

decision in *People v. Diaz* (2011) 51 Cal.4th 84, where it was held that any container that is “*immediately associated with the person*” (i.e., found on the person), when that person is subjected to a “*custodial arrest*” (i.e., taken into physical custody and to be transported), is subject to a warrantless search incident to the arrest even after the container has been seized and the arrestee has been secured, and even if the container is not searched until later. Such a “*container*” includes “*portable electronic devices,*” such as (but not limited to) cell phones. (See *Legal Update*, Vol. 16, #2, February 2, 2011.) The bad news is that, I’m told, the bill was passed unanimously by the California Legislature. So, despite the veto, expect to see it rear its ugly head again.

CASE LAW:

Assault Weapons and Retired Peace Officers:

93 Ops.Cal.Atty.Gen. 130 (Dec. 31, 2010)

Rule: A peace officer who purchases and registers an assault weapon in order to use the weapon for law enforcement purposes pursuant to P.C. § 12280(f)(2) is not permitted to continue to possess the assault weapon upon retirement.

Facts: Sheriff William D. Gore, Sheriff of San Diego County, requested that the Attorney General issue an opinion answering the following question: “Is a peace officer who purchases and registers an assault weapon in order to use the weapon for law enforcement purposes (pursuant to P.C. § 12280(f)(2)) permitted to continue to possess the assault weapon after retirement?”

Held: In response, the California Attorney General issued an extensive opinion to the effect that a peace officer who purchases and registers an assault weapon in order to use the weapon for law enforcement purposes, as allowed under P.C. § 12280(f)(2), is *not* permitted upon his or her retirement to continue to possess that assault weapon. The AG based this opinion on an interpretation of the relevant statutes as well as an analogous case decision from the Ninth Circuit Court of Appeal; *Silveira v. Lockyer* (9th Cir. 2002) 312 F.3rd 1052 (as amend. Jan. 27, 2003). The opinion includes an extensive description of the “Assault Weapons Control Act,” P.C. §§ 12275-12290, contained in a chapter of the Penal Code entitled “Roberti-Roos Assault Weapons Control Act of 1989” and “.50 Caliber BMG Regulation Act of 2004.” The AG further describes the Legislature’s intent in enacting the above statutes, particularly as it relates to the placement of restrictions on the possession and use of assault weapons and to control the proliferation of such weapons by establishing a registration and permit procedure for their lawful sale and possession. At issue here are the provisions contained in P.C. § 12280(f)(2) which, as an exception to the general prohibitive provisions of the Act, permit a peace officer employed by one of the agencies designated in the statute (i.e., law enforcement agencies as listed in subd. (e)) to buy an assault weapon or a .50 BMG rifle if the officer’s employer authorizes him or her to possess the weapon and the officer registers the weapon within a specified time period. The question presented is whether this statute, by

inference, allows the officer when he or she retires to retain the assault weapon he lawfully purchased while employed. First, the AG noted that section 12280(f)(2) does not make reference to retired peace officers, either allowing or prohibiting such former officers to possess assault weapons. Failure to include a reference to retired officers, particularly when other statutes include such a reference, tends to indicate a legislative intent *not* to include them in its provisions. Also, as a matter of statutory construction, it is generally not proper to infer an exception to a prohibitive statute. The AG further noted that the Ninth Circuit, in *Silveira v. Lockyer*, ruled as equal protection violations other provisions of the Act (former § 12280(h) and (i)) that had permitted currently employed, but off duty peace officers to use assault weapons without restriction, and retired peace officers to possess and use assault weapons they had acquired from their agencies while they were employed. The Ninth Circuit held that the Act cannot constitutionally allow off duty peace officers or retired officers unrestricted use of assault weapons while prohibiting such possession or use to private non-law enforcement individuals. While there is a governmental interest in allowing employed peace officers (both on or off-duty) to use assault weapons “*for a law enforcement purpose*,” that governmental purpose doesn’t apply to the possession or use of assault weapons by active, but off-duty officers, or to retired officers, unless also restricted to a law enforcement purpose. As a result of the decision in *Silveira*, the Legislature deleted these provisions for off-duty and retired law enforcement officers. Section 12280(f)(2) also contains no such restriction. Similarly, section 12280(f)(2), if interpreted to allow retired police officers unrestricted possession or use when there is no law enforcement purpose involved, would constitute a constitutional equal protection violation. Also, it violates the stated legislative purpose of the Act of controlling the unnecessary proliferation of such weapons. The fact that an officer may have purchased the assault weapon with his own money while employed as a police officer does not justify allowing him or her to keep the weapon in retirement. With such a history, it is neither logical nor constitutional to now infer a provision in other subdivisions of the same statutes in favor of retired officers being allowed to possess assault weapons.

Note: For you gun-nuts who are OCD about assault weapons and the Second Amendment’s right to bear arms provisions, you need to pull this whole opinion and bathe yourself in its extensive and detailed description of the Assault Weapons Control Act. There’s also a section talking about the U.S. Supreme Court’s rulings finding that despite earlier rulings to the contrary, the right to bear arms is a personal right and not necessarily tied to the maintaining of a militia. (*District of Columbia v. Heller* (2008) 554 U.S. 570; *McDonald v. City of Chicago* (2010) 561 U.S. __ [130 S. Ct. 3020].) But the AG’s opinion also cites some of the existing authority to the effect that the Second Amendment does not allow for the unrestricted possession of firearms, and that assault weapons in particular are subject to control by a state legislature. (*People v. James* (2009) 174 Cal. App. 4th 662, 664.) Referring to assault weapons, the *James* court notes: “*These are not the types of weapons that are typically possessed by law-abiding citizens for lawful purposes such as sport hunting or self-defense; rather, these are weapons of war.*” (Id., at p. 676.) But while the AG’s excessive regurgitation on this issue makes for a much more complicated opinion than it needs to be, it also provides an excellent description of the history and purpose of the Assault Weapons Control Act. I highly

recommend a thorough reading of this opinion for those of you interested in the subject. By the way, for those of you who are unfamiliar with “*Opinions of the Attorney General*,” such an opinion, while not as important as an appellate court decision, is “*entitled to great weight in the absence of controlling state statutes and court decisions to the contrary.*” (*Phyle v. Duffy* (1948) 334 U.S. 431, 441.) Thus, this brief for your consideration.

Residential Entries and Standing:

***People v. Magee* (Apr. 12, 2011) 194 Cal.App.4th 178**

Rule: The reasonableness of a visitor’s expectation of privacy in a residence is determined by that person’s purpose in being in the residence at the time of an alleged law enforcement’s illegal entry.

Facts: Corporal Potts of the Vallejo Police Department and three other officers were patrolling a high-crime area known for drug trafficking when they observed defendant from their unmarked van as defendant walked from the front of a house towards a car that appeared to slow as it approached. Corporal Potts recognized defendant as a person who had been arrested for dealing dope years earlier. He’d also attempted to contact defendant some months earlier, only to have defendant run into a residence. Defendant spotted the uniformed officers as they all got out of their van. He turned and “jogged hurriedly” back towards the house, entering via the front door as Corporal Potts called to him to stop. Potts ran after defendant through the unlocked screen door and heard the bathroom door as it was shut and locked. He kicked in the door just in time to see defendant flushing a plastic baggie containing at least 20 individually wrapped pieces of white chalky substance. Potts believed the substance to be cocaine base. After a brief struggle, defendant was arrested. A loaded pistol and \$800 in cash were recovered from his person. A magazine to the gun was found in the bathtub. Charged with a host of drug-related offenses, defendant filed a motion to suppress. Although the preliminary examination magistrate denied the motion and held defendant to answer, a superior court judge later granted defendant’s P.C. § 995 motion to dismiss, ruling that the evidence should have been suppressed. The People appealed.

Held: The First District Court of Appeal (Div. 5) reversed, finding that defendant did not have the necessary “standing” to challenge Corporal Potts’ entry into either the house or the bathroom. (The legality of the officers’ entry itself was neither discussed nor determined.) As a preliminary matter, warranting a footnote only (fn. 4), the Court pointed out that an evaluation of one’s “standing” is more correctly (and more recently) referred to as a determination whether a person’s own constitutional rights were violated; i.e., that it is the defendant’s personal expectation of privacy that is in issue. In analyzing a standing issue, “a defendant must demonstrate that he personally has an expectation of privacy in the place searched and that his expectation is reasonable.” The defendant must show that he himself “manifested a subjective (i.e., in his own mind) expectation of privacy in the object of the challenged search that society is willing to recognize as reasonable” (i.e., that it is “objectively” reasonable). Citing prior Supreme Court

decisions on this issue, the Court noted that it has been held that while an overnight guest in a residence has standing (*Minnesota v. Olson* (1990) 495 U.S. 91.), a casual visitor who is present in the residence merely to facilitate the commission of a criminal offense does not. (*Minnesota v. Carter* (1998) 525 U.S. 83.) In the instant case, a witness (and resident of the house in issue) testified at the motion to suppress that defendant visited the house two or three times a week. The witness' mother, and owner of the house, loved defendant as if he were her own grandson. Although defendant never stayed overnight, he was free to come and go as he wished without knocking, and was free to use the bathroom. The Court found defendant's situation to be somewhere between *Olson* and *Carter*; i.e., that even though defendant might have had standing while visiting the residents of the house socially, the same cannot be said for when he would come into the house solely to commit an illegal act. Had he been merely visiting the residents of the house when Corporal Potts entered the house, he could have validly argued that his own reasonable expectation of privacy had been violated. In this case, however, defendant's sole purpose in entering the house was to destroy contraband. Under these circumstances, any expectation of privacy defendant might claim cannot be said to have been objectively reasonable. The Court further held that the same conclusion applied to Corporal Potts' forced entry into the bathroom. Had defendant been using the bathroom for its intended purpose, "because nature was calling," the result might have been different. But it cannot be said that defendant had a reasonable expectation of privacy in the bathroom when he entered it for the purpose of flushing his dope. Having failed to demonstrate that, under these circumstances, he had a reasonable expectation of privacy in either the house itself or the bathroom, his motion to suppress should have been denied.

Note: This is an interesting theory that I can't say that I've seen before; i.e., that a person might have an expectation of privacy in a residence under certain circumstances, but not others. It makes sense when you think about it. But don't expect to take this to ridiculous extremes. For instance, defendant's surrogate grandmother, as a full-time resident and owner of the house, has standing whether she's using it for living purposes or smoking her dope. In other words, the rule of this case must be limited to visitors. The Court, in its own roundabout way, says this. Note also that the Court did not discuss the legality of the officer's warrantless entry into the residence, or the locked bathroom. Absent a showing of the defendant's standing, the legality of the entry becomes irrelevant. But had this issue been litigated, the answer would necessarily depend upon whether defendant could have been detained under these circumstances, and if so, whether a suspect should be allowed to thwart that detention by escaping into a residence? I think the answer is obvious. Flight in a high-crime area (if "jogg(ing) hurriedly" is to be considered "flight") is legally sufficient to constitute a reasonable suspicion (*Illinois v. Wardlow* (2000) 528 U.S. 119.), and the officer's entry into the residence (and the bathroom) while in pursuit of defendant can be justified as an exigency (*People v. Lloyd* (1989) 216 Cal.App.3rd 1425.). Also, not discussed was a warrantless search of defendant's vehicle when he was arrested, resulting in the discovery of relevant evidence (that was not described in the decision). The prelim magistrate held that search to be illegal; a result not contested by the People. However, unless there was some circumstance not apparent in the decision, that search should have also been upheld. (See

People v. Hockstraser (2009) 178 Cal.App.4th 883, 902-905.) But because the People rolled over on that issue, we will never know how that would have turned out had it been litigated.

Vehicle Stops and a Mistake of Law:

***People v. Reyes* (June 17, 2011) 196 Cal.App.4th 856**

Rule: A traffic stop for a vehicle having only one license plate, when the vehicle is from a state that issues only one license plate, is illegal despite the officer's ignorance of the other jurisdiction's statutes on that issue.

Facts: Officer Matthew Blackmon of the Seaside Police Department noted that defendant's van, driving in the opposite direction, didn't have a front license plate. Officer Blackmon knew that California Vehicle Code § 5200(a) requires two license plates be displayed on a vehicle "(w)hen two license plates are issued" However, after executing a u-turn and getting behind defendant, the officer noted that there was a valid Florida license plate on the rear of his vehicle. Officer Blackmon made a traffic stop anyway. Upon contacting him, defendant told the officer that he didn't have a driver's license and gave him a false name. In pulling down the visor while looking for the vehicle's certificate of title, that proverbial yet pesky little plastic baggie containing a tenth of a gram of cocaine fell out. Defendant was arrested and charged in state court with transporting cocaine, giving false information to a peace officer, and driving on a suspended license. Defendant filed a motion to suppress, presenting evidence to the effect that Florida issues only one license plate. As such, per the defendant, he was not in violation of any California statutes and the traffic stop was therefore illegal. After the trial court denied his motion, defendant pled guilty and appealed.

Held: The Sixth District Court of Appeal reversed. The issue on appeal, as it was in the trial court, was whether the officer had sufficient reasonable suspicion of a traffic violation to justify the stop. In considering this issue, the Court noted that a reasonable suspicion of a Vehicle Code violation is sufficient to justify a traffic stop. Here, the officer knew that defendant only had one license plate. However, the California Vehicle Code provides that two plates must be displayed only when two plates are issued to a particular vehicle. (V.C. § 5200(a)) When the jurisdiction from where a vehicle is registered only provides one license plate, it is legal to drive that vehicle so long as its one plate is displayed on the rear of the vehicle. (V.C. §§ 5202, 5200(b)) Officer Blackmon's failure to know that Florida issues only one license plate to passenger automobiles comes within the category of a "*mistake of law*." The question in this case came down to whether the officer's mistake on this point was reasonable, and would therefore justify the traffic stop based upon the officer's good faith. Citing the many cases that have dealt with this issue, the Court noted that the general rule is that a mistake of law cannot be considered reasonable. There is no "good faith exception" to the mistake of law rule. With rare exception, "[c]ourts on strong policy grounds have generally refused to excuse a police officer's mistake a law." In so finding, the Court rejected the Attorney General's argument that an officer cannot be expected to know the

law of all 50 states. To excuse such a mistake of law “would provide a strong incentive to police officers to remain ignorant of the language of the laws that they enforce” Also, there’s something fundamentally unfair with allowing “those ‘entrusted to enforce the law to be ignorant of it” while at the same time telling private citizens that “ignorance of the law is no excuse.” In conclusion, the Court noted that “(i)f there are extraordinary circumstances that would render a mistake of law reasonable, this is not such a case.” The traffic stop, therefore, was illegal. The resulting evidence should have been suppressed.

Note: This result was somewhat preordained. Police officers’ failure to know that Arizona (*People v. White* (2003) 107 Cal.App.4th 636.) and then Michigan (*United States v. Twilley* (9th Cir. 2000) 222 F.3rd 1092.) both issued only one license plate, were held in each case to be a mistake of law that made the resulting traffic stops illegal. The one exception to this line of reasoning is found in *People v. Glick* (1988) 203 Cal.App.3rd 796, where it was held that an officer’s failure to know that New Jersey does not require annual stickers on its license plates to show that the vehicle’s registration has been renewed was a reasonable mistake of law, and that the resulting traffic stop was therefore lawful. This new case, as well as a number of others, criticize *Glick* as either restricted to its unique facts, or just bad law. But either way, officers should expect to be held to the knowledge of what another state’s laws say on such issues as how many license plates are required.

Residential Burglary:

***People v. Jackson* (Dec. 8, 2010) 190 Cal.App.4th 918**

Rule: A patio area normally accessible only through a residence can be the subject of a first degree residential burglary when entered with the intent to commit a theft or a felony.

Facts: Ericson Monsalud, manager of an apartment building, heard a loud noise at around 12:30 a.m., “like a plate breaking.” Investigating the source of the noise, Monsalud found defendant on his neighbor’s back patio, halfway inside the apartment through a sliding glass door. The patio, veranda, or porch area, was described as a private balcony, surrounded by a short wall, and not shared with anyone else. The only unobstructed access to the balcony was through the victim’s apartment. The victim had also placed a wooden lattice piece against the edge of the balcony in order to create more privacy, blocking the view from an outdoor stairway on the other side of the balcony. The victim had a few plants, a coffee table, and a larger table on the balcony. The apartment itself was a one bedroom apartment with a combined living room/dining room area that opened out to the balcony through a sliding glass door and screen being the main living space. Other than through the apartment, the only way to get into the balcony area was to climb over a fence or to climb over a concrete barrier from Monsalud’s landing, which is apparently what defendant had done. Monsalud called to defendant, asking him what he was doing. Defendant looked at Monsalud, apparently in surprise, but did not answer. So Monsalud reentered his own apartment to get his phone to call

police. When Monsalud went back outside, defendant had jumped over the wall and was standing face to face with Monsalud, about 12 inches away. Monsalud warned defendant that the police were on the way. Defendant said something about looking for someone named Belinda, and left. Monsalud did not know anyone named Belinda. Responding police found defendant as he was boarding a bus and arrested him after being identified by Monsalud. Defendant was charged in state court with one count of first degree residential burglary. Following the presentation of evidence, the prosecution submitted a proposed jury instruction that defined residential burglary as including the entry of an attached balcony with the intent to commit theft. The trial court agreed, instructing the jury accordingly. Defendant appealed from his conviction for first degree burglary.

Held: The Second District Court of Appeal (Div. 4) affirmed. Defendant's argument on appeal was that the jury had been misinstructed when told that the victim's balcony was, as a matter of law, a part of the residence for purposes of first degree burglary. Defendant argued that whether or not the balcony was a part of the residence should have been a question for the jury to decide. The Court disagreed. The instructions at issue defined first degree burglary as burglary of an inhabited dwelling, which was further defined to include "any balcony that is attached thereto and functionally connected with it as defined elsewhere in these instructions." The instructions then went on to provide that "[a] structure or balcony is part of an inhabited dwelling if it is functionally interconnected with and immediately contiguous to other portions of the dwelling house. 'Functionally interconnected' means used in related or complementary ways. 'Contiguous' means adjacent, adjoining, and in actual close contact." It was these instructions that defendant contended erroneously imposed a presumption that the balcony in this case constituted a building for purposes of the burglary statute (i.e., P.C. § 459), thus relieving the prosecution from the burden of proving that appellant entered a structure when he was on the victim's balcony. In this case, the victim's balcony was immediately adjacent to his living room, effectively extending the living room space. In addition, the balcony was separated from the bedroom by no more than one thin wall. The balcony, therefore, was "functionally interconnected to, and immediately contiguous to, that part of the apartment used for residential activities." The balcony was accessible only through the victim's apartment and was intended for the exclusive use of the inhabitants only. This satisfied what is sometimes referred to as the "functionally interconnected test." But also, this satisfies what the California Supreme Court has called the "reasonable person test," i.e.; "whether a reasonable person would believe that the element of the building in question enclosed an area into which a member of the general public could not pass without authorization." The balcony accordingly was an element of the building that enclosed an area into which a reasonable person would believe that "a member of the general public could not pass without authorization." (*People v. Valencia* (2002) 28 Cal.4th 1, 12.) Whether or not the balcony was a part of the residential structure was not a jury question, but rather one, as a question of law, that is properly resolved by the trial court's instructions to the jury. Lastly, even had the trial court erred in its instructions relative to the balcony, the evidence showed that defendant had partially entered the victim's apartment through the rear sliding glass door. Any entry, no matter how slight, into a residence with the requisite intent is sufficient to constitute a completed burglary.

Note: Interesting case, showing how broadly the courts tend to interpret the burglary statutes. But note that this porch is not the subject of a burglary because it, itself, is a structure, but rather because it is *an integral part* of a structure. There's an important distinction between the two when you think about it. And don't assume from this that any porch or patio attached to a residence is going to be automatically included as a part of the residence. The defendant relied upon an older case, *People v. Brown* (1992) 6 Cal.App.4th 1489, where it was held that an "ordinary, unenclosed front porch, . . . without any signs, gates or other indications that would tend to show the residential occupant did not expect intrusion into that area," was not a part of the residence. It's going to depend upon the circumstances whether an attached porch is a part of a residence or other structure, and there's a lot of unexplored territory between the circumstances described in *Brown* versus this new case.

Identity Theft, per P.C. § 530.5(a):

***In re Rolando S.* (Jul. 21, 2011) 197 Cal.App.4th 936** (As modified Aug. 10, 2011)

Rule: (1) Publishing obscene and libelous language via another's Internet Facebook account, after having willfully obtained the victim's identifying information and pretending to be that person, is an identity theft per P.C. § 530.5(a). (2) The term "unlawful purpose," as used in section 530.5(a), includes the commission of a civil tort.

Facts: Defendant received an unsolicited text message containing another minor's password to her Internet e-mail account. Taking advantage of this information, defendant accessed the victim's Facebook account, posting in her name some obscene messages soliciting various sex acts from two of her male friends, and altered her profile to include some vulgar references. When the victim and her father figured out who had done this, she reported defendant's acts to the police. When contacted, defendant admitted to being the culprit. A petition was filed in Juvenile Court alleging a violation of P.C. § 530.5(a); Identity Theft. The Juvenile Court magistrate sustained the petition and committed defendant to the Kings County Juvenile Academy Alpha Program for 90 days to a year, and put him on probation. Defendant appealed, arguing that his prank did not fit the elements of identity theft, per section 530.5(a).

Held: The Fifth District Court of Appeal affirmed. P.C. § 530.5(e) provides in part: "Every person who willfully obtains personal identifying information, as defined in subdivision (b) of Section 530.55, of another person, and uses that information for any unlawful purpose, . . . without the consent of that person, is guilty of a public offense (a felony, wobbler). . . ." Section 530.55(b) includes "unique electronic data" as "personal identifying information." (1) One of the elements contested by defendant was the necessity of proving that he "willfully obtain(ed) personal identifying information . . . of another person." Having received the victim's personal identifying information without any effort on his own part, "passively receiving" it via an unsolicited text message on his cell phone without his prior knowledge or consent, the issue was whether this was done "willfully." "Willfully" is generally defined as the equivalent of "intentionally." "Willfully . . . implies simply a purpose or willingness to commit the act, or make the

omission referred to.” In this case, defendant had a choice when he received the victim’s e-mail password; delete it or retain it. He chose the latter, and then abused it. The Court concluded that defendant “willfully obtained the victim's password when he chose to remember the password from the text message, and later affirmatively used the password to gain access to the victim's electronic accounts.” He also willfully obtained the Facebook account password by purposely using the victim’s e-mail account information as a vehicle to alter the Facebook account password to his own advantage. (2) Defendant next contended that there was no proof that he used the victim’s identifying information for an “*unlawful purpose*,” as required by section 530.5(a), in that an “unlawful purpose” element required a criminal act. At most, per the defendant, the victim was merely “defamed;” a civil tort only. The Court disagreed. Reviewing the legislative history of section 530.5, it was noted that a 1998 amendment to the section added provisions intended to increase the penalty for identity theft from a misdemeanor to a felony, to expand the crime of identity theft to include use of personal information “for any unlawful purpose,” and to provide a mechanism in criminal court for an identity theft victim to clear his or her name. This amendment was intended to expand the range of unlawful purposes for which a perpetrator could be found guilty of committing identity theft, specifically denoting the nonexclusive nature of the list of unlawful purposes set forth in the statute. Also, the Supreme Court has defined the term “unlawful” to include wrongful conduct which is not necessarily criminal. In determining the scope of the term, it held that an act is “unlawful ... if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.” (*Korea Supply Co. v. Lockheed Martin Corp* (2003) 29 Cal.4th 1134, 1159, & fn. 11.) Under this definition, “unlawful conduct” includes acts prohibited by non-criminal acts such as civil torts. A civil tort, therefore, such as libel pursuant to Civil Code § 45, constitutes an “unlawful purpose” for purposes of P.C. § 530.5(a). And even if it didn’t, defendant’s obscene references published on the victim’s Facebook page constituted the criminal act of publishing obscene language via an electronic communication device, per P.C. § 653m(a). Having established these two elements, defendant was therefore properly found to have violated section 530.5(a).

Note: The Attorney General further argued that the “unlawful purpose” element should include the annoying or molesting of a child, per P.C. 647.6(a)(1). The Court rejected this argument, at least as to this case, noting that there was no proof that defendant was “motivated by an unnatural or abnormal sexual interest” in the victim, as required by the statute. But despite this one negative finding, this is a great case describing the Legislature’s intent to give this statute broad application; something sorely needed given the serious damage identity theft can do.