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Contents

Search Warrants

There's a simple way for the police to avoid many complex search and seizure problems: Get a search warrant.[1]

That's good advice, except for two things: Officers cannot simply "get" a search warrant; they must *apply* for one. And there is nothing "simple" about the application process. On the contrary, even with the advent of email warrants it is one of the more tedious and vexing legal hoops through which officers are required to jump.[2] While some veterans, having suffered through the process for many years, can crank out search warrants with relative ease, for most officers it's a challenge. In this article, we hope to make it much less challenging.

But before we begin, it will be helpful to briefly explain the organization of the subject and some of its terminology. The legal issues can be divided into two broad categories. The first consists of the various requirements for establishing probable cause, a subject we covered in the Fall 2008 edition. The second—which is the subject of this article—covers the requirements as to the form and content of the warrant and, except for demonstrating probable cause, the affidavit. Although some of these requirements are technical in nature, most are substantive and, if not complied with, will invalidate a warrant just as surely as the absence of probable cause.

As for terminology, the following are the principal terms that are used in the law of search warrants and which are used in this article:

Affidavit: An affidavit is a document signed under penalty of perjury.[3]

Affiant: An affiant is a person who writes and signs an affidavit.

Magistrate: In the context of search warrants, the term "magistrate" is synonymous with "judge."[4] In this article, we use the terms interchangeably.

General warrant: A warrant will be deemed "general"—and therefore unlawful—if it contained such a broad description of the evidence to be seized that officers were permitted to conduct a virtually unrestricted search of the premises.[5] Examples include warrants to search for "all evidence" or "stolen property." Unless the severance rule applies (discussed later), evidence seized pursuant to a general warrant will be suppressed.

Overbroad warrant: A warrant is "overbroad" if its affidavit failed to demonstrate probable cause to believe that each of the things that officers were authorized to search for and seize were, in fact, evidence of a crime and would be found in the place to be searched.[6] Overbreadth is a fatal defect unless the severance rule applies.

Particularity: The term "particularity" refers to the constitutional requirement that a search warrant must clearly describe (1) the places and things that officers may search, and (2) the property they are permitted to search for and seize.[7] (The terms "overbreadth" and "particularity" are often confused.[8])

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[1] *U.S.* v. *Harper* (9th Cir. 1991) 928 F.2d 894, 895.

[2] See *Alvidres* v. *Superior Court* (1970) 12 Cal.App.3d 575, 581 ["One of the major difficulties which confronts law enforcement… is the time that is consumed in obtaining search warrants."]; *U.S.* v. *Garcia* (7th Cir. 1989) 882 F.2d 699, 703 ["Yet, one of the major practical difficulties that confronts law enforcement officials is the time required to obtain a warrant."].

[3] See Code Civ. Proc. § 2003 ["An affidavit is a written declaration under oath, made without notice to the adverse party."].

[4] See Pen. Code §§ 807, 808 [magistrates are judges of the California Supreme Court, the Court of Appeal, and Superior Court]

[5] See *U.S.* v. *Kimbrough* (5th Cir. 1995) 69 F.3d 723, 727 ["The Fourth Amendment prohibits issuance of general warrants allowing officials to burrow through a person's possessions looking for any evidence of a crime."].

[6] See *People* v. *Hepner* (1994) 21 Cal.App.4th 761, 773-74 ["[T]he concept of breadth may be defined as the requirement that there be probable cause to seize the particular thing named in the warrant."]; *U.S.* v. *SDI Future Health, Inc.* (9th Cir. 2009) 568 F.3d 684, 702 ["Breadth deals with the requirement that the scope of the warrant be limited by the probable cause on which the warrant is based."].

[7] See *U.S.* v. *SDI Future Health, Inc.* (9th Cir. 2009) 568 F.3d 684, 702 ["Particularity means that the warrant must make clear to the executing officer exactly what it is that he or she is authorized to search for and seize."]; *Millender* v. *County of Los Angeles* (9th Cir. 2010) 620 F.3d 1016, 1024 ["Particularity is the requirement that the warrant must clearly state what is sought."].

[8] See *U.S.* v. *SDI Future Health, Inc.* (9th Cir. 2009) 568 F.3d 684, 702 ["The district court only made one inquiry, which explicitly conflated particularly and overbreadth."]; *Millender* v. *County of Los Angeles* (9th Cir. 2010) 620 F.3d 1016, 1024 ["We read the Fourth Amendment as requiring 'specificity,' which has two aspects, 'particularity and breadth.'"].

The Affidavit

A search warrant affidavit is a document signed under penalty of perjury that contains the following: (1) the statement of probable cause, (2) descriptions of the place to be searched and the evidence to be seized, (3) justification for implementing special procedures (if any), and (4) other information required by California law.

The statement of probable cause

Writing the statement of probable cause is, by far, the most difficult and time consuming part of the process, as the affiant must persuade the judge there is a fair probability that the evidence he is seeking exists, that it is now located at the place to be searched, and that it will still be there when the warrant is executed.[9]

ORGANIZE THE FACTS: The affiant should usually start by jotting down the main facts upon which probable cause will be based. This will reduce the chances that important facts are inadvertently left out.[10] Although a statement of probable cause will not be judged as "an entry in an essay contest,"[11] the affiant should present the facts in a logical sequence. This is especially important in complex cases.[12]

EDIT AND SIMPLIFY: The statement of probable cause should seldom include everything that officers have learned about the crime under investigation and the suspect. Instead, it "need only furnish the magistrate with information, favorable and adverse, sufficient to permit a reasonable, common sense [probable cause] determination."[13]

WHO SHOULD BE THE AFFIANT? The affiant should normally be the investigator who is "most directly involved in the investigation and most familiar with the facts stated in the affidavit."[14] While most affiants are peace officers, anybody can be one; e.g., a prosecutor or an informant.[15]

TRAINING AND EXPERIENCE: The affiant should include a *brief* statement of his training and experience if (1) the existence of probable cause will be based, even partly, on his opinion concerning the meaning or significance of information contained in the affidavit; or (2) the description of the evidence to be seized will be based in part on an inference he has drawn. (We will discuss descriptions based on training and experience later in this article.) Note that the affiant need not have qualified as an expert witness in court to offer an opinion.[16]

USING ATTACHMENTS: Probable cause may be based in part on information that is contained in another document, such as a police report, a fingerprint or DNA report, a witness's statement, or a photograph. The subject of incorporating attachments into affidavits and warrants is covered later in the section on describing evidence.

SHOULD A PROSECUTOR REVIEW IT? A prosecutor (preferably one who knows the law of search and seizure) should ordinarily review an affidavit if there are legal issues with which the affiant is unfamiliar or uncertain. A review is also recommended if the existence of probable cause is a close question. This is because a prosecutor's approval is a circumstance that the courts will consider in determining whether the good faith rule applies.[17]

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[9] See Pen. Code § 1527 ["The affidavit or affidavits must set forth the facts tending to establish the grounds of the application, or probable cause for believing that they exist."]; *Illinois* v. *Gates* (1983) 462 U.S. 213, 238 [probable cause to search exists if "there is a fair probability that contraband or evidence of a crime will be found in a particular place"].

[10] See *People* v. *Bell* (1996) 45 Cal.App.4th 1030, 1956 ["[T]he most obvious and routine things are those easiest to forget and their absence least noticeable."].

[11] *United States* v. *Harris* (1971) 403 U.S. 573, 579. ALSO SEE *State* v. *Multaler* (Wis. 2002) 643 N.W.2d 437, 447 [an affidavit "is not a research paper or legal brief that demands citations for every proposition"].

[12] See *U.S.* v. *Spilotro* (9th Cir. 1986) 800 F.2d 959, 967 [a 157-page affidavit was "nonindexed, unorganized"].

[13] *People* v. *Kurland* (1980) 28 Cal.3d 376, 384.

[14] *Bennett* v. *City of Grand Rapids* (5th Cir. 1989) 883 F.2d 400, 407.

[15] See *People* v. *Bell* (1996) 45 Cal.App.4th 1030, 1055 ["no section of the [Penal] code requires the person seeking a search warrant be a peace officer"].

[16] See *Wimberly* v. *Superior Court* (1976) 16 Cal.3d 557, 565.

[17] See *People* v. *Camarella* (1991) 54 Cal.3d 592, 605, fn.5 ["It is, of course, proper to consider . . . whether the affidavit was previously reviewed by a deputy district attorney."]; *U.S.* v. *Otero* (10th Cir. 2009) 563 F.3d 1127, 1135 ["[One of the more important facts . . . is the officers' attempts to satisfy all legal requirements by consulting a lawyer."].

Other affidavit requirements

In addition to the statement of probable cause, the affidavit must include the following.

DESCRIPTIVE INFORMATION: The affidavit must contain descriptions of (1) the person, place, or thing to be searched; and (2) the evidence to be seized.[18] Although this information must also appear on the warrant, it must be included in the affidavit because the affiant must swear that it is true, and only the information contained in the affidavit is subject to the oath. The requirements pertaining to the quality and quantity of descriptive information are covered later in this article.

GROUNDS TO UTILIZE SPECIAL PROCEDURES: The affiant will usually request authorization to implement one or more special procedures, such as night service, no-knock entry, or affidavit sealing. While such authorization must appear on the warrant, the affidavit must contain the facts upon which the request is based. We will cover the subject of special procedures in the Summer 2011 edition.

THE OATH: The affiant must sign the affidavit under oath; e.g., *"I declare under penalty of perjury that the foregoing is true."*[19] By doing so, he is swearing that (1) the information within his personal knowledge is accurate; and (2) the information that was not within his personal knowledge was, in fact, received by him from others, and that he had no reason to doubt its accuracy.[20] Note it is inappropriate for affiants to swear that their information establishes probable cause (this is a legal determination to be made by the judge), or that they "believe" they have probable cause (this is irrelevant). As the court noted in *People* v. *Leonard*, "Warrants must be issued on the basis of facts, not beliefs."[21]

WHEN TO SIGN: The affiant must not sign the affidavit until he is directed to do so by the judge. This is because the judge must state on the warrant that the affidavit was "sworn to and subscribed before me." See "The jurat," below.

The Warrant: Technical Requirements

Because a search warrant is a court order,[22] it must contain the information that is necessary to constitute an enforceable judicial command, plus certain information required by California statute.

THE HEADING: Like any court order, the heading must identify the issuing court:

SUPERIOR COURT OF CALIFORNIA
County of _____

IDENTIFY THE OFFICERS: The warrant must identify the officers who are ordered to conduct the search. Thus, most warrants begin with the following: *The People of the State of California to any peace officer in the County of* _____.[23]

WHAT COUNTY? The county that is listed must be the same as the county in which the issuing judge sits. For example, if the warrant was issued by a judge in Alameda County, the warrant must be directed to "any peace officer in the County of Alameda." As we will discuss in the Summer 2011 edition, this requirement will not bar a judge from issuing a warrant to search a person, place, or thing located in another county in California.

THE JURAT AND IDENTIFICATION OF THE AFFIANT: The warrant must identify the affiant,[24] and the judge must confirm by means of the jurat that the affiant signed the affidavit under oath in the judge's

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[18] See *People* v. *Coulon* (1969) 273 Cal.App.2d 148, 152 ["both the affidavit upon which [the warrant] is based and the warrant itself must describe the place of search with particularity"].

[19] See *People* v. *Hale* (2005) 133 Cal.App.4th 942, 947 ["The test of the sufficiency of an officer's oath in support of a search warrant is whether he can be prosecuted for perjury should his statement of probable causes prove false."]; *People* v. *Leonard* (1996) 50 Cal.App.4th 878, 884 ["The failure of the affiant to swear to the truth of the information given to the magistrate cannot be construed as a 'technical' defect. It is a defect of substance, not form."].

[20] See *Johnson* v. *State* (Fla. 1995) 660 So.2d 648, 654 ["As to hearsay, officers obviously are vouching for nothing more than the fact that the hearsay was told them and they have no reason to doubt its truthfulness."].

[21] (1996) 50 Cal.App.4th 878, 883.

[22] See *People* v. *Fisher* (2002) 96 Cal.App.4th 1147, 1150 ["A search warrant is not an invitation that officers can choose to accept, or reject, or ignore . . . . It is an order of the court."]; Pen. Code § 1523 ["A search warrant is an order . . . directed to a peace officer, commanding him or her to search for a person or persons, a thing or things, or personal property"].

[23] See Pen. Code §§ 1529, 1530; *People* v. *Fleming* (1981) 29 Cal.3d 698, 703.

[24] See Pen. Code § 1529 [the warrant must name "every person whose affidavit has been taken"].

SUPERIOR COURT OF CALIFORNIA

County of _____

SEARCH WARRANT

THE PEOPLE OF THE STATE OF CALIFORNIA
to any peace officer in _____ County Warrant No. _____

The affidavit below, sworn to and subscribed before me, has established probable cause for this search warrant which you are ordered to execute as follows:

Place(s) to be searched: Described in Exhibit 1A, *attached* hereto and incorporated by reference.

Property to be seized: Described in Exhibit 1B, *attached* hereto and incorporated by reference.

Night service: [If initialed by judge] For good cause, as set forth in the Statement of Probable Cause, night service is authorized: _____

Disposition of property: All property seized pursuant to this search warrant shall be retained in the affiant's custody pending further court order pursuant to Penal Code §§ 1528(a), 1536.

_____ _____
Date and time warrant issued Judge of the Superior Court

◆ AFFIDAVIT ◆

Affiant's name and agency: _____

Incorporation: The facts in support of this warrant are contained in the Statement of Probable Cause which is incorporated by reference. Incorporated by reference and *attached* hereto are Exhibit 1A, describing the place(s) to be searched; and Exhibit 1B, describing the evidence to be seized.

Evidence type: (Penal Code § 1524)

- ☐ Stolen or embezzled property.
- ☐ Property or things used as a means of committing a felony.
- ☐ Property or things in the possession of any person with the intent to use it as a means of committing a public offense, or in the possession of another to whom he or she may have delivered it for the purpose of concealing it or preventing its being discovered.
- ☐ Property or things that are evidence that tends to show a felony has been committed, or tends to show that a particular person has committed a felony.
- ☐ Property or things consisting of evidence that tends to show that sexual exploitation of a child, in violation of Penal Code § 311.3, or possession of matter depicting sexual conduct of a person under the age of 18 years, in violation of Penal Code § 311.11 has occurred or is occurring.
- ☐ Firearms, deadly weapons: The warrant authorizes a search for a deadly weapon in the following premises:
  5150: The premises are occupied or controlled by a person who is in custody on a 5150 W&I hold.
  Domestic violence: The premises are occupied by a person arrested for a domestic violence incident involving threatened harm.
  No firearms order: The premises are owned or controlled by a person who is prohibited from possessing firearms pursuant to Family Code § 6389.
- ☐ **Night Service**: [If checked] Authorization for night service is requested based on information contained in the Statement of Probable Cause, filed herewith.

Declaration: I declare under penalty of perjury that the information within my personal knowledge contained in this affidavit, including all incorporated documents, is true.

_____ _____
Date Affiant

presence; e.g., *"An affidavit by [name of affiant], sworn and subscribed before me on this date . . ."*[25] Note that if the affiant is a confidential informant who is covered under California's nondisclosure privilege, the warrant may be modified as follows: *"An affidavit by a confidential informant . . ."*[26]

DISPOSITION OF SEIZED EVIDENCE: The warrant must include instructions as to what the officers must do with any evidence they seize. Although Penal Code sections 1523 and 1529 state that the officers must bring the evidence to the judge, Penal Code sections 1528(a) and 1536 state that the officers must retain it pending further order of the court. Because judges do not want officers to deliver to their chambers loads of drugs, firearms, stolen property, and other common fruits of search warrants, the Court of Appeal has ruled that the evidence must be retained by the officers unless the warrant directs otherwise.[27]

Note that because the officers hold the evidence on behalf of the court, they may not transfer possession of it to any other person or agency except per further court order. As the California Supreme Court explained, "Law enforcement officers who seize property pursuant to a warrant issued by the court do so on behalf of the court, which has authority pursuant to Penal Code section 1536 to control the disposition of the property."[28]

EVIDENCE CLASSIFICATION: Penal Code section 1524(a) states that search warrants may be issued for certain types of evidence, depending mainly on whether the crime under investigation was a felony or misdemeanor. (See this footnote for a listing of seizable evidence.[29]) Consequently, the affiant should specify (usually by checking one or more preprinted boxes) that the listed evidence falls into one or more of these categories.

The question has arisen whether officers who are investigating a misdemeanor can obtain a warrant to search for evidence that is not listed in Penal Code section 1524(a). It is arguable that a judge could do so because the statute does not say that judges are prohibited from issuing warrants for other types of evidence; it is merely a permissive statute, and the distinction between prohibitive and permissive statutes has long been recognized by the courts.[30] Furthermore, evidence that was obtained by means of a warrant that was constitutionally valid cannot be suppressed on grounds that the warrant violated a state statute.[31] As a practical matter, however, judges may be unwilling to issue warrants that do not comply with state law.

FORMS AVAILABLE: Search warrant forms and related documents are available to officers and prosecutors. For information, go to our website: www.le.alcoda.org (click on "Forms").

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[25] See *People* v. *Egan* (1983) 141 Cal.App.3d 798, 801, fn.3 ["Although no particular form is required, a proper and usual form of jurat is 'sworn to and subscribed before me,' followed by the date and the taking officer's signature."]. **NOTE**: It appears that a warrant will not be invalidated if the judge did not administer the oath to the affiant, so long as the affiant signed the affidavit under penalty of perjury. See *U.S.* v. *Bueno-Vargas* (9th Cir. 2001) 383 F.3d 1104, 1110 [court rejects argument that a faxed statement of probable cause under penalty of perjury was constitutionally deficient "because no one administered an oath to [the affiant]."

[26] See *People* v. *Sanchez* (1972) 24 Cal.App.3d 664, 677-78, fn.8.

[27] *People* v. *Superior Court (Loar)* (1972) 28 Cal.App.3d 600, 607, fn.3 ["[Pen. Code §§ 1528 and 1536] prevail[] over conflicting language in Penal Code Sections 1523 and 1529"]. ALSO SEE *Oziel* v. *Superior Court* (1990) 223 Cal.App.3d 1284, 1292-93 ["possession by the officer is, in contemplation of the law, possession by the court."].

[28] *People* v. *Superior Court (Laff)* (2001) 25 Cal.4th 703, 713.

[29] **NOTE**: Penal Code § 1524(a) states that a warrant may authorize the seizure of evidence pertaining to a felony when the evidence (1) tends to identify the perpetrator, (2) tends to show that a felony was committed, or (3) was used to commit a felony. A warrant may be issued to seize evidence pertaining to any crime when the evidence (1) is possessed by a person who intends to use it as a means of committing a felony or misdemeanor; (2) consists of stolen or embezzled property; (3) is possessed by a person to whom it was delivered for the purpose of concealing it; (4) consists of records in the possession of a provider of an electronic communications service or a remote computing service, and it tends to prove that certain property was stolen; (5) tends to show that sexual exploitation of a child occurred in violation of Penal Code § 311.3; or (6) tends to show that a person possesses child pornography in violation of Penal Code § 311.11. Warrants may also authorize a search for a person who is wanted on an arrest warrant, or for deadly weapons inside premises that are (1) occupied or controlled by a person who is being held in custody pursuant to Welfare and Institutions Code § 5150, (2) occupied or controlled by a person who has been arrested for domestic violence involving threatened harm, or (3) owned or controlled by a person who is prohibited from possessing firearms pursuant to Family Code § 6389.

[30] See *United States* v. *Ramirez* (1998) 523 U.S. 65, 72.

[31] See *Virginia* v. *Moore* (2008) 553 U.S. 164, 176; *People* v. *McKay* (2002) 27 Cal.4th 601, 608.

Describing the Place To Be Searched

The requirement that search warrants describe the people, places, and things that may be searched will be deemed satisfied if the quality and quantity of the descriptive information is such that the search team can "ascertain and identify the place intended" with "reasonable effort."[32] While this "reasonable effort" test is somewhat ambiguous, as we will now discuss, the courts have generally agreed on what descriptive information will suffice.

SINGLE-FAMILY RESIDENCES: In most cases, a simple street address will do if the place to be searched is a house, apartment, condominium, or motel room.[33] If, however, street signs or unit numbers are lacking or obscured, the warrant must include a physical description of the premises or some other information that will direct the officers to the right place; e.g., a photograph, diagram, map, or image from Google Earth or Google Street View.[34] Although affiants sometimes describe the premises by inserting the name of the owner, this is not a requirement.[35] Moreover, it would ordinarily be of dubious value because ownership is a legal determination that seldom can be made at the scene prior to entry.

DETACHED BUILDINGS: If officers have probable cause to search detached structures on residential property (e.g., detached garage, storage shed), the warrant must indicate which structures may be searched. There are two ways to do this. First, the affiant can describe their physical characteristics; e.g., "The house at 415 Hoodlum Place and the red storage shed located approximately 100 feet behind the house." The other method is to insert the word "premises" in the description of the place to be searched (e.g., "The *premises* at 415 Hoodlum Place") as the courts have interpreted the word "premises" as expanding the scope of the search to all outbuildings that are ancillary to the main house.[36]

MULTI-OCCUPANT RESIDENCES: A multi-occupant residence is loosely defined as a building that has been divided into entirely separate living units, each under the exclusive control of different occupants. For example, a motel is a multi-occupant building, while a single motel room is a single-family residence. Another example of a multiple-occupant residence (although unusual) is found in *Mena* v. *Simi Valley*[37] where a single-family house was occupied by several unrelated people, each of whom occupied rooms that were "set up as studio apartment type units, with their own refrigerators, cooking supplies, food, televisions, and stereos."

The rule regarding multiple-occupant residences is straightforward: If, as is usually the case, officers have probable cause to search only a particular living unit, the warrant must direct them to search only *that* unit; e.g., "apartment 211," "the lower unit of the two-story duplex," "room number one of the Bates Motel."[38] As the court explained in *People* v. *Estrada*, a warrant for a multiple-occupant residence must "limit the search to a particular part of

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[32] *Steele* v. *United States* (1925) 267 U.S. 498, 503. ALSO SEE *People* v. *Superior Court (Fish)* (1980) 101 Cal.App.3d 218, 222.

[33] See *People* v. *McNabb* (1991) 228 Cal.App.3d 462, 469 ["As the search warrant included the street address of the premises, the premises were adequately identified"]; *People* v. *Superior Court (Fish)* (1980) 101 Cal.App.3d 218, 225 ["the more conventional method of identifying a particular residence [is] by street number"] ALSO SEE *U.S.* v. *Hinton* (7th Cir. 1955) 219 F.2d 324, 325-26 ["searching two or more apartments in the same building is no different than searching two or more completely separate houses"].

[34] See *People* v. *Superior Court (Fish)* (1980) 101 Cal.App.3d 218, 225 [description was necessary because the homes on the street "did not have house numbers, nor were the streets described by signs"].

[35] See *Hanger* v. *U.S.* (8th Cir. 1968) 398 F.2d 91, 99 ["Although desirable, a search warrant otherwise sufficient is not rendered invalid by the omission of the name of the owner or occupant"].

[36] See *People* v. *Mack* (1977) 66 Cal.App.3d 839, 859 ["premises" included "both the house and [detached] garage"]; *People* v. *Dumas* (1973) 9 Cal.3d 871, 881, fn.5 ["premises" included "outbuildings and appurtenances in addition to a main building when the various places searched are part of a single integral unit"]; *People* v. *Grossman* (1971) 19 Cal.App.3d 8, 12 ["premises" authorized search of a cabinet in an adjacent carport]; *People* v. *Weagley* (1990) 218 Cal.App.3d 569, 573 ["premises" authorized a search of a mailbox]; *People* v. *McNabb* (1991) 228 Cal.App.3d 462, 469 ["premises . . . has been held to embrace both the house and the garage"].

[37] (9th Cir. 2000) 226 F.3d 1031.

[38] See *People* v. *Govea* (1965) 235 Cal.App.2d 284, 300 ["A warrant directing a search of an apartment house or other dwelling house containing multiple living units is void unless issued on probable cause for searching each apartment or living unit or for believing that the entire building is a single living unit."]; *People* v. *MacAvoy* (1984) 162 Cal.App.3d 746, 754-55 ["the warrant would allow the officers to search every part of the fraternity house [but] probable cause existed to search appellant's room"].

the premises either by a designation of the area or other physical characteristics of such part or by a designation of its occupants."[39]

Note that a single-family residence does not turn into a multiple-occupant residence merely because the occupants had separate bedrooms; e.g., roommates. For example, in *People* v. *Gorg*[40] officers in Berkeley developed probable cause to believe that a man named Fontaine was selling marijuana out of a three-bedroom flat that he shared with Gorg and another man. So they obtained a warrant to search the flat and, in the course of the search, found marijuana in Gorg's bedroom. Gorg argued that the flat was a multiple-occupant residence and, therefore, the search of his bedroom was unlawful because the warrant did not restrict the search to Fontaine's bedroom and the common areas. The court disagreed, explaining:

> [The warrant] was issued for a search of the lower flat in question, and Fontaine was named as the one occupying the named premises. Actually three people lived in this flat, sharing the living room, kitchen, bath and halls. The three bedrooms opened on these rooms and were not locked. All of the rooms constituted one living unit.

BUSINESSES: If the business occupies the entire building, and if there is probable cause to search the entire business, the warrant can simply identify the building by its street address and direct officers to search the entire structure. But, as with multiple-occupant residences, a more restrictive description will be required if probable cause is limited to a certain area or room.[41]

DETACHED COMMERCIAL STRUCTURES: If officers also have probable cause to search structures that are ancillary to the main business office, the affiant should ordinarily describe each building for which probable cause exists. This is because the relationship between the various structures on commercial property is often ambiguous,

VEHICLES: It is sufficient to identify vehicles by their license number and a brief description. If the license number is unknown or if there are no plates on the vehicle, it may be identified by its VIN number, or its location and a detailed description.[42] A warrant may authorize a search of "all vehicles" on the premises, but only if there is probable cause to believe that at least some of the listed evidence will be found in *each* vehicle.[43]

PEOPLE A warrant to search a person must identify the person by name, physical description, or both.[44] If necessary, a photograph of the person may be attached to the warrant; e.g., DMV or booking photo.[45] A warrant may authorize a search of "all residents" of the premises or everyone who is present when officers arrive, but only in those rare cases in which the affidavit establishes probable cause to believe that at least some of the listed evidence will be found on *every* resident or occupant.[46]

COMPUTERS: If officers have probable cause to search a home or business for information, data, or graphics, it is usually reasonable to believe that some or all of it has been stored in a computer or external storage device. But officers will seldom know what type of computer or device they will find; and the only way they can learn is to obtain a warrant. A classic Catch-22 situation.

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[39] (1965) 234 Cal.App.2d 136, 148. Edited.

[40] (1958) 157 Cal.App.2d 515. ALSO SEE *People* v. *Superior Court (Meyers)* (1979) 25 Cal.3d 67, 79 [house occupied by several individuals]; *Hemler* v. *Superior Court* (1975) 44 Cal.App.3d 430, 433 ["At most, the evidence shows that three individuals lived in the residence, sharing the living room, bathroom, kitchen and hallways, and that defendant's bedroom opened onto the other rooms and was not locked."]; *People* v. *Govea* (1965) 235 Cal.App.2d 285, 300-301 ["[The evidence disclosed] that Mendoza used the front of the house as a bedroom and that defendant Govea and his family, at least on the night of the search, were using a bedroom. This does not show that the premises were not a single living unit."].

[41] See *Dalia* v. *United States* (1979) 441 U.S. 238, 242, fn.4.

[42] See *People* v. *Dumas* (1973) 9 Cal.3d 871, 881 [the warrant "must, at the very least, include some explicit description of a particular vehicle or of a place where a vehicle is later found"]; *People* v. *McNabb* (1991) 228 Cal.App.3d 462, 469 [warrant was sufficient when it described the car as a gold Cadillac with a black landau top and no license plates, and that it was parked in certain driveway].

[43] See *People* v. *Sanchez* (1981) 116 Cal.App.3d 720, 727-28; *U.S.* v. *Hillyard* (9th Cir. 1982) 677 F.2d 1336, 1341.

[44] See Pen. Code § 1525 [affidavit must contain the name or description of the person]; *People* v. *Tenney* (1972) 25 Cal.App.3d 16, 22-23 [warrant to search "unidentified persons" was not sufficiently particular].

[45] See *People* v. *Superior Court (Fish)* (1980) 101 Cal.App.3d 218, 220 [CDL was attached to warrant].

[46] See *Ybarra* v. *Illinois* (1979) 444 U.S. 85, 91; *People* v. *Tenney* (1972) 25 Cal.App.3d 16, 22-23.

Some courts have resolved this dilemma by ruling that authorization to search all computer devices on the premises will be implied if the warrant authorized a search for data that could have been stored digitally.[47] But the better practice is to seek express authorization by particularly describing the data or graphics to be seized, then adding language that authorizes a search for it in any form in which it could have been stored; e.g., *"[After particularly describing the data to be seized] whether stored on paper or on electronic or magnetic media such as internal or external hard drives, diskettes, backup tapes, compact disks (CDs), digital video disks (DVDs), optical discs, electronic notebooks, video tape, or audio tape."*[48]

Describing the Evidence

Next to establishing probable cause, the most difficult part of the application process is usually describing the evidence to be seized. This is because officers will not know exactly what the evidence looks like unless they had seen it. As we will discuss, however, the problem is not insurmountable, as the courts have ruled that descriptions may be based on reasonable inference.

But before going further, we must stress that providing a description of the evidence is not a mere "technical" requirement that requires little effort. On the contrary, it is crucial because a detailed description provides the courts with the necessary assurance that the officers will confine their search to places and things in which specific evidence may be found, and that they will seize only evidence for which probable cause exists. Thus, the Ninth Circuit noted that search warrants will be deemed invalid "when they are so bountiful and expansive in their language that they constitute a virtual, all-encompassing dragnet of personal papers and property to be seized at the discretion of the State."[49]

It is understandable that affiants may worry that their searches will be unduly restricted if they describe the evidence too narrowly. But this is seldom a problem because most warrants include authorization to search for small objects (such as drugs) or documents (such as indicia) that can be found almost anywhere on the premises.

The "particularity" requirement

While a warrant must contain a description of the evidence to be seized, not just any description will do. The description must be "particular," a word having such significance that it was incorporated into the Fourth Amendment to the United States Constitution.[50] Thus, the Supreme Court ruled that "a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional."[51]

What, then, constitutes a "particular" description? Although the issue "has been much litigated with seemingly disparate results,"[52] a description will ordinarily suffice if it imposes a "meaningful restriction" on the scope of the search,[53] or if it otherwise "sets out objective standards"[54] by which officers can determine what they may, and may not, search for and seize.

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[47] See *People* v. *Balint* (2006) 138 Cal.App.4th 200, 218 [a laptop "amounts to an electronic container capable of storing data similar in kind to the documents stored in an ordinary filing cabinet, and thus potentially within the scope of the warrant"]; *U.S.* v. *Giberson* (9th Cir. 2008) 527 F.3d 882, 887 [search of computer was impliedly authorized "where there was ample evidence that the documents authorized in the warrant could be found on [the] computer"].

[48] See *U.S.* v. *Banks* (9th Cir. 2009) 556 F.3d 967, 973 ["computer storage devices" was sufficient "because there was no way to know where the offending images had been stored"]; *U.S.* v. *Upham* (1st Cir. 1999) 168 F.3d 532, 535 [the description, "Any and all computer software and hardware . . . computer disks, disk drives . . . " was sufficient because it "was about the narrowest definable search and seizure reasonably likely to obtain the images"]; *U.S.* v. *Brobst* (9th Cir. 2009) 558 F.3d 982, 994 ["At the time Detective Yonkin applied for the warrant, he could not have known what storage media Brobst used."].

[49] *U.S.* v. *Bridges* (9th Cir. 2003) 344 F.3d 1010, 1016. Edited.

[50] See U.S. Const. Amend. IV. ALSO SEE Pen. Code § 1525.

[51] *Massachusetts* v. *Sheppard* (1984) 468 U.S. 981, 988, n.5.

[52] *U.S.* v. *Upham* (1st Cir. 1999) 168 F.3d 532, 535.

[53] See *Burrows* v. *Superior Court* (1974) 13 Cal.3d 238, 249 [the warrant must impose "a meaningful restriction upon the objects to be seized"]; *People* v. *Tockgo* (1983) 145 Cal.App.3d 635, 640 ["meaningful restriction" is required].

[54] *U.S.* v. *Lacy* (9th Cir. 1997) 119 F.3d 742, 746, fn.7. ALSO SEE *Davis* v. *Gracey* (10th Cir. 1997) 111 F.3d 1472, 1478 ["[We ask] did the warrant tell the officers how to separate the items subject to seizure from irrelevant items"].

Later, we will discuss specific applications of this test. But first, it is necessary to cover the principles that the courts apply in determining whether a description was sufficiently particular, and also some practices that have tended to cause problems.

PRACTICAL—NOT ELABORATE—DESCRIPTIONS: While some courts in the past elevated form over substance and required technical precision and elaborate specificity,[55] that has changed. Today, as the Court of Appeal observed, "the requirement that a search warrant describe its objects with particularity is a standard of 'practical accuracy' rather than a hypertechnical one."[56]

Consequently, a description will suffice if it contains just the amount of information that is reasonably necessary to identify the evidence to be seized.[57] Or, in the words of the First Circuit, the warrant must provide "clear, simple direction":

> Specificity does not lie in writing words that deny all unintended logical possibilities. Rather, it lies in a combination of language and context, which together permit the communication of clear, simple direction.[58]

TOTALITY OF DESCRIPTIVE INFORMATION: In determining whether a description was sufficiently particular, the courts will consider the descriptive language as a whole, meaning they will not isolate individual words and ignore the context in which they appeared.[59] As the Supreme Court observed, "A word is known by the company it keeps."[60]

REASONABLY AVAILABLE INFORMATION: As noted, it happens that, despite their best efforts, officers are simply unable to provide a detailed description of the evidence. In these situations, a description will ordinarily suffice if the affiant provided as much descriptive information as he had or could have obtained with reasonable effort (including, as we will discuss later, as much descriptive information as he could reasonably infer).[61] Thus, the Eleventh Circuit pointed out the following in *U.S.* v. *Santarelli*:

> There are circumstances in which the law enforcement officer applying for a warrant cannot give an exact description of the materials to be seized even though he has probable cause to believe that such materials exist and that they are being used in the commission of a crime. In these situations we have upheld warrants when the description is as specific as the circumstances and the nature of the activity under investigation permit.[62]

This also means, however, that a warrant is apt to be invalidated if officers could have—but did not—provide a particular description. For example, in

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[55] See, for example, *People* v. *Frank* (1985) 38 Cal.3d 711, 726.

[56] *People* v. *Superior Court* (*Nasmeh)* (2007) 151 Cal.App.4th 85, 95.

[57] See *United States* v. *Ventresca* (1965) 380 U.S. 102, 108 [interpret in "a commonsense and realistic fashion"]; *People* v. *Amador* (2000) 24 Cal.4th 387, 392 ["Complete precision in describing the place to be searched is not required."]; *People* v. *Minder* (1996) 46 Cal.App.4th 1784, 1788 ["Technical requirements of elaborate specificity have no proper place in this area."]; *U.S.* v. *Meek* (9th Cir. 2004) 366 F.3d 705, 716 ["The prohibition of general searches is not to be confused with a demand for precise *ex ante* knowledge of the location and content of evidence related to the suspected violation."]; *U.S.* v. *Williams* (4th Cir. 2010) 592 F.3d 511, 519 [the description "should be read with a commonsense and realistic approach, to avoid turning a search warrant into a constitutional straight jacket."]; *U.S.* v. *Otero* (10th Cir. 2009) 563 F.3d 1127, 1132 ["A warrant need not necessarily survive a hypertechnical sentence diagramming and comply with the best practices of *Strunk & White* to satisfy the particularity requirement."].

[58] *U.S.* v. *Gendron* (1st Cir. 1994) 18 F.3d 955, 966. **NOTE**: In *Marron* v. *United States* (1927) 275 U.S. 192, 196 the U.S. Supreme Court seemed to set an impossibly high standard for search warrant descriptions when it said, "As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." Over the years, however, most courts have interpreted this language in a practical manner. See, for example, *People* v. *Rogers* (1986) 187 Cal.App.3d 1001, 1007 ["but few warrants could pass [the *Marron* test] and thus it is more accurate to say that the warrant must be sufficiently definite so that the officer executing it can identify the property sought with reasonable certainty."]; *U.S.* v. *Wuagneux* (11th Cir. 1982) 683 F.2d 1343, 1349, fn.4 ["[if *Marron*] were construed as a literal command, no search would be possible"].

[59] See *Andresen* v. *Maryland* (1976) 427 U.S. 463, 480; *People* v. *Schilling* (1987) 188 Cal.App.3d 1021, 1031.

[60] *Gustafson* v. *Alloyd Co.* (1995) 513 U.S. 561, 562.

[61] See *Maryland* v. *Garrison* (1987) 480 U.S. 79, 85 ["The validity of the warrant must be assessed on the basis of the information that the officers disclosed, or had a duty to discover and to disclose, to the issuing Magistrate."]; *People* v. *Smith* (1986) 180 Cal.App.3d 72, 89 ["particularity" reflects "the degree of detail known by the affiant and presented to the magistrate"]; *U.S.* v. *Meek* (9th Cir. 2004) 366 F.3d 705, 716 ["The proper metric of sufficient specificity is whether it was reasonable to provide a more specific description of the items at that juncture of the investigation"].

[62] (11th Cir. 1985) 778 F.2d 609, 614.

U.S. v. *Stubbs* the court ruled that a warrant obtained by IRS agents to search the defendant's office for evidence of tax evasion was not sufficiently particular because, as the court pointed out, "The IRS knew both what the seizable documents looked like and where to find them, but this information was not contained in the warrant."[63]

Similarly, in *Center Art Galleries* v. *U.S.*[64] officers developed probable cause to search several art galleries for stolen paintings by Salvador Dali. In the course of the investigation, they obtained warrants to search the defendant's galleries for, among other things, "sales records and customer/client information, lithographic and etching plates." But the court ruled this description was insufficiently particular because it "failed to limit the warrants to items pertaining to the sale of Dali artwork." This failure, said the court, was especially egregious because "the government had the means to identify accounts which may have involved Dali artwork. The lead government investigator was aware that a special card was created for the file of all clients who were interested in Dali artwork."

Problem areas

Before we discuss the ways in which officers can provide a particular description, it is necessary to address some issues and practices that have tended to cause problems or confusion.

BOILERPLATE: In the context of search warrants, the term "boilerplate" means a list—usually lengthy—of descriptions copied verbatim from other warrants and affidavits.[65] Because boilerplate is now commonly stored in computer files, it now takes only a few clicks or keystrokes to provide *pages* of boilerplated descriptions—much of it worthless, if not potentially destructive.

The problem with boilerplate is that, unless it has been carefully edited, the descriptions it contains often have little or no resemblance to the evidence for which there is probable cause. Thus, warrants that authorize searches for boilerplated evidence often contain overbroad descriptions that may render the warrant invalid unless, as discussed below, the severance rule applies. This does not mean that officers should never utilize boilerplate. As we will discuss later, it may properly be used to provide descriptions of evidence that can only be described by inference.

TRAINING AND EXPERIENCE: Like boilerplate, statements by affiants of their training and experience tend to be too lengthy and are frequently unnecessary. In the context of describing evidence, they are usually relevant only if the description was based on an inference that, in turn, was based on the affiant's training and experience; e.g., a description of drug paraphernalia based on the affiant's knowledge of the common instrumentalities used by drug users and traffickers. (For a discussion of training and experience as it pertains to establishing probable cause, see "The Affidavit," above.)

"AMONG OTHER THINGS": Affiants will sometimes provide a particular description of some evidence, then add some language that authorizes a search for similar things that have not been described; e.g., "including, but not limited to," "among other things," "etc." Such indefinite language—sometimes called a "wildcard"[66] or a "general tail"[67]—may render a warrant insufficiently particular if, when considered in context, it authorizes an unrestricted search.

For example, a warrant that simply authorizes a search for "Heroin, among other things" is insufficiently particular (and also overbroad) because it contains no restriction on what officers may search for and seize. Thus, in *Aday* v. *Superior Court*[68] the California Supreme Court invalidated a warrant to search for "all other records and paraphernalia" connected with the defendants' business because,

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[63] (9th Cir. 1989) 873 F.2d 210, 211. ALSO SEE *People* v. *Tockgo* (1983) 145 Cal.App.3d 635; *Millender* v. *County of Los Angeles* (9th Cir. 2010) 620 F.3d 1016.

[64] (9th Cir. 1989) 875 F.2d 747.

[65] See *People* v. *Frank* (1985) 38 Cal.3d 711, 722 ["boilerplate lists [are] routinely incorporated into the warrant without regard to the evidence"]; *U.S.* v. *Ribeiro* (1st Cir. 2005) 397 F.3d 43, 51 [boilerplate is "stereotyped or formulaic writing"]; *Cassady* v. *Goering* (10th Cir. 2009) 567 F.3d 628, 636, fn.5 [the affiant used "stock language" that "could be applied to almost any crime"].

[66] *In re Search Warrant Dated July 4, 1977* (D.C. Cir. 1977) 572 F.2d 321, 329.

[67] See *U.S.* v. *Abrams* (1st Cir. 1980) 615 F.2d 541, 547.

[68] (1961) 55 Cal.2d 789.

said the court, "[t]he various categories, when taken together, were so sweeping as to include virtually all personal business property on the premises and placed no meaningful restriction on the things to be seized."

Similarly, in *U.S.* v. *Bridges*[69] the affiant described the evidence to be seized as all records relating to the suspect's clients and victims, "including but not limited to" certain records that were particularly listed in the warrant. But because this language effectively authorized a search for "all records"—regardless of whether they were particularly described—the court ruled the warrant was invalid. As it pointed out, "[I]f the scope of the warrant is not limited to the specific records listed on the warrant, it is unclear what is its precise scope or what exactly it is that the agents are expected to be looking for during the search."

This does not mean that wildcards are forbidden. In fact, there are three situations in which they are regularly used without serious objection. First, there are situations in which the evidence is limited to fruits or instrumentalities of a certain crime, and the wildcard could be interpreted as merely providing descriptive examples of seizable evidence pertaining to that crime.[70] For instance, in *Toubus* v. *Superior Court*[71] a warrant authorized a search for "any papers or writings, records that evidence dealings in controlled substances, including, but not limited to address books, ledgers, lists, notebooks, etc." In ruling that this language did not render the warrant insufficiently particular, the court pointed out that it permitted a seizure of only those things pertaining to "dealings in controlled substances."

Second, a wildcard may be appropriate when a warrant authorized a search of a crime scene, but officers could not be expected to know exactly what types of evidence pertaining to the crime they would find. For example, in *People* v. *Schilling*[72] the body of a woman was discovered in the Angeles National Forest. Having developed probable cause to believe that Schilling had shot and killed the woman in his home, a homicide detective with the Los Angeles County Sheriff's Department obtained a warrant to search Schilling's house for, among other things, "scientific evidence, including but not limited to fingerprints, powder burns, blood, blood spatters, photographs, measurements, bullet holes, hair, fibers." On appeal, Schilling argued that the "but not limited to" language rendered the warrant insufficiently particular, but the court disagreed, pointing out that the warrant "simply authorized seizure of additional scientific evidence" pertaining to the murder that the affiant "was unable to detail."

Third, as we will discuss later, wildcards are commonly used to provide examples of the types of indicia that officers may seize.

THE SEVERANCE EXCEPTION: If the affiant fails to satisfactorily describe some, but not all, of the listed evidence, the courts will ordinarily suppress only those items that were inadequately described.[73] For example, if items A and B were adequately described but item C was not, it is likely that only item C would be suppressed.

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[69] (9th Cir. 2003) 344 F.3d 1010. ALSO SEE *Roman Catholic Archbishop of Los Angeles* v. *Superior Court* (2005) 131 Cal.App.4th 417, 460 ["But the crucial defect in *Bridges* was that the search warrant nowhere stated what criminal activity was being investigated."].

[70] See *People* v. *Balint* (2006) 138 Cal.App.4th 200, 207 ["the itemized list following the word 'including' may reasonably be interpreted as nonexclusive and merely descriptive examples of items likely to show who occupied the residence"]; *U.S.* v. *Riley* (2nd Cir. 1990) 906 F.2d 841, 844 ["In upholding broadly worded categories of items available for seizure, we have noted that the language of a warrant is to be construed in light of an illustrative list of seizable items."]; *U.S.* v. *Washington* (9th Cir. 1986) 797 F.2d 1461, 1472; *U.S.* v. *Abrams* (1st Cir. 1980) 615 F.2d 541, 547 ["the general 'tail' of the search warrant will be construed so as not to defeat the 'particularity' of the main body of the warrant."]; *Roman Catholic Archbishop of Los Angeles* v. *Superior Court* (2005) 131 Cal.App.4th 417, 460 [subpoena for documents including "but are not limited to" was not insufficiently particular because it was linked to language indicating "what criminal activity was being investigated"]. ALSO SEE *Andresen* v. *Maryland* (1976) 427 U.S. 463, 479-80 [Warrant: "[listing of documents pertaining to Lot 13T] together with other fruits, instrumentalities and evidence of crime at this time unknown." Court: "[T]he challenged phrase must be read as authorizing only the search for and seizure of evidence relating to 'the crime of false pretenses with respect to Lot 13T'"].

[71] (1981) 114 Cal.App.3d 378.

[72] (1987) 188 Cal.App.3d 1021, 1031.

[73] See *People* v. *Superior Court (Marcil)* (1972) 27 Cal.App.3d 404, 415; *U.S.* v. *Gomez-Soto* (9th Cir. 1984) 723 F.2d 649, 654; *U.S.* v. *Christine* (3rd Cir. 1982) 687 F.2d 749759 ["redaction is an efficacious and constitutionally sound practice, and should be utilized in order to avoid unnecessary social costs"].

The severance exception will not, however, be applied if the inadequately-described evidence so predominated the warrant that it effectively authorized a general search. As the Ninth Circuit observed, "[S]everance is not available when the valid portion of the warrant is a relatively insignificant part of an otherwise invalid search."[74] For example, in *Burrows* v. *Superior Court* the court ruled that, "[a]ssuming arguendo that the warrant is severable, the direction to seize 'any file or documents' relating to the [suspects] is too broad to comport with constitutional requirements."[75] (Note that severance may also be appropriate when the affidavit fails to establish probable cause to search for some—but not all—of the listed evidence.[76])

Basics of providing particular descriptions

Although the courts understand that officers may sometimes be unable to provide much descriptive information, they expect them to utilize all reasonably available means to limit, at least to some extent, the scope of their warranted searches. The following are the most common ways in which this is done.

AVOID GENERAL TERMS: The use of precise language to describe evidence is the mark of a particular description. The following are examples:

- illegal drugs consisting of heroin and crack cocaine[77]
- records relating to loan sharking and gambling, including pay and collection sheets, lists of loan customers, loan accounts, line sheets, bet slips, and tally sheets[78]
- blue plaid long-sleeved flannel shirt[79]
- fingerprints, powder burns, blood, blood spatters, bullet holes[80]
- vehicles with altered or defaced identification numbers[81]
- a 14-inch security hole opener cutter attached to a hole opener[82]
- oil and water drill bits in sizes from four inches to 18 inches, having altered or defaced serial numbers[83]

In contrast, the following descriptions were plainly inadequate:

- stolen property[84]
- all other property owned by [the theft victim].[85]
- any and all illegal contraband[86]
- certain personal property used as a means of committing grand larceny[87]
- all business records and paraphernalia[88]
- other evidence[89]

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[74] *In re Grand Jury Subpoenas* (9th Cir. 1991) 926 F.2d 847, 858. ALSO SEE *Aday* v. *Superior Court* (1961) 55 Cal.2d 789, 797; *U.S.* v. *Sears* (9th Cir. 2005) 411 F.3d 1124, 1130 ["We also take into account the relative size of the valid and invalid portions of the warrant in determining whether severance is appropriate."]; *Cassady* v. *Goering* (10th Cir. 2009) 567 F.3d 628, 641 ["Here, the invalid portions of the warrant are sufficiently broad and invasive so as to contaminate the whole warrant."]; *U.S.* v. *Sells* (10th Cir. 2006) 463 F.3d 1148, 1158 ["Total suppression may still be required even where a part of the warrant is valid (and distinguishable) if the invalid portions so predominate the warrant that the warrant in essence authorizes a general [search]."].

[75] (1974) 13 Cal.3d 238, 250.

[76] See, for example, *People* v. *Joubert* (1983) 140 Cal.App.3d 946, 952-53; *U.S.* v. *SDI Future Health, Inc.* (9th Cir. 2009) 568 F.3d 684, 707].

[77] See *People* v. *Superior Court (Marcil)* (1972) 27 Cal.App.3d 404, 415; *People* v. *Walker* (1967) 250 Cal.App.2d 214, 216, fn.1.

[78] See *U.S.* v. *Spilotro* (9th Cir. 1986) 800 F.2d 959, 965.

[79] *People* v. *Kraft* (2000) 23 Cal.4th 978, 1049.

[80] See *People* v. *Schilling* (1987) 188 Cal.App.3d 1021, 1030-31.

[81] See *U.S.* v. *Hillyard* (9th Cir. 1982) 677 F.2d 1336, 1341.

[82] See *People* v. *Superior Court (Williams)* (1978) 77 Cal.App.3d 69, 76-77. ALSO SEE *People* v. *Lowery* (1983) 145 Cal.App.3d 902, 906 ["Synertek 2716 integrated circuits further described as rectangular objects approximately 1-¼" by ¾", having 24 gold colored pins extending downward . . . "].

[83] See *People* v. *Superior Court (Williams)* (1978) 77 Cal.App.3d 69, 78.

[84] See *Lockridge* v. *Superior Court* (1969) 275 Cal.App.2d 612, 625; *Thompson* v. *Superior Court* (1977) 70 Cal.App.3d 101, 108; *People* v. *Superior Court (Williams)* (1978) 77 Cal.App.3d 69, 77 ["Without a specific means of identification, the police had no means of distinguishing legitimate goods from stolen goods."].

[85] See *People* v. *Smith* (1986) 180 Cal.App.3d 72, 89.

[86] See *Cassady* v. *Goering* (10th Cir. 2009) 567 F.3d 628, 635

[87] See *People* v. *Mayen* (1922) 188 Cal. 237, 242.

[88] See *Aday* v. *Superior Court* (1961) 55 Cal.2d 789, 795-96.

[89] See *Stern* v. *Superior Court* (1946) 76 Cal.App.2d 772, 784.

DESCRIBE BY LOCATION: If officers know exactly where on the premises the evidence is located (e.g., in a certain room, closet, cabinet, file, or box), this information may be included in the description.[90] But unless officers are certain that the evidence will be found only in that location when the warrant is executed, the affiant should explain that this information is being provided only to assist in the identification of evidence, not to restrict the scope of the search.

UTILIZING ATTACHMENTS: One of the most efficient means of inserting information into affidavits and warrants—whether to establish probable cause or to provide a description—is to incorporate documents that already contain that information; e.g., witness statements, prior affidavits, police reports, autopsy reports, rap sheets, business records, maps, photographs. As the court observed in *State* v. *Wade*, incorporation "is a recognized method of making one document of any kind become a part of another separate document without actually copying it at length in the other."[91]

An attachment will not, however, be deemed incorporated merely because it was submitted to the judge along with the affidavit and search warrant. Instead, the law imposes three requirements that are designed to eliminate any confusion as to the status of supplementary documents:

(1) **IDENTIFY THE ATTACHMENT**: The affiant must clearly identify the document that is being incorporated into the warrant or affidavit.[92] This is typically accomplished by assigning it an exhibit number or letter, then writing that number or letter in a conspicuous place at the top of the attachment.

(2) **INCORPORATE BY REFERENCE**: The affiant must then insert into the search warrant or affidavit "appropriate words of reference"[93] or other "clear words"[94] that give notice to the judge that the identified document is being incorporated.[95] As the Third Circuit explained in *United States* v. *Tracey,* "Merely referencing the attached affidavit somewhere in the warrant without expressly incorporating it does not suffice."[96] Although there are no "magic" or required words of incorporation,[97] it is usually best to use the direct approach; e.g., *"The police report containing the list of stolen property, identified as Exhibit 4, is attached hereto and incorporated by reference."*[98]

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[90] See *People* v. *McNabb* (1991) 228 Cal.App.3d 462, 469; *In re Search Warrant Dated July 4, 1977* (D.C. Cir. 1978) 572 F.2d 321, 324. COMPARE *U.S.* v. *Kow* (9th Cir. 1995) 58 F.3d 423, 427 [the affidavit summarized in detail the various locations within the business where the evidence was located, "this information was excluded from the warrant"].

[91] (Fla. App. 1989) 544 So.2d 1028, 1030. ALSO SEE *Baranski* v. *Fifteen Unknown ATF Agents* (6th Cir. 2006) 452 F.3d 433, 440 ["[A]ll of the courts of appeals (save the Federal Circuit) have permitted warrants to cross-reference supporting affidavits and to satisfy the particularity requirement through an incorporated and attached document—at least when it comes to the validity of the warrant at the time of issuance."].

[92] See *People* v. *Egan* (1983) 141 Cal.App.3d 798, 803 ["It is necessary that the incorporated document be clearly identified."].

[93] *Groh* v. *Ramirez* (2004) 540 U.S. 551, 557-58 ["Indeed, most Courts of Appeals have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant." Citations omitted.]. ALSO SEE *U.S.* v. *SDI Future Health, Inc.* (9th Cir. 2009) 568 F.3d 684, 699 ["A warrant expressly incorporates an affidavit when it uses suitable words of reference."]; *U.S.* v. *Vesikuru* (9th Cir. 2002) 314 F.3d 1116, 1121 ["Our case law requires only suitable words of incorporation"].

[94] See *U.S.* v. *Tracey* (3rd Cir. 2010) 597 F.3d 140, 148 ["our Court requires clear words of incorporation"].

[95] See *Groh* v. *Ramirez* (2004) 540 U.S. 551, 557 ["most Courts of Appeals have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant."]; *People* v. *Egan* (1983) 141 Cal.App.3d 798, 803 ["Incorporation by reference occurs when one complete document expressly refers to and embodies another document."].

[96] (3rd Cir. 2010) 597 F.3d 140, 149.

[97] *U.S.* v. *Vesikuru* (9th Cir. 2002) 314 F.3d 1116, 1121.

[98] BUT ALSO SEE *U.S.* v. *Tracey* (3rd Cir. 2010) 597 F.3d 140, 148 ["Other Courts of Appeals have accepted phrases such as 'attached affidavit which is incorporated herein,' 'see attached affidavit,' and 'described in the affidavit,' as suitable words of incorporation." Citations omitted.]; *Nunes* v. *Superior Court* (1980) 100 Cal.App.3d 915, 933 [sufficient notice was given when the warrant authorized a search for "stolen property as indicated in the Affidavit and attached Police report"]; *Marks* v. *Clarke* (9th Cir. 1996) 102 F.3d 1012, 1030-331 ["see attached lists"]; *U.S.* v. *Waker* (2nd Cir. 2008) 534 F.3d 168, 172, fn.2 ["see attached Affidavit as to Items to be Seized"]; *Rodriguez* v. *Beninato* (1st Cir. 2006) 469 F.3d 1, 5 ["See attached affidavit"]; *Baranski* v. *Fifteen Unknown ATF Agents* (6th Cir. 2006) 452 F.3d 433, 439-40 ["See Attached Affidavit"].

(3) **PHYSICAL ATTACHMENT**: If the attachment is being utilized solely to establish probable cause in the affidavit, the courts do not require that it be physically attached to the affidavit[99] (but it's a good practice). If the attachment is used to describe the place to be searched or the evidence to be seized, the United States Supreme Court indicated in *Groh* v. *Ramirez* that the attachment need only be "present" when the warrant is served; i.e., physical attachment is not required.[100] But because some pre-*Groh* cases in California required physical attachment,[101] it is recommended that officers avoid this issue by affixing to the warrant any attachments containing descriptive information.

Two other things about attachments to warrants and affidavits. First, they must be legible.[102] Second, because judges are required to read all attachments to affidavits,[103] officers should not incorporate lengthy attachments that contain only a small amount of relevant information. Instead, this information should be extracted from the attachment or summarized in the affidavit.

SEARCH PROTOCOLS: If the affiant is unable to particularly describe the evidence to be seized, but there is a procedure that will enable the search team to identify it after they enter the premises, it may be deemed sufficiently described if the search warrant sets forth a procedure—commonly known as a "protocol"—by which officers could make the determination. For example, if officers want to look for stolen property that may have been intermingled with similar looking items, they may seek authorization to employ a protocol that would permit them to seize items that conform to certain criteria; e.g., a particular VIN or serial number.[104]

One of the most common uses for protocols today is in computer searches when officers expect to find seizable files intermingled with non-seizable files. In such cases, they may seek authorization to conduct the search pursuant to a protocol that sets forth the manner in which the search team can distinguish between the two. For example, in one case the protocol required "an analysis of the file structure, next looking for suspicious file folders, then looking for files and types of files most likely to contain the objects of the search by doing keyword searches."[105]

Having covered the general principles pertaining to descriptions of evidence, we will now look at the ways in which evidence may be described when the description is based on direct observation or inference. We will also examine warrants to search for entire classes of items and documents, including documents stored in computers.

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[99] See *Baranski* v. *Fifteen Unknown ATF Agents* (6th Cir. 2006) 452 F.3d 433, 444.

[100] (2004) 540 U.S. 551, 560. ALSO SEE *Millender* v. *County of Los Angeles* (9th Cir. 2010) 620 F.3d 1016, 1026 [the affidavit must be either "attached physically to the warrant or at least accompan[y] the warrant"]; *U.S.* v. *SDI Future Health, Inc.* (9th Cir. 2009) 568 F.3d 684, 699 ["We consider an affidavit to be part of a warrant, and therefore potentially curative of any defects the affidavit either is attached physically to the warrant or at least accompanies the warrant while agents execute the search."]; *Baranski* v. *U.S.* (8th Cir. 2008) 515 F.3d 857, 861 [there is no "bright line rule that an incorporated affidavit must accompany the warrant"]; *U.S.* v. *Towne* (9th Cir. 1993) 997 F.2d 537, 547 ["[I]n no case have we ever held that an affidavit that was expressly incorporated by reference and that did accompany the warrant when the search was authorized and carried out could not be treated as part of the warrant because it was not physically attached to it."].

[101] See, for example, *People* v. *Tockgo* (1983) 145 Cal.App.3d 635, 643 ["Absent such physical and textual incorporation, the affidavit may not be used to narrow and sustain the terms of the warrant."]; *People* v. *MacAvoy* (1984) 162 Cal.App.3d 746, 755 ["The requirement that the affidavit be incorporated into and attached to the warrant insures that both the searchers and those threatened with search are informed of the scope of the searcher's authority."].

[102] See *Kaylor* v. *Superior Court* (1980) 108 Cal.App.3d 451, 457.

[103] See *Kaylor* v. *Superior Court* (1980) 108 Cal.App.3d 451, 457 ["[A]ll the writings offered in support [of the warrant] must be read."].

[104] See *U.S.* v. *Hillyard* (9th Cir. 1982) 677 F.2d 1336, 1341 [warrant to search wrecking yard for stolen cars contained authorization to implement "procedures to differentiate stolen vehicles from those legally owned"]. COMPARE *U.S.* v. *Klein* (1st Cir. 1977) 565 F.2d 183, 188 ["[The government] failed to establish that there was a large collection of contraband in defendant's store and it failed to explain the method by which it intended to differentiate that contraband from the rest of defendant's inventory."]; *U.S.* v. *Spilotro* (9th Cir. 1986) 800 F.2d 959, 965 ["the warrant provides no basis for distinguishing [the stolen] diamonds from others the government could expect to find on the premises"].

[105] *U.S.* v. *Burgess* (10th Cir. 2009) 576 F.3d 1078, 1094. ALSO SEE *U.S.* v. *Hill* (9th Cir. 2006) 459 F.3d 966, 978 ["[W]e look favorably upon the inclusion of a search protocol; but its absence is not fatal."]; *U.S.* v. *Cartier* (8th Cir. 2008) 543 F.3d 442, 447 [court notes "there may be times that a [computer] search methodology or strategy may be useful or necessary"].

Description based on direct observation

Officers will sometimes seek a warrant to search for evidence that an officer, victim, or witness had previously observed, such as property that the victim of a burglary had reported stolen, a handgun or clothing that was seen in a surveillance video, or drug lab equipment that an undercover officer or informant had seen when negotiating a drug purchase. Describing this type of evidence is, of course, much easier than describing evidence whose appearance can only be based on inference. But, as discussed earlier, because the affiants in such cases have the ability to provide a particular description, the courts will readily invalidate a warrant if they fail to do so.

For example, in *Millender* v. *County of Los Angeles*[106] a woman notified sheriff's deputies that her boyfriend, Jerry Bowen, had tried to shoot her during an argument. Although the woman described the weapon as a "black sawed-off shotgun with a pistol grip," and even though she provided deputies with a photograph of the weapon, they obtained a warrant to search Bowen's house for the following: *"All handguns, rifles, or shotguns of any caliber, or any firearms capable of firing ammunition."* In ruling that this language rendered the warrant insufficiently particular, the court said:

> [W]here the police do have information more specifically describing the evidence or contraband, a warrant authorizing search and seizure of a broader class of items may be invalid.

Another example is found in *People* v. *Tockgo*[107] where officers in Los Angeles developed probable cause to believe that boxes containing stolen cigarettes were located in a certain liquor store. They had also learned from the victim that certain invoice numbers were printed on each box, that each box contained a tax stamp, and that the cigarette cartons were sealed with a unique colored glue. Although this information was contained in the affidavit, it was omitted from the warrant, which simply described the evidence to be seized as "cigarettes, cellophane wrappers, cigarette cartons." In ruling that this description was insufficient, the court pointed out that "[t]he vice of this uncertainty is particularly objectionable because the procuring officer's affidavit provided a ready means for effective description and identification of the particular cigarette packages to be seized."

Descriptions based on inference

In many cases, an affiant cannot provide a particular description of evidence inside a home or business because, for example, no officer or informant had been inside or because the evidence was hidden. As we will now discuss, in situations such as these officers may ordinarily provide a description that, based on their training and experience, can be reasonably inferred.

FRUITS AND INSTRUMENTALITIES OF A CRIME: Descriptions are commonly based on inference when officers have probable cause to believe that the premises are being used to carry out a certain type of criminal activity and, thus, they have probable cause to believe that the premises contain the common fruits and instrumentalities of such a crime.[108] For example, in *United States* v. *Holzman*[109] officers in Scottsdale, Arizona arrested Holzman and Walsh for using and possessing stolen credit cards. Having probable cause to believe they were co-conspirators in an identify theft operation, but not knowing exactly what fruits and instrumentalities they possessed, an officer obtained a warrant to search their hotel rooms for, among other things, "All credit

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[106] (9th Cir. 2010) 620 F.3d 1016. ALSO SEE *Bay* v. *Superior Court* (1992) 7 Cal.App.4th 1022, 1027 [court notes that a warrant to search for "all chairs" on the premises would lack particularity if officers only had probable cause to search for a "brown leather-covered" one]; *Lockridge* v. *Superior Court* (1969) 275 Cal.App.2d 612.

[107] (1983) 145 Cal.App.3d 635.

[108] See *Andresen* v. *Maryland* (1976) 427 U.S. 463, 480, fn.10; *U.S.* v. *Spilotro* (9th Cir. 1986) 800 F.2d 959, 964 [the affiant "could have narrowed most of the descriptions in the warrant" by "describing in greater detail the items one commonly expects to find on premises used for the criminal activities in question"]; *U.S.* v. *Gomez-Soto* (9th Cir. 1984) 723 F.2d 649, 654 [Since the DEA sought articles it claims are typically found in the possession of narcotics traffickers, the warrant could have named or described those particular articles."]; *U.S.* v. *Santarelli* (11th Cir. 1985) 778 F.2d 609 [the officers knew that loan sharks ordinarily kept business records such as loans outstanding, interest due, and payments received]; *U.S.* v. *Scharfman* (2nd Cir. 1971) 448 F.2d 1352, 1354 [reasonable to believe that "books and records would be utilized as instrumentalities in connection with the crime of disposing of hundreds of fur garments through a façade of legitimacy"].

[109] (9th Cir. 1989) 871 F.2d 1496.

cards under miscellaneous issuance names and account numbers" and "credit card drafts under miscellaneous issuance and names." In ruling that these descriptions were sufficiently particular, the court said, "In the absence of complete and detailed knowledge on the part of the police, the magistrate was justified in authorizing the search for these generic classes of items."

Similarly, if the affiant has probable cause to believe that the suspect is selling drugs out of his house, a general description of typical sales paraphernalia and instrumentalities ought to suffice; e.g., items commonly used to ingest, weigh, store, and package drugs; documents identifying buyers and sellers; drug transaction records.[110]

Another example is found in cases where officers are seeking a warrant to search for evidence of sexual exploitation of a child. Here, a description might include such things as sexually explicit material or paraphernalia used to lower the inhibition of children, sex toys, photography equipment, address ledgers, journals, computer equipment, digital and magnetic storage devices.[111] Finally, a warrant to search for evidence of loan sharking or gambling might authorize a search for pay and collection sheets, lists of loan customers, loan accounts and telephone numbers, line sheets, and bet slips.[112]

EVIDENCE AT CRIME SCENES: At crime scenes, officers will often have probable cause to believe that certain evidence will be found on the premises depending on the nature and freshness of the crime. But because they cannot know exactly what's there, the courts permit them to describe the evidence in terms of what is commonly found at the scenes of such crimes.

For example, in *People* v. *Schilling,*[113] discussed earlier, an LASD homicide detective developed probable cause to believe that Schilling had shot and killed an out-call masseuse whose body had been dumped in a remote area. Because the woman had had an appointment to meet with Schilling at his home shortly before the approximate time of death, the detective sought a warrant to search the house for evidence that, based on his training and experience, would likely be found at the scene of a shooting; namely, "scientific evidence, including but not limited to fingerprints, powder burns, blood, blood spatters, bullet holes, hairs, fibers." The search turned up incriminating evidence which, according to Schilling, should have been suppressed because the description was too general. But the court disagreed, saying it "was clearly a particularized specification of the scientific evidence that could reasonably be obtained in defendant's residence in light of the facts set forth in [the] affidavit."

Warrant to seize entire class

A warrant may authorize the seizure of every item in a broad class (e.g., all credit cards, all firearms) if there is a fair probability that all such items are evidence. For example, in *Vitali* v. *U.S.*[114] officers obtained a warrant to search Vitali's offices for all Speidel watch bands on the premises, having developed probable cause to believe that he was selling these types of watch bands from a back room. In ruling the warrant was sufficiently particular, the First Circuit said:

> Where goods are of a common nature and not unique there is no obligation to show that the ones sought (here a substantial quantity of watch bands) necessarily are the ones stolen, but only to show circumstances indicating this to be likely.

If officers have probable cause to believe that only some of the items in the class are evidence, the warrant may authorize a search for, and inspection of, all items in the class to determine which are seizable if the warrant provides them with some criteria for making this determination. As the Ninth Circuit explained:

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[110] See *People* v. *Superior Court (Marcil)* (1972) 27 Cal.App.3d 404, 415; *U.S.* v. *Burgess* (10th Cir. 2009) 576 F.3d 1078, 1091. ALSO SEE *U.S.* v. *Johnson* (8th Cir. 1976) 541 F.2d 1311, 1314 ["the term 'paraphernalia' is not unknown in criminal law having been used in several state gambling statutes, and as a result, having appeared frequently in search warrant descriptions"].

[111] See *U.S.* v. *Meek* (9th Cir. 2004) 366 F.3d 705; *U.S.* v. *Gleich* (8th Cir. 2005) 397 F.3d 608.

[112] See *U.S.* v. *Spilotro* (9th Cir. 1986) 800 F.2d 959, 965.

[113] (1987) 188 Cal.App.3d 1021.

[114] (1st Cir. 1967) 383 F.2d 121. ALSO SEE *U.S.* v. *Klein* (1st Cir. 1977) 565 F.2d 183, 188 ["the level of particularity required in a warrant may decline when there is reason to believe that a large collection of similar contraband is present on the premises"].

> When there is probable cause to believe that premises to be searched contains a class of generic items or goods, a portion of which are stolen or contraband, a search warrant may direct inspection of the entire class of all of the goods if there are objective, articulated standards for the executing officers to distinguish between property legally possessed and that which is not.[115]

An example of a case in which a warrant failed to provide officers with an adequate means of identifying seizable evidence in a class is found in *U.S.* v. *Klein.*[116] Here, officers developed probable cause to believe that the owners of a music store were selling pirated 8-track tapes. So they obtained a warrant to search the store for "8-track electronic tapes and tape cartridges which are unauthorized 'pirate' reproductions." In ruling the warrant was not sufficiently particular, the court noted that "the affidavit and the warrant failed to provide any before the fact guidance to the executing officers as to which tapes were pirate reproductions."

In cases such as *Klein* where a cursory examination of a class of items may be insufficient to identify seizable evidence, the warrant may include a protocol (discussed on page 14), describing a procedure that officers must utilize to make the determination. For example, in *U.S.* v. *Hillyard*[117] FBI agents developed probable cause to believe that stolen vehicles were being stored in a certain wrecking yard. Although the agents were able to describe some of the stolen vehicles, they had probable cause to believe there were others on the premises. So they obtained a warrant authorizing a seizure of the particularly described vehicles plus any others on the premises that "possess altered or defaced identification numbers or which are otherwise determined to be stolen." In upholding the warrant, the court pointed out that "the affidavit explained that vehicle alterations could be discovered by comparing secret identification numbers with those openly displayed, that true numbers could be checked with law enforcement computerized lists."

Describing documents and computer files

The rule that warrants must describe the evidence to be seized with reasonable particularity seems to be enforced more strictly when the evidence consists of documents, whether hard copies or computer files. There are four reasons for this. First, a search for documents is especially intrusive as officers must usually examine every room, container, and computer file in which they may be found. Second, every document and computer file on the premises must ordinarily be read (or at least skimmed) to determine whether it is covered under the warrant.[118] Third, the reading of documents constitutes "a very serious intrusion into personal privacy."[119] Fourth, officers will usually have *some* information that would have made it possible to distinguish between relevant and irrelevant documents.

Even so, the courts require only reasonable particularity. As the court explained in *U.S.* v. *Phillips*:

> A warrant need not—and in most cases, cannot—scrupulously list and delineate each and every item to be seized. Frequently, it is simply impossible for law enforcement officers to know in advance exactly what business records the defendant maintains.[120]

Consequently, a warrant to search for documents, like other types of warrants, will be deemed sufficiently particular if officers described the documents as best they could.

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[115] *U.S.* v. *Hillyard* (9th Cir. 1982) 677 F.2d 1336, 1340. ALSO SEE *Millender* v. *County of Los Angeles* (9th Cir. 2010) 620 F.3d 1016, 1025 [a warrant for "classes of generic items" may be permissible "if the warrant establishes standards that are sufficiently specific"].

[116] (1st Cir. 1977) 565 F.2d 183.

[117] (9th Cir. 1982) 677 F.2d 1336.

[118] See *Andresen* v. *Maryland* (1976) 427 U.S. 463, 482 ["In searches for papers, it is certain that some innocuous documents will be examined"]; *People* v. *Alcala* (1992) 4 Cal.4th 742, 799 ["law enforcement officers would be unable to conduct a search for a rental receipt were they prohibited from reading papers"]; *U.S.* v. *Hunter* (D. Vt. 1998) 13 F.Supp.2d 574, 582 ["Records searches are vexing in their scope because invariably some irrelevant records will be scanned in locating the desired documents."].

[119] *U.S.* v. *Leary* (10th Cir. 1988) 846 F.2d 592, 603, fn.18.

[120] (4th Cir. 2009) 588 F.3d 218, 225. ALSO SEE *U.S.* v. *Reyes* (10th Cir. 1986) 798 F.2d 380. 383 ["[I]n the age of modern technology and commercial availability of various forms of items, the warrant could not be expected to describe with exactitude the precise form the records would take."].

DESCRIPTION LIMITED BY SENDER, RECIPIENT, DATE: If the relevance of a document depends on who sent it, its date, or to whom it was addressed, this information should be included as it will significantly narrow the description.[121]

DESCRIPTION LIMITED BY CRIME OR OTHER SUBJECT MATTER: Probably the most common method of describing documents is to state their subject matter, such as the nature of the crime for which the documents are evidence.[122] The following are some examples:

- "Loan records reflecting the $500,000 teamster trust fund loan and its subsequent disbursement."[123]
- "Drug trafficking records, ledgers, or writings identifying cocaine customers, sources."[124]
- Documents "pertaining to the Windward International Bank."[125]
- "All property constituting evidence of the crimes of making and conspiring to make extortionate extensions of credit, financing extortionate extensions of credit, and collections of and conspiracy to collect extortionate extensions of credit."[126]
- "Books" and "records" that "are being used as means and instrumentalities" by the perpetrators of hijackings.[127]
- "Title notes and contracts of sale pertaining to the crime of false pretenses pertaining to Lot 13T."[128]
- "Child pornography."[129]
- "Documents, photographs, and instrumentalities" constituting harassment and threats.[130]
- "Monopoly money" and "maps of Churchill County" (Monopoly money was found near the body of the murder victim in Churchill County, Nevada).[131]

In contrast, the following descriptions of documents were plainly insufficient because they contained absolutely no limiting criteria:

- All financial records.[132]
- All medical records.[133]
- Any and all records and paraphernalia pertaining to [defendant's] business.[134]

Note that a description that is limited only by reference to a broadly-worded criminal statute may not suffice. Thus, affiants who restrict the seizure of documents to general crimes should describe the crime or the manner in which it was carried out;[135] e.g., affidavit provided details of defendant's illegal kickbacks to physicians,[136] the affidavit "described the extortion scheme in detail, including that [the suspect] possessed a computer-generated database and communicated with Paycom over email."[137]

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[121] See *Burrows* v. *Superior Court* (1974) 13 Cal.3d 238, 249-50 [the warrant "permitted the seizure of all of petitioner's financial records without regard to the persons with whom the transactions had occurred or the date of transactions"]; *U.S.* v. *Rude* (9th Cir. 1996) 88 F.3d 1538, 1551 ["post-May 1992 documents"]. COMPARE *U.S.* v. *Kow* (9th Cir. 1995) 58 F.3d 423, 427 ["The government did not limit the scope of the seizure to a time frame within which the suspected criminal activity took place, even though [the affidavit] indicates that the alleged criminal activity began relatively late in HK Video's existence."]; *U.S.* v. *Abrams* (1st Cir. 1980) 615 F.2d 541, 543, 545 [although officers were aware that the relevant records pertained to certain dates, "there is no limitation as to time"].

[122] See *Bay* v. *Superior Court* (1992) 7 Cal.App.4th 1022, 1027 [reference to a certain crime "would have provided the executing officer with meaningful limits on the nature of the items to be seized in order to ensure there was probable cause for all the items seized"].

[123] *U.S.* v. *Wuagneux* (11th Cir. 1982) 683 F.2d 1343, 1350.

[124] *U.S.* v. *Reyes* (10th Cir. 1986) 798 F.2d 380, 382.

[125] *U.S.* v. *Federbush* (9th Cir. 1980) 625 F.2d 246, 251.

[126] *U.S.* v. *Santarelli* (11th Cir. 1985) 778 F.2d 609.

[127] *U.S.* v. *Scharfman* (2nd Cir. 1971) 448 F.2d 1352.

[128] *Andresen* v. *Maryland* (1976) 427 U.S. 463, 479-82.

[129] See *U.S.* v. *Banks* (9th Cir. 2009) 556 F.3d 967, 973; *Davis* v. *Gracey* (10th Cir. 1997) 111 F.3d 1472, 1479 ["pornographic material"]; *US* v. *Burke* (10th Cir. 2011) __ F.3d __ [2011 WL 310520].

[130] *U.S.* v. *Williams* (4th Cir. 2010) 592 F.3d 511, 520.

[131] *U.S.* v. *Wong* (9th Cir. 2003) 334 F.3d 831, 838.

[132] *Burrows* v. *Superior Court* (1974) 13 Cal.3d 238, 249.

[133] *U.S.* v. *Abrams* (1st Cir. 1980) 615 F.2d 541, 545.

[134] *Aday* v. *Superior Court* (1961) 55 Cal.2d 789, 795-96.

[135] See *U.S.* v. *Leary* (10th Cir. 1988) 846 F.2d 592, 602 ["unadorned reference to a broad federal statute" was unsufficient].

[136] *U.S.* v. *SDI Future Health, Inc.* (9th Cir. 2009) 568 F.3d 684, 691-92.

[137] *U.S.* v. *Adjani* (9th Cir. 2006) 452 F.3d 1140, 1145.

ALL DOCUMENTS: "PERMEATED WITH FRAUD": There is a long-standing exception to the specificity requirement for business records when the affiant establishes probable cause to believe that the enterprise was so corrupt—so "permeated with fraud"—that all, or substantially all, of its records would likely constitute evidence of a crime.[138] As the Ninth Circuit explained in *United States* v. *Kow:*

> A generalized seizure of business documents may be justified if the government establishes probable cause to believe that the entire business is merely a scheme to defraud or that all of the business's records are likely to evidence criminal activity.[139]

For example, in *People* v. *Hepner*[140] the California Court of Appeal concluded that authorization to seize all files in a doctor's office was justified under the "permeated with fraud" rule because the affidavit demonstrated that about 90% of his files constituted evidence of insurance fraud. Similarly, in a case involving a precious metals investment scam, *U.S.* v. *Bentley,* the Fourth Circuit upheld a search for "21 categories of documents that collectively covered every business document" on the premises because, said the court, "This is the rare case in which even a warrant stating 'Take every piece of paper related to the business' would have been sufficient. [The business] was fraudulent through and through. Every transaction was potential evidence of that fraud."[141]

A "permeated with fraud" warrant must not, however, authorize the seizure of all documents if it is reasonably possible to isolate those documents that constitute evidence of the crime.[142] For example, if the fraud pertained only to a certain product or occurred only during a certain time period, the warrant should ordinarily authorize a search for documents pertaining only to *that* product or *that* period. Similarly, the Ninth Circuit pointed out in *Solid State Devices, Inc.* v. *U.S.* that, "[w]here a business appears to be engaged in some legitimate activity, this Court has required a more substantial showing of pervasive fraud."[143]

Finally, it should be noted that the "permeated with fraud" doctrine may also be applied to searches of homes, but the required level of proof of widespread fraud may be greater.[144]

COMPLEX "PAPER PUZZLE" CASES: The courts may ease the requirement for a particular description of documents in cases where a detailed description is impossible because (1) the crime under investigation was a complex scheme that could only be proved by linking many bits of documentary evidence, and (2) officers described the documents as best they could.[145] As the California Supreme Court observed, "In a complex case resting upon the piecing together of many bits of evidence, the warrant properly may be more generalized than would be the case in a more simplified case resting upon more direct evidence."[146]

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[138] See *U.S.* v. *Rude* (9th Cir. 1996) 88 F.3d 1538, 1551 ["it is clear that NPI's central purpose was to serve as a front for defrauding prime bank note investors"]; *U.S.* v. *Smith* (9th Cir. 2005) 424 F.3d 992, 1006 [a "warrant authorizing the seizure of essentially all business records may be justified when there is probable cause to believe that fraud permeated the entire business operation"]; *U.S.* v. *Falon* (1st Cir. 1992) 959 F.2d 1143, 1147 ["no indications of legitimate business"].

[139] (9th Cir. 1995) 58 F.3d 423, 427. ALSO SEE *Solid State Devices, Inc.* v. *U.S.* (9th Cir. 1997) 130 F.3d 853, 856.

[140] (1994) 21 Cal.App.4th 761, 776-77.

[141] (7th Cir. 1987) 825 F.2d 1104, 1110. ALSO SEE *People* v. *Farley* (2009) 46 Cal.4th 1053, 1101 [personnel records for "any and all documents and correspondence relating to" defendant was not overbroad because he had killed and wounded several people at his workplace].

[142] See *U.S.* v. *Stubbs* (9th Cir. 1989) 873 F.2d 210, 211 ["The affidavit fails to provide probable cause for a reasonable belief that tax evasion permeated Stubbs's entire real estate business."]; *U.S.* v. *Bentley* (7th Cir. 1987) 825 F.2d 1104, 1110 ["[I]f the fraud infects only one part of the business, the warrant must be so limited"].

[143] (9th Cir. 1997) 130 F.3d 853, 857. Edited.

[144] See *U.S.* v. *Falon* (1st Cir. 1992) 959 F.2d 1143; *U.S.* v. *Humphrey* (5th Cir. 1997) 104 F.3d 65, 69, fn.2 ["only in extreme cases" will an "all documents" search of a residence be upheld].

[145] *See Andresen* v. *Maryland* (1976) 427 U.S. 463, 482, fn.10; *U.S.* v. *Wuagneux* (11th Cir. 1982) 683 F.2d 1343, 1349 ["complex financial transactions and widespread allegations of various types of fraud" necessitate "practical flexibility"]; *Kitty's East* v. *U.S.* (10th Cir. 1990) 905 F.2d 1367, 1374 ["Evidence of conspiracy is often hidden in the day-to-day business transactions"].

[146] *People* v. *Farley* (2009) 46 Cal.4th 1053, 1102. ALSO SEE *U.S.* v. *Phillips* (4th Cir. 2009) 588 F.3d 218, 225 ["Indeed, especially in cases such as this one—involving complex crime schemes, with interwoven frauds—courts have routinely upheld the search of items described under a warrant's broad and inclusive language."].

For example, in a real estate fraud case, *Andresen* v. *Maryland,* the United States Supreme Court ruled that a warrant to search a lawyer's office for an array of documents was sufficiently particular because, said the Court:

> Like a jigsaw puzzle, the whole picture of petitioner's false-pretense scheme could be shown only by placing in the proper place the many pieces of evidence that, taken singly, would show comparatively little.[147]

The Court added that, when officers have probable cause to search for large numbers of documents "[t]he complexity of an illegal scheme may not be used as a shield to avoid detection."

Indicia

When a warrant authorizes a search for evidence which, if found, would incriminate the people who own or control the home or business that was searched, affiants will almost always seek permission to search for and seize documents and other things that tend to identify these people. Authorization to search for such things—commonly known as "indicia" or "evidence of dominion and control"—is especially apt to be granted when the primary objective of the warrant is to search for drugs, weapons, child pornography, stolen property, or other fruits or instrumentalities of the crime under investigation.

It is true, of course, that authorization to search for indicia may significantly expand the scope of the search.[148] Nevertheless, the additional intrusion is almost always deemed justified by the overriding need for proof of control.[149]

The problem with indicia is that, while officers can be reasonably certain that it will be found on the premises,[150] they can never know for sure what form it will take. Consequently, the courts permit a description of the *types* of things that tend to establish dominion and control, such as the following:

- Delivered mail
- Bills and receipts
- Bail contracts and other legal documents
- Keys to cars, safe deposit boxes, and post office boxes
- Photographs
- Answering machine tapes[151]

Note, however, that a description must not be so broad as to permit the seizure of documents that do not establish ownership or control; e.g., "All papers bearing the [suspect's] name."

POV

In the next Point of View, we will continue our discussion of search warrants by examining the various special procedures that may be employed if approved by the issuing judge. These include night and no-knock entry, the sealing of warrants, contingent and out-of-county warrant service, and searches by special masters.

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[147] (1976) 427 U.S. 463, 482, fn.10. Edited. ALSO SEE *U.S.* v. *Phillips* (4th Cir. 2009) 588 F.3d 218, 226 ["We thus decline to allow Phillips to create a safe harbor from the complexity of his schemes."].

[148] See *People* v. *Balint* (2006) 138 Cal.App.4th 200, 209 [search of an open laptop computer was authorized by a dominion and control clause]; *U.S.* v. *Bruce* (6th Cir. 2005) 396 F.3d 697, 710 ["To be sure, this authorization necessarily entailed a cursory review of any papers found in the hotel rooms to determine whether they reflected ownership or control of illegal drugs."].

[149] See *People* v. *Varghese* (2008) 162 Cal.App.4th 1084, 1102 ["establishing dominion and control of a place where incriminating evidence is found is reasonable and appropriate"]; *People* v. *Rogers* (1986) 187 Cal.App.3d 1001, 1009 ["We cannot believe the Fourth Amendment prohibits officers with ample probable cause to believe those in a residence have committed a felony from searching the residence to discover ordinary indicia of the identities of the perpetrators."]; *People* v. *Balint* (2006) 138 Cal.App.4th 200, 206 ["The dominion and control clause at issue here is a standard feature in search warrant practice."].

[150] See *People* v. *Rogers* (1986) 187 Cal.App.3d 1001, 1009 ["[C]ommon experience tells us that houses and vehicles ordinarily contain evidence establishing the identities of those occupying or using them."].

[151] *People* v. *Balint* (2006) 138 Cal.App.4th 200, 204, fn.1. ALSO SEE *People* v. *Alcala* (1992) 4 Cal.4th 742, 799 ["rent receipts, cancelled mail envelopes, and keys"]; *People* v. *Nicolaus* (1991) 54 Cal.3d 551, 574-75 ["letters, papers, bills tending to show the occupants of [address of house to be searched"]; *Millender* v. *County of Los Angeles* (9th Cir. 2010) 620 F.3d 1016, 1030 [indicia "usually refers to such items as 'utility company receipts, rent receipts, cancelled mail envelopes, and keys"]; *U.S.* v. *Riley* (2nd Cir. 1990) 906 F.2d 841, 844 [in discussing warrants to search for indicia, the court noted that "[i]n upholding broadly worded categories of items available for seizure, we have noted that the language of a warrant is to be construed in light of an illustrative list of seizable items."]. **NOTE**: The court in *People* v. *Frank* (1985) 38 Cal.3d 711, 726 summarily invalidated a warrant to search for indicia consisting of "credit card receipts, records of telephone toll calls, cancelled checks, and personal diary notations," claiming these categories were "impermissibly general." Because the court neglected to provide any analysis of its position, *Frank* seems to have been relegated to the pile of "misguided" opinions that the court had been issuing at the time. See *People* v. *Rogers* (1986) 187 Cal.App.3d 1001, 1006 ["It is difficult to discern from *Frank* a principled basis to distinguish between the generic categories found insufficiently particular and those not declared so."].

Recent Cases

People v. Diaz

(2011) 51 Cal.4th 84

Issue

May officers search an arrestee's cell phone as an incident to the arrest?

Facts

After arresting Diaz for conspiracy to distribute ecstasy, a Ventura County sheriff's deputy seized his cell phone and drove him to the sheriff's station for questioning. After Diaz denied involvement in the crime, the deputy terminated the interview. A short time later, he searched the phone's text message folder and saw a message that read "6 4 80." Based on his training and experience, he believed the message meant "six pills of Ecstasy for $80." So he confronted Diaz with the message, at which point Diaz confessed. When his motions to suppress the text message and confession were denied, he pled guilty.

Discussion

It is apparently now the law that officers who have arrested a suspect may, as an incident to the arrest, search only those things that were in his immediate control when the search occurred.[1] Even so, there is a related rule that officers may search property that was not within the arrestee's immediate control if it was the type of property that was "immediately associated" with the person of the arrestee.[2]

Consequently, because Diaz had no control over his cell phone when it was searched, the deputy's search would have been illegal if cell phones were viewed as ordinary containers (such as vehicles[3] or footlockers[4]); but it would have been legal if they fell within the category of personal property that is "closely associated" with the arrestee's person (such as clothing, a wallet, or a package of cigarettes[5]). And so the issue before the California Supreme Court in *Diaz* was how cell phones should be classified.

Diaz argued that cell phones are not immediately associated with the arrestee's person because they are not routinely "attached" to the body, like clothing. But the court rejected that argument, pointing out that the U.S. Supreme Court has ruled that the "character" of the item searched is irrelevant if the arrestee was carrying it on his person. This is because the Court has ruled that arrestees have a reduced expectation of privacy as to items they were carrying when they were arrested.

Diaz also argued that, because cell phones contain such a large amount of information—much of it highly personal—the rules pertaining to searches of their contents should be more restrictive. But, again, the court pointed out that the logical basis for permitting searches of items carried by the arrestee when he was taken into custody is the reduced expectation of privacy as to such things, not the quantity or nature of information they contain.

Accordingly, the court ruled that, because there is no principled reason for distinguishing cell phones from other items that are immediately associated with the person of the arrestee, officers may search them even though the arrestee did not have immediate control when the search occurred.

Comment

Diaz is an especially important case because of the large number of arrestees who carry cells phones, and the likelihood that their phones will contain incriminating information; e.g., phone numbers, lists of contacts, text messages.

But the question arises: May officers search a cell phone that the arrestee was not carrying on his person, but which was in his possession when he was arrested; e.g., next to him on the seat of his car? Because this was not an issue in *Diaz*, the court did not address it. Consequently, until the matter is resolved it would be prudent for officers to seek a warrant if they believe there is probable cause.

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[1] See *Arizona* v. *Gant* (2009) __ U.S. __ [129 S.Ct. 1710].
[2] See *United States* v. *Chadwick* (1977) 433 U.S. 1, 15.
[3] See *Arizona* v. *Gant* (2009) __ U.S. __ [129 S.Ct. 1710].
[4] See *United States* v. *Chadwick* (1977) 433 U.S. 1, 15.
[5] See *United States* v. *Edwards* (1974) 415 U.S. 800, 805; *United States* v. *Robinson* (1973) 414 U.S. 218.

People v. Moore

(2011 __ Cal.4th __ [2011 WL 285186]

Issues

Was a murder suspect "in custody" for *Miranda* purposes when he was questioned in a patrol car or in a sheriff's interview room?

Facts

At about 5 P.M., the Monterey County Sheriff's Department received a call from Rebecca Carnahan who said that, upon returning home from work, she discovered that her home in Salinas had been ransacked and that her 11-year old daughter Nicole was missing. Ms. Carnahan told the responding deputies that, after discovering the break-in, she saw her next-door neighbor, Ronald Moore, in her back yard; he was carrying "a bundle of some sort" and he was running through a gap in the fence that separated her property from Moore's house trailer. She yelled at him, but Moore kept running. Ms. Carnahan also said that after phoning 911 she saw Moore in his yard and asked if he had seen Nicole. He responded by saying that he had seen "two Mexicans" in her yard.

A deputy went to Moore's trailer and started to question him but, because it was cold and dark in the trailer, he asked Moore if he would talk to him in his patrol car. Moore said he would and did not object to sitting in the back seat. Although the deputy closed the locking rear door, he apparently closed it because Moore had complained about the cold.

During the subsequent 15-minute interview, Moore told the deputy that he had gone to Ms. Carnahan's house that afternoon for a drink of water and that Nicole had given him one. He also gave a convoluted account of his actions that afternoon, an account that differed somewhat from the story he had given to Ms. Carnahan. The deputy asked Moore if he would be willing to wait in the car while he talked with someone at the crime scene, and Moore said yes. The deputy then opened the rear door for him, apparently so that he could smoke.

But just then they both heard Ms. Carnahan screaming from her house. At first, Moore seemed to ignore it but then asked, "Did they find her?" They had, in fact, found Nicole—she was dead, and her body had been stuffed between her bed and the wall of her bedroom. Her injuries were horrifying.

Moore continued to wait in the patrol car (with the rear door open) until he was contacted by sheriff's investigator John Hanson who asked, "Would you volunteer to come down to the station and talk to me? I need to take a real detailed statement about it." Moore asked if he could give a statement tomorrow morning, but Hanson said no, "we have to do it now," adding that a deputy would drive him home afterward. Moore said "Okay."

At the station, Det. Hanson questioned Moore in an interview room. Although the door locked automatically when shut, another investigator had placed something next to the door jamb to prevent the door from closing. Det. Hanson began by telling Moore that he was "not under arrest or anything," that he was "free to go or whatever," and that he was there "only to make a statement because he was the last person known to have seen the victim." Det. Hanson did not seek a *Miranda* waiver.

After Moore gave a story that differed from the story he had given to Ms. Carnahan, Det. Hanson asked, "Did you burglarize the house?" When Moore said no, Det. Hanson "asked a series of questions suggesting [Moore] might have been in the Carnahan house that day and might know what happened to Nicole," adding, "This is the time for you to be honest with me." He also asked Moore if he was carrying a weapon when he went to the house for a glass of water. Moore said he usually carried a butcher knife, but claimed he was not carrying it then. Det. Hanson asked him where the knife was located and Moore said it was in his trailer, but he refused to consent to a search unless he was present. When another investigator suggested that he must have been carrying the knife when he went to Ms. Carnahan's house, Moore said, "You guys are trying to trick me."

The interview then became more confrontational and eventually Moore asked, "Can I please get a ride home? You going to charge me or what?" The investigators continued to question him and eventually arrested him, apparently after obtaining additional incriminating information from the crime scene. Det. Hanson then *Mirandized* Moore, who immediately invoked his right to counsel.

During Moore's trial, the evidence against him included the statements he made in the patrol car and in the interview room. He was found guilty of murdering Nicole and was sentenced to death.

Discussion

Moore contended that his statements should have been suppressed because they were obtained in violation of *Miranda*. Specifically, he argued that he was continuously "in custody" for *Miranda* purposes from the time he was seated in the patrol car and, therefore, the failure of the deputy and detective to obtain *Miranda* waivers rendered his statements inadmissible. The court disagreed.

It is settled that officers must obtain a *Miranda* waiver before interrogating a suspect who is "in custody." And a suspect will be deemed in custody if he had been arrested or if he reasonably believed that his freedom had been restricted to the degree associated with an arrest.[6] Furthermore, in determining whether a suspect was in custody, the courts apply an objective test, meaning the only circumstances that matter are those that were, or reasonably appeared to have been, seen or heard by the suspect.[7] It is, thus, immaterial that, unbeknownst to the suspect, he had become the "focus" of the officers' investigation.[8]

In applying these principles to the facts, the California Supreme Court ruled that Moore was not in custody when he was questioned in the patrol car, mainly because the deputy had explained to him that he did not want to continue the interview inside the cold and dark trailer. Also, it would have been apparent to Moore that he was considered merely an important witness, and that the deputy would have permitted him to leave had he requested. This conclusion was bolstered by the deputy' act of leaving Moore alone in the car with the rear door open.

As for the interview at the sheriff's station, the court ruled that it did not become custodial, at least until Moore's request to be driven home was denied. Although Moore said he would have preferred that the interview be delayed for one day, the court noted that "he acceded to [Det. Hanson's] reasonable explanation that time was of the essence." It also pointed out that Det. Hanson told Moore that "he was not under arrest and was free to leave," that he "was not handcuffed or otherwise restrained," and "there was no evidence the interview room door was locked against his leaving."

Although the interview became somewhat accusatory when Moore was asked if he had burglarized the house and whether he was carrying his knife when he went there for a drink of water, the court explained that "police expressions of suspicion, with no other evidence of restraint on the person's freedom of movement, are not necessarily sufficient to convert voluntary presence at an interview into custody."

Consequently, the court ruled that until Moore's request to leave was denied, "a reasonable person in [his] circumstances would have believed, despite indications of police skepticism, that he was not under arrest and was free to terminate the interview and leave if he chose to do so." As for the statements Moore made after his request to leave was denied, the court ruled that their admission into evidence was harmless error because they were insignificant.[9] Moore's conviction and death sentence were affirmed.

Comment

This case provides a good illustration of the problems that officers encounter at crime scenes when they locate a percipient witness who may also be the perpetrator. On the one hand, because they need to obtain as much information from him as possible, they may not want to seek a *Miranda* waiver as it tends to inhibit openness. On the other hand, a waiver may be required at some point because the need to control the suspect's movements may inadvertently render him "in custody."

The main thing to remember about this case is that locking a suspect in a patrol car or an interview room is a strong indication that the suspect was in custody. Consequently, if it becomes necessary to do so before seeking a waiver, officers must take steps to reduce the coerciveness of this circumstance. That's what happened here, as one deputy left the rear door to the patrol car open, and another propped open the door to the interview room. It was also highly significant that Moore was told at the station that he was not under arrest and was free to leave.

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[6] See *Thompson* v. *Keohane* (1995) 516 U.S. 99, 112.

[7] See *Stansbury* v. *California* (1994) 511 U.S. 318, 323.

[8] See *Stansbury* v. *California* (1994) 511 U.S. 318, 326.

[9] **NOTE**: In a similar recent case, *People* v. *Thomas* (2011) __ Cal.4th __, the Supreme Court ruled that, even though a witness/suspect was in custody when he was locked in a patrol car while awaiting the arrival of detectives, his statement to the detectives was not obtained in violation of *Miranda* because, before questioning, he had been released from the car and was not handcuffed.

People v. Gomez

(2011) __ Cal.App.4th __ [2011 WL 383876]

Issue

When a booking officer questions an arrestee about his gang affiliation without obtaining a *Miranda* waiver, are the arrestee's answers admissible in court under *Miranda's* booking question exception?

Facts

At about 1 A.M., four men accosted a man outside the man's apartment in Riverside, flashed gang signs, severely beat him, then stole his truck. A little later, a Riverside police officer spotted the truck parked on a street about two miles away—and there were four men "pulling stuff" out and tossing it to the ground. The officer detained the men and subsequently arrested them when the victim was brought to the scene and positively identified them as the assailants. One of the men was Gomez.

During booking, a Riverside County sheriff's deputy asked Gomez his name, date of birth, and whether he had any gang affiliations. Gomez said he was affiliated with the gang Arlanza. The deputy then asked if he was an active member, an associate, or a former member. He said he was an active member.

Gomez was charged with, among other things, carjacking, assault with a deadly weapon, and active participation in a criminal street gang. At trial, his statements were used to help prove that he was an active gang participant. He was convicted.

Discussion

Gomez contended that his statements should have been suppressed because he had not waived his *Miranda* rights. While waivers are ordinarily required before officers interrogate arrestees, they are not necessary when the purpose of the questioning was to obtain basic identifying data or other biographical information that is needed to complete the booking process; e.g., arrestee's name, address, date and place of birth, phone number, occupation, social security number, employment history, arrest record.[10]

Although the courts sometimes say that such information is admissible under the "routine booking search exception" to *Miranda*, in reality it is admissible because an officer's act of seeking basic identifying information is not reasonably likely to elicit an incriminating response and, therefore, does not constitute "interrogation" under *Miranda*.[11]

In *Gomez*, however, the deputy's questions were, in fact, reasonably likely to result in an incriminating response; i.e., Gomez's admission that he was an active gang member. In addition, as the deputy testified, he did not ask the questions for the purpose of obtaining basic identifying data but, instead, to make sure that Gomez was separated from members of rival gangs. Consequently, the issue in the case was whether such an inquiry is exempt from *Miranda*.

The court ruled it is—but only if prosecutors can prove that the questions were (1) reasonably necessary for a legitimate jail administrative purpose, and (2) were not a pretext to obtain incriminating information. Said the court:

> In determining whether a question is within the booking question exception, courts should carefully scrutinize the facts surrounding the encounter to determine whether the questions are legitimate booking questions or a pretext for eliciting incriminating information.

In *Gomez*, it was apparent that the first requirement was satisfied because, said the court, "[i]t is reasonable to take steps to ensure that members of rival gangs are not placed together in jail cells." The other issue—whether the questioning was a pretext to obtain incriminating information—was not as easily resolved because, as the court observed, "Given the prevalence of gang-related offenses, questions about an arrestee's gang affiliation are, by their nature, more likely to be incriminating than basic identifying questions about one's name, address, and age."

Still, the court concluded that there was no reason to believe the deputy was fishing for incriminating information because he was not involved in the investigation of the crime, and he asked the questions in conjunction with the booking process. Said the court, "The questions appear to have been asked in a legitimate booking context, by a booking officer uninvolved with the arrest or investigation of the crimes, pursuant to a standard booking form." Thus, the court ruled the deputy did not violate *Miranda*.

[10] See *Pennsylvania* v. *Muniz* (1990) 496 U.S. 582, 601-602.
[11] See *Rhode Island* v. *Innis* (1980) 446 U.S. 291, 301.

Huff v. City of Burbank

(9th Cir. 2011) __ F.3d __ [2011 WL 71472]

Issue

Did exigent circumstances justify an officers' warrantless entry into the home of a teenager who was reportedly planning to "shoot up" his school?

Facts

The principal of a Catholic high school in Burbank notified the police that one of her students was rumored to be planning to bring a gun to school and start shooting. Officers met with the principal, Sister Milner, who said she had heard talk that a student named Vincent Huff was going to "shoot up" the school, and that the threat was supposedly contained in a letter which she had not seen. She also said that Vincent had been absent from school for the past two days; and that, as the result of the rumor, some parents were keeping their children at home. The officers also learned (apparently from two students they also interviewed) that Vincent had been a victim of bullying. Based on this information and Sister Milner's request that they investigate the matter, the officers went to Vincent's home to interview him.

When they knocked on the door and announced they were police officers, no one responded. So an officer phoned the residence (and could hear the phone ringing) but, again, no one answered. The officer then called the cell phone of Vincent's mother, Maria Huff. She answered the phone, but when he identified himself and explained that he wanted to talk with her about Vincent, she hung up. Then, about two minutes later, Maria Huff and Vincent walked outside and stood on the front steps. When one of the officers explained that they wanted to "talk about some threats at the school," Vincent responded, "I can't believe you're here for that." Another officer asked Maria Huff if they could go inside to talk about the matter, but she said no. The officer then asked her if there were any guns in the house, at which point she "turned and ran" into the house, followed by Vincent—and two officers.

When one of the officers was asked at trial why he entered the house, he testified it was "because of, again, the threat that he was going to blow up or shoot up the school. I wanted to make sure neither one of them could access any weapons from inside the house, and that's where they normally get the weapons from is from either their parents or relatives or friends." After entering, the officers stayed in the living room for five to ten minutes. The court did not say what they did during this time except that they did not search anything, and that they left after satisfying themselves that the rumor was not true.

The Huffs later sued the officers and the city in federal court (seeking money damages), claiming that the officers' entry into their living room without a warrant constituted a violation of the Fourth Amendment. Following a bench trial, the district court ruled that the officers' entry was justified by exigent circumstances. The Huffs appealed to the Ninth Circuit.

Discussion

A warrantless entry into a home is permitted under the exigent circumstances exception to the warrant requirement if it was objectively reasonable;[12] and it is objectively reasonable if the need for the action outweighed its intrusiveness.[13] But because a warrantless entry is such a serious intrusion, the Ninth Circuit and other courts have ruled that it cannot normally be upheld on the basis of exigent circumstances unless the officers had *probable cause* to believe it was necessary to defuse an imminent threat to life or property.[14] The question, then, was whether the facts known to the officers when they entered constituted probable cause.

The court in *Huff* ruled that probable cause did not exist for two reasons. First, none of the circumstances that it considered relevant demonstrated a sufficient threat. Second, an officer testified that he did not think that probable cause existed. Having also ruled that the two officers who entered the residence were not entitled to qualified immunity (because it was clearly established that probable cause was required), the court ruled that the case should proceed to trial.

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

[13] See *Illinois* v. *McArthur* (2001) 531 U.S. 326, 331; *Illinois* v. *Lidster* (2004) 540 U.S. 419, 426.

[14] See *U.S.* v. *Alaimalo* (9th Cir. 2002) 313 F.3d 1188, 1193 ["Even when exigent circumstances exist, police officers must have probable cause to support a warrantless entry into a home."]; *U.S.* v. *Socey* (D.C. Cir. 1988) 846 F.2d 1439, 1444, fn.5 ["Exigent circumstances justify a warrantless entry into a home only where there is also probable cause to enter the residence."].

Comment

There are several things about this opinion that must be addressed. For starters, it appears the court was unable to grasp the district court's ruling on the matter. On two occasions it explicitly acknowledged the district court had ruled that exigent circumstances had, in fact, existed; viz., "[a]fter holding a two-day bench trial, the district court held that exigent circumstances permitted the police's warrantless entry into the Huff residence"; and later, "the district court found that exigent circumstances justified the warrantless entry" into the house. And yet, the court began its analysis by saying "[i]t is not clear whether the district court actually found that there were exigent circumstances…"

More troublesome, the court misrepresented a crucial piece of evidence, saying that Mrs. Huff, when asked if there were any guns in the house, merely "responded that she would go get her husband. [She] then turned around and went into the house." But in reality, she turned and "ran" into the house. As the dissenting judge pointed out, "[T]he district court found that when asked whether there were guns in the house, rather than responding, Mrs. Huff turned and *ran* into the house." And, as one of the officers testified, it was this unusual and highly suspicious action that precipitated the decision to enter.

In addition to distorting the facts, the majority failed to apply the correct legal standard in determining whether probable cause existed. The United States Supreme Court has repeatedly instructed the lower courts that they must consider the totality of relevant circumstances in making this determination;[15] and, moreover, they must not isolate the facts upon which the officers relied, belittle the importance of these facts or try to explain them away, and then announce that probable cause did not exist because none of the abstract facts were sufficiently incriminating.[16] And yet, this is precisely what the majority did in *Huff*.

For example, the fact that the Huffs did not answer their door or phone was casually dismissed by the court as follows: "That the Huffs did not answer their door or telephone may be 'unusual,' but it did not create exigent circumstances." It is obvious, however, that no one was contending that these circumstances "created" exigent circumstances. Instead, they were among the many facts that the officers could rightly consider in making that determination. The majority then compounded its error when it said, "The district court was incorrect in finding that Maria Huff's failure to inquire about the reason for the officer's visit, or her reluctance to speak with the officers and answer questions, were exigent circumstances." But the district court *did not rule* that these facts "were exigent circumstances." It merely ruled—as required by the Supreme Court—that they were facts that the officers could rightly consider.

Not only was the court oblivious to the Supreme Court's totality standard, it also ruled that probable cause did not exist because the officers testified that they did not think it did. And yet, an officer's belief that he had—or did not have—probable cause is absolutely irrelevant.[17] As the Fourth Circuit pointed out in a related context:

> The Supreme Court's definition of probable cause asks not whether the arresting officer reasonably believed that the arrestee had committed a crime, but whether the evidence was sufficient to support such a reasonable belief.[18]

Because the majority neglected to properly consider the totality of circumstances as determined by the district court, we will do so. Here are the circumstances upon which the officers' entry was based:

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[15] See *Illinois* v. *Wardlow* (2000) 528 U.S. 119, 136 ["The totality of the circumstances, as always, must dictate the result."]; *United States* v. *Arvizu* (2002) 534 U.S. 266, 273 ["[W]e have said repeatedly that [the lower courts] must look at the totality of the circumstances of each case"]; *United States* v. *Sokolow* (1989) 490 U.S. 1, 9 ["Any one of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion."].

[16] See *Massachusetts* v. *Upton* (1984) 466 U.S. 727, 732 [trial court erred when it made its probable cause determination by "judging bits and pieces of information in isolation"]; *Maryland* v. *Pringle* (2003) 540 U.S. 366, 372, fn.2 ["The [district] court's consideration of the money in isolation, rather than as a factor in the totality of the circumstances, is mistaken in light of our precedents."].

[17] See *Maryland* v. *Macon* (1985) 472 U.S. 463, 470-1 ["Whether a Fourth Amendment violation has occurred turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time, and not on the officer's actual state of mind at the time the challenged action was taken."]; *Brigham City* v. *Stuart* (2006) 547 U.S. 398, 404 ["An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind"].

(1) Although the threat to "shoot up" the school was merely a rumor, Sister Milner was apparently acquainted with Vincent and was so concerned that she had notified the sheriff's department.
(2) As the result of the rumor, some parents were keeping their children away from school, a rather drastic response unless, like Sister Milner, the parents had reason to believe it was more than a vague or malicious rumor.
(3) The officers knew that Vincent had been the victim of bullying. (See Report of the Columbine Review Commission: "The Relationship Between Bullying and School Violence").
(4) Vincent had not attended school for the past two days; it appears his absence was unexplained.
(5) Although the Huffs were home when the officers arrived, they did not answer their door when the officers knocked and announced they were police officers.
(6) The Huffs did not answer their phone when the officers called.
(7) When Maria Huff answered her cell phone and was informed that the officers wanted to talk with her, she hung up.
(8) After Maria Huff exited the house and learned that the officers wanted to talk about threats at the school, she "did not inquire about the reason for their visit or express concern that they were investigating her son."[19]
(9) The officers could have reasonably inferred that Vincent Huff had inadvertently acknowledged that there was some factual basis for the rumor when, after an officer informed him of the threat, he responded, "I can't believe you're here for that."
(10) When asked if there were any guns in the house, Maria Huff "turned and ran" inside.

Keeping in mind that with each additional suspicious circumstance—with each additional "coincidence of information"[20]—the chances of having probable cause increase exponentially,[21] it is apparent that the court was badly mistaken when it concluded that the officers lacked probable cause to enter the house for their safety and the safety of others. It was also curious that it expressed absolutely no concern for the seriousness of an investigation into a report that a student may have been planning to commit mass murder of his schoolmates, and they exhibited no sensitivity for the plight of Sister Milner and the officers who were trying to resolve this potentially explosive matter while keeping everyone safe.

But while the Ninth Circuit's reasoning was slipshod and its decision inept, the actions of Mr. and Mrs. Huff were contemptible. This entire sordid affair was triggered by their immature and irresponsible response to the officers' legitimate inquiry. And then, as if to display their loutishness to the general public, they sued the officers, hoping to make some easy money. The whole thing is just disgusting.[22]

U.S. v. Carona

(9th Cir. 2011) __ F.3d __ [2011 WL 32581]

Issue

Did a prosecutor violate the California Rules of Professional Conduct when he arranged for an informant to elicit incriminating statements from an uncharged suspect about a crime for which the suspect was represented by counsel?

Facts

In 2004, federal agents began investigating reports that Orange County Sheriff Michael Carona was taking bribes. In the course of the investigation, they learned that one of the bribers was Donald Haidl who would later testify that Carona "offered [him] the complete power of the sheriff's department for raising money and supporting him."

[18] *U.S.* v. *Han* (4th Cir. 1996) 74 F.3d 537, 541.
[19] **NOTE**: This quote is from the transcript of the district court judge's ruling.
[20] *Ker* v. *California* (1963) 374 U.S. 23, 36.
[21] See *People* v. *Soun* (1995) 34 Cal.App.4th 1499, 1523 [court notes the "coincidence with descriptions of the assailants, and the use of a car"]; *People* v. *Hillery* (1967) 65 Cal.2d 795, 804 ["The probability of the independent concurrence of these factors in the absence of the guilt of defendant was slim enough to render suspicion of defendant reasonable and probable."]; *U.S.* v. *Abdus-Price* (D.C. Cir. 2008) 518 F.3d 926, 930 [a "confluence" of factors].
[22] **NOTE**: The majority opinion was written by a District Court judge from Ohio, Algenon Marbley, who was sitting on the Ninth Circuit by designation. He was joined by Chief Circuit Judge Alex Kozinski. The dissenting opinion was written by Judge Johnnie Rawlinson.

In 2007, after developing grounds to arrest and possibly charge Haidl, agents and federal prosecutors interviewed him and obtained a confession and plea agreement. As part of the deal, Haidl agreed "to meet with Carona and make surreptitious recordings of their meetings." At some point before or after this meeting, an attorney notified prosecutors that he had been hired by Carona to represent him in connection with the bribery probe.

Thereafter, Haidl met with Carona on two occasions but was unable to "provide enough evidence to satisfy the prosecutors." So they developed a new plan: They provided Haidl with two fake subpoena attachments which purportedly required Haidl to produce certain incriminating records pertaining to "cash payments Haidl provided to Carona" and to a "sham transaction" that Haidl had used to conceal a gift of a speedboat to him. The ploy worked. When Haidl showed Carona the fake subpoena attachments, Carona made some damaging admissions and, more importantly, suggested that "he wanted Haidl to lie to the grand jury about theses transactions."

Carona was subsequently charged with, among other things, tampering with a grand jury witness. His case went to trial and he was found guilty of witness tampering, but was acquitted of the other charges.

Discussion

Carona argued that the incriminating statements he made during his meeting with Haidl should have been suppressed because they were obtained in violation of California's Rules of Professional Conduct. Specifically, Rule 2-100 prohibits prosecutors from communicating directly or indirectly with a person who is represented by counsel if (1) the communication pertained to a crime for which he is represented, and (2) the person's attorney did not consent to the communication.

In *Carona*, the district court judge ruled that the prosecutor had, in fact, violated Rule 2-100 because "the use of the fake subpoena attachments made Haidl the alter ego of the prosecutor." But the judge also ruled that a violation of the rule does not constitute grounds to suppress evidence. (Instead, he referred the matter to the State Bar which declined to take disciplinary action.).

On appeal, the Ninth Circuit ruled the prosecutor's actions did not, in fact, constitute a violation of Rule 2-100. Although it acknowledged that it has not formulated a "bright line" rule that covers the scope of Rule 2-100 as it pertain to prosecutors, it pointed out that "our cases have more often than not held that specific instances of contact between undercover agents or cooperating witnesses and represented suspects did not violate Rule 2-100."[23]

The court then ruled that a violation of Rule 2-100 does not result when, as here, (1) prosecutors did not directly meet with the represented suspect but, instead, arranged for a third person to do so; (2) the interview "did not resemble an interrogation"; and (3) the represented suspect had not been charged with the crime under investigation. Said the court, "Haidl was acting at the direction of the prosecutor in his interactions with Carona, yet no precedent from our court or from any other circuit [with one exception[24]] has held such indirect contacts to violate Rule 2-100 or similar rules." The court added, "It would be antithetical to the administration of justice to allow a wrongdoer to immunize himself against such undercover operations simply by letting it be known that he has retained counsel."

The court also rejected the argument that the prosecutor's actions crossed the line when he provided Haidl with the fake subpoena attachments. Said the court, "The use of a false subpoena attachment did not cause the cooperating witness, Haidl, to be any more an alter ego of the prosecutor than he already was by agreeing to work with the prosecutor." The court added that "it has long been established that the government may use deception in its investigations in order to induce suspects into making incriminating statements."

Consequently the Ninth Circuit affirmed Carona's conviction. POV

[23] Citing *U.S.* v. *Powe* (9th Cir. 1993) 9 F.3d 68, 69; *U.S.* v. *Kenny* (9th Cir. 1981) 645 F.2d 1323, 1337-38.
[24] Citing *U.S.* v. *Hammond* (2nd Cir. 1988) 858 F.2d 834.

The Changing Times

Alameda County District Attorney's Office

Nancy O'Malley was sworn in as District Attorney of Alameda County on January 3, 2011. Chief Deputy District Attorney **Tom Rogers** and Deputy DA **Andy Cuellar** were appointed to the California Superior Court. Asst. DA **Richard Klemmer**, Lt. **Don Harris**, Lt. **Clint Ojala** and Insp. II **Jeff Harvey** have retired. New inspectors: **Anthony Banks** (Oakland PD), **Simon Rhee** (Oakland PD), and **Tom Simonetti** (Martinez PD). New Deputy DA: **Chris Chin**.

Alameda County Narcotics Task Force

Lt. **Derrick Hesselein** (ACSO) has been assigned as the new Task Force Commander. Sgt. **Kyle Ritter** (ACSO) has been assigned as the new Operations Supervisor. Lt. **Jeff Bromstead** retired from ACSO after 29 years of service. Transferring out: Dep. **Johnnie Graham** (ACSO) to Dublin PD after four years, Dep. **Oscar Perez** (ACSO) to the Special Investigations Unit after four years, and Officer **Ramon Jacobo** (Oakland Housing Authority PD) after five years.

Alameda County Sheriff's Department

Assistant Sheriff **Gary Thuman** retired after 41 years of service. Assistant Sheriff **Stephen Roderick** retired after 31 years of service and was appointed captain of the U.C. Berkeley PD. **Casey Nice** and **Brent Keteles** were appointed Assistant Sheriffs. Captains **Kevin Hart**, **Dennis Houghtelling**, **Carla Kennedy**, and **Donald Buchanan** were promoted to commander. Acting Capt. **Kerry Jackson**, Acting Capt. **Neal Christensen**, Lt. **David Sanchas**, Lt. **Kelly Miles**, Lt. **Kurt von Savoye** were promoted to captain. Acting Lt. **Daniel Harrison**, Sgt. **Herbert Walters**, Sgt. **Darryl Griffith**, Sgt. **Patrick Jones**, Sgt. **Colby Staysa**, and **Christopher Lucia** were promoted to lieutanant. Sgt. **David McKaig** was promoted to acting lieutenant.

Acting Sgts. **Victor Fox**, **Francisco Intriago**, **Paul Liskey**, **Christopher Shepard**, **Frederick Hamilton**, **Miguel Ibarra**, **Raphael Alvarez**, **Wesley Horn**, **David Harris**, **Sierry Wilhelm**, **Yesenia Sanchez**, and **Scott Sorensen** were promoted to sergeant. Deps. **Sean Tyrrell**, **John White**, **Michael Gallardo**, **James Russell**, and **Anthony Lopez** were promoted to sergeant. Deps. **Francisco Intriago**, **Paul Liskey**, and **Christopher Shepard** were promoted to acting sergeant.

The following deputies have retired: Capt. **David Alvey**, Capt. **Glenn Melanson**, Lt. **Debra Jurgens**, Sgt. **Bruce McVey**, Sgt. **George Kruse**, Sgt. **Michael Pecoraro**, Sgt. **Duane Hodges**, Sgt. **Linda Puthuff**, **Edward Fantozzi**, **Glenn Colbert**, **Steve Angeja**, **Victor Munoz**, **Dennis Aurit**, **Gene Gurich**, **Danny Kujawski**, **Shirley Hays**, **Roy Fortino**, and **David You**. New deputies: **Ian Willis**, **Richard Hassna**, **Joel Hassna**, **Jorge Ferreira**, and **Charles Joe**.

Dep. **Marco Ortiz** was killed in a a car accident on December 30, 2010. ACSO reports the following retired deputies have died: Cmdr. **Jack Baugh**, Capt. **Gerald Slater**, Sgt. **Chris Kreighbaum**, **James Matthews**, **Bud Markwith**, **Mario Bertolotti**, and **Leroy Higgins**.

Alameda Police Department

Lt. **Paul Rolleri** was promoted to acting captain. Sgts. **Jill Ottaviano** and **Ted Horlbeck** were promoted to acting lieutenant. **Ron Simmons**, **Darin Tsujimoto**, **Aaron Hardy**, and **Jarrod Suth** were promoted to acting sergeant. Sgt. **Kevin McNiff** retired after 32 years in law enforcement. **Becky McWilliams** retired as the department's records supervisor after 25 years with APD. Transfers: Sgt. **Joe McNiff** from Patrol to Violent Crimes, Sgt. **Don Owyang** from Patrol to Identification Bureau, Sgt. **Wayland Gee** from Patrol to Property Crimes, Sgt. **Pat Wyeth** from Violent Crimes to Patrol, and **Rick Bradley** from Patrol to the Violent Crimes.

BART Police Department

The following officers have retired: Sgt. **Seleta Ellis** (26 years), **Curtis Lum** (26 years), and **Yvonne Moilanen** (7 years). New officers: **Adam Rudy**, **Sean Roan**, **Manmohan Bal**, **Robert DeMarco**, **Denise Gutierrez**, **Cody Cox**, **John Johnson**, and **David Ernst**. Transfers from Patrol: Lt. **Kevin Franklin** to Acting Manager of Rail Security Programs, **Ravi Sincerny** to detectives, **Carolyn Perea** to training officer, **Andrew Rodrigues** and **Daniel Hoover** as FTOs, and Sgt. **Ed Alvarez**, **David McCormick**, **Esteban Toscano**, **Brian Lucas**, **Hany Abdoun**, **Richard Jacobson**, **Shane Coduti**, and **Rebecca Larson** to Critical Asset Patrol Team. **Justin Hawkins** was selected as canine handler with K9 "**Ilya**." BART PD welcomes the department's new police chaplains: Rev. **Rufus Watkins**, Rev. **Joseph Prudhomme**, Rev. Dr. **Jasper Lowery**, and Fr. **Jayson Landeza**.

BERKELEY POLICE DEPARTMENT

Lateral appointment: **Christopher Flores** (Oakland PD). New officers: **Jason Collier**, **Kelvin Gibbs**, **Devin Hogan**, **Kevin Kleppe**, and **Joshua Smith**. **Marty Heist** retired after 27 years of service. CSO **Alicia Escamilla-McNie** was promoted to CSO Supervisor. Retired sergeant **Michael Drucquer** passed away.

CALIFORNIA HIGHWAY PATROL

HAYWARD AREA: **Manny Torres** retired after 28 years of service with the CHP. Manny was part of the "CHP Motor Squad" and proudly rode a CHP enforcement motorcycle for 21 years. New officers: **Erica Kubo**, **Michael Melton**, **Jennifer Salazar**, **Josh Wiirre**, and **Micah Workman**.

EAST BAY REGIONAL PARKS POLICE DEPARTMENT

Lt. **Wayne Morimoto** retired after 29 years of service. Officer/Pilot **Bill Probets** was promoted to Helicopter Sergeant/Chief Pilot. Public Safety Student Aide **Daniel Beisheim** was hired as a dispatcher.

EMERYVILLE POLICE DEPARTMENT

Andrew Cassianos was promoted to sergeant. Sgt. **Fred Dauer** was assigned to Administration. **Frank Sierras** retired after 36 years of service.

FREMONT POLICE DEPARTMENT

The following officers retired: **John Anderson** (30 years), **Jon Buckhout** (30 years), **William Moon** (30 years), **Patrick Mayo** (26 years). Property Officer **Robin Neal** retired after 30 years. **Michelle Griese** and **Michael Tegner** were promoted to sergeant. **Mel Evangelista** was promoted to property officer. Lateral appointment: **Tiffany Greenberg** (Sacramento County SO).

NEWARK POLICE DEPARTMENT

Det. **Sal Sandoval** transferred from the Special Enforcement Team to Patrol. **Shannon Todd** transferred from Patrol to the Special Enforcement Team.

OAKLAND POLICE DEPARTMENT

The following officers have retired: Capt. **Anthony Banks** (28 years), Lt. **Richard Hassna** (28 years), Sgt. **Kevin Johnson** (28 years), and **Marcus Midyett** (21 years). The following officers have taken disability retirement: Sgt. **Bruce Garbutt**, **Victor Bullock**, **Kenneth Kim**, **Chad Ingebrigtsen**, and **Rodney Taya**. Retired officers **Lawrence Adams** and **Charles Teich** have died.

PIEDMONT POLICE DEPARTMENT

Sgt. **Frank McNally** retired after 26 years with the department. **Jeff Sloan** retired after nine years of service. Jeff served with the Antioch PD for 12 years before coming to Piedmont. **Catherine Carr** was promoted to sergeant. Lateral appointment: **Robert Jaime** (Oakland PD and U.S. Marshals Service). New officer: **Kristina Foster,** formerly a reserve officer. **Sheila Cox**, administrative assistant to the police and fire chiefs, retired after 21 years of service.

PLEASANTON POLICE DEPARTMENT

Sgt. **Brian Laurence** was promoted to lieutenant. Lateral appointments: **Nicholas Albert** (Oakland PD) and **Brian Simon** (Oakland PD).

SAN LEANDRO POLICE DEPARTMENT

Chief of Police **Ian R. Willis** retired from the department on January 9, 2011 after 26 years of service. **Sandra R. Spagnoli** was appointed Chief of Police on January 10, 2011. Prior to her appointment, Chief Spagnoli headed the Benicia PD and, before that, was a commander of the San Carlos PD.

Lateral transfers: Sgt. **Rick Decosta** from Investigation-Juvenile to Patrol, Sgt. **Bob Sanchez** from Patrol to Investigation-Juvenile, **Mike Olivera** from Investigation-Fraud to Patrol, and **Mike Cauraugh** from Patrol to Investigation-Fraud. **Ivie Pagano** was appointed Public Safety Dispatcher.

UNION CITY POLICE DEPARTMENT

Chief **Greg Stewart** retired after 34 years of combined service between Union City PD and ACSO, but he will stay on until a new chief is appointed. Capt. **Kevin Finnerty** retired after 33 years of combined service between UCPD and Modesto PD. Corp. **Nicole Fay** has taken a disability retirement. Corp. **Mark Housley** was promoted to sergeant. **Steve Cesaretti** was promoted to corporal. Transfers: **Yousuf Shansab** to Investigations, **Mike Ward** to School Resource Officer. The department is sad to report that **Lora Andrews** passed away on December 7, 2010. She was an 18-year veteran dispatcher with the department.

UNIVERSITY OF CALIFORNIA, BERKELEY POLICE DEPARTMENT

Sgt. **Michael Shipman** retired after 28 years of service. Acting Sgt. **Nicole Sanchez** was promoted to sergeant. Lateral transfer: **Rory McMilton** (San Jose PD). POV

War Stories

Returning to the scene

A few days after a hamburger stand on Telegraph Avenue was held up, two Oakland PD robbery detectives went to the place to show the cook a photo lineup. She couldn't ID anyone but, just as the detectives were gathering up the photos, she looked up and saw the robber—he was standing in line, waiting for a burger! The cook was so frightened she could hardly speak ("Ah…that's…over…there…him!").

After arresting the guy, one of the detectives asked him why he returned to the scene of his crime. The robber explained that, a few hours after he held up the burger joint, he was arrested on an auto theft charge, and he'd been in jail ever since. So when he made bail about an hour earlier, he decided to satisfy his craving for a hamburger. "But why," asked the detective, "did you come back to this place, the place you robbed just a few days ago?" "They got real good sauce," he explained.

Sometimes education is a bad thing

From the recent case of *United States* v. *Allen*: After police in Missouri found machine guns and a videotape in the home of Guy Allen, he was tried for possession of illegal firearms. When he claimed he didn't know anything about machine guns, the prosecutor played the videotape which showed him teaching his mother how to shoot one of the weapons. The verdict was never in doubt.

A suspicious story

Late one night, a Fremont police officer detained a guy who was acting suspiciously, maybe casing a residential burglary:

Officer: What're you doing here?

Suspect: I'm looking for my friend's house.

Officer: What's you friend's name?

Suspect: Eric.

Officer: What his last name?

Suspect: Uh . . . I'm not really sure. He used to be Eric Richardson. But he got married recently, so I don't know what his name is now.

Three coincidences and you're out

A few minutes after a bank was robbed in Fremont, a Union City police officer spotted two men in a car that was similar to the getaway car. After detaining the men, he radioed his dispatcher for a better description of the robbers.

As he was explaining to the men why he had stopped them, his dispatcher notified him that one of the robbers had brown curly hair. The driver, who had brown curly hair, noticed the officer examining his hair and said, "Hey," said the driver, "a lot of guys have brown curly hair." The dispatcher then reported that the curly haired robber also had a mustache. "Hey," said the driver as he stroked his mustache, "a lot of guys have these things." Then the dispatcher said that the curly haired, mustachioed robber had a missing front tooth. "Hey . . ." said the driver, but the officer interrupted him, saying, "That's your third coincidence, and that's all you get." The loot from the robbery was found under the front seat.

No further questions

In Juvenile Court in San Leandro, the attorney for a teenager charged with stealing a bicycle from an 11-year old boy was cross-examining the victim:

Attorney: Do you know the difference between telling the truth and telling a lie?

Victim: Yes.

Attorney: OK. Give me an example of a lie.

Victim: It would be a lie if I said that kid sitting next to you didn't steal my bike.

An existential question

Two BART police officers were walking through the Powell Street station in San Francisco when they spotted a woman who was smoking a cigarette. While one of the officers was explaining BART's no smoking law, the other ran her for warrants and learned that she had been reported missing. "We have a report that you're a missing person," said the officer. The woman replied, "How can I be missing? I'm right here!"

A big mouth

Two members of Watsonville PD's gang unit went to the home of a local gangbanger who was wanted on a warrant. After determining that he wasn't home, they suggested to a family member that, unless they wanted daily visits from the police they should call the officer on his cell phone when the gangbanger turns up. Later that day, one of the officers received a call from a blocked number on his cell phone: it was the gangbanger, and he was angry, swearing at the officer and demanding that he stop bothering his family. For the next two days, he repeatedly phoned the officer from the blocked number, each time saying "Come get me. Come get me. Ha Ha Ha Ha."

So the officer obtained a court order for the blocked number, traced the calls to a house in Watsonville, staked out the house, and arrested the gangbanger when he stepped outside. When the arrestee expressed shock that the officer would go to all of the trouble to find him, the officer explained, "I was motivated."

Looking on the bright side

Our one and only reader in Scotland sent us a story that appeared in a local newspaper there: A man who'd been arrested for shoplifting a can of sardines appeared before the judge and pled guilty. The judge asked, "How many sardines were in the can?" The man replied, "Four, M'Lord." "Well, then," said the judge, "I'm going to sentence you to one day in jail for each sardine—that's four days. Have you anything to say for yourself?" The man responded, "Aye. I'm just grateful I didn't steal a tin o' beans."

I see a jail cell in your future

One afternoon, a burglar broke into a house in Virginia and, after grabbing some jewelry and other valuables, decided to use the phone to check-in with his psychic. A few weeks later when the homeowner received his phone bill, he found a $250 charge for "Psychic Consultation" incurred on the afternoon of the burglary. A detective later phoned the psychic, who refused to reveal the name of her "client," citing the psychic-client privilege. But when the detective inquired whether the psychic had a business license, she waived the privilege. The burglar was apprehended the next day.

More from the world of the occult

In a courtroom at the Alameda County Courthouse in Oakland, the prospective jurors were introduced to the defendant and the attorneys, and were then asked to fill out a questionnaire. Here's what a lady from Berkeley wrote:

> I believe in ESP. This accused party is manifesting many signs of guilt to my perception, including an aura, tension so tight he's obviously overcompensating for his misdeeds. Blank and dark and cold is the hand of death on him.

The judge granted the defendant's challenge for cause, but not before the prosecutor protested that jurors should not be excused merely because they were clairvoyant.

What else is happening in court

Down the hall in another courtroom, the following was going on:

Defendant: Judge, I want you to appoint me a new lawyer.

Judge: Why's that.

Defendant: Because my public defender doesn't care about my case.

Judge: (Addressing the public defender) Do you have anything to say about your client's motion?

Public Defender: I'm sorry, judge, would you repeat that? I wasn't listening.

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We need more war stories!

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—Albert Einstein

(But it's a good place to start.)

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