

in the case before the court either malfunctioned, was improperly calibrated, or wasn't used properly. Great victory for The People.

The Presses Continue to Roll: My sincere and grateful thanks to the many subscribers and readers of *The California Legal Update* for the flood of supportive comments that stem from my present little "tiff" with the San Diego District Attorney. (See Vol. 18, #11 & #12, Administrative Notes.) This support has come in many forms, including offers of financial help in securing the legal research resources necessary to write the *Update* and other publications. Such out-pouring of support has done much to solidify my resolve not to bend to the tyrannical and short-sighted reaction of the San Diego District Attorney administration to my endorsements of both Robert S. Brewer and Terri Wyatt; two extremely well qualified and exceptional candidates for the Office of San Diego District Attorney. Please note that I have already secured my own Lexis account and have a number of other resources which provide me with more than enough to stay current and informed on new case law and legislative enactments, enabling me to continue writing. So, for those of you who were concerned, *the presses will continue to roll*. Also, while I greatly appreciate the offers of financial assistance, I ultimately decided that it would not be appropriate for me to accept such generous offers. That is not to discount by any means my sincere gratitude for the individual gestures. I made this decision out of a concern for other potential problems, legal and ethical, accepting such assistance might ultimately cause. Know that I will be here to do my small part for California's law enforcement and prosecutorial efforts for a long time to come.

CASE LAW:

Miranda; Spanish Language Admonishments:

United States v. Botello-Rosales (9th Cir. July 15, 2013) 728 F.3rd 865

Rule: While a *Miranda* admonishment need not follow the exact language as dictated in the *Miranda* decision, it must still "*reasonably convey*" the defendant's Fifth Amendment self-incrimination rights.

Facts: Defendant was arrested on charges of conspiracy to manufacture marijuana and possession of a firearm by a person unlawfully in the United States. Upon his arrest, defendant was advised of his *Miranda* rights in English. Defendant's primary language, however, was Spanish. So the detective attempted a second advisal, this time in Spanish. In advising defendant of his rights in Spanish, the detective told him what was later translated into English as: "*You have the right to remain silence. Anything you say can be used against you in the law. You have the right to talk to a lawyer and to have him present with you during the interview. If you don't have the money to pay for a lawyer, you have the right. One, who is free, could be given to you.*" Charged in federal court with the above offenses, defendant filed a motion to suppress his resulting statements.

The trial court found that the admonishment was legally sufficient, denying the motion to suppress. Defendant entered a conditional plea of guilty and appealed.

Held: The Ninth Circuit Court of Appeal reversed. The Court ruled that the above advisal failed to “*reasonably convey*” his rights as required by *Miranda v. Arizona* (1966) 384 U.S. 436. Although the Supreme Court has held that while a “*talismanic incantation*” is not required (*California v. Prysock* (1981) 453 U.S. 355.), there are limits as to how far an admonishment can stray. When talking about a “*free*” attorney, the detective used the Spanish term “*libre*,” intending it to mean “*without cost*.” However, the correct Spanish-to-English translation for this term is “*to be available or at liberty to do something*.” Also, telling defendant “*that a lawyer who is free could be appointed*” is legally inadequate. Phrased like this makes it sound like the right to appointed counsel is contingent on the approval of a request or on the lawyer’s availability, rather than the government’s absolute obligation to provide one. Given the inadequacies of the above parts of the advisal, the Court declined to reach the issue of whether telling defendant that; “*Anything you say can be used against you in the law*” is legally sufficient. Lastly, the Court rejected the argument that a prior English (and presumably correctly stated) advisal helped. All this did was create confusion as to which set of warnings was the correct one. A defendant is not expected to have the legal expertise be able to resolve this conflict. The case was therefore remanded for further proceedings.

Note: For many years now I’ve consistently counseled officers to (1) *read* the *Miranda* admonishment from a card or form no matter how well you think you know it, and (2) don’t try to do a Spanish (or other foreign language) advisal unless you speak the language fluently. This issue is one that could have been avoided by the use of a little common sense, an admonishment card, and someone who is intimately familiar with the Spanish language. You can’t wing it like this and expect a positive result.

Fourth Wavier Searches:

People v. Ermi (May 14, 2013) 216 Cal.App.4th 277

Rule: A police officer conducting a Fourth waiver probation search may search those portions of a residence over which the officer reasonably believes the probationer has joint control or access.

Facts: Oxnard Police Officer Paul Knapp, a 16-year veteran, went to the apartment of Ronald Williams intending to conduct a Fourth waiver probation search. Williams was on probation and on Fourth waiver search and seizure conditions. Defendant Ermi, Williams’ girlfriend who was *not* on probation, answered the door. She called to Williams who came out of a bedroom. Defendant told Officer Knapp that she and Williams shared the bedroom. In conducting the Fourth-waiver search, Officer Knapp entered their bedroom and found it cluttered with boxes, bags, and other things “*strewn about*.” In the middle of the room Officer Knapp found a tan purse on a chair. As he picked up the purse, defendant said that it was her purse and that she needed some medication out of it. Officer Knapp told her that he’d retrieve the medication for her.

Opening the purse, Officer Knapp found a small makeup bag. In his training and experience he knew that both males and females commonly carry drugs in similar makeup bags. Defendant claimed that the bag was not hers, that she didn't know how it got into her purse, and that a friend had recently borrowed the purse. Defendant, however, was nervous, had dilated pupils, and appeared to be under the influence of a controlled substance. In the makeup bag, Officer Knapp found a glass vial of methamphetamine and some other narcotics paraphernalia. Other dope and paraphernalia were found in other parts of the apartment. Defendant was arrested and charged in state court with various narcotic-related offenses. Her motion to suppress the contents of the makeup bag was denied. Defendant appealed.

Held: The Second District Court of Appeal (Div. 6) affirmed. The issue on appeal was the legality of Officer Knapp's warrantless search of defendant's purse when she was not the one who was subject to search and seizure conditions. Defendant's argument was that Officer Knapp had no reason to believe that the purse belonged to Williams. The Court ruled that that was not the test. Persons who are subject to warrantless search and seizure conditions cannot be allowed to so easily secret illegal contraband, hiding it from authorities. To prevent this, the rule has developed that an officer conducting a probation Fourth waiver search may search those portions of a residence (or other areas) over which the officer "*reasonably believes the probationer has joint control or access.*" The fact that a container being searched may be a "distinctly female depository" when the probationer is male, does not mean that it is not an area where the probationer might seek to secret illegal contraband. Here, the purse was on a chair in the middle of a cluttered bedroom that the probationer shared with defendant; a fact supported by Officer Knapp's observation of Williams emerging from the bedroom just moments before the search. Based upon Officer Knapp's training and experience, he knew that it was not unusual for probationers to hide contraband in a roommate's belongings to avoid detection. The Court found that "substantial evidence supported the trial court's express factual findings of (the probationer's) control or access" over defendant's purse. The search of the purse, therefore, was lawful. "To rule otherwise would enable a probationer to flout a probation search condition by hiding drugs in a cohabitant's purse or any other hiding place associated with the opposite gender."

Note: "*Joint control or access*" has become the watchword in these Fourth waiver search cases of a non-probationer or parolee's belongings. (See also *People v. Smith* (2002) 95 Cal.App.4th 912; *People v. Schmitz* (2012) 55 Cal.4th 909, 916-933.) The standard of proof is merely a "*reasonable suspicion.*" (*People v. Boyd* (1990) 224 Cal.App.3rd 736, 745-346, 749-750.) But you *do* have to be able to articulate some reason to believe (amounting to at least a reasonable suspicion) that the item or place to be searched is something over which the one with the Fourth waiver has control or access. (*People v. Baker* (2008) 164 Cal.App.4th 1152; *People v. Alders* (1978) 87 Cal.App.3rd 313, 317-318.) This is a good case further solidifying this rule about which, at least in the past, there has been a lot of confusion.

Freedom of Expression and Retaliatory Arrests:

Ford v. City of Yakima (9th Cir. Feb. 8, 2013) 706 F.3rd 1183

Rule: Arresting a person, even with probable cause, but in retaliation for disrespectful comments and demeanor, constitutes a First Amendment freedom of expression violation.

Facts: Plaintiff Eddie Ford in this civil lawsuit, listening to music (apparently being played quite loudly) as he drove to work, noticed a police car tailgating him. Ford attempted to get out of the way but the police car stayed right behind him. Stopped at a red light, Ford “abruptly” got out of his car and asked the officer, civil defendant Yakima Officer Ryan Urlacher, why he was being followed so closely. Officer Urlacher told Ford to get back into his car and “go.” So Ford did so. However, as soon as they got through the intersection, Officer Urlacher turned on his emergency lights and initiated a traffic stop. Ford got out of his car again, yelling at the officer. Officer Urlacher asked for his license and registration. As Ford retrieved the requested document from his car, he told Officer Urlacher that he thought the stop was racially motivated. Ford was warned to stay in his car or risk being taken to jail. While checking Ford for warrants, Officer Urlacher told his partner that Ford might be going to jail if he didn’t cooperate. Officer Urlacher then returned to Ford, got him out of the car, and handcuffed him. At this point, Officer Urlacher warned Ford to “(s)top running the mouth and listen.” “If you talk over me, you are going to go to jail, sir. Do not talk over me.” “If you cooperate, I may let you go with a ticket today. If you run your mouth, I will book you in jail for it. Yes, I will, and I will tow your car.” “If you cooperate and shut your mouth, I’ll give you a ticket and you can go.” When Ford expressed concern about getting to work, Urlacher replied: “Well that’s not going to happen if you don’t—if you keep running your mouth. Okay? If you have diarrhea of the mouth, you will go to jail. If you cooperate with us and treat us like human beings, we will treat you like a human being. Do you understand me?” Although Ford said nothing further, Officer Urlacher did in fact put him into the back seat of his patrol car. Urlacher then told a backup officer; “I don’t know if I’m going to book him yet. I’ll see if he’s going to shut up.” Officer Ulacher did in fact arrest Ford and take him to jail. On the way, Ford asked why he was being taken to jail. Urlacher told him that it was because he was playing his music too loud and because he “acted a fool.” He then told him that “(i)f you would have acted like a human being towards me, I would have treated you like a human being.” When Ford told Officer Ulacher that he was merely “invok(ing) his right to free speech,” Urlacher responded: “I have the freedom to take you to jail, too. And that’s what’s going to happen. You exercise [your freedom of speech] all you want, okay? If you just cooperate and treat the police like humans, we’ll treat you like that. . . . You talked yourself—your mouth and your attitude talked you into jail.” Tried in state court for having violated Yakima’s municipal noise ordinance, a municipal court judge acquitted Ford of the charge. At trial, Officer Urlacher testified that he booked Ford (1) because he violated the city noise ordinance, which gives him discretion to book a person “if I feel like it,” and (2) because Ford “failed to listen[,] . . . failed to act civil, . . . failed to take responsibility for his actions, [and because of] his rageful [and disrespectful] behavior towards law enforcement,” which put public safety at risk. Ford sued the involved officers and the City of Yakima in

federal court for violating his First Amendment rights by having “retaliated” against him for exercising his freedom of speech. The trial court judge granted summary judgment in favor of the officer, holding that there was no constitutional violation.

Held: The Ninth Circuit Court of Appeal reversed. The Court held both that Ford’s constitutional First Amendment rights were in fact violated and that the officer was not entitled to qualified immunity. The First Amendment protects a significant amount of verbal criticism and challenges directed at police officers. Even where an individual’s comments may be “provocative and challenging,” they are nonetheless protected against censorship or punishment, at least until they produce a “clear and present danger of a serious substantive evil.” Even when an officer has probable cause to arrest a person, as he did in this case, that person has a constitutional right to be free from any police action motivated by “retaliatory animus.” In order to prove a claim of retaliation, a plaintiff must demonstrate that the officer’s actions “would chill a person of ordinary firmness from future First Amendment expressive activity.” Ford also had to prove that he wouldn’t have been booked and jailed, rather than cited and released, “*but for*” the officers’ desire to punish him for his speech. The Court found that Ford’s allegations, if proved to be true, meet both requirements. Upon arresting an individual for a misdemeanor, a Washington State police officer has the statutory discretion to hold that person in custody (as opposed to citing and releasing him) based on a limited number of factors, including “whether detention appears reasonably necessary to prevent imminent bodily harm to [the individual] or another, or injury to property, or breach of the peace.” (CrRLJ 2.1(b)(2)(ii)). Retaliation for “mouthing off” doesn’t fall into any of these categories. So booking and jailing a person merely because of his bad attitude, at the very least, violates Washington state law. Lastly, the Court found that the officer was not entitled to qualified immunity in that the law prohibiting retaliatory arrests is clearly established. “(P)olice officers may not use their authority to punish an individual for exercising his First Amendment (freedom of expression) rights.” As such, the trial court improperly granted the officer’s motion for summary judgment.

Note: On its face, the officer’s comments and actions in this case appear to be completely out of line. And had the things Officer Urlacher said to Eddie Ford not been video and audiotaped, as they apparently were, I would tell you that there must have been a whole lot of exaggeration going on in the Court’s description of the facts. What’s scary is that the officer apparently really believed, based upon his testimony, that he had the right to book an individual merely because of that person’s attitude. If true, then the Yakima Police Department has some serious retraining to do. As pointed out in the case decision, professional police officers know that a certain amount of verbal abuse comes with the job, and they can’t let it affect their in-the-field decisions. But even so, what is glossed over in the case decision is what Ford must have said to the officer, along with the details of his demeanor and lack of just plain civil decorum, to generate so much anger in Officer Urlacher to warrant the resulting touch-lashing as was quoted in the case decision, let alone taking him to jail for it. As wrong as the officer was for losing his cool, I’m thinking that a civil jury might very well be prone to sympathize with the officer when the whole story is heard.

Gangs, and P.C. § 186.22(a):

People v. Rodriguez (Dec. 27, 2012) 55 Cal.4th 1125

Rule: The gang participation offense described in P.C. § 186.22(a) is not committed by a gang member who commits a felony by himself.

Facts: Defendant was a member of the Norteño gang from Woodland. Visiting his girlfriend in Marysville, defendant came upon Stanley Olsen as Olsen was just getting out of his truck. Olsen saw defendant coming at him and asked defendant whether he knew him. Defendant responded with a racial slur and a death threat. Moving close enough so that their chests touched, defendant accompanied a second threat with a demand for money. When Olsen told him to go away, defendant responded with a punch to the jaw. The two of them fell to the ground as defendant continued to beat Olsen. However, Olsen was able to get up and run. Responding police found and arrested defendant at his girlfriend's apartment. He was charged in state court with attempted robbery and a count of actively participating in criminal street gang activity, per P.C. § 186.22(a) (abbreviated as "*gang participation*"). At trial, gang experts testified for the prosecution that robbery was a primary activity of the Norteño gang, opining that the attempted robbery of Olsen was committed for the benefit of the gang. There was no evidence that defendant acted with anyone else. Defendant was convicted of both counts and appealed. The Court of Appeal reversed defendant's conviction on the gang participation count; P.C. § 186.22(a). The California Supreme Court granted the Attorney General's petition for review.

Held: The California Supreme Court, in a split 4-to-3 decision affirmed the Court of Appeal. P.C. § 186.22(a) reads as follows: "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, *and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang,*" is guilty of a felony. (Italics added). There are three elements to this offense: (1) Active participation in a criminal street gang, in the sense of participation that is more than nominal or passive; (2) knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity; and (3) the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang. The issue here is whether this third element is met when a gang member commits a felony on his own, without the active participation of at least one other gang member. The Attorney General argued that a gang member satisfies the third element of section 186.22(a) even though he committed the felony alone, noting that the statute does not specifically require that one promote, further, or assist other gang members. The Court, in interpreting the statute, disagreed. Instead, the Court found that a gang member may be convicted of the crime of gang participation *only* if he willfully does an act that "*promotes, furthers, or assists in any felonious criminal conduct by members of that gang.*" It comes down to interpreting the words "*promotes, furthers, or assists,*" as required by the third element. Following the rules on statutory interpretation—i.e., considering the "plain meaning" of the words used while looking at the intent of the Legislature—the Court agreed with the defendant when he argued that this requires the involvement of more than a lone gang member. After reviewing the

various cases interpreting this statute, and noting the Legislature's intent to require a nexus between a gang member's illegal act and the illegal activities of the defendant's gang, the Court found that the active participation of at least one other gang member is necessary to preserve this nexus.

Note: P.C. § 186.22 is a part of the so-called "STEP" Act; i.e., the "*California Street Terrorism Enforcement and Prevention*" Act; P.C. § 186.20 et seq. It is targeted at addressing the serious gang problem in California. To be constitutional, it was noted that mere membership in a gang cannot be prohibited. In reaching its conclusion in this case, the Court provides a comprehensive review of the multitude of cases that have been decided with the goal in mind of keeping the STEP Act from being interpreted too broadly. The decision also discusses this statute's relationship to the separate sentencing enhancement contained in P.C. § 186.22(b)(1), that imposes additional penalties for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, . . ." "Unlike the substantive offense (i.e., subd. (a) of § 186.22), the enhancement (subd. (b)) does not require proof of participation in a gang. The enhancement is further distinguished from the substantive offense by applying only to gang-related offenses and by requiring the defendant to act with the specific intent to "promote, further, or assist any criminal conduct by gang members." If you enforce or prosecute gang cases, you should read this entire case.

Dirk or Dagger; The "Upon the Person" Element:

People v. Pellecer (Apr. 17, 2013) 215 Cal.App.4th 508

Rule: A dirk or dagger inside a carried or adjacent container, even though in a person's possession and under his control, is not carried "upon the person" for purposes of P.C. § 12020(a)(4). "Upon the person" requires that the knife be on the body or in the clothing worn on the body.

Facts: Los Angeles Police Department officers responding to a call at 2:30 a.m. concerning a possible burglary suspect at Barnsdall Art Park in Los Angeles found defendant crouching in a corner of an enclosed patio in the park. Defendant was leaning on a closed backpack. In the backpack officers found a nylon pouch which in turn contained three identical knives. The knives were identified by one of the officers with martial arts experience as "shuriken throwing knives" that could be used for throwing or stabbing. Each knife was three to four inches long, with one sharp end and a ring on the opposite end. Each knife had an identical ribbon attached to its ring. Defendant was arrested and charged in state court for possessing a concealed dirk or dagger. The officer testified at trial that the ring could be used as a handle for stabbing, concealing the knife, or "flipping" it. Another officer with extensive martial arts experience testified that the knives were principally used for throwing but could also be used for stabbing. During defendant's trial, the jury asked the court for a definition of "on the person." Over defendant's objection, the trial court instructed the jury that: "'On his person' includes upon the body of a person, or the attire or clothing, or a bag or container carried by the

person.” The jury convicted defendant of carrying a concealed dirk or dagger on his person in violation of P.C. § 12020(a)(4) (Now P.C. § 21310; effective 1/1/2-13) Defendant appealed.

Held: The Second District Court of Appeal (Div. 1) reversed. On appeal, defendant argued that he wasn’t carrying the weapons “on his person;” that with the knives in his backpack, the elements of section 12020(a)(4) were not met. P.C. § 12020(a)(4) (now 21310) makes it illegal (a felony-wobbler) when “any person in this state . . . carries concealed *upon the person* any dirk or dagger . . .” (Italics added) In determining the meaning of the word “carries” and the phrase “*on the person*,” the Court engaged in some statutory interpretation. To do this, it was necessary to take into account the ordinary and usual meaning of the words used in the statute, i.e., their “*plain meaning*,” using a construction that best comports with the apparent intent of the Legislature, and with a view to promoting the purpose of the statute and avoiding absurd consequences. Any ambiguity must be resolved by considering the legislative history, the statute’s purpose, and public policy. Under these guidelines, the Court determined here that a dirk or dagger inside a carried or adjacent container is *not* being carried “*upon the person*.” Most significantly, the ordinary meaning of “*upon the person*” is that the knife must be on the body or in the clothing worn on the body. The fact that the knives may have been at defendant’s fingertips and readily available is irrelevant. The Court noted that had the Legislature wanted to expand the scope of the statute to include knives in carried containers, it could have done so.

Note: The Court also discussed the conflicting decision of *People v. Dunn* (1976) 61 Cal.App.3rd Supp. 12, which reached a contrary conclusion in interpreting former P.C. § 12025; possession of a concealable firearm. In that case, the appellate department of the superior court held that a concealable pistol found in a briefcase carried by the defendant was “sufficiently on the person” to be a violation of the statute. The Court here ruled that the *Dunn* Court was simply wrong. Also, if you’re interested enough to look up the statutes, the definition of a dirk or dagger, formerly described in P.C. § 12020(c)(24), is now located at P.C. § 16470: A “‘dirk’ or ‘dagger’ means a knife or other instrument with or without a handguard that is capable of ready use as a stabbing weapon that may inflict great bodily injury or death.” It was not an issue in this case whether defendant’s “shuriken throwing knives” were in fact dirks or daggers.

Miranda; Invocation as Impeachment Evidence:

United States v. Gomez (9th Cir. Aug. 6, 2013) 725 F.3rd 1121

Rule: An explanatory statement as to why a suspect is invoking his right to silence, under *Miranda* is admissible at trial for purposes of impeachment where the defendant testifies to a defense that is inconsistent with that statement.

Facts: When defendant crossed the Mexico border going into the United States as the sole occupant of a Toyota Camry, border officials discovered 15 packages containing several kilograms of methamphetamine hidden in the gas tank. Defendant was taken into

custody and questioned. He was advised of his *Miranda* rights, which he said he understood. But when asked if he wanted to waive those rights, defendant indicated that he “*can’t talk*” because “*it’s my family, you see.*” When asked for clarification, defendant told his interrogator that, “*I can’t say anything because my family . . . my family will get killed, okay?*” Charged in federal court with one count of importation of methamphetamine, defendant’s motion to suppress this statement was granted with the proviso that “if appropriate,” the Government could use this statement for impeachment purposes. At trial, defendant testified that he was unaware that the drugs were in his car. In rebuttal, the Government had the interrogating agent testify that defendant “*basically told me he could not talk because they were going to kill his family.*” Defendant was convicted, sentenced to 135 months imprisonment, and appealed.

Held: The Ninth Circuit Court of Appeal affirmed. Among the issues on appeal was the constitutionality of the use of defendant’s statement in the Government’s rebuttal case concerning why he would not answer questions; i.e., that his family would be killed. As a general rule, “due process” dictates that a defendant’s silence after receiving *Miranda* warnings cannot be used against him at trial. It has been held that it is fundamentally unfair to use a defendant’s silence against him after telling him that he has a constitutional right to remain silent. This rule applies whether the fact of that silence is being used in the Government’s case-in-chief, or in rebuttal. (*Doyle v. Ohio* (1976) 426 U.S. 610.) It has also been held that when a defendant states a reason for invoking his *Miranda* rights (i.e., an “explanatory refusal”), that explanation is also inadmissible, at least in the Government’s case-in-chief. (*United States v. Busyhead* (9th Cir. 2001) 270 F.3rd 905; *Hurd v. Terhune* (9th Cir. 619 F.3rd 1080.) But an exception to both of these rules is triggered when the defendant makes a voluntary statement that would be inadmissible under *Doyle* or *Busyhead/Hurd*, but then later testifies in a manner that is “arguably” inconsistent with that prior statement. The prior statement, if deemed to be (1) “voluntary,” and (2) “arguably inconsistent” with his trial testimony, may be used in evidence in the Government’s rebuttal case for purposes of impeachment. In this case, defendant’s statement as to why he was declining to talk with his interrogators (i.e., due to danger to his family) was in fact both voluntary and inconsistent with his testimony at trial (i.e., that he didn’t know the drugs were in his car). Therefore, because “(d)efendant testified in a manner arguably inconsistent with his earlier explanation, the Constitution does not prohibit the use of his explanation during rebuttal only, as impeachment evidence.” His reasons for refusing to waive his *Miranda* rights were therefore properly admitted into evidence at trial for impeachment purposes.

Note: This case is of importance to prosecutors more than cops, being a trial issue. But law enforcement officers should be aware of this rule as well in that it highlights the importance in an interrogation setting to note, with particularity, the exact words used even in a suspect’s invocation. Those words, under the right circumstances, may come back to bite a defendant, and may even be all we have in some cases to challenge his alibi. The best time to get incriminating statements is early on in an investigation before a defendant has had a chance to think about, or to discuss with his attorney, which cock-and-bull story a jury might believe. It’s legal to take advantage of this fact.