The California Legal Update

Remember 9/11/2001; Support Our Troops

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THIS EDITION'S WORDS OF WISDOM:

"*I like to see a man proud of the place in which he lives. And I like to see a man live so that his place will be proud of him.*" (Abraham Lincoln)

IN THIS ISSUE: **pg.**

***Administrative Notes*:**

Second Amendment Update 2
Amended P.C. § 308; Minors and Cigarettes 2

***Cases*:**

Prolonged Detentions 3
Detentions and Reasonable Suspicion 3
Detentions and the Use of Handcuffs 3
Infraction Offenses and Custodial Arrests 3
Reverse Sting Operations and Outrageous Governmental Misconduct 6
Entrapment 6
Residential Burglary 9

Commercial Burglary 10
Forgery and the Intent to Defraud 10

ADMINISTRATIVE NOTES:

***Second Amendment Update*:** The long-awaited en banc decision in *Peruta v. County of San Diego* (9th Cir. June 9, 2016) __ F.3rd __ [2016 U.S. App. LEXIS 10436] (combined with *Richards v. Prieto*, out of Yolo County) finally came down, holding that you and I, as members of the general public, *do not* have a Second Amendment constitutional right to carry a concealed firearm in public. (If you are a law enforcement officer, or a retired officer, your right to carry concealed is not a "right" at all, but exists only because the Legislature provided you with the privilege.) The problem is that San Diego and Yolo counties will not issue anyone a CCW permit without a showing of "*Good Cause*." (See P.C. § 26150(a)) "Good cause" does *not* include a perceived general need for self-protection absent specific documented threats. The plaintiffs' theory for challenging California's restrictive carrying concealed statute (P.C. § 25400) is based upon the theory that because of the state's "open carry" restrictions (P.C. § 26350), when combined with the need to show "good cause" to carry a concealed firearm, the Second Amendment right to bear arms has effectively been obliterated; i.e., "tantamount to (a) complete (ban) on the Second Amendment right to bear arms outside the home for self-defense." An en banc panel of the Ninth Circuit, in a split 7 to 4 decision, and after an extensive analysis of the history before and after enactment of the Second Amendment, simply concluded that even if plaintiffs are correct—i.e., that California has effectively banned the carrying of any firearms in public (except for limited statutory exceptions)—the states have the right to do just that. Per the Court: "(T)he Second Amendment right to keep and bear arms does not include, in any degree, the right of a member of the general public to carry concealed firearms in public." (The Court declined to decide whether California's "open carry" statute is constitutional.) I'm not briefing the entire case, however, because it is obvious that *Peruta* will be appealed to the U.S. Supreme Court. So grab you socks and let's wait to see what happens.

***Amended P.C. § 308; Minors and Cigarettes*:** Effective June 9, 2016, P.C. § 308 has been amended to eliminate any penal sanctions for a minor possessing cigarettes or other smoking paraphernalia. The amended section now covers only the criminal and civil sanctions for any "person, firm, or corporation" to furnish tobacco products to anyone under the age of 21 (raised from 18, with the exception of active military personnel). It also expands the term "*cigarette*" to include "*electronic cigarettes*," as defined in amended B&P Code § 22950.5(d). Lastly, provisions for using minors in undercover sting cigarette purchasing

operations has been deleted from section 308 and is now covered exclusively, and in more detail, in B&P Code § 22952. (My thanks to Officer Uriel Pacheco, of the Bakersfield P.D., for turning me on to this change in the law.)

CASES:

***Prolonged Detentions*:**
***Detentions and Reasonable Suspicion*:**
***Detentions and the Use of Handcuffs*:**
***Infraction Offenses and Custodial Arrests*:**

People v. Espino **(May 24, 2016) 247 Cal.App.4th 746**

Rule: (1) A reasonable suspicion of other criminal activity will justify prolonging a traffic stop situation beyond the time it takes to write the citation. (2) Consent to search obtained from an illegally arrested suspect will likely be held to be involuntary. The use of handcuffs, absent cause to believe the suspect will resist or attempt to flee, converts a detention into an arrest. (3) A custodial arrest for a non-bookable offense is not lawful absent a good faith belief that probable cause exists for charging a bookable offense.

Facts: Gilroy Police Sergeant Joseph Deras, working speed enforcement in the City of Gilroy, clocked defendant driving 50 miles per hour in a 35 mph zone. Making a traffic stop, Sgt. Deras collected all the necessary documentation from defendant and ran a routine license and warrant check. Although the warrant check came back negative, it revealed that defendant was a registered sex offender, per P.C. § 290; something Sgt. Deras apparently already knew. Sgt. Deras made it a routine practice to verify that sex registrants were still living at their registered addresses. With defendant, Sgt. Deras had prior information that although certified letters had been sent to his home address, police were unable to establish fact-to-face contact with him at that location. While Sgt. Deras was attempting to locate the officer who had told him about defendant, Gilroy Police Detective Bill Richmond called him on his cellphone and told him to "hang on" to defendant until he could get there. Detective Richmond had information from a "validated confidential informant" that defendant was selling narcotics and firearms. Sergeant Deras later testified that he managed all the informants in Gilroy and that he also was aware from his own firsthand knowledge of an informant "looking into" defendant concerning drugs and firearms. Also, a civilian ride-along with Sgt. Deras told him that when they first stopped defendant, the ride-along had seen him "making a very pronounced movement" to the passenger side of the car. Now, concerned that defendant might be packing a pistol, Sgt. Deras decided to wait for cover to assist before contacting him again. Within several minutes, Detective Richmond and another officer arrived. Ordered out of the car, defendant told them that he was

living at the address listed in his sex offender registration information but denied ever getting any certified letters. Noticing that defendant would put his hands in his pockets off and on, he was asked for consent to search his pockets. Defendant consented. In one of his pockets was found what appeared to be a single rock of crack cocaine. Believing that defendant was committing a felony, he was placed in handcuffs while being told that he was only being detained and not arrested. A closer check of the rock showed that it was in fact a small diamond and not cocaine. Defendant, while still in handcuffs, and sitting on the curb of the sidewalk where the officers had placed him, was asked for consent to search his car. After "think(ing) about it" for a moment, defendant consented. In the car was found several grams of methamphetamine, an electronic scale, and some clear plastic bags. He was arrested on a possession-for-sale charge and a search warrant was obtained for his home. Execution of the warrant resulted in the recovery of a .22-caliber revolver and some ammunition. A video from Sgt. Deras' car established that the entire stop, up until defendant's arrest, lasted about 13 minutes. Charged in state court with possession of methamphetamine for sale (H&S Code, § 11378), possession of a firearm by a felon (former P.C. § 12021(a)(1)), and possession of ammunition by a felon (P.C. § 30305(a)(1)), defendant's motion to suppress all the evidence seized from his vehicle and his home was denied. He thereafter pled no contest to the sheet and admitted to a prior conviction for possession of cocaine. Defendant appealed from his two-year, eight-month prison sentence.

Held: The Sixth District Court of Appeal reversed. On appeal, defendant argued that although the traffic stop was legal, his consent to search his car was invalid as the product of an illegally prolonged detention, and that the warrant for his home, supported only by information obtained during his illegal detention, was invalid. He also argued that any probable cause the officers might have had to support an arrest had "ceased to exist" when it was discovered that he was not in possession of cocaine, and that his consent to search his car, obtained while he was under an illegal "de facto" arrest, was therefore invalid. The People responded that Sgt. Deras had sufficient reasonable suspicion independent of the traffic violation to justify a prolonged detention. The People also argued that defendant had validly consented to the search of his car because he was only being detained despite the use of handcuffs, and, in the alternative, the police had the authority to arrest defendant for the traffic violation, despite statutes that require him to be cited and released, under Supreme Court authority that says that to do so is not a Fourth Amendment violation (i.e., *Atwater v. City of Lago Vista* (2001) 532 U.S. 318.)

(1) *The Prolonged Detention*: After being stopped for speeding, defendant was never written a citation. Instead, the police expanded the scope of the stop beyond its initial purpose and detained him for longer than necessary to cite him while investigating the possibility that he might be dealing in drugs and weapons. The legality of the initial stop was not contested. The rule under these circumstances is that when making such a traffic stop, the seizure of the driver "can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." If, however, "the police develop reasonable suspicion of some other criminal activity during a traffic stop of lawful duration, they may expand the scope of the detention to investigate that activity." That "(r)easonable suspicion is a lesser standard than probable cause and can arise from less reliable information than that required for probable cause." In this case, Sgt. Deras had some prior information that defendant might not have been in compliance with P.C. § 290's

registration requirements in that no one had been able to verify that he lived where he said he lived. Sgt. Duras was also aware that a confidential informant had information suggesting that defendant might be involved in selling drugs and guns. And during the traffic stop, Sgt. Duras' ride-along reported to him that defendant had made a furtive movement during the stop, suggesting that defendant may have hidden drugs or a weapon. Taken together, these facts provided sufficient reasonable suspicion to justify an extension of the duration of the traffic stop beyond the time it would have taken to write a traffic citation. (Detective Richmond's information concerning defendant's possible illegal activities was disregarded absent some proof of the reliability of his sources.)

(2) *Consent Given During a De Facto Arrest*; *The Use of Handcuffs*: At the time defendant gave consent to search his car the probable cause to arrest him had disappeared, it being determined that the supposed rock cocaine found in his pocket was not a controlled substance at all. But the officers kept defendant in handcuffs and seated on the curb despite no longer having any probable cause to arrest. The people argued that defendant was only being detained at this point. Whether or not defendant was under arrest or only detained depends upon an evaluation of the "totality of the circumstances." It is sometimes lawful to use handcuffs to effect a detention, depending upon the circumstances. However, unless the use of cuffs in a detention situation can be justified by a reasonable belief that the detainee presents a physical threat to the officer, or that he might attempt to flee, then using handcuffs will convert that detention into a "de factor arrest." In this case, defendant was outnumbered by officers at the scene three to one. He was 50 years old, and not a large person, physically. He also had shown no signs of potentially physically resisting or attempting to escape, being "peaceful and compliant" throughout the stop. Defendant's person had already been searched and no weapons were found. Also, he was being held too far from his car to reach for any weapons that might have been in there. Under these circumstances, it was not necessary to use handcuffs to effect a detention. Failure to remove the handcuffs "within a reasonable amount of time" of discovering that there no longer was any probable cause to justify an arrest converted the situation into a "de facto arrest," and became unlawful. The fact that defendant was told that he was not under arrest was held to be insufficient to overcome the other circumstances indicating to the contrary. As to the subsequent consent defendant gave to search his car, the rule is that "whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." Under the circumstances presented here, it was held that defendant's consent to search his car, occurring within 2 to 3 minutes of discovering that the rock in his pocket was not a controlled substances, was a direct product of the illegal arrest. As such, it was invalid. The dope found in defendant's car, therefore, should have been suppressed. As for the gun and ammunition found at defendant's home upon execution of a search warrant, its legality depends upon whether there was probable cause justifying the issuance of that warrant. The Court remanded the case back to the trial court for a hearing to determine whether, after deleting information related to what was found in his car, there remained probable cause to justify issuance of the warrant.

(3) *Applicability of Atwater*: The People also argued that even if not lawfully under arrest for possession of a controlled substance, the United States Supreme Court's decision in *Atwater v. City of Lago Vista* allowed for defendant's physical, custodial arrest for speeding. Based upon

this theory, defendant was in fact lawfully under arrest at the time he gave his consent to search his car, albeit for speeding only. The Court rejected this argument. In *Atwater*, it was held that taking a suspect into custody for a non-bookable offense (a seatbelt violation), even if in violation of a state statute mandating that the person be cited and released, is *not* a Fourth Amendment violation and does not require the suppression of any of the direct products of that statutorily illegal, but constitutionally permissible, arrest. California authority is in accord. (See *People v. McKay* (2002) 27 Cal.4th 601; a V.C. § 21650.1 [riding a bicycle on the wrong side of the street] violation.) Per the People's argument, *Atwater* (and *McKay*) establishes that the police officers here could have arrested defendant for speeding without violating the Fourth Amendment. The Court here wiggled its way out of this one by ruling that nothing in the *Atwater* line of cases suggests that this theory can be used when the offense for which defendant is actually arrested (possession of cocaine, in this case) is not supported by probable cause. In other words, the officers must first have an objectively reasonable good faith belief in the facts supporting probable cause for the offense (i.e., one that is bookable pursuant to statute) for which they arrested the defendant. In this case, once the officers discovered that the object in defendant's pocket was other than an controlled substance, the facts known to the officers no longer supported his arrest for drug possession. Under such circumstances, without a good faith belief that defendant was subject to a lawful custodial arrest, *Atwater* and its progeny do not apply. To hold otherwise would allow the police to search and arrest a motorist for any offense —even where officers know there is no evidence that a bookable offense has been committed— so long as there is probable cause to support a traffic violation (e.g., speeding). Therefore, the Court announced the rule that "police may not use probable cause for a traffic violation to justify an arrest for an unrelated offense where, under the facts known to police, they have no probable cause supporting the unrelated offense." Here, although the officers initially had probable cause to arrest defendant for possession of a controlled substance, that probable cause went away when they discovered that the rock in defendant's pocket was not contraband. Upon this discovery, reliance upon *Atwater* was no longer valid. Defendant was not lawfully subject a custodial arrest or booking for the traffic violation.

Note: As to the *Atwater* argument, I found the Court's reasoning to be a bit strained, and I'm not sure I buy it from a purely legal standpoint. Why the products of a search incident to an arrest for an infraction or non-bookable misdemeanor are not subject to suppression (per *Atwater*; *Mckay*; *People v. Donaldson* (1995) 36 Cal.App.4th 532; *People v. Trapane* (1991) 1 Cal.App.4th Supp. 10; *People v. Gomez* (2004) 117 Cal.App.4th 531, 538-539; *People v. Gallardo* (2005) 130 Cal.App.4th 234, 239, fn. 1; and *People v. Bennett* (2011) 197 Cal.App.4th 907, 918.), but you can't get a valid consent to search under the same circumstances, is beyond me. The only thing I can see justifying this decision is that the officers in this case never really intended to physically arrest the defendant for speeding. But I can't fault the Court's ultimate conclusion. I don't encourage officers to be making physical arrests for minor offenses where state statutes dictate a cite and release (e.g., P.C. §§ 853.5, 853.6, V.C. §§ 40303, 40500). This inevitably leads to officers conveniently changing their minds after finding nothing during a search incident to an arrest for speeding, for instance, and writing him a ticket instead. This is not only dishonest, but also damages good police-public relations. I'm of the school (noting that not

everyone agrees) that the statutory restrictions on making custodial arrests for infractions and misdemeanors should be respected, whether or not there is a suppression sanction for violating them. In other words, it shouldn't take an exclusionary rule to motivate police officers to follow the dictates of the state Legislature. This case is also noteworthy on the issue of using handcuffs to detain. I've been getting reports of police officers routinely using handcuffs in effecting detentions under the theory that any such contact is potentially dangerous. That may be true, but an officer must still be able to articulate why, under the circumstances of the particular case in issue, he or she reasonably believed that this particular suspect was going to resist or flee. This case is correct in noting that the use of handcuffs, absent an articulable reason for doing so (i.e., the suspect's lack of cooperation or likelihood that he will attempt to flee), converts such a contact into a de facto arrest, and is illegal absent probable cause supporting that arrest.

***Reverse Sting Operations and Outrageous Governmental Misconduct*:**
***Entrapment*:**

United States v. Pedrin **(9th Cir. Aug. 17, 2015) 797 F.3rd 792**

Rule: Reverse sting operations are lawful so long as the Government is not instigating a crime that would not have otherwise occurred.

Facts: The federal Bureau of Alcohol, Tobacco, and Firearms ("ATF") conducts what is known as "reverse sting" operations on a regular basis. The plan is to identify and apprehend people who can be enticed into robbing a fictitious drug "stash house," i.e., somewhere where drugs are being "stashed." In conducting this operation, an undercover agent poses as a disgruntled drug courier, telling the intended targets of the sting that he knows of a stash house where a large amount of cocaine is being protected by armed guards. The agent then suggests to the targets that they join forces, rob the house, and split the proceeds. Once the targets themselves have taken steps to rob the fictitious stash house, they are arrested and charged with conspiracy to violate federal narcotics laws. Defendant was the target of just such a sting operation in this case. The sting was planned by ATF Agent Richard Zayas, at the time a 20-year veteran of the bureau with a number of such sting operations under his belt. Agent Zayas had a confidential informant who told Zayas that he had a nephew who was looking to steal drugs. The informant set up a meeting between Agent Zayas, working undercover, and the nephew. Defendant accompanied the nephew to the meeting. Agent Zayas described himself to the nephew and defendant as a disgruntled cocaine courier. He told the two men that he knew about a local stash house that was guarded by two armed men and that contained between 40 and 50 kilograms of cocaine. Agent Zayas said he was looking for "someone to go in there and take everything." He then asked the men, "*What do you think*? . . . *Can that be done*?" Each man assented. In a second meeting, the nephew and defendant provided Agent Zayas with the details of their plan, indicating that they'd recruited three other men to help. Defendant also told Zayas that he had obtained walkie talkies and scanners to facilitate the operation. At no point did Zayas instruct the men in how to carry out the robbery. Two days later, on the day set to rob the stash house, Agent Zayas met with all five men. After reiterating that the stash house contained between 40

and 50 kilograms of cocaine and that it was guarded by at least two armed men, Agent Zayas instructed defendant and the others to follow him to a storage locker where they were to deliver Zayas's share of cocaine after the robbery. One of the men, however, growing suspicious, decided to drive himself to the locker where he spotted other ATF agents. He called the others and warned them that it was a sting. The men all fled but were picked up by federal and state officers shortly afterward. Defendant was charged in federal court with conspiracy to possess with intent to distribute 40 to 50 kilograms of cocaine. At trial, evidence was introduced to the effect that defendant had been doing stash house robberies for years. Convicted and sentenced to prison for 17½ years, defendant appealed.

Held: The Ninth Circuit Court of Appeal, in a split, two-to-one decision, affirmed. On appeal, defendant argued that the ATF's actions in this case constituted "*outrageous governmental conduct*," a violation of his Fifth Amendment due process rights. A prosecution results from outrageous government conduct when the actions of law enforcement officers are "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." However, dismissal of a case on these grounds is limited to extreme cases in which the government's conduct violates "fundamental fairness." Such a dismissed is justified only where the government's conduct is "so grossly shocking and so outrageous as to violate the universal sense of justice." Defendant argued that by Agent Zayas initiating the contact with defendant, telling him (and the confidential informant's nephew) of a fictitious stash house and suggesting that they rob it, "all without any individualized suspicion about defendant's criminal history," that the government's conduct was "outrageous," warranting dismissal of the case. Noting that the Court had "concerns" about reverse sting operations, it ultimately concluded that the ATF, at least in this case, "did not cross the line," and that dismissal was not warranted. Prior cases have identified six factors in determining whether the government's conduct is outrageous: (1) Known criminal characteristics of the defendants; (2) individualized suspicion of the defendants; (3) the government's role in creating the crime of conviction; (4) the government's encouragement of the defendants to commit the offense conduct; (5) the nature of the government's participation in the offense conduct; and (6) the nature of the crime being pursued and necessity for the actions taken in light of the nature of the criminal enterprise at issue. In this case, it was noted that the government was not "trolling for targets;" i.e., targeting a generalized population, such as in "a bad part of town, a bad bar," where the likelihood was greater of "creat(ing) a criminal enterprise that would not have come into being but for the temptation of a big payday." Rather, the confidential informant's nephew had initiated the contact, bringing defendant along to the initial meeting with Agent Zayas. The government thus had little reason to suspect that defendant was a "vulnerable" person "who would not otherwise have thought of doing such a robbery." Also, defendant was not a reluctant participant. Along with the nephew, he readily agreed to carry out the robbery, actively participating in the planning and the supplying of walkie talkies and scanners. Defendant's conduct gave rise to an inference that he had previously committed similar crimes. In this case, the government had reason to believe, in light of what it knew as it was setting up the sting, that defendant was predisposed to committing such an offense. This prior disposition to commit such an offense is a necessary element to reverse sting operations if they are to be upheld in order to

avoid the possibility that the government is "manufactur(ing) a crime that would not have otherwise occurred." While continuing to express "concerns about the risks of government overreaching inherent in fictitious stash house sting operations," the Court concluded that the government's conduct in this case was not "so grossly shocking and so outrageous as to violate the universal sense of justice." Defendant's conviction (and sentence) was therefore upheld.

Note: Remember that this decision was split, with a strong dissent. The same dissenting Ninth Circuit judge, Justice John T. Noonan, also wrote a dissent to the Court's refusal to rehear the case en banc (i.e., with eleven justices; see 806 F.3rd 1009 (9th Cir. Nov. 23, 2015).). The majority never uses the word "*entrapment*." But Justice Noonan did, arguing that the Government failed to meet its burden of proof in showing that defendant was not the victim of entrapment. The rule is this: "Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and induce commission of a crime so that the government may prosecute." Also, "[T]he prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by government agents." (Citing *Jacobson v. United States* (1992) 503 U.S. 540, 549.) While defendant was hardly an "innocent person," his prior criminal history (not yet having been caught ripping off stash houses) was unknown to ATF when this reverse sting was being set up. As noted by the majority opinion, what the Government discovers about the suspect after the fact is irrelevant when evaluating the issue of the suspect's propensity or predisposition to commit such a crime. The counter argument, as noted by the majority opinion, was that defendant showed his criminal propensities by first coming to Agent Zayas (with the informant's nephew) hoping to set up such a robbery, and then through his active participation in the planning of the proposed robbery. That argument carried the day. But the entrapment issue still has to be considered when conducting reverse stings such as the one done here. As emphasized by the Court, reverse sting operations are not favored by the courts. The legality of such an operation and can go either way.

***Residential Burglary*:**

People v. Vasquez **(Aug 31, 2015) 239 Cal. App. 4th 1512**

Rule: The new owner of a house does not necessarily have to be physically sleeping there for a burglar's entry of the house with the intent to steal to be a first degree residential burglary.

Facts: Defendant had rented the single family residence in Ventura for some two years. He was eventually evicted on June 19, 2013, by the owner—the Society of St. Vincent de Paul—which then sold the house to C.B. Escrow closed on the C.B.'s purchase of the house on August 28, 2013. Upon receiving the keys on that date, C.B. started making arrangements to move in

although she did not intend to sleep in the home until it was secure; i.e., until the doors and windows were replaced. Prior to escrow closing, C.B. arranged for the transfer of the home's utilities to her name. She also introduced herself to a neighbor as the new owner. After closing, she notified creditors of her changed address. The day after closing, C.B. had a contractor remove the acoustic ceiling. C.B. arrived later that same day with painting supplies and a few tools so that she and friends could begin painting the interior that evening. She also brought patio chairs and a canvas bag that contained a change of clothing and her "hair extensions." She added window locks to several of the windows. One friend brought a case of bottled water, plastic cups, and cookies for the work party. That evening, C.B. and her friends painted the interior of the garage, finishing at approximately 8:00 p.m. C.B. left the canvas bag, painting supplies, tools, and snacks inside the house, locking all the doors and the two windows that could be locked prior to leaving for the night. She stayed with a friend that night. At approximately 8:10 a.m. the next morning, defendant came to C.B.'s newly purchased home, entered through an unsecured bathroom window, and let friends in the front door. Three women with defendant took showers. The neighbors saw defendant and, knowing that he did not belong there, called police. At approximately 9:00 a.m., C.B. arrived at her home and was met by Ventura police officers. The contents of her canvas bag had been emptied onto the floor and her hair extensions were missing. The bottled water, cookies, paint jars, cordless screwdriver, and a GPS were also all missing. After C.B. left that morning, defendant returned, looking for a watch that had been left in the shower. Police officers arrested defendant and interviewed him. He admitted taking the food from the home, but explained that he believed the food belonged to him as a former tenant. Charged in state court with residential first degree burglary and misdemeanor trespass, defendant testified in his own defense that he believed his former roommate still lived there, denying knowing that the house had recently been sold. He also denied taking anything from the house. The jury didn't believe him and convicted him of both charges. Sentenced to prison for three years, defendant appealed.

Held: The Second District Court of Appeal (Div. 6) affirmed. Defendant's primary argument on appeal was that there was insufficient evidence to support the first degree residential burglary conviction in that the victim's home was not "inhabited," pursuant to the burglary statutes, at the time. He asserted that the home was between occupants because C.B. had not yet moved her furniture into the home, was not sleeping or cooking there, and did not intend to move in until the home was secure. Specifically, defendant objected to a special instruction given to the jury on this issue that read as follows: "A structure is an inhabited house for the purposes of first degree residential burglary if the resident has previously demonstrated an intent to use the structure as a residence. [¶] The structure is still 'inhabited' if the resident is temporarily absent from the structure at the time of the burglary so long as the resident intended to return to the structure and use it as a residence." The Court rejected defendant's arguments on this issue. Pursuant to P.C. § 460: "Every burglary of an inhabited dwelling house . . . is burglary of the first degree." Per P.C. § 450: "'[I]nhabited' means currently being used for dwelling purposes, whether occupied or not." And per the California Supreme Court: "(T)he use of a house as sleeping quarters is not determinative; it is but one circumstance in deciding whether a house is inhabited." The "inhabited-uninhabited dichotomy" turns on the character of the use of a

building, not the presence or absence of a person. (*People v. Hughes* (2002) 27 Cal.4th 287.) Here, C.B. had taken a number of necessary steps to make the Albany Avenue house her home, with the sole exception of not yet sleeping there. Aside from her temporarily sleeping at a girlfriend's house, C.B. was generally in or around the premises of her new home. Based upon this, the Court found the special instruction on this issue as given to the jury to be a correct statement of the law. C.B. "demonstrated" her intent to establish residency by activating the utilities, notifying her creditors, introducing herself to a neighbor prior to the close of escrow, embarking upon renovations to the property, and bringing personal property to the home. By sleeping at friend's house, C.B. had only temporarily absented herself from the house. The issue of habitation was a factual question for the jury to resolve from the evidence, and the instruction plainly concerns the temporary absence of one who has already established residency.

Note: Had I been asked ahead of time, I would have expressed some concern whether the house was in fact inhabited at the time of defendant's entry. Kudos to some prosecutor for either thoroughly researching this issue beforehand, or pushing the envelope by taking the chance and blindly filing a first degree burglary charge. Either way, it resulted in some great case law for the People in such a circumstance, somewhat expanding what some of us believed to be the parameters of the term "inhabited."

***Commercial Burglary*:**
***Forgery and the Intent to Defraud*:**

People v. Isom **(Sep. 30, 2015) 240 Cal. App. 4th 1146**

Rule: The fact that a burglary victim is reimbursed for his loses does not negate the theft element needed to support a burglary charge. Defendant's mistake of fact as to the necessity of forging a document to make a profit does not negate his intent to defraud in doing so.

Facts: Defendant was caught on video returning items at a Walmart store in Murrieta, using receipts from the Bakersfield Walmart that, upon inspection, were determined to have been altered. Based upon the information that appeared on the receipt, defendant received the full value for the items returned. Walmart's asset protection associate was able to obtain a copy of the original receipt from the Bakersfield store. Comparing the two receipts, it was noted that coupon discounts had been removed from the original receipt, thus increasing the apparent cost of the items purchased. Defendant therefore had obtained a full refund for items purchased at a discount. The Murrieta Police Department was called and defendant was arrested while still in the store. At the time of defendant's arrest, he had various bulk items in a shopping cart as well as multiple receipts including one from a Walmart in Visalia. After being advised of his *Miranda* rights, defendant made a full confession. He told the officers that he had been making purchases at a Walmart store with discount coupons and then returning the items for their full value at another store. After purchasing an item with a discount coupon, defendant would take the original receipt, cut off the subtotal and total so as to remove the discounted price, and then copy the receipt to his own receipt paper to make it appear as though the receipt had not been altered and that he had paid full price. He used the altered receipts to obtain full price refunds. He also

told the officer that when he entered the Murrieta Walmart, his intent was to return the items previously purchased at discount prices and get the full price back for them, using the altered receipt. He explained that he believed the manufacturers of the purchased items would give Walmart the money for the coupon discount so that the Walmart store itself would not suffer a loss. He was unaware, however, that Walmart had a return policy of refunding customers the full price whether or not the returned item had been purchased at a discount. Defendant was charged in state court with second degree burglary (P.C. § 459) and forgery (P.C. § 470), plus other prior prison term and strike enhancements. Found guilty by a jury, defendant appealed from his four-year prison sentence.

Held: The Fourth District Court of Appeal (Div. 2) affirmed. Burglary consists of an act, e.g., entering a store, "with intent to commit grand or petit larceny or any felony." (P.C. § 459.) A person may be found guilty of burglary upon entering a store with the requisite intent, regardless of whether any felony is actually committed after entering the establishment. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1041–1042.) Forgery requires an intent to defraud. (P.C. § 470(d).) "[D]efraud" means "to injure someone in their pecuniary or property rights." On appeal, defendant argued that there was a lack of substantial evidence to support his conviction for either burglary or forgery. As to the burglary, he noted that Walmart had not suffered any loss in that the store would receive reimbursements for the coupons from the products' manufacturers. The Court found this to be "of no consequence." If this were true, then any time a burglar stole property for which the victim had insurance, there would be no burglary. Reimbursement from a third party, therefore, is irrelevant. As to the forgery charge, defendant argued that there was insufficient evidence that he intended to defraud Walmart. Specifically, because of Walmart's policy of refunding the full purchase price even when the item is purchased at a discounted price, defendant's efforts to alter the receipts were irrelevant; he would have received a full purchase price either way. The Court, however, found that this "mistake of fact" on defendant's part did not lessen his guilt. "When a person commits an act based on a mistake of fact, his guilt or innocence is determined as if the facts were as he perceived them." In this case, defendant thought he needed to alter the receipts to obtain full price refund. The fact that he did not need to make such an effort does not cause him to be innocent. Defendant's criminal intent associated with what he thought he needed to do to make a profit is what the Penal Code seeks to deter.

Note: Good case. Poorly written decision. It actually took me a while, and a number of re-writes, to figure out what the Court was talking about in that they jumbled up the necessary elements of burglary and forgery that needed to be proved. But I think I figured it out. The long and short of it is that reimbursement to the victim by a third party (e.g., the manufacturer of the property stolen or an insurance company) does not negate the theft element of a burglary. Somebody is going to suffer a loss as the defendant gets a windfall. And just because a crook's efforts in forging a document are unnecessary for him to obtain a profit to which he is not otherwise entitled does not negate the fraud element of a forgery. Both concepts are simply common sense.