The California Legal Update

Remember 9/11/2001: Support Our Troops; Support our Cops

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THIS EDITION'S WORDS OF WISDOM:

"*Have you ever listened to some folks for a minute and thought, . . . their cornbread ain't done in the middle*?" (Unknown)

IN THIS ISSUE:

ADMINISTRATIVE NOTES:

Red Flag Statutes and the Need for a Search Warrant*:** In the *California Legal Update*, Vol. 25, #9 (Aug. 30. 2019), I wrote in that edition's Administrative Notes a piece on California's evolving "Red Flag" statutes (**Pen. Code §§ 18100, et seq.**), on the books since January 1, 2015, and expanded several times since then. I've since been asked whether a search warrant is necessary in those cases where an officer is unable to secure a lawful consent to search the restrained person's residence for guns or ammunition. Although there is yet to be any case law on this issue as it might relate to the Red Flag statutes, my *strong* opinion is "*Yes*." If you can't get a homeowner's free and voluntary consent (whether it's the person subject to the gun violence restraining order or someone else authorized to give consent), you need a search warrant. This opinion is not rendered here in a vacuum, however. In the depublished case of ***People v. Sweig (2008) 167 Cal.App.4th 1145, it was held that a search warrant was necessary in order to conduct a non-consensual search for firearms in a **W&I § 5151** patient's home. This case was depublished only because the California Supreme Court granted of a hearing in the matter, and then dismissed the suit as a moot issue upon the Legislature's enactment of **P.C. § 1524(a)(10)**, authorizing the issuance of a search warrant in such cases. Since then, the Legislature has also enacted **P.C. § 1524(a)(14)** (effective Jan. 1, 2016) which provides legal authority to obtain a search warrant for firearms and/or ammunition "that are owned by, in the possession of, or in the custody or control of a person who is the subject of *a gun violence restraining order* that has been issued pursuant to **P.C. §§ 18100 et seq**. (i.e., the "Red Flag" statutes) if a prohibited firearm or ammunition or both is possessed, owned, in the custody of, or controlled by a person against whom a gun violence restraining order has been issued, the person has been lawfully served with that order, and the person has failed to relinquish the firearm as required by law." Also note that **P.C. § 29810(c)(4)** further provides that after a court makes the necessary probable cause finding as noted in **subd. (3)** of section **29810(c)**, the court is required to issue an order for the search and removal of firearms upon a finding that the person has failed to relinquish the firearms. So the bottom line is that it is apparent that the Legislature, at the very least, expects you to get a search warrant before searching someone's residence or other protected areas (e.g., a business, etc.). Based upon ***Sweig***, depublished or not, we know that at least one court, and probably the California Supreme Court, expects you to get a warrant. And I dare say the **Fourth Amendment's** protections against warrantless searches, absent an exigency or consent, expects you to get a warrant. So, *get a warrant*.

CASE LAW:

***Knock and Talks at a Resident's Front Door*:**
***Anticipatory Search Warrants*:**
***Warrantless Exigent Circumstance Entries into a Residence*:**
***Consent Searches of a Residence*:**

United States v. Iwai **(9th Cir. July 23, 2019) 930 F.3rd 1141**

Rule: A "knock and talk" at a resident's front door is lawful. A forced warrantless entry into a residence is constitutional upon an officer's reasonable belief that evidence inside is about to be destroyed. There is no constitutional duty to obtain a search warrant as soon as officers have probable cause to do so, even if the opportunity presented itself.

Facts: Defendant Bryant Iwai lived on the 23rd floor of a multi-story condominium high rise in Honolulu, Hawaii. On August 4, 2015, the United States Postal Service intercepted a package, mailed from Las Vegas, Nevada, that was addressed to defendant's condominium. A search warrant was obtained authorizing the opening of the package after a narcotic detection dog alerted to the presence of a controlled substance. Six pounds of methamphetamine were found in the package. Drug Enforcement Agents obtained a second search warrant authorizing the placing of a GPS tracking device into the package, intending to do a controlled delivery to defendant's condominium. Aside from keeping track of the package's location, the GPS device included a sensor which would activate when the package was opened. Normally, an "anticipatory search warrant" (see below) would have been obtained at this point. However, packages addressed to defendant's condominium could only be delivered to a central mailroom where residents would retrieve them. The agents felt that without knowing for sure that the package would not be removed from the mailroom and taken elsewhere other than the addressee's condo, an anticipatory warrant was not practical. Resealing the package with the GPS device, the sensor, a non-narcotic substance, and a small representative sample of the meth, it was hand carried by a United States Postal Inspector posing as a mail carrier to defendant's condominium complex, arriving at about 11:48 a.m., on August 5th. Because the package was too large to fit into the locker in the mailroom, the Inspector took it to the management's front desk from where defendant's room was called, notifying him of the delivery. Not home at the time, the call was automatically forwarded to defendant's cellphone. Told that he had a package, defendant asked the Inspector to leave it at the manager's desk. The Inspector complied. Defendant picked up the package a little more than an hour later, at 12:56 p.m., and took it upstairs to his condominium as tracked by the GPS device. Two hours and 19 minutes later, at 3:15 p.m., the beeper activated, signaling that the package had been opened. Deciding that contact had to be made at that point in order to avoid the destruction of the evidence, an agent at defendant's door (with others standing by) knocked and announced his presence. Looking into defendant's condo through the door's peephole, the Agent could see "shadowy movements" as someone inside approached the door, then moved away back into the condominium. Announcing his presence twice more over the next several minutes, the Agent got no response. However, he heard noises from inside the unit that sounded like plastic and paper rustling. It was surmised at this point that defendant might be destroying evidence from the package. Forced entry was made at 3:17 p.m. Upon making entry, it was determined that the package had

not yet been opened (the signaling device apparently malfunctioning). But in plain sight on the kitchen table was observed a gun and some zip lock bags containing what appeared to be methamphetamine. A cooperative defendant readily signed a consent-to-search form. The subsequent search of the condo resulted in the recovery of 14 pounds of crystal methamphetamine, more than $32,000 in United States currency, a digital scale, a ledger, and plastic bags. Charged in federal court with various drug-related offenses, defendant filed a motion to suppress all the evidence (including his concurrent statements) recovered during this controlled delivery operation. After the trial court denied his motion, defendant entered a conditional guilty plea of guilty to conspiracy to possess and distribute methamphetamine, and possession of a firearm in furtherance of a drug trafficking crime. He appealed.

Held: In a split two-to-one decision (with a lengthy 13-page dissent), the Ninth Circuit Court of Appeal affirmed. Noting that a warrantless search of a residence is "*presumptively unreasonable*" (i.e., unconstitutional), the Court held that in this case, two exceptions to the rule applied; (1) exigent circumstances authorizing the forced entry and (2) defendant's written consent to search of the condo. Specifically, the officers constitutionally relied upon the "*exigent circumstance*" that if an immediate entry were not made, evidence would be destroyed; or at least, they "*reasonably believed*" it might be. The entry being lawful, defendant's "*free and voluntary consent*" allowed for the subsequent warrantless search of his residence. Two issues were discussed concerning the constitutionality of the warrantless, forced entry of defendant's condominium. The first was whether the agents were legally required to obtain an "*anticipatory search warrant*" prior to initiating the controlled delivery of the meth. Disagreeing with defendant (and the dissenting opinion), a majority of the court held that according to U.S. Supreme Court precedent as decided in *Kentucky v. King* (2011) 563 U. S. 452, "officers have no constitutional duty to obtain a warrant as soon as they have probable cause," even if the opportunity presented itself. In this case, even though the Agents could have obtained an "anticipatory search warrant," there's no legal requirement that they do so. An "*anticipatory warrant*" is one that contains a *condition-precedent* to the legal effectiveness and actual execution of the warrant. Such a warrant, with its execution conditioned upon the happening of a particular event (e.g., the delivery of illegal substances or articles to a particular address; referred to as a "*triggering condition*"), has been held to be legal. (*United States v. Grubbs* (2006) 547 U.S. 90, 93-97.) The only consequence for failing to obtain an anticipatory warrant is that when a warrantless entry is eventually made, it is "*presumptively illegal*," necessitating the Government to overcome this presumption by proving that an exception to the warrant requirement (e.g., exigent circumstances) existed under the circumstances. Had such a warrant been obtained, the entry would have been presumed to be lawful, putting the burden of proof on the defendant to somehow show that the warrant was invalid. In this case, when the officer knocked seeking consent to enter, he observed (through the peephole) a shadowy figure moving towards, and then away from, the door. He then heard the rustling of plastic and papers, indicating to him (in this training and experience) that evidence was being destroyed. The immediate forced entry under these circumstances was lawful. In so ruling, the majority also ignored defendant's (and the dissent's) opinion that officers are not allowed to create their own exigency; a legal theory that *King* seems to invalidate, at least by implication. (See *Kentucky v. King, supra*, at pp. 469-470.) The Court also declined to consider the issue of whether the agents should (or could) have obtained a warrant during the more than two hours between when defendant took the package into his condo and the agents' eventual forced entry in that defendant

failed to raise this issue at the trial court level. (However, given the Court's ruling on the lack of a legal obligation to obtain a warrant even though they could have done so, the ruling on this issue would not likely have been any different.) Having ruled that the entry was lawful, the court was able to reject out of hand the argument that defendant's written consent to search his condo was the product of an unlawful entry.

Note: I seldom get heavily into dissenting opinions, given their relative lack of value as a legal precedent. But here, Justice Jay Scott Bybee—a senior justice with the Ninth Circuit Court of Appeal—in his 13-page (pgs. 1148 to 1161) dissent (the majority opinion was only 4½ pages) may just be right. *First issue*: Everyone agreed that the agents had the opportunity to get an "anticipatory" search warrant prior to making the controlled delivery. In attempting to explain why they didn't, the agents made the somewhat lame excuse that they couldn't be sure that the package would be taken into defendant's condo and not to some other as-of-yet unknown location. I refer to it as "*lame*" because you don't have to be sure. You only need probable cause. Justice Bybee lists a number of cases where probable cause existed to believe that a package, delivered to an apartment complex, was most likely to end out in the addressee's apartment under circumstances similar to this case. The whole purpose of making such a search warrant "*anticipatory*" is because you don't know for sure where the package is going to be when it is eventually opened by the suspect. (See dissent, at p. 1149.) If the package in this case had in fact been taken elsewhere, then the search warrant as written would have been no good. So you simply don't use it. You follow the package's GPS signals to its ultimate destination and, if time allows, get another warrant. If time doesn't allow for the obtaining of a new warrant, then you evaluate those developing circumstances and determine whether an exigency exists at that point. *Second issue*: As for the agents' attempt to contact defendant at his front door, *Kentucky v. King* specifically holds that such a "*knock and talk*" procedure is lawful. But there are limits to this rule. The problem in this case is the issue (not discussed by the majority opinion) of whether the agents may have not only knocked, but also "*demanded*" entry, thus creating their own exigency. The majority justices refer to the situation at the door as the agent simply having "*knocked and announced their presence*." (pg. 1143) Justice Bybee, on the other hand, describes the situation a little differently, claiming that while "geared up in body armor and, carrying a ballistic shield and a battering ram, . . . (with) a drawn weapon" (some or all of which defendant probably observed through the peephole in his door), the agent not only knocked, but also "yelled 'police,' and *demanded* that (defendant) open the door." (Italics added.) When it appeared that defendant was not going to comply, the agent then "kicked the door another three times and continued to demand that (defendant) open the door." (pgs. 1148 & 1160.) Per Justice Bybee, the agents were therefore not seeking a consensual knock and talk at defendant's door, as assumed by the majority opinion, but rather created their own exigency by telling defendant, in effect, that if he did not open the door and allow them in, they were prepared to break down the door and come in anyway. This is where *Kentucky v. King* draws the line. Here's the rule: Assume there is no warrant. It is legal for officers go to the door and knock, seeking a "knock and talk." That's because anyone—the police or otherwise—can do that. Should the defendant, at that point, attempt to destroy evidence, and the officers see or hear that, then it is the defendant who created the exigency. Per *King* (at p. 470): "Occupants who choose *not* to stand on their constitutional rights (under such circumstances) but instead elect to attempt to destroy evidence (thus creating an exigent circumstance) have only themselves to blame for the warrantless exigent-circumstances search that may ensue." It is lawful at that point

for the officers to break in for the purpose of preventing the destruction of evidence. However, should officers (still without a warrant) go to the door and "*demand*" entry, or otherwise telegraph to the occupant an intent to come in no matter what (remembering that an entry at that point is lawful only with consent, a warrant, or an exigency), and the defendant inside *then* starts to destroy evidence as a result, that is an exigency of the officers' making. Entering under these circumstances is illegal and will result in the suppression of the evidence. (*People v. Shuey* (1973) 13 Cal.App.3rd 835; see also *United States v. Driver* (9th Cir. 1985) 776 F.2nd 807.) The majority's version of the facts (merely knocking and announcing their presence) is an example of the former. Justice Bybee's version (demanding entry and threatening to force their way in) is an example of the latter. We don't know for sure here whether the majority opinion or Justice Bybee's opinion more closely describes the agent's actions at defendant's door. But recognizing that a selective omission by the majority (not an uncommon occurrence in appellate court practice) is a lot more likely than an intentional lie on Justice Bybee's part (which, I sure, wouldn't ever happen), I strongly suspect Justice Bybee's version is closer to the truth. If so, then the resulting evidence should have been suppressed as dictated by *Kentucky v. King*. *Solution*: *Get an anticipatory search warrant prior to the attempt to enter*! *Problem solved.*

***Consent to Enter One's Residence*:**
***Scope of a Consent*:**
***Qualified Immunity From Civil Liability*:**
***Constitutionality of Using Destructive Means (Tear Gas) To Extricate a Person from a House*:**

West v. City of Caldwell **(9th Cir. July 25, 2019) 931 F.3rd 978**

Rule: Threatening a person with prosecution for not revealing information does not necessarily poison that person's later consent to enter her residence. A person's general consent to enter a residence to look for a suspect probably does not include consent to destroy property by shooting tear gas into the house to flush that suspect out. Damaging property during the execution of a police officer's duties is not likely a constitutional violation so long as unavoidable under the circumstances.

Facts: On an afternoon in August, 2014, Plaintiff Shaniz West's grandmother called the Caldwell Police Department to report that Plaintiff's former boyfriend, Fabian Salinas, was in Plaintiff's house and that he "might" be threatening Plaintiff and her children with a BB gun. Per grandma, Salinas was likely to be high on methamphetamine. She also told police that her granddaughter (i.e., Plaintiff) would likely deny that he's there. Salinas was already known to the Caldwell Police, being a gang member with outstanding felony arrest warrants for several violent crimes. He was also known to have prior convictions for rioting, discharging a weapon, aggravated assault, and drug crimes. Recently, defendant had been involved in a high-speed car chase where he had driven his car directly at a Caldwell patrol car, forcing the officer off the road to avoid a collision. The police also had information that Salinas possessed a .32 caliber pistol and that he might be suicidal as well. Responding police officers, before trying to go in, attempted to call Plaintiff's cellphone several times, but with no response. So they called grandma who continued to claim that Salinas was in the house. Plaintiff's sister was also called, who told police she'd seen Salinas in the house in the last 30 minutes, that he had what she thought was a BB gun, and that he was high on drugs. Caldwell Police Officer Matthew

Richardson then knocked on the door, but got no response. Just then, Plaintiff came walking up the sidewalk. Contacted by police, she told the officers that Salinas "might" be in her house. When told that she could get charged with harboring a criminal if she didn't tell the truth—a comment she later testified caused her to "(feel) threatened"—she indicated that he had been inside when she left earlier, but didn't know if he was still there. Out of Plaintiff's presence, the officers discussed calling SWAT to assist. Forty-five seconds later, Officer Richardson returned to Plaintiff and asked for permission to "get inside (her) house and apprehend him." Without answering, Plaintiff "nodded affirmatively" and gave Officer Richardson the key to her front door. Plaintiff then called a friend who came to the scene and picked her up. Sergeant Joe Hoadley, who was also at the scene, called a prosecutor and inquired as to the need for a search warrant. The prosecutor told him that with Plaintiff's consent, no warrant was necessary. SWAT was called in and a plan was put together ("conforming to commonly accepted police practices") which included as a last resort the use of tear gas. Various lesser intrusive means were unsuccessfully tried, attempting to coax Salinas out of the house. Despite hearing what was believed to be someone moving around inside the house, and after shooting tear gas through various windows causing considerable damage, it was eventually discovered that no one was inside. As a result of the use of the tear gas, Plaintiff and her children weren't able to live in the house for two months. Despite the City of Caldwell providing Plaintiff with a hotel room for three weeks, and reimbursing her $900 for the damaged personal property, she sued the City and the involved officers in federal court pursuant to 42 U.S.C. § 1983, seeking damages and alleging claims for unreasonable search, unreasonable seizure, and conversion. The federal district court denied the civil defendant's motion for summary judgment and for qualified immunity on the grounds that the officers' actions were "carried out in an unreasonable fashion." The court also found that Plaintiff's consent was not "free and voluntary" under the circumstances. The Defendants appealed.

Held: The Ninth Circuit Court of Appeal, in a split decision (one justice dissenting only as to issue #2, "*Scope of the Consent*," below), reversed:
(1) *The Consent to Enter*: Plaintiff alleged that the consent she gave to Officer Richardson to enter her house was not voluntary in that her consent was the product of the Officer's threat to charge her with harboring a wanted felon. Assuming for the sake of argument that Officer Richardson's threat did in fact result in her consent being involuntary—the Court declining to actually decide the issue—the issue to be decided here was whether Officer Richardson was entitled to "qualified immunity" from being held civilly liable. To overcome a claim of qualified immunity, a plaintiff has to show that not only did the civil defendant violate the Constitution, but that the constitutional right violated was clearly established in the law at the time of the challenged conduct so that a reasonable person would have known it. Although the Court said it was assuming for the sake of argument that Plaintiff's consent had been coerced, it then went on to find that under the circumstances, it was unlikely that it had. The alleged threat was made when Plaintiff appeared to be hesitating to tell the officers whether Salinas was in her house. Some minutes had elapsed between the threat to charge her with harboring a criminal and her eventual consent given to the officers to enter her house, with Officer Richardson leaving her undetained during that time period while he consulted with other officers. Although Plaintiff did not expressly consent, she did in fact nod when asked, handing Officer Richardson the key to her front door. Of particular significance was the fact that she was never threatened with arrest should she withhold her consent. Also, Plaintiff was not prevented from leaving the scene with a

friend, indicating that she knew full well that she was not being detained. All this, per the court, "suggested voluntary consent." But either way, the Court could not find any legal precedent that would have put Officer Richardson on notice that he had violated the Constitution under these circumstances. So at the minimum, he was entitled to qualified immunity on this issue.

(2) *Scope of the Consent*: Plaintiff argued that even if she had consented voluntarily to the officers entering her house, they exceeded the scope of her consent when they shot tear gas into the house, destroying property in the process. Her argument was that she never consented to the use of tear gas, or to her house being damaged. Again, assuming without deciding that the officers did in fact exceed the scope of Plaintiff's consent, the majority (2 justices) of the Court held that the officers were entitled to qualified immunity on this issue given the lack of any prior precedent holding in effect that a general consent to enter one's residence does *not* include the use of tear gas while doing so. The Court did note, however, that it was *not* disputing the dissenting opinion's citation to U.S. Supreme Court authority holding that it is "clearly established that general consent to search is not without its limitations." (*Florida v. Jimeno* (1991) 500 U.S. 248.) The majority here also noted that it was *not* holding "that a 'typical reasonable person' consenting to an entry to look for a suspect could be understood by a competent police officer as consenting to damage to his or her home so extreme that [it] renders [the home] uninhabitable for months." (pg. 985.) Based upon these comments, it is apparent that despite the fact that the officers are entitled to qualified immunity on this issue, the Court—if pressed to make a decision—would have held that one's general consent to enter a residence to look for a suspect does *not* include consent to destroy property by shooting tear gas into the house to flush that suspect out.

(3) *Reasonableness of Using Tear Gas to Extricate a Person from a House*: Again, "assum(ing) without deciding that (the civil) Defendants used excessive force by shooting tear gas canisters through the windows of Plaintiff's house," the Court held that the officers were entitled to qualified immunity on this issue as well. The underlying facts are simple. The defendant officers "reasonably believed that Salinas was in the house, that he was high on meth, that he possessed what had been described as a BB gun, that he was suicidal, and that he owned a .32 caliber pistol. They also knew that he was a gang member with outstanding felony arrest warrants for violent crimes and that he had aggressively tried to run down a patrol car during a recent high-speed chase." Examining these facts, the Court could not find any prior case authority that would have put the officers on notice that to shoot tear gas into Plaintiff's house constituted an excessive or unreasonable use of force. While prior cases do hold that it is unconstitutional to damage property unnecessarily, or for sport, or because an officer might find it "cool" to do so, it is also recognized that some property damage, when unavoidable in the exercise of an officer's duties, is acceptable. Nothing in the record here indicates that the damage caused was unnecessary, or otherwise done for any improper purpose. Although declining to decide whether the officers did or did not in fact use unreasonable (i.e., unconstitutional) force by shooting tear gas into Plaintiff's house, by noting that such destruction is sometimes necessary, the Court's comments as noted above tend to indicate that again, if pressed on the issue, the Court would have found that the damage done to Plaintiff's house was reasonable under the circumstances.

Note: With the Ninth Circuit doing so much "*assuming without deciding*" as to the various issues here, this is almost a worthless case, at least as legal precedent. But from an instructional standpoint, it raises a number of important issues that police officers need to think about when

(1) asking for consent, and (2) using tear gas or other potentially destructive means to accomplish lawful goals. *First*, a consent to making a warrantless entry into a person's house has to be obtained "*freely and voluntarily*" to be valid. (*Bumper v. North Carolina* (1969) 391 U.S. 543.) Consent that is obtained under coercive circumstances (e.g., with the person under arrest, detained, in handcuffs, held at gunpoint, or threatened with other intrusive police activity such as a pending search, etc.) is always going to be argued by the defense to be the product of those coercive circumstances, and invalid. If the prosecutor consulted by Sgt. Hoadley in this case was aware of the circumstances of Plaintiff's consent (and we don't know whether he was or not), he should have recommended getting a telephonic search warrant. Two hours getting a warrant would have saved days of litigation and piles of paperwork. An officer can also undo the coerciveness of the situation by taking the handcuffs off, telling the person he or she is not under arrest and/or not being detained, or otherwise letting the person know that nothing is going to be done to him even if he doesn't consent. A signed consent form, although not legally required, is always a big help in a later court evidentiary hearing on the issue. The *second* lesson learned here is that while an officer's destruction of personal property is generally lawful in performing his or her duties, such destruction must be (1) kept to a minimum, and (2) necessary. The Court cites as an example *Mena v. City of Simi Valley* (9th Cir. 2000) 226 F.3rd 1031, at pg. 1041, where the Court quotes an officer as allegedly saying as he kicks open a patio door; "*I like to destroy these kind of materials, it's cool*." (This was taken from the plaintiff's testimony in *Mena*, and not necessary a truthful description of the circumstances.) Such unnecessary destructiveness, of course, is not only totally unprofessional, but unconstitutional as well. And while an officer may get away with such destructiveness more times than not, getting involved in something so stupid can be a career-ender. 'Nuff said on this issue.

***Warrantless Residential Entries and the Emergency Aid Exception*:**
***Warrantless Residential Entries and the Community Caretaking Exception*:**
***Warrantless Residential Entries and the Exigent Circumstance Exception*:**
***Good Faith Reliance Upon Overruled Case Law*:**
***Inventory Searches of Vehicles*:**

People v. Smith **(Mar. 12, 2020) __ Cal.App.5th __ [2020 Cal.App. LEXIS 204]**

Rule: The "Community Caretaking" theory does not apply to residences. The "emergency aid exception" to the search warrant requirement requires a finding of "exigent circumstances." A vehicle left in a driveway with the engine running, by itself, even when combined with the fact that no one answers a knock at the door, fails to establish that either someone inside needs assistance, or that a burglary is in progress. Reliance upon overruled case authority, when that authority was based upon a "plurality" decision, fails to support a "good faith" exception to the search warrant requirement. Inventory searches of a motor vehicle (including a motorcycle) are lawful so long as done in compliance with a law enforcement agency's polices, and not for the purpose of looking for evidence of ordinary criminal wrongdoing.

Facts: In December, 2014, two Palms Springs P.D. police officers were dispatched to a residence to check a neighbor's report that an unoccupied car was sitting in the driveway of a residence with the engine running, and had been for the past 30 minutes. The officers found the car as reported, with its windows rolled up and fogged over, and its lights on. A check of the

license plate resulted in a determination that the car was owned by a rental company. In attempting to determine why a car would be sitting there unattended and running, one of the officers remembered a prior similar incident where a person had experienced a diabetic coma. Hearing no noise from inside the house, the officer felt that someone might be in the house in distress, or in the alternative, that "criminal activity was afoot." The officers knocked and rang the doorbell at the front door, and waited about 30 to 60 seconds, but got no response. About 10 feet from the front door was a second door, under the same roofline, which appeared to be **"**part of and open to the main residence." What the officers did not know was that this second door led to a separate "casita," which was completely divorced from the main residence. (A "casita," which in Spanish means "little house," commonly refers to a small suite which comes with, but separate from, a single-family home.) Without knocking, one of the officers tried the door, finding it unlocked. Opening the door, the officer saw an individual, who he knew to be a felon and not a resident of this home, lying on the floor looking back at him. Believing now that a "crime was afoot," and stepping into the room, the officer saw (in addition to the known felon) defendant Smith, drug paraphernalia, and what appeared to be methamphetamine, all in plain view. Defendant was arrested and the dope was recovered. Nine months later (i.e., September, 2015), while the above case was still pending in the courts, defendant crashed his motorcycle. Having injured himself, he was transported to a local hospital. A traffic investigator with the Palms Springs Police Department responded to the scene to do the investigation. With the motorcycle left blocking a traffic lane, it was determined that the motorcycle would have to be impounded. While preparing to do a standard pre-impound inventory search of the motorcycle, the Investigator learned that a handgun had been found by the hospital staff on defendant's person. It was noted that there was a single storage compartment underneath the seat. Unlocking the compartment with the ignition key, the Investigator found a black zippered bag which contained among other items a baggie of what was later determined to be methamphetamine. With the two cases eventually being combined for prosecution in state court, defendant's motions to suppress the evidence in each case were denied. Convicted on all counts, defendant was sentenced to ten years and eight months in prison. He appealed.

Held: The Fourth District Court of Appeal (Div. 1; handling Div. 2's overflow) reversed in part and affirmed in part, remanding the case back to the trial court for resentencing:
(1) *The Running-Engine, Residential-Entry Case*: "At 'the very core [of the Fourth Amendment] stands the right of a man (or woman) to retreat into his (or her) own home and there be free from unreasonable governmental intrusion.'" (*Payton v. New York* (1980) 445 U.S. 573.) (Noting that "standing" was never raised as an issue, we have to assume that defendant lived there.) Generally, absent evidence of an exception to the rule, a search warrant is necessary. The People in this case argued the applicability of several possible exceptions to the search warrant requirement.
(a) *The* "*Emergency Aid Exception*:" Pursuant to this exception, "police may enter a home without a warrant when they have *an objectively reasonable basis for believing* that an occupant is seriously injured or imminently threatened with such injury." (Italics added: *Brigham City v. Stuart* (2006) 547 U.S. 398, 400.) Related to this theory is what has been referred to as the "*community caretaking*" exception, arguably applicable whenever an entry into a residence is unrelated to the criminal investigation duties of the police. (See *People v. Ray* (1999) 21 Cal.4th 464.) The California Supreme Court, however, has recently ruled that the community caretaking rule is inapplicable to residential entries. (*People v. Ovieda* (2019) 7 Cal.5th 1034; overruling

Ray. But see "Note," below.) The applicability of the "*emergency aid exception*" requires a finding of "*exigent circumstances*." Exigent circumstances are defined as "an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence." Where it can be said that it is reasonably necessary to enter house in order to render emergency aid, whether or not a crime might be involved, then the "exigent circumstance" exception applies. In this case, the officer expressed concern that there might be someone inside the residence who needed assistance, given the unusual event of a car left in the driveway with the engine running and no one responding to the officers knocking at the front door. The Court, however, found it legally insufficient to "rationalize silence," and a running car, "into a justification for his warrantless entry," there being "absolutely no evidence support(ing) a conclusion that anything was amiss inside the residence. Absent something else, such as "moaning or groaning from inside the home, blood or vomit near the vehicle or residence, or disarray inside the vehicle or near the home," the Court found that the officers did not have enough to justify a warrantless entry into defendant's residence.

(b) *Exigent Circumstances Exception*: Separate from the Emergency Aid Exception (even though somewhat related) is the exception to the search warrant requirement for entries of a residence based upon "*exigent circumstances*." Typically this exception applies whenever an officer has sufficient facts to generate a "*reasonable belief*" that a burglary of the residence may be in progress. (*People v. Duncan* (1986) 42 Cal.3rd 91.) This was argued by the People in this case as an alternate theory justifying the officer's entry into defendant's casita. In rejecting this argument, the Court noted that all the officers had to go on was a car in the driveway with its engine running, a lit porch light, locked front door, and a dark interior, with no one answering at the front door. Working against the People's argument was the lack of any evidence of movement inside the house or someone seen running from the house. Unable to find authority for the argument that a vehicle with its engine running, by itself, was enough to provide the necessary reasonable belief that a burglary was in progress, the Court ruled that the officer's entry was unlawful. "(W)hile the unoccupied running car warranted investigation, no articulable facts existed to create a nexus between any suspected criminal activities and the residence." Therefore, the warrantless entry was held to be illegal.

(c) *Good Faith*: Lastly, the People argued that the officers reasonably relied upon *People v. Ray*, *supra*, where a "plurality" (i.e., less than a majority) of the California Supreme Court upheld the applicability of the "*community caretaking*" theory to residential entries. Based upon U.S. Supreme Court case authority to the effect that an officer's reasonable reliance upon binding precedent that was applicable at the time of a search will save an otherwise unlawful search (*Davis v. United States* (2011) 564 U.S. 229, 236-239.), and noting that *People v. Ovieda*, overruling *Ray* on this issue, was not decided until after defendant's arrest in this case, the officer's good faith here should similarly save this search. However, noting that the community caretaking ruling in *Ray* was a plurality decision only, both the U.S. and the California Supreme Courts have held that plurality decisions are *not* binding precedent (*Texas v. Brown* (1983) 460 U.S. 730, 737; *People v. Karis* (1988) 46 Cal.3d 612, 632.), and that an officer is therefore not justified in relying upon such authority that is later shown to be incorrect. Therefore, *Ovieda*, finding that the community caretaking theory does not apply to residential entries, dictates the rule to be used here. The officer's good faith in relying upon the rule of *People v. Ray* is irrelevant.

(2) *The Motorcycle Search*: Inventory searches of a vehicle subject to impoundment are legal. An inventory search may extend to a car's trunk, glove compartment, and closed containers located within a car or a motorcycle. Also, a police officer must be allowed sufficient latitude to determine whether a particular container should or should not be opened in light of the nature of the search and characteristics of the container itself. Such searches are subject to significant restrictions, however. First, such a search is only lawful when done when in accordance with an established departmental policy; pursuant to "standardized criteria" or an "established routine." Secondly, an inventory search is unlawful if done for the purpose of locating and recovering evidence of "ordinary criminal wrongdoing." In other words, such a search cannot be used as "a ruse for a general rummaging in order to discover incriminating evidence." The purpose of an inventory search of an impounded vehicle must be restricted to satisfying three distinct needs; (a) the protection of the owner's property while it remains in police custody, (b) the protection of the police against claims or disputes over lost or stolen property, and (c) the protection of the police from potential danger. In this case, defendant argued that the Palms Spring Investigator inventoried his motorcycle with the intention of locating evidence with which to prosecute him. As evidence of this fact, he argued that opening the locked compartment under the passenger seat of his motorcycle was unnecessary and a pretext for an investigation of criminal activity. He also noted that after being informed that a gun had been recovered from his person, the Investigator ordered his motorcycle to be impounded at a police storage yard as opposed to the tow company's facility. With the Inspector testifying that the search of defendant's motorcycle was consistent with established police procedures, the Court found substantial evidence to support the trial court's conclusion that the Investigator lawfully performed a required inventory search, that the search was not a pretext to look for contraband, and that had the Inspector failed to perform the search it would have resulted in uncertainty whether the motorcycle contained anything of value, making the Inspector potentially liable for any lost or stolen items that may have been in there. Further, the Investigator's use of the ignition key to unlock the motorcycle's storage compartment was "akin to opening a car trunk, which is permissible." And lastly; "(t)he fact the motorcycle would be towed to a police storage yard rather than a tow yard . . . is a distinction without a difference." "Accordingly, the trial court reasonably concluded that the traffic investigator had performed a lawful inventory search aimed at securing the motorcycle and its contents."

Note: A couple interesting observations: *First*, whether or not the "*community caretaking*" exception to the warrant requirement applies to private residences, despite the California Supreme Court's opinion in *People v. Ovieda* that it does not, is still a very open question. The U.S. Supreme Court has never ruled on this issue. The Ninth Circuit Court of Appeal has consistently ruled that it does. (E.g., see *Rodriguez v. City of San Jose* (9th Cir. 2019) 930 F.3rd 1123, 1136-1141.) Other federal appellate courts have gone both ways. (E.g., "*Yes*:" *United States v. Smith* (8th Cir. 2016) 820 F.3rd 356; and *United States v. Rohrig* (6th Cir. 1996) 98 F.3rd 1506. "*No*:" *United States v. Williams* (6th Cir. 2003) 354 F.3rd 497, 508.) My personal opinion is that *Ovieda* was wrongly decided; i.e., there's really no rational reason why it would not. But think about it: Do we even need a community caretaking theory to justify residential entries when we already have the "*emergency aid*" exception to the warrant requirement? Probably not. That, in my never-to-be-so-humble opinion, is why the U.S. Supreme Court has never addressed the issue. *Next*, you note that the Court here, when talking about both the "*emergency aid*" and the "*exigency*" exceptions to the warrant requirement, use an "*objectively reasonable basis for*

believing" standard, without defining this phrase. Is it a "*probable cause*," or merely a "*reasonable suspicion*," requirement? The answer is, . . . (wait for it) . . . "*I don't know*!" But I can tell you that the Ninth Circuit consistently defines this phrase as requiring full-blown probable cause. (E.g., see *Sialoi v. City of San Diego* (9th Cir. 2016) 823 F.3rd 1238.) Some California courts do as well. (E.g., *People v. Lujano* (2014) 229 Cal.App.4th 175, 185-189.) But at least one state court, in specifically discussing the issue, has held that a "*reasonable belief*" requires no more than a mere "*reasonable suspicion*," and *not* probable cause. (*People v. Downey* (2011) 198 Cal.App.4th 652, 657-662.) Someday, we may get this issue resolved.