retired Det. **Roman Ray**, who had worked with the department from 1995 to 2005, passed away after a long bout with illness. Ray began his law enforcement career with the Hayward Police Department. Sadly, Ray's grandfather passed away the same week and both shared a colorful service side by side at Chapel of the Chimes. Ray is survived by his fiancée and sister. He was 43 years old.

EPD has temporarily moved its headquarters to 5780 Shellmound Street while the old building is being renovated. All police services will remain the same and the department expects to have a state-of-the-art facility upon its return.

CALIFORNIA HIGHWAY PATROL

CASTRO VALLEY AREA OFFICE: Lt. **Linda Franklin** transferred in from the Mission Grade Inspection Facility and is the new Area Commander. Lt. **Chris Day** transferred to the San Luis Obispo Area. Transferring out: **Kathleen Hayes** (Golden Gate Division Investigative Services Unit), **Dustin Jorrick** (Stockton), **Matt Brown** (South Sacramento), **John Rosendale** (South Sacramento), and **Erik Mallory** (Oroville). Sgt. **Mike Fitzgerald** retired after 20 years of service. Transferring in: **Bob Van der Paardt** (Central Los

Angeles Area) and **Joseph Mosinski** (Redwood City Area). Recent CHP Academy graduates assigned to the office: **Tarren Granberry**, **Barrett Adams**, **Garnner Swartz**, and **Gregory Barker**.

EAST BAY REGIONAL PARKS POLICE DEPARTMENT

The Police Chief's Confidential Secretary, **Pamela Flax**, retired after 25 years of service. **Katie Quick** was appointed to succeed her. Officer **Denise Maehara** medically retired after six years of service.

EMERYVILLE POLICE DEPARTMENT

Retired Det. **Roman Ray**, who had worked with the department from 1995 to 2005, passed away after a long bout with illness. Ray began his law enforcement career with the Hayward Police Department. Sadly, his grandfather passed away the same week and both shared a colorful service side by side at Chapel of the Chimes. Ray is survived by his fiancée and sister. He was 43 years old.

EPD has temporarily moved its headquarters to 5780 Shellmound Street while the old building is being renovated. All police services will remain the same, and the department expects to have a state-of-the-art facility upon its return.

FREMONT POLICE DEPARTMENT

Sgt. **Frank Dorsey** retired after 36 years of service. Officer **Greg Bruner** retired after 26 years of service. Senior Office Specialist **Carmen Magpayo** retired after 28 years of service. **Bryan Hollifield** and **Joshua Harvey** have been hired as police officers and will attend the Sacramento Police Academy. Other new hires: Dispatchers **Linda Aguirre**, **Geradette Williams**, and **Kristen Parks**; and Records Assistant **Stephen Hill**.

HAYWARD POLICE DEPARTMENT

New officers: **Paul Garcia**, **Victoria Thomas**, **Norman McAdams**, **Robert Purnell**, **Thomas Nunes**, **Chad Norris**, **David Waters**, **Anthony Hendricks**, **Matthew McCrea**, **Edward Barrientos**, **Sean Kenney**, **Michael Miller**, and **Michael Ambrose**. Officer **Jeff Albertelli** has taken a disability retirement following over 24 years of service. Retired police sergeant **Thomas West** died on May 25, 2010 following a brief battle with cancer. Tom retired in 2001 after serving the department for 22 years.

LIVERMORE POLICE DEPARTMENT

The following officers retired: **Wes Morgan** (33 years) and Sgt. **Wayne Jacobs** (28 years). **Jeremy "Todd" Lohmeyer** medically retired after 13 years of service. Lateral appointment: **Matthew Ishmael** (San Bernardino). New officer: **Taylor Burruss**.

OAKLAND HOUSING AUTHORITY POLICE DEPT.

Kevin Usher took a service-related medical retirement after 14 years of service. Reserve Officer **Christopher McGregor** was hired as an officer. Officer **Ricardo Flores** passed the department's field training program and was assigned to Patrol. New reserve officer: **Stephanie Chan**.

OAKLAND POLICE DEPARTMENT

Lts. **Darren Allison** and **Ersie Joyner** were promoted to captain. Sgts. **Blair Alexander**, **Dana Flynn**, and **Danielle Outlaw** were promoted to lieutenant. The following officers were promoted to sergeant: **William Bacon**, **Jack Doolittle**, **Bryan Hubbard**, **Steven Nowak**, and **Gregory Porritt**. Officer **Darryl Tolbert** retired after 19 years of service. **Tae Chey** has taken a disability retirement. Lateral appointments: **Marc Oliver** (OPD Ranger), **Fernando DeVera** (LAPD), **Tiffany Greenberg** (Sacramento SO), **Michael Pena** (Fairfield PD), and **Robby Stofle** (Sacramento SO).

OAKLAND SCHOOL POLICE DEPARTMENT

Officers **Barhin Bhatt** and **Melissa Centeno** were promoted to sergeant. Lateral appointments: **Antonio Fregoso**, **Miguel De Luna**, and **Michael Anderson**. New officer: **Gloria Beltran**. The department has moved its Oakland headquarters from 900 High Street to 1011 Union Street.

SAN LEANDRO POLICE DEPARTMENT

Lt. **Pete Ballew** was promoted to captain (Bureau of Services). Sgt. **Greg Lemmon** was promoted to lieutenant, **Ted Henderson** was promoted to sergeant, and Dispatcher **Robert Rosas** was promoted to Administrative Specialist-Police. Capt. **Tom Overton** retired after 24 years of service. Other retirements: Administrative Specialists **Christine Selleaze** (27 years) and **Peggy Heubel** (23 years), and Police Service Aide **LeAnna Tasby** (23 years). New dispatcher: **Ashlee D'Apice**.

POV

War Stories

Nice try

55-year old Michael Cornelius has been committing residential burglaries since he was old enough to jump a fence. But judging by his string of felony convictions, he's not very good at it. His latest burglaries occurred late one night in Berkeley when he broke into a house and stabbed one of the residents when she confronted him. As he fled, he happened to walk by a Berkeley fire station and noticed that the big front door was opening up (the firefighters were responding to the stabbing call). Seeing an open door, Cornelius naturally tried to sneak inside—but the firefighters saw him and detained him until police arrived.

During sentencing, Michael's attorney urged the judge to be lenient, pointing out that his client's arrest for the Berkeley felonies in 2007 was the first time he had been arrested since 1992. "He's been clean for almost 16 years!" gushed the attorney. "Well, that's technically true, judge," conceded Deputy DA Mark Melton. "But, according to his rap sheet, he was serving time in San Quentin during every one of those 16 years." The judge sentenced him to 316 years in prison.

What's happening in court

In Hayward, a man who had been arrested by CHP officers for DUI opted for a urine test which was tested at .22%. At the man's trial, his attorney was cross-examining the arresting officer:

Attorney: Officer, are you truly qualified to give a urine sample?

Officer: I think so. I've been giving 'em for as long as I can remember.

Jails and prisons turn a profit

Speaking of serving time, some county jails and state prisons are trying to make some money in these troubled times by selling junk food to their inmates. For example, inmates at San Antonio's County Jail can buy a "Pizza and Wings Party Pack" for \$15.95, while inmates in the Sebastian County Jail in Arkan-

sas are living it up with the "Meaty Big 'n Beefy Box" for only \$8.95. "We have to be creative in tough fiscal times," said an official with the Indiana Department of Corrections, adding that his department hopes to make around \$2 million this year selling junk food. But some inmates are having second thoughts. For example, a prisoner at the Miami Correctional Facility complained that he's gained over 10 pounds in the past two months.

More news from the DUI front

Just before 2 A.M. on a Saturday night, a Fremont officer parked down the street from a local bar whose hard-drinking patrons have been causing a spike in the city's DUI rate. As the officer watched the front door, he saw a man stumble outside and almost fall to the ground. The man then staggered and weaved over to his car and eventually drove off. The officer took off after him, thinking that the man's blood-alcohol level might set a city record. But after he stopped the man, the officer started having second thoughts. For one thing, he passed every one of the FSTs. Also, his speech was clear and he didn't smell of alcohol. Totally confused, the officer administered a PAS test. The result: 0.00. "What's your story," asked the officer, "a few minutes ago you were a falling down drunk?" "It's like this," said the man. "You've heard of Designated Drivers. Well, I'm tonight's Designated Decoy."

Very suspicious

After arresting a man for possessing cocaine for sale, an officer in Northern California decided to conduct a parole search of his apartment. (We promised we wouldn't reveal the name of the agency.) Although he didn't find any drugs, the officer wrote in his police report that he found something just as incriminating: "several boxes of sandwich bags." He then wrote that prosecutors would be able to prove that the sandwich bags were being used to package drugs because the officers who searched the house found "absolutely no sandwiches."

From our Memphis correspondent

911: This is 9-1-1. What's your emergency?

Caller: My wife is pregnant and her contractions are only two minutes apart!

911: Is this her first child?

Caller: No, you idiot! This is her husband!

The problem with tattoos

A Hayward PD school resource officer was interviewing a student when he noticed a large, bright, fresh tattoo on the young man's forearm that read "50 on 50." "What's that mean?" asked the officer. "Well," explained the student, "I'm always acting crazy, so my buddies call me '50 on 50.' It's police code for a crazy person. You're a cop, you should know that." "Well, I hate to break the news to you but it's 5150, not 50 on 50." The bewildered young man looked down at his tattoo for some time and said sadly, "I guess I'm crazier than they thought."

W.T.F.?

One afternoon, a man phoned the People's United Bank in Bridgeport, Connecticut and said, "This is a robbery. Put \$100,000 in a bag with no dye packs, or else there'll be a blood bath. I'll be there shortly." The bank manager phoned police, who arrested the young man when he arrived to pick up his order.

Shoplifting Follies #1

A woman decided to steal a pair of ski pants from the Any Mountain Store in Dublin (Alameda County). So, after finding a pair she liked, she removed the alarm sensor from the pants, put it in her purse, and walked out the door with the pants hidden under her coat. Boy, was she surprised when the shoplifting alarm started shrieking—triggered by the sensor she'd put in her purse. As she sat handcuffed in the security office, she suddenly figured out why the alarm sounded. "You are so stupid," she said to herself.

Shoplifting Follies #2

At Bayfair Mall in San Leandro, a clerk in a woman's clothing store spotted two women shoplifting. As the thieves left the store, she tried to apprehend them,

but they got away. The clerk immediately phoned SLPD and said she saw the women get on an AC Transit bus on East 14th St. A few minutes later, a San Leandro officer stopped the crowded bus but, because the clerk's description of the shoplifters was so general, and because it fit so many people on the bus, he had to let it go.

As the bus continued on its way, the ladies started laughing and bragging to the other passengers how they had just spent the day at Bayfair ripping off all kinds of stuff, and they were so smart because they'd lined their purses with aluminum foil so they wouldn't set off the sensor alarms. This was especially interesting to three of the passengers—undercover Alameda County sheriff's deputies on the transit detail. They arrested the women and recovered a load of stolen merchandise.

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