The California Legal Update

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Support Our Troops

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THIS EDITION'S WORDS OF WISDOM

"*I truly believe the wireless mouse was invented so people at work had one less thing to hang themselves with*." (Mike Vanatta)

IN THIS ISSUE:

ADMINISTRATIVE NOTES:

***Update Case Law Index*:** I've just put together a list (an "*index*," if you will) of all the cases (and the Administrative Notes), by case cite, topic, and basic rule, that I've briefed for the *Legal Update* for the last two years. While organizing this was more for my benefit than yours, making it quicker and easier for me to find a particular case when someone asks (e.g., "*I seem to recall you briefed a case about spitting on the sidewalk some time ago, but I can't seem to find it right now. Do you remember such a case*?"), I will send you the list if you'd like it. You need merely ask. It will help you to find old cases I've briefed. Or, if you're new to the *Update*, going through it might pique your

interest on certain topics from past *Updates*. If you then see a case you'd like to review, or a whole edition you missed, I can send it to you. Note also you can locate prior *Update* editions at the websites listed above in the upper left-hand corner of the first page.

CASES:

***P.C. § 148(a)(1) and Exhorting Others Not to Cooperate with Police*:**
***P.C. § 148(a)(1) and Refusing to Cooperate with Police*:**
***P.C. § 148(a)(1) and a Detainee Refusing to Identify Himself*:**

In re Chase C. **(Dec. 18, 2015) 243 Cal.App.4th 107**

Rule: (1) Absent proof that encouraging others to refuse to cooperate with law enforcement actually results in physical interference, such "political speech" is protected by the First Amendment. (2) Being slow to cooperate with law enforcement is not a violation of P.C. § 148(a)(1). (3) Refusing to identify oneself while being detained is not illegal, being a protected right under the Fifth Amendment right against self-incrimination.

Facts: San Diego Sheriff's Deputy Scott Hill was in (partial) uniform, patrolling Turtle Park in the Forest Ranch area of San Diego, when a group of middle school children reported to him that two high school-aged minors had attempted to sell them drugs. With a full description of the culprits, Deputy Hill went looking for them. He found them several minutes later amongst a group of about eight other 16-year-olds. The deputy approached them and, while telling the others that they were free to go, ordered the two suspects to sit on the curb.

One of the suspects, Jason (or Jacob) McBride, cooperated and remained cooperative throughout the contact. The other, Brandon Hewgley, refused to sit down, questioning Deputy Hill as to why he was being detained. At this point, defendant, who was among the other un-detained minors, began telling Hewgley "not to listen to (the deputy) or obey, (and) not to do what (the deputy) was telling him to do." As Deputy Hill placed his hand on Hewgley's arm, telling him again to sit down, Hewgley protested by "throwing his arm up as if he was going to strike (the deputy)." This resulted in Deputy Hill pulling Hewgley back and holding him there as he called for assistance on his radio. Deputies Baquiran and Robins responded within two minutes. The still uncooperative Hewgley was handcuffed and placed into the backseat of a patrol car. At that point, "another kid (in the crowd) was yelling something," as the other non-suspect minors "were just kind of standing around."

For safety purposes, and to facilitate the collection of information and to insure that no one had any contraband on them (apparently, no one did), Deputy Baquiran handcuffed all the remaining minors. As this process was going on, and despite Deputy Baquiran's request to "please be quite," defendant continued to verbally protest, telling the others not to listen to the deputies or to tell them anything. Despite defendant's interference, Deputy Baquiran later testified that securing all the other minors only "took 'a few minutes,' and was accomplished 'in an efficient manner,' (but) that there was 'a little delay' in getting the minors' information." Deputy Baquiran felt this delay was caused by defendant telling the other minors not to cooperate. However, once told that if they didn't cooperate they'd be taken to the patrol station and their

parents called, everyone (except defendant and Hewgley) began to comply. But then Hewgley, still handcuffed and in a patrol car, began banging his head inside the patrol car.

Becoming concerned that Hewgley might hurt himself or damage the patrol car, Deputy Baquiran determined that they should get him out of the area and back to the station. Deputy Baquiran later testified, however, that he was delayed in dealing with Hewgley because of the need to detain the other minors and get their information. As for his part, Deputy Hill later testified that defendant, while using profanities, was telling Hewgley, as well as the other minors at the scene, not to listen to the deputies or to cooperate. However, Deputy Hill admitted that Hewgley was already refusing to comply with the deputy's commands even before defendant chose to interfere, and that he (Deputy Hill) could not speculate as to whether or not defendant's verbal advice affected Hewgley's continued lack of cooperation. Deputy Hill further testified that although he believed defendant's comments had prompted some of the other minors in the crowd to verbally question his actions, he admitted that "nobody (else) became violent (or) resistant physically."

As for defendant, while at the scene, he continued to refuses to give his name or any information as to his parents, stating that he was "pleading the Fifth Amendment." Upon handcuffing him, defendant questioned (in loud profanities) why he was being arrested. Told to calm down, defendant continued to tell the other minors not to cooperate and not to tell the deputies anything. He did not, however, attempt to physically resist, flee, or use any force. Once defendant was placed into a patrol car, his attitude did a 180, suddenly becoming "extremely" cooperative. Transported to the sheriff's station, defendant remained cooperative for the rest of the contact. Asked in court why defendant had been arrested, Deputy Baquiran testified that: "He delayed what we were trying to do, trying to accomplish, by him not providing just simple information: What is your name, who can we contact so they can come and take care of you, take custody of you here. That's all we needed to do. It's very simple. Just, what is your name? Who is your mom? Where is your dad? What's your phone number? But (he) refused to provide that information to us." A Juvenile Court magistrate found defendant to be a ward of the court under W&I § 602, for having violated P.C. § 148(a)(1); delaying or obstructing a peace officer in the performance of his duties. Defendant appealed.

Held: The Fourth District Court of Appeal (Div. 1) reversed. The issues on appeal were whether either or both the following two acts constitute a violation of P.C. § 148(a)(1): *First*; exhorting others not to cooperate with a police investigation, and *Second*; a detainee refusing to cooperate or identify himself. Defendant argued here that what he did constituted protected political speech which did not result in any physical interference with the officer's investigation. He also argued that neither he nor the non-suspect minors were lawfully detained and that he was therefore within his rights when he told the others not to cooperate and by refusing identify himself. In order for there to be a violation of P.C. § 148(a)(1), the People must prove that; (1) the defendant willfully resisted, delayed, or obstructed a peace officer, (2) while the officer was engaged in the performance of his or her duties, and (3) the defendant knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties.

Only the first two elements were at issue here. In analyzing the applicability P.C. § 148(a)(1) to this case, the Court broke the incident down into three parts. (1) *Telling Hewgley not to cooperate*: The Court found that defendant's verbal exhortations to Hewgley did not support a charge of delaying or obstructing an officer in the performance of his duties. Defendant's encouragement to Hewgley had no effect on what Hewgley did or did not do. Hewgley was already uncooperative before defendant said anything, and continued to be uncooperative after he was separated from defendant. It is not illegal, on its face, to verbally protest and challenge law enforcement's actions so long as such protestations do not cause physical interference. Absent some proof that defendant's encouragement to Hewgley to refuse to cooperate actually resulted in Hewgley's physical interference with the deputies, his speech is protected by the First Amendment as "political speech." "[S]peech is generally protected by the First Amendment, even if it is intended to interfere with the performance of an officer's duty, provided no physical interference results." There being no evidence here that defendant's actions were the cause of Hewgley's resistance, defendant did not violate P.C. § 148(a)(1).

(2) *Telling the non-suspect minors not to cooperate*: It is an essential element of P.C. § 148(a)(1) that an officer be acting in the performance of his duties. Detaining a person without at least a reasonable suspicion that that person is involved in criminal activity is illegal. An officer is not acting in the performance of his or her duties when he or she conducts an illegal detention. Other than McBride and Hewgley, the two suspected dope dealers, the officers in this case had no legal cause to detain any of the non-suspect minors and were therefore *not* acting in the performance of their duties when they did so. Under these circumstances, defendant's conduct in protesting the deputies' illegal act of detaining the non-suspect minors constituted protected free speech.

(3) *Defendant's lack of cooperation and his refusal to identify himself*: Deputy Baquiran testified that his reasons for arresting defendant was due to his refusal to provide identification information and his telling the other minors not to cooperate. Per the above, defendant's encouragement to the others not to cooperate was not illegal. Also, relative to his own lack of cooperation, prior case law has held that an individual who protests repeatedly before complying with an officer's orders cannot be prosecuted under P.C. § 148 because verbal (as opposed to physical) challenges to police action are protected by the First Amendment freedom of expression. (*People v. Quiroga* (1993) 16 Cal.App.4th 961.) "(T)he fact that someone verbally challenges a police officer's authority or is slow to comply with an officer's orders does not mean that he or she has delayed an investigation." (*Quiroga*, *supra*, at p. 966.)

It is not until a person's words or actions go "beyond verbal criticism, into the realm of interference with [an officer's performance of his or her] duty," that the First Amendment no longer protects him from criminal punishment. Providing examples, the Court held that this line is not crossed until the suspect's actions extend beyond merely responding slowly and challenging an officer's authority. "(S)ection 148 does not 'criminalize a person's failure to respond with alacrity (i.e., "*promptness*") to police orders.' . . . (T)he First Amendment protects the right to dispute an officer's actions." Also, at least until a stationhouse booking interview, one's Fifth Amendment right against self-incrimination renders a suspect "'free to refuse to identify himself or to answer questions' without violating section 148." Per the Court, "(Defendant's) refusal to identify himself, not just preceding booking but before even being

placed in a patrol car, was protected conduct under the Fifth Amendment." Here, defendant's pre-booking uncooperative conduct and his refusal to identify himself constituted no more than a "simple delay" in responding to a directive from a sheriff's deputy while engaging in protected speech. (He did, once taken to the station, become cooperative, identifying himself as required.) Neither such a "simple delay," nor a pre-booking refusal to identify oneself, per the Court, constitutes a violation of P.C. § 148(a)(1).

Note: I'm sorry, but unless you were there, a judge in the quiet comfort of his or her chambers cannot possibly understand how one loudmouth in the midst of a crowd can "obstruct or delay" an officer who is attempting to gain the cooperation of a unruly detainee, even if it's later difficult in testimony to quantify the degree to which that loudmouth interfered. I have all the respect in the world for Justice Dick Huffman, the author of this decision (after all, as the then #2 man [Assist. DA] in the San Diego DA's Office some 37 years ago, he had the foresight to hire me), but his discussion of the issues here totally ignores a common sense recognition of the difficulties inherent in working on the streets and dealing with a crowd.

Next, I've always made the argument that a detainee refusing to identify himself can be charged with P.C. § 148(a)(1). This case, however, says that a detainee has a Fifth Amendment self-incrimination constitutional right *not* to ID himself, at least until (and if) he is arrested and booked. The Court here does not even mention *Hiibel v. Sixth Judicial District Court of Nevada* (2004) 542 U.S. 177, where the Supreme Court specifically ruled that requiring a detainee to identify himself is *not*, as a general rule, a constitutional violation. And I fail to see how defendant here, by simply providing his name, could have possibly incriminated himself. *Hiibel*, however, was based upon a Nevada statute requiring a detainee to ID himself when asked. California has no such statute, and it remains an issue (at least in my mind) whether P.C. § 148(a)(1) can be used instead. Probably not, based upon this case and what little other case law there is on this issue, at least without an actual, measurable, and articulable delay (something beyond a "*simple delay*," whatever that is) caused by the refusal. But the argument is still there.

Also, I've always wondered in cases like this, when the purpose of juvenile jurisprudence is supposed to be rehabilitation as opposed to merely punishment, why the same search and seizure balancing tests applicable to adult offenders is also used with minors. For instance, although juveniles, just as with adults, may enjoy the same First Amendment freedom to voice what the court here refers to as "*political speech*," I have to ask whether it's really wise to give this right so much weight in a juvenile case when it only serves to teach the youth that the courts will back up his disrespect for, and lack of cooperation with, law enforcement? Where's the rehabilitative effect there?

***Search Warrants; Staleness and Breadth*:**

United States v. Fries **(9th Cir. Mar. 30, 2015) 781 F.3rd 1137**

Rule: A search warrant is not stale when there is shown to be a consistent modus operandi over the years, with the latest crime occurring within two weeks of the issuance of the warrant. A search warrant is not overbroad when the descriptions of what is to be searched and what may be seized is specific enough to enable the person conducting the search reasonably to identify the things authorized to be seized.

Facts: Myles and Karen Levine hired defendant to resurface their driveway in Tucson, Arizona, in 2008. Not being satisfied with the job defendant did, they stopped payment on their $200 check to him. This, according to testimony later received at trial, infuriated defendant.

On August 2, 2009, the Levines woke up in the morning to the strong odor of chlorine gas. They couldn't get out of their front door or garage door in that both, along with their windows, had been sealed shut. Responding law enforcement officers arrived to find a large pile of burning, gas-emitting debris in front of the Levine's closed garage door in the front of the house. On the back patio, they found a bucket also containing burning, oozing debris. The two burning fires together created a very large, thick plume of a grayish white-colored cloud. There was evidence presented at defendant's later trial that it was chlorine gas that was emitting around the Levine's home, and that it was toxic; chlorine qualifying as a chemical that is immediately dangerous to life and health. Also, spread throughout the front driveway, sidewalk and walkway leading to the front door was a thick, viscous, slimy material, which appeared to be a combination of paint and motor oil, plus foam peanuts. Also strewn in the front of the home were dead animal carcasses including a rabbit, cat, coyote and numerous woodpeckers.

Offensive graffiti was painted on the front of the house, including a swastika. The front door, windows and garage door of the Levine's home were found to be sealed shut with a foam expanding sealant, thereby preventing the Levines from escaping out the front of their house. Near the Levine's residence, investigators found a driver's license and day planner for someone named Michele Fuentes, business cards for Debbie's Cleaning Service, and a check from Fuentes made out to Karen Levine with a notation "refund customer unhappy." Defendant's latent fingerprint was later found on the check.

Two days later, the FBI received a telephone call purporting to be from Michele Fuentes, except that the voice on the phone sounded more like a male. The caller claimed to be upset with the Levines over an unrelated incident, and that her (the caller's) cousin, Joaquin Contreras-Navarette, an "extremely violent person," took revenge for her by placing the above-described burning devices at the Levine's home. Fuentes was later contacted and claimed that her purse was stolen several years before, with the loss of her driver's license, social security card, checks, and a day planner. The earlier telephone call to the FBI that was purportedly from Fuentes was traced to a hospital where witnesses later testified that they saw a man lurking around a particular telephone. Defendant's prints were lifted off that phone.

The Levines had been the victims of a nearly identical attack once before, on November 1, 2008. After that first attack, the Levines moved from that house to another gated community where the second attack (described above) occurred. After the first (i.e. 2008) attack, just as occurred in the second (i.e., 2009), a woman's wallet was found next to the driveway. With the wallet was a driver's license issued to Kayln Hovey, and other personal items. When investigators interviewed Hovey, she identified the driver's license and other items as hers, but not the wallet, saying that these items had been stolen from her in October, 2005. And then lastly, on April 28, 2011, another attack similar to the 2008 and 2009 attacks on the Levines was perpetrated on another of defendant's former customers who was dissatisfied with his work and refused to pay.

As occurred with the Levine's two attacks, found near that scene was a small black wallet containing business cards and a driver's license.

When agents interviewed the female whose license was found at that scene, they learned that she had lost her driver's license in December, 2010. A number of defendant's former employees were interviewed, telling FBI agents that defendant had attempted to enlist their aid in staging the above attacks. As a result, FBI Special Agent Brian Nowak obtained a search warrant, two weeks after the last (2011) attack, for defendant's residence and the vehicles he used in his business. The items to be seized included "[a]ny written material that describes how to produce, make or manufacture bombs, chemical weapons or destructive devices," as well as defendant's computers and computer equipment.

Incriminating evidence was discovered as a result of executing this warrant. Defendant was charged in federal court with using a chemical weapon (18 U.S.C. § 229(a)), and making false statements to the FBI (18 U.S.C. § 1001), for the single incident occurring on August 2, 2009. Prior to trial, defendant filed a motion to suppress the evidence obtained as a result of the execution of the search warrant. The trial court denied the motion. Defendant was convicted by a jury of both counts and sentenced to 151 months (that's over 12½ years) in prison. Defendant appealed.

Held: The Ninth Circuit Court of Appeal affirmed. Among the issues defendant raised on appeal was the legality of the search warrant used in the investigation of his crimes. Defendant first alleged that the probable cause alleged in the warrant affidavit was stale, Special Agent Nowak not having obtained the warrant until almost two years after the 2009 attack on the Levine's residence for which defendant was prosecuted. The issue here is whether, after nearly two years, there was still probable cause to believe that evidence related to defendant's 2009 crime would be found in the places the agents sought to search. In this case, defendant didn't stop in 2009. There was reason to believe, based upon his unique modus operandi, that defendant committed a very similar offense as late as April, 2011; two weeks before the warrant was sought. "Information underlying a warrant is not stale if there is sufficient basis to believe, based on a continuing pattern or other good reasons, that the items to be seized are still on the premises. . . ."

Given the evidence tending to indicate that defendant committed similar crimes, including the element of attempting to steer investigators to other innocent individuals by leaving items of identification at each of the 2008, 2009, and lastly, 2011, crime scenes, there was every reason to believe that he would still have evidence of his crimes in the locations sought to be searched. "We conclude that (defendant's) 'continuing pattern' of vandalizing the homes of former customers militates against a finding that the information supporting probable cause was impermissibly stale."

Defendant also questioned whether the warrant affidavit was impermissibly overbroad. A search warrant must particularly describe both the place to be searched and the person or things to be seized. A warrant that is so broad in its scope that it allows the government to rummage through personal items or information that is irrelevant to any criminal allegations is considered constitutionally defective, and in violation of the Fourth Amendment. "The description must be

specific enough to enable the person conducting the search reasonably to identify the things authorized to be seized. The purpose of the breadth requirement is to limit the scope of the warrant by the probable cause on which the warrant is based. . . ." Under the facts of this case, the Court found the warrant to be sufficiently narrow in scope to limit that searching agents' discretion to constitutionally permissible limits.

As to the defendant's computers, the search warrant affidavit sufficiently explained that seizure of defendant's computers was required because of the difficulty in analyzing the computers on-site and the potential for alteration or destruction of the computers' components, including business records. According to Agent Nowak, a confidential source revealed that defendant had "a laptop that he carries with him at all times and uses frequently," and that defendant "has a computer at his home that he uses very frequently . . . ." Additionally, Agent Nowak described in great detail how defendant's alleged criminal conduct and the corresponding probable cause stemmed from his harassment of former business customers. With this much detail, it cannot be said that it was not clear to the searching agents where they were allowed to search, and exactly what they were allowed to seize. As a result, the search warrant was not impermissibly overbroad.

Note: Good case to use on both search warrant issues; staleness and breadth. Prosecuting this guy must have been fun, given the degree of outrageousness of his crimes. He made some other interesting arguments as well, however, related to whether what he did was within the jurisdiction of the federal courts to handle. Given the dangerousness of his acts, and the fact that what he put together was considered a "chlorine bomb" (in fact causing injury to some first responders who breathed the chlorine fumes, and necessitating the implementation of HAZMAT procedures), and "because '[t]he Federal Government undoubtedly has a substantial interest in enforcing criminal laws against . . . acts with the potential to cause mass suffering. . . ,'" the federal court took jurisdiction.

***Disorderly Conduct, per P.C. 647(j)(2); An Identifiable Person*:**

People v. Johnson **(Mar. 10, 2015) 234 Cal.App.4th 1432**

Rule: An "identifiable person," for purposes of P.C. § 647(j)(2), means a person (i.e., a "victim") who is capable of being identified or recognized, where it is reasonably probable that the person may be identified by another or by the victim herself, whether or not that person is in fact ultimately identified.

Facts: In March, 2014, Andrea M and her sister, Raquel M, were shopping at a Target store in Lancaster when Andrea noticed defendant following them. She saw him kneel down, as if pretending to pick something up off the ground. However, defendant instead aimed a cell phone he was holding up under her skirt. Finding this "creepy," the sisters reported the incident to a Target security employee who watched defendant do the same to another woman, apparently filming up her dress after having followed her around the store. Target security called the Los Angeles County Sheriff's Department and a deputy responded, contacting defendant in the parking lot. When contacted, defendant admitted to the deputy that he'd been taking pictures up women's skirts, conceding that he didn't have permission to do so. Upon being identified by

Andrea and Raquel, he was arrested, after which he apologized to the women. After being *Mirandized*, defendant told the deputy that he'd only photographed one woman and that it was the first time he had ever done so. However, a search of his phone revealed well over 100 "up-skirt" videos and pictures of women who appeared to be unaware they were being photographed.

A detective from the sheriff's department reviewed videos from defendant's phone and the hard drive of a laptop seized from his home, finding over 2,000 videos, including "sex videos" of defendant with various women, and up-skirt videos. One other victim was tracked down because her license plate had been recorded. Otherwise, while some videos showed the victims' faces, it was impossible to tell who each person was. The overwhelming majority of the videos involved "sexual-related" content. In general, the videos showed that defendant would stalk his victims through various public places for several minutes until he was able to get close enough to aim his phone "under the person's skirt or near their buttock region." Defendant was charged in state court with 12 counts of Disorderly Conduct (i.e., "Peeping"), per P.C. § 647(J)(2), with the victims identified by name in only three counts.

In the other nine counts, the victims were listed as "Jane Doe." In counts 8, 9, 11, 14 and 15, the "Jane Doe" victims' faces were not shown, but rather only their shoes, legs, skirts, dresses, purses, or, in a few cases, the back of their heads. At trial, the court instructed the jury only that "the People must prove that . . . [t]he defendant willfully used a concealed camcorder, motion picture camera, or photographic camera of any type to secretly videotape, film, photograph, or record by electronic means another, identifiable person under or through the clothes being worn by that other person. . . ." The court did not define what the statute meant by "identifiable person." So, left up to the attorneys, the prosecutor argued that an "identifiable person" is anyone "that exists, someone you can identify as a person, as opposed to a doll or something like that." Defense counsel told the jury that an identifiable person is someone who "is a specifically identifiable human being; in other words, what's on the video allows you to tell who that person is." The jury convicted defendant of all counts (plus sexual battery by fraud [P.C. § 243.4(c)] and felony false imprisonment [P.C. § 236], for another incident where defendant took his photography skills to the next level and apparently confronted one of his victims, groping her beneath her underwear; an incident not relevant to this case.). Sentenced to 20 years and six months in prison, defendant appealed.

Held: The Second District Court of Appeal (Div. 8) reversed the convictions on five counts, finding that both the prosecutor's and the defendant's definition of "identifiable person" missed the mark, but otherwise affirmed. The obvious issue on appeal was the meaning of the term "*identifiable person*," for purposes of P.C. § 648(j)(2). The statute itself does not define the term. So the Court undertook a review of the language of the statute, the legislative history, and the apparent legislative purpose, as well as the "Oxford English Dictionary." In so doing, it determined that the Legislature was primarily concerned with the invasion of privacy that occurs when one person secretly photographs or films under or through the clothing of another person.

Recognizing this, the Court held the following: (1) The victim's actual identity does not need to be established. The statute requires the recording to be of an "*identifiable person*," not a person who is actually identified or named. The People do not have to prove the victim has actually been identified, located, or named. And the People do not have to offer evidence showing anyone

has actually recognized the victim. (2) "*Identifiable*" means capable of identification, or capable of being recognized. In other words, is there enough evidence about the victim that it is reasonably probable someone could identify or recognize her? It is not enough, as the People argued, that it merely be possible to distinguish one victim from another. So long as there is a reasonable probability that someone could identify or recognize the victim, the "identifiable person" element is satisfied. (3) "*Identifiable*" means that when all of the available evidence is considered, it is reasonably probable that someone—even if only the victim herself—could identify or recognize the victim. The People need only prove that, when all of the evidence is considered, it is reasonably probable that someone, including the victim, could identify or recognize the person secretly recorded. (4) It is not required that the victim be identifiable solely from the defendant's photographs or videos. All the available evidence related to the victim's identity may be considered. This might include, for example, contemporaneous surveillance footage from a store's cameras. Information regarding the time and location of the recording, combined with other identifying information about the victim such as body type, hair color or length, distinctive clothing or handbag, may be enough to allow the fact finder to conclude that it is reasonably probable someone, including the victim herself or himself, could identify or recognize the person the defendant unlawfully filmed, photographed, or otherwise recorded.

In sum: "The People must establish, beyond a reasonable doubt, that when all of the evidence is considered, it is reasonably probable someone could identify or recognize the victim. This may include the victim herself or himself. If the only evidence of the crime is a recorded image that includes no unique or identifying characteristics, and there is no evidence extrinsic to the image the defendant recorded, such that it is not reasonably probable even a victim could recognize herself or himself from the evidence, the People will be unable to establish the 'identifiable person' element of a section 647(j)(2) violation." In this case, the Court held that the prosecution had in fact met this standard as to each of the charged violations. However, the trial court failed to instruct the jury correctly by not providing a legal definition of "identifiable person" for the jury's guidance. Having failed to properly instruct the jury, the Court found it necessary to reverse defendant's convictions on those counts where the definition of "identifiable person" was an issue; i.e., counts 8, 9, 11, 14 and 15. Otherwise, however, defendant's conviction was affirmed and the matter was remanded to the trial court for retrial on the reversed counts.

Note: The case decision itself provides a lengthy dissertation on the legislative history behind P.C. § 647(j)(2) that may be of value to prosecutors when trying such a case. It also gives us all a lot of guidance on what it takes to prove up such a charge. An improvised jury instruction will need to be written, consistent with the definition of "*identifiable person*" as defined here. The only surprise in this case was that the trial court left it up the attorneys to tell the jury what, in their respectively biased opinions, the term "identifiable person" meant. It's the court's duty to instruct on the law; not the attorneys. It's no surprise that both sides got it wrong.

***Permitting a Loaded Firearm In a Vehicle; per P.C. § 26100(a)*:**

People v. Gonzales **(Jan. 13, 2015) 232 Cal.App.4th 1449**

Rule: It is the prosecution's burden to prove that for purposes of P.C. § 26100(a) (A driver permitting a passenger to carry a loaded firearm into a vehicle), not only did the driver know that another person had brought a firearm into his vehicle, but that he also knew it was loaded.

Facts: On July 8, 2012, police officers (for reasons not discussed) stopped a vehicle in which 27-year-old defendant was the driver and two 15-year-old males were passengers. Upon asking all three to step out of the car, John Doe One, in the front passenger seat, told the officers: "I'm not gonna lie to you, sir. I have a loaded gun on me." Sure enough, he was carrying a stolen, loaded .45-caliber semiautomatic pistol in his waistband. When questioned, defendant admitted to having been told by John Doe One that he was packing a pistol. Although defendant hadn't seen it, John Doe One made it pretty obvious what he had by grabbing his waistband area and shaking it up and down.

There was also evidence tending to indicate that all three people in the car belonged to the Santa Rita Bahamas Norteño criminal street gang. Defendant was arrested for permitting a person to carry a loaded firearm in a vehicle, in violation of P.C. § 26100(a); a misdemeanor. Tried on this charge in state court, along with a gang allegation (P.C. § 186.22(d)), the trial court instructed the jury that in order for them to find defendant guilty, they needed only to find that defendant knew that a firearm was brought into his vehicle. While that firearm must have been loaded, the court did not instruct the jury that defendant had to have known this. In support of the gang allegation, however, a gang expert testified to the violent nature of defendant's street gang, and that carrying loaded, concealed firearms, was a part of the gang's culture. Defendant was convicted and sentenced to probation. He appealed.

Held: The Sixth District Court of Appeal reversed. Defendant argued on appeal that section 26100(a) is not violated unless the driver of the vehicle knows the firearm is loaded and that in this case, there was no evidence of that knowledge. The Court agreed. P.C. § 26100(a) makes it a misdemeanor "for a driver of any motor vehicle . . . knowingly to permit any other person to carry into or bring into the vehicle a firearm in violation of" P.C. § 25850 or Fish & Game Code § 2006. P.C. § 25850 and Fish and Game Code § 2006 both apply only where the firearm is loaded.

Based upon this, it is clear that the People have the burden of proving that defendant, as the driver of a vehicle, knew that another person was carrying a firearm while in, or had brought a firearm into, a vehicle when, as it turns out, the firearm is loaded. However, it was not clear from the statute whether the driver had to also have known that the firearm was in fact loaded. The First District Court of Appeals, in *In re Ramon A.* (1995) 40 Cal.App.4th 935, held that it was not required that the driver actually know that the firearm was loaded; only that he knew a firearm (which is later determined to be loaded) was brought into the car he was driving. The Court here, however, in reversing defendant's conviction, disagreed with the First District on this issue. The Court also found, however, that the statute on this issue to be ambiguous, necessitating a detailed discussion of the Legislative intent in enacting section 26100(a). *In re*

Ramon A., for instance, found that to require the prosecution to prove that the defendant knew the firearm to be loaded would negate a legislative intent to curb drive-by shootings. This Court, however, noted that *In re Ramon A.* preceded the "evolution of [the California Supreme Court's] mens rea jurisprudence" (citing *In re Jorge M.* (2000) 23 Cal.4th 866), tightening up on the rules whereby one's knowledge as to specific factors need not be proved (referred to as a "public welfare offense").

In *In re Jorge M*, the Supreme Court determined that in determining the legislative intent on the issue of whether some specific knowledge (i.e., "mens rea") must be proved, a court must consider the following: (1) The legislative history and context; (2) any general provision on mens rea or strict liability crimes; (3) the severity of the punishment provided for the crime ("Other things being equal, the greater the possible punishment, the more likely some fault is required."); (4) the seriousness of harm to the public that may be expected to follow from the forbidden conduct; (5) the defendant's opportunity to ascertain the true facts ("The harder to find out the truth, the more likely the Legislature meant to require fault in not knowing."); (6) the difficulty prosecutors would have in proving a mental state for the crime ("The greater the difficulty, the more likely it is that the Legislature intended to relieve the prosecution of that burden so that the law could be effectively enforced,"); and (7) the number of prosecutions to be expected under the statute ("The fewer the expected prosecutions, the more likely the Legislature meant to require the prosecuting officials to go into the issue of fault")."

Taking these factors into account, the Court here determined that it was indeed the prosecution's burden to prove that not only did defendant know that another person had brought a firearm into his vehicle, but that he also knew the firearm was loaded. "The legislative history strongly supports a conclusion that the Legislature actually intended to limit criminal liability to only those owners/drivers who knew the firearm was loaded." In this case, the Court ruled that there was sufficient evidence that defendant knew the firearm was loaded when the passenger who possessed the gun was a fellow member of the defendant-driver's criminal street gang, and where a gang expert testified that the primary activities of defendant's gang, which included carrying concealed firearms, murders, homicides, and shooting into inhabited dwellings, required that firearm be loaded. However, because the jury had not been instructed as to all the elements of P.C. § 26100(a), his conviction had to be reversed and retried with the jury being told that defendant's knowledge that the gun was loaded is an element of the offense which they must find beyond a reasonable doubt in order to convict.

Note: This case is a good illustration of the fact that a court can justify whatever conclusion it wants if it talks long and hard enough about the issue, leaving us mere mortals never to be the wiser. But either way, we now know. There's also something called "*the rule of lenity*," by the way, briefly discussed by the Court (pg. 1461). This rule "generally requires that ambiguity in a criminal statute should be resolved in favor of lenity, giving the defendant the benefit of every reasonable doubt on questions of interpretation." This rule applies, however, "only if two reasonable interpretations of the statute stand in relative equipoise (i.e., "*balance*")." That sounds like it applies here to me. They might have said that from the very beginning and saved a lot of ink. Also, for you gang enthusiasts, the court also held that there *was* sufficient evidence of the P.C. § 186.22(d) gang allegation to allow that to be a part of any retrial. So that's good

news. Had the evidence of that been insufficient, Double Jeopardy might have prevented the gang allegation from being retried.