

# *San Diego District Attorney*

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### *Remember 9/11/01; Support our Troops*

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#### **THIS EDITION'S WORDS OF WISDOM:**

*“If you pick up a starving dog and make him prosperous, he will not bite you; that is the principal difference between a dog and a man.” (Mark Twain)*

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#### **CASE LAW:**

##### *Knock and Notice and the Exclusionary Rule:*

**Hudson v. Michigan (Jun. 15, 2006) \_\_ U.S. \_\_ [2006 DJDAR 7469]**

**Rule:** When serving a lawful search warrant, the suppression of evidence is not a proper remedy for a “*knock and announce*” violation.

Facts: Michigan police officers obtained a search warrant for Booker Hudson’s residence, authorizing them to search for drugs and firearms. (The legality of the

warrant was not in issue.) The officers knocked and announced their presence at defendant's front door before making an almost immediate (3 to 5 seconds) entry; an occurrence later conceded to be a violation of the "*knock and announce*" (or, as referred to in California, "*knock and notice*") rules. In the resulting search, an unlawful gun and "large quantities of drugs," including some rock cocaine, were recovered. Defendant's motion to suppress these items as the product of a "*knock and announce*" violation was granted by the trial court. On appeal to Michigan's intermediate appellate court, the trial court's ruling on this issue was reversed, the Court holding that suppression of evidence is not the appropriate remedy for a knock and announce violation when serving an otherwise lawful search warrant. This issue was eventually appealed to the United States Supreme Court.

**Held:** The United States Supreme Court, in a spit 5-to-4 decision, affirmed, ruling that the evidence *should not* have been suppressed. In a protracted discussion of the history of the "*knock and announce*" rule, the Court first noted that compliance with the knock and announce requirements (i.e., knocking, identifying oneself as a law enforcement officer, stating the officer's purpose, and demanding entry) before entering a residence is the subject of both state (E.g., see California's P.C. §§ 844, 1531, and federal (18 U.S.C. § 3109) statutes. It is also required in most cases by the Fourth Amendment." (*Wilson v. Arkansas* (1995) 514 U.S. 927.) But the Court also recognized that there are difficulties inherent in the use of this rule. For instance, how long officers must wait before it is reasonable to assume they are being denied entry, justifying a forced entry, and under what other "*exigent circumstances*" an immediate entry is lawful, has been the subject of much debate. Also, the Court further noted that the suppression of evidence is not always an appropriate remedy even when the Constitution has been violated, and should be done only as a last resort. Whether or not the Exclusionary Rule is appropriate in a particular circumstance is determined by balancing the costs to society that suppression entails (i.e., letting guilty people go free) with the need to deter unlawful police conduct. With these ideals in mind, the Court noted that the officers in this case had a legal right to search the defendant's home as authorized by a search warrant. Had they conducted the search without a judicially approved search warrant, the Exclusionary Rule would have been the appropriate remedy for such unlawful conduct. Compliance with knock and announce rules, however, is of lesser importance. In considering the costs to society by suppressing the evidence when the lawfulness of the entry (as opposed to the lawfulness of the search) is the issue, the Court ruled that suppressing the gun and drugs is *not* necessary in order to deter unlawful police conduct. Other remedies are available: E.g., suing the officers civilly and/or imposing internal police discipline. Because civil suits are a more viable alternative than they once were, and because law enforcement officers today are better educated, trained and supervised than they might have been when the Exclusionary Rule was first developed (i.e., 1914; *Weeks v. United States*, 232 U.S. 383.), penalizing the Government by suppressing evidence for merely entering a residence in violation of the knock and announce rules is not necessary, and therefore not an appropriate remedy.

**Note:** Contrary to much of the information already being circulated about this case, PURPOSELY VIOLATING KNOCK AND NOTICE IS NOT AN APPROPRIATE LAW ENFORCEMENT TACTIC. *DON'T DO IT!!!* All this case did was eliminate the

suppression of evidence as a remedy for a knock and notice violation. It does not eliminate the legal requirement that officers comply with the traditional knock and notice rules. It is still contrary to state and federal statutes, the California Constitution, *and* the Fourth Amendment to the United States Constitution, to ignore knock and notice. Violating knock and notice might not compromise the resulting criminal case, but *will* expose you to civil liability as well as departmental discipline. So as far as you (the cop) are concerned, *nothing has changed*. As far as the prosecutor is concerned, we can now save cases that otherwise would have been lost due to a knock and notice violation. The Court has paid law enforcement a great compliment in this case by noting how much more professional and ethical police officers are today than they were when the Exclusionary Rule was first adopted. Don't violate this trust by regressing now.

### ***Suspicionless Parole Fourth Waiver Searches:***

**Samson v. California (Jun. 19, 2006) \_\_\_ U.S. \_\_\_ [2006 DJDAR 7626]**

**Rule:** A Fourth Wavier search of a parolee, done without any suspicion of renewed criminal activity, is constitutional so long as not done arbitrarily, capriciously, or for purposes of harassment.

**Facts:** Officer Alex Rohleder of the San Bruno, California, Police Department observed defendant innocently walking down the street and recognized him as a parolee. Believing that defendant had an outstanding "parolee at large" arrest warrant, Officer Rohleder stopped him. Defendant's denial that he was wanted was confirmed through a radio check. But since he had defendant stopped anyway, Officer Rohleder conducted a search of defendant's person. A baggie of methamphetamine was found in a cigarette box in his shirt pocket. (*Surprise!*) Charged in state court with possession of methamphetamine, defendant filed a motion to suppress the meth, arguing that the search of his person was illegal absent at least a reasonable suspicion that he was involved in criminal activity. Noting that as a parolee and subject to search and seizure conditions, as dictated by P.C. § 3067(a), and that the search of his person was not "arbitrary or capricious," the trial court denied defendant's motion. He was subsequently convicted by a jury trial and sentenced to seven years in prison. The state District Court of Appeal affirmed. Defendant petitioned the United States Supreme Court.

**Held:** The United States Supreme Court, in a split, 6-to-3 decision, affirmed. The United States Supreme Court decided in 2001 that a *probationer* who is subject to search and seizure conditions (i.e., a "*Fourth Waiver*") may be searched with as little as a mere "*reasonable suspicion*" that the probationer is again involved in criminal activity. (*United States v. Knights* (2001) 534 U.S. 112.) The Court in *Knights*, however, specifically left open the question whether a person who is subject to a Fourth Waiver may be searched on *less* than a reasonable suspicion. (pg. 120, fn. 6.) That question is at least partially answered in this case. *Knights* set out the legal standards to be used in evaluating the constitutionality of a search on less than probable cause, requiring courts to consider the "*totality of the circumstances*" and to balance "the degree to which (the search) intrudes upon an individual's privacy" with "the degree to which (the search) is

needed for the promotion of legitimate governmental interests.” *Knights* further noted the high recidivism rates for probationers and the “*legitimate governmental interest*” in monitoring the activities of persons on probation, thus “significantly diminish(ing)” a probationer’s “*expectation of privacy*.” The same is true for parolees, and maybe even more so. In fact, on a “‘continuum’ of state-imposed punishments, . . . parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment.” “(P)arole is the stronger medicine; ergo, parolees enjoy even less of the average citizen’s absolute liberty than do probationers.” All parolees in California are subject to search and seizure conditions as a requirement of their parole; the alternative being for the prison inmate to complete his entire term in a prison cell. Even when the prison inmate chooses parole, however, he remains in the legal custody of the California Department of Corrections through the remainder of his term. Penal Code section 3067(a) provides that, “Any inmate who is eligible for release on parole . . . shall agree in writing to be subject to search and seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause.” Defendant in this case, as with all parolees, signed a waiver of his rights to this effect. Being fully cognizant of this, any expectations of privacy defendant might have had were therefore diminished to the degree where he could no longer reasonably expect to be free from suspicionless searches of his person and property. Lastly, the Court answered concerns about giving law enforcement officers such “a blanket grant of discretion untethered by any procedural safeguards” by noting that California case law restricts Fourth Waiver searches to those which are not arbitrary, capricious, or done for purposes of harassment. Under such circumstances, a suspicionless Fourth Waiver search of a parolee is lawful.

**Note:** What this case does *not* tell us is what the rule is when searching a *probationer* who is subject to search and seizure conditions. The Court did hint very strongly, however, that a probationer has not given up as much in the way of his constitutional rights as has a parolee, and that the standards are therefore likely to be different. There is a lot of language in this decision, as indicated above, that seems to be laying the groundwork for a future case requiring that a law enforcement officer have a reasonable suspicion of renewed criminal activity before doing a Fourth Waiver search on a probationer who has waived his search and seizure protections. As of right now, however, there is no case, state or federal (at least from the Ninth Circuit) holding that you need any suspicion before conducting a Fourth Waiver search of a probationer. To the contrary, there is California authority, never overruled, that says you don’t need any suspicion. (*People v. Bravo* (1987) 43 Cal.3<sup>rd</sup> 600; *People v. Brown* (1987) 191 Cal.App.3<sup>rd</sup> 761.) But the issue is ripe for another look. So if you want to provide me with a test case, have at it. It’s your house, not mine, you’ll be risking.

### ***Hearsay Statements and the Sixth Amendment Right to Confrontation:***

***Davis v. Washington* (Jun. 19, 2006) \_\_\_ U.S. \_\_\_ [2006 DJDAR 7615]**

**Rule:** Statements made in a 9-1-1 call by a victim while a crime is occurring are *not* “*testimonial*,” and are therefore *admissible* at trial when that victim is later unavailable to

testify. Statements made during the subsequent investigation, however, *are testimonial* and *inadmissible* when the victim is unavailable to testify and the defendant has not yet had an opportunity to cross-examine her.

**Facts:** Two cases: #1. In Washington state, Michelle McCottry called 9-1-1 and hung up when the police emergency operator answered. The operator called her back and asked her what was going on. Michelle complained that defendant Davis was “jumping on me again,” using his fists. Michelle was able to identify Davis by name. Davis fled the scene as Michelle was talking to the 9-1-1 operator. He was later charged with a felony violation of a domestic violence no-contact court order. However, Michelle failed to appear for Davis’s trial. In her absence, the prosecutor presented the testimony of the responding officers who described Michelle’s visible injuries and her emotional state at the time. A tape of the 9-1-1 call from Michelle, identifying Davis as the one who beat on her, was also admitted into evidence. Davis appealed from his conviction, arguing that use of the 9-1-1 tape violated his Sixth Amendment right to confront his accuser. Davis’s conviction was affirmed by the Washington courts. Certiorari was granted by the United States Supreme Court.

#2. In Indiana, police responded to a late-night “domestic disturbance” call. They found the “somewhat frightened” victim, Amy Hammon, sitting on the front porch. In answer to the officers’ inquiry, Amy told them “nothing was the matter.” Entering the house with Amy’s permission, the officers found a gas heater with its front glass panel broken and pieces of glass on the floor. Defendant Hershel Hammon, contacted in the kitchen, admitted to having had an argument with his wife, but denied that it had become physical. With Hershel detained in the kitchen, one of the officers interviewed Amy separately. She then admitted that during the argument, Hershel Hammon had broken the heater, some lamps and the telephone. He also “tore up” the family van so she couldn’t leave. He then pushed her down onto the floor, shoving her head into the broken glass from the heater, and punched her twice in the chest. She filled out a sworn affidavit to this effect. Hammon was charged in state court with “domestic battery” and a probation violation. Amy failed to appear for the trial. Over Hammon’s objections, the prosecution was allowed to present the officer’s testimony about what Amy had told him, classifying her statements under the “excited utterance” exception to the hearsay rule. Amy’s affidavit was also admitted into evidence, the trial court ruling that it qualified under the “present sense impression” exception to the hearsay rule. Convicted as charged, Hammon’s conviction was upheld on appeal. Certiorari was granted by the United States Supreme Court and joined with the Davis case.

Held: The United States Supreme Court, in a near-unanimous decision, upheld Davis’s conviction but reversed the conviction in Hammon’s case. The respective victims’ statements to police (which included the tape of the recorded 9-1-1 call in *Davis* and the written affidavit in *Hammon*, as well as what the victims told the responding police officers) as they related to and described the actions of the defendants in both cases, are “*hearsay*” when testified to by the officers who overheard such statements, or, with the affidavit, when it is offered into evidence. When such statements come within one of the recognized hearsay exceptions, however, they *may be* (depending upon a legal analysis not relevant here) admissible in evidence. A major limitation on the admissibility of such

statements, however, is when use of the statements violates the defendants' Sixth Amendment right to confront his accusers. The Supreme Court in *Crawford v. Washington* noted that admission of such hearsay statements does in fact violate a defendant's Sixth Amendment rights when (1) the "declarant" (i.e., the respective victims in these cases) is unavailable to testify, (2) the defendant has not yet had the opportunity to cross-examine that witness, and (3) the statements are "testimonial" in nature. In the present case, both victims failed to appear for trial. In both cases, the defendant had not yet had an opportunity to cross-examine the victim. The only issue left is whether the statements were "testimonial." Although *Crawford v. Washington* gave some guidance in what is, and what is not, "testimonial," it failed to specifically define the term. At least partially filling this gap, the Court here provided the following distinction: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (In footnote #1, the Court also adds that the term "interrogation" is not to be taken literally. This term would include what might more often be referred to as a "witness interview.") Based upon these standards, the Court found the 9-1-1 call to the police emergency operator (who, for purposes of this case, was found to be a police agent) in the *Davis* case to be *non-testimonial*. This conclusion was based upon the following: (1) The victim was speaking of events as they were actually occurring; (2) the victim was facing an on-going emergency; (3) the statements elicited from the victim were necessary to enable the police to resolve the present emergency rather than simple to learn what had happened in the past; and (4) the formality of the situation was less than where a victim is interviewed about a past event. In the *Hammon* case, however, the officer's interview of the victim, as well as her sworn affidavit describing her husband's acts, were found to be testimonial based upon the following: (1) The interview of the victim was part of an investigation into possibly past (even though very recent past) criminal conduct; (2) there was no emergency in progress; (3) the interview was to determine not what was happening, but rather what *had* happened; and (4) the primary, if not sole, purpose of the interview was to investigate a possible crime. The admission into evidence of Amy Hammon's statements, therefore, violated *Crawford* and the Sixth Amendment. Lastly, in response to the suggestion that the rules of admissibility should be loosened up a little in domestic violence cases, the Court, while declining to do so, noted that the same end can be accomplished through application of the so-called "*Rule of Forfeiture by Wrongdoing*." Under this theory (codified into federal law by Federal Rule of Evidence 804(b)(6), and a part of California state jurisprudence through case law), statements that might otherwise be classified as testimonial, and therefore inadmissible under *Crawford* and the Sixth Amendment, may be used anyway if the prosecution can prove by a preponderance of the evidence that the defendant did something to cause the unavailability of the victim or witness. "(W)hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require the courts to acquiesce." The Court therefore upheld *Davis*'s conviction, but remanded the

*Hammon* case back to the trial court for further proceedings, including a determination of whether the “*Rule of Forfeiture by Wrongdoing*” might apply.

**Note:** While I don’t normally brief cases involving courtroom evidentiary issues only, the *Crawford* rule is one that both police officers and prosecutors need to know. The importance of this issue to prosecutors is self-evident. But cops also need to be sensitive to *Crawford* because it underscores the need to keep track of witnesses and victims, and to protect them from intimidation. This new case is one we really needed in that the *Crawford* decision, at least in its discussion about what is, and what is not, “*testimonial*,” is about as clear as mud. This issue is now significantly clarified. If you want it, I have an extensive up-to-date training outline on Sixth Amendment “*right to an attorney*” and “*confrontation*” issues, including *Crawford* and a lot of state *Crawford*-issue cases I never briefed for the Update, which I will send you upon request. In this new case, the Court took advantage of the opportunity to expound a little more on some other *Crawford*-related side-issues. For instance, it was noted here that non-testimonial statements can turn into testimonial statements as the emergency dissipates while the “*interrogation*” of the victim continues. When the questioning becomes one of seeking information on a crime that is no longer occurring, the victim’s responses will become testimonial at some point. In fact, the Court indicated that this may have happened in the *Davis* case after the defendant fled the scene. However, if it was an issue in *Davis*, it became moot when the lower courts in Washington found the error, if any, to be harmless, and the issue was not raised again on appeal to the Supreme Court. Also, the Court made reference to another category of what is *not* considered to be testimonial; i.e., responses to an officer’s initial questions upon arriving at the scene of an incident, where the police “*need to know whom they are dealing with in order to assess the situation, the threat to their safety, and possible danger to the potential victim.*” The admissibility of the responses to these initial questions should not be precluded by *Crawford*. The sole dissenting opinion, if you keep track of such trivia, was written by Justice Clarence Thomas, and only as to the reversal of the *Hammon* case in that he is of the belief that *Crawford v. Washington* was wrongly decided in the first place.

***The Compassionate Use Act (Prop. 215) and Search Warrants:***

***People v. Russell* (Apr. 14, 2006) 138 Cal.App.4<sup>th</sup> 723**

**Rule:** Absent probable cause to believe a crime is being committed, the Compassionate Use Act precludes the issuance of a search warrant.

**Facts:** In July, 2003, Deputy James Wegner of the Amador County Sheriff’s Department received information from a county code enforcement officer that defendant was growing marijuana. While inspecting a septic system problem on defendant’s rural property, the code enforcement officer had observed six to seven marijuana plants being cultivated at a location that was visible from the street. Deputy Wegner suspected that by growing marijuana so openly, it might be for medicinal purposes and with the recommendation of a physician, pursuant to the so-called Compassionate Use Act (i.e., Proposition 215). Deputy Wegner asked Deputy Elgin Bowers to drive by the property to take a look.

Deputy Bowers reported back to Wegner that there was a sign attached to defendant's trailer indicating that the marijuana was indeed being grown for medicinal purposes, as authorized by a Dr. William R. Turnispeed, with a phone number provided. Deputy Wegner called the number and spoke to a person who identified himself as Dr. Turnispeed. Deputy Wegner represented himself to be a person in need of medical marijuana for a sore back, but was advised by the doctor that he would have to first seek treatment for the ailment or the "judge won't buy it." Deputy Wegner later flew over the property while conducting an aerial reconnaissance and observed several marijuana plants growing adjacent to the residence. All of the above information was included in a search warrant affidavit. Deputy Wegner also alleged in his affidavit that based upon his training and experience, he knows that cultivators of marijuana often grow additional plants inside. A later search based upon this warrant resulted in recovery of some psilocybin mushrooms and ammunition. (Six marijuana plants were also discovered, but apparently not taken. No charges related to the cultivation or possession of the marijuana were filed.) Being charged in state court with the possession of the mushrooms and with being a felon in possession of ammunition, defendant's motion to suppress was denied. He pled guilty and was sentenced to prison.

**Held:** The Third District Court of Appeal reversed defendant's conviction, ruling that the evidence should have been suppressed. Citing *People v. Mower* (2002) 28 Cal.4<sup>th</sup> 457, the Court noted that the California Supreme court has dictated that when determining whether there is probable cause to arrest or, as in this case, to search, an officer must take into consideration "all of the surrounding facts [citations], including those that reveal a person's status as a qualified patient or primary caregiver under (H&S Code) section 11362.5(d)" of the Compassionate Use Act. (*Mower*, at pp. 468-469.) All the known circumstances in this case indicate that defendant legally possessed the six marijuana plants under the Compassionate Use Act. Growing the marijuana openly, in an amount that is reasonable for personal use, with a sign referring an observer to the physician who authorized defendant to do so, as required by the Act, are all indications that defendant had a right to do what he was doing. Despite the deputy's expert opinion that those who cultivate marijuana will have more plants indoors as well, there was no actual evidence of any plants other than those that were visible outside. Everything that the officer knew, therefore, indicated that defendant was legally cultivating the marijuana. The search warrant, without probable cause of any illegal activity to support it, should not have been issued. The search was therefore illegal.

**Note:** This decision sounds reasonable upon first blush. But there's a real problem here. The Court correctly quotes *Mower*, as far as it goes, but takes it out of context. The very next sentence in *Mower* after the above referenced quote, conveniently ignored by the Court, specifically says: "But contrary to defendant's position, the requirement that law enforcement officers have probable cause for an arrest does not mean that section 11362.5 must be interpreted to grant such persons immunity from arrest. It is well established that immunity from arrest is exceptional, and, when granted, ordinarily is granted expressly." The Compassionate Use act does not expressly grant immunity from arrest. (Such immunity from arrest was not available until the subsequent enactment of H&S § 11362.7 et seq., effective 1/1/04, and then only for a person who has obtained a

government issued “*identification card*” authorizing the possession, cultivation, transportation and use of marijuana for medicinal purposes. See H&S § 11362.7(e)) *Mower*, as I understand it, does no more than provide a defendant the right to argue the affirmative defense of a medical necessity at trial, or in a pre-trial motion to dismiss. And then when a defendant does so, he need only “raise a reasonable doubt” as to the illegality of his actions. If, and only if, he can do so to the satisfaction of the court is he entitled to a dismissal of the criminal charges. This case here in effect says that a suspect can make himself immune from arrest (or search) by claiming openly that he is complying with the requirements of the Compassionate Use Act while keeping from view anything else that might indicate that he is not. *Mower* expressly says that he can’t do that. Per Deputy Wegner, this case is to be appealed (if the Supreme Court agrees to accept it), or maybe depublished. Let’s hope so.

***Photo Lineups; Suggestiveness:***

***People v. Carlos* (Apr. 19, 2006) 138 Cal.App.4<sup>th</sup> 907**

**Rule:** Evidence of an impermissibly suggestive photographic lineup, with the suspect’s photo highlighted, is inadmissible at trial.

**Facts:** Vutha Kear is the owner of a donut shop. Her brother, Vutena Kear, and husband, Luis Hermosillo, both worked at the donut shop. On November 26 2003, defendant, wearing a hooded blue jacket, entered the donut shop and ordered Vutena to open the cash register. He complied. But when defendant started to put his hand into the cash register drawer, Hermosillo slammed it shut. Defendant grabbed the whole register and attempted to open it again. During this struggle, Vutha opened the drawer allowing defendant to grab between \$100 to \$200 and flee. The police were called. A usable latent fingerprint was recovered by a Sheriff’s Department technician from the cash register. This print was “linked” (whatever that means) to defendant, who *just happened* to live within a mile of the donut shop, and who *just happened* to have two prior robbery convictions, and who *just happened* to own a hooded blue jacket. A Deputy Sheriff prepared a “six-pack photographic array” that included defendant’s photograph. Defendant’s picture was placed in the #5 position (presumably, at the bottom center with three photos across the top and three across the bottom), with defendant’s name and an identification number directly below his photograph. None of the other five pictures had similar markings near them. Vutena identified defendant as the robber. Hermosillo made a tentative identification, saying that defendant was “the person that I believe robbed us.” Vutha was unable to identify anyone. Charged with robbery, the prosecution didn’t show the defense attorney the photo lineup until the day of trial. Defendant’s motion for a one day continuance to evaluate the lineup was denied. During trial, none of the victims were able to identify defendant in the courtroom. Evidence of the photograph lineup identifications was admitted into evidence, however. (The decision did not indicate whether the fingerprint evidence was introduced. It appears that it was not.) Defendant was convicted. As a third striker, he was sentenced to 25-years-to-life, the term being enhanced with an extra 10 years added on for two prior serious felony convictions. Defendant appealed.

**Held:** The Second District Court of Appeal (Div. 1) reversed, finding the photographic lineup “*impermissibly suggestive*.” As such, evidence of the pre-trial identifications of defendant should not have been admitted. Without such evidence, there was no evidence identifying defendant as the robber. Therefore, the conviction must be reversed. “A due process violation occurs when a pretrial identification procedure is so impermissibly suggestive that it gives rise to a very substantial likelihood of irreparable misidentification.” In this case, the witnesses were presented with a “six-pack” photo lineup array that included defendant’s name and an identification number directly below his photograph. None of the other photographs included such information. The prosecutor told the trial judge that this was the procedure done in all cases, suggesting (apparently) that a suspect’s identification information is always listed at the bottom center of the array no matter where the defendant’s photo is positioned. Other than the fact that this information happened to be right below defendant’s picture, the witness has no idea to which of the six photos the information refers. The Appellate Court ruled that whether this was by design, or coincidence, positioning of the written information right below defendant’s photo could not help but hint at who was the robber. Specifically, the Court criticized the following occurrences, entitling defendant to a new trial: (1) The photo array was impermissibly suggestive and prejudicial because the labeling and positioning of defendant’s picture plainly made his photograph “stand out” from the others; (2) the method of labeling, on the front of the array and directly under defendant’s photo, was unnecessary; (3) the photo array was not disclosed to the defense until the first day of trial; (4) defense counsel’s request for a brief continuance was denied; and (5) none of the witnesses identified defendant at trial.

**Note:** The experts are now saying that it is fairer to not use the traditional six-pack lineup procedure at all, but rather to lay out one photo at a time, sequentially, in front of the witness. I don’t know why this is fairer, but this conclusion is supposed to be the result of studies done on the reliability of the various methods we’ve used over the years. Given the simple fact that ID cases, at least where there is no corroboration, are perhaps the most dangerous cases we do from an *accidentally-convict-the-innocent* standpoint, and particularly since photo lineups are less reliable than live or curbstome lineups, I’m all for whatever makes it fairer. But in this case, I’m not sure reversal was necessary. While no one identified the defendant at trial, we did have the similar clothing, the defendant, just by coincidence, out of the millions of people listed in CAL ID (if that’s how he was identified as the robber), happening to live nearby, and the fingerprint left at the scene. Unfortunately, they never explain where on the cash register the latent print was found, whether the print evidence was ever introduced in trial, and if it wasn’t, why it wasn’t. Also, you have to wonder whether his prior robberies might have been similar enough to make them admissible under E.C. § 1101(b). (I assume not, but with the other mistakes made here, who knows.) And while I’m criticizing, I’ll bet you that the preliminary hearing was done utilizing Prop. 115 hearsay (per P.C. § 872(b)), losing the opportunity for an in-court identification while the robbery was still fresh in the victims’ minds. That possibility, however, was also not discussed in this very poorly written decision, so we’ll never know (at least until I get an irate e-mail or phone call from the officers and/or prosecutor who handled this case). I just see this case as one that was (and should still be) salvageable if handled a little differently.