The California Legal Update

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

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THIS EDITION'S WORDS OF WISDOM:

"*It's going to be one of those days: The voices in my head are arguing; my imaginary friend is running with scissors; and one of my personalities has wandered off.*" (Anonymous)

IN THIS ISSUE:

ADMINISTRATIVE NOTES:

Harbor Patrol Officers as Peace Officers: The California Supreme Court was asked to decide in ***People v. Pennington*** **(Aug. 17, 2017) 3 Cal.5th 786**, whether a sworn member of the City of Santa Barbara Harbor Patrol was in fact a "*peace officer*" in a case where the defendant was charged with battery on a peace officer, per **P.C. §§ 242/243(b)**. The circumstances involved the defendant physically resisting a Santa Barbara Harbor Patrol Officer during an attempted arrest for trespassing and theft. The Court ultimately determined that unlike most municipal police officers and deputy sheriffs, who are peace officers by virtue of their appointment and employment in that capacity (see **P.C. § 830.1(a)**), not all harbor patrol officers are peace officers. In analyzing **P.C. § 830.33(b)**, the Court determined that such a harbor patrol officer qualifies as a "peace officer" only in two limited circumstances; i.e., (1) when their "primary duty . . . is the enforcement of the law in or about the properties owned, operated, or administered by the harbor or port, *or* (2) when performing necessary duties with respect to patrons, employees, and properties of the harbor or port. The circumstances in this case involve an application only of the first of these two alternative requirements. It was noted that harbor patrol officers commonly have duties other than enforcing the law; e.g., boating safety issues, emergency medical technician, marine firefighter, and ocean lifeguard. In ***Pennington***, the Court found that the People failed to offer any evidence proving either of the above two necessary elements related to the officer's duties; i.e., specifically that the victim Harbor Patrol Officer's "primary duty [was] the enforcement of the law." This may have been merely because the prosecutor failed to ask the right questions, or because "enforcement of the law" is in fact not the Santa Barbara Harbor Patrol's "*primary*" duty. We don't know. But the decision is consistent with a similar holding in ***People v. Miller*** (2008) 164 Cal.App.4th 653.

CASE LAW:

***Use of Deadly Force*:**
***Qualified Immunity*:**

Kisela v. Hughes **(Apr. 2, 2018) __ U.S. __ [200 L.Ed.2nd 449; 138 S. Ct. 1148]**

Rule: An officer's decision to use deadly force is protected from later civil suit by the concept of qualified immunity when the officer's conduct does *not* violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Facts: Officer Andrew Kisela of the Tucson Police Department, along with two other officers, responded to a radio call concerning a woman hacking at a tree with a knife. The reporting party flagged the officers down as they arrived in the area and told them that the woman had been acting erratically. The officers soon saw a woman (later identified as Amy Hughes) emerge from a house and who matched the description of the woman with the knife. She was in fact carrying a kitchen knife at her side. As the officers watched, Hughes walked toward another woman (later identified as Sharon Chadwick) who was standing next to a car, stopping no more than six feet from her. A chain-link fence with a locked gate separated the officers from the two women. All three officers

drew their firearms, telling Hughes at least twice to drop the knife. Hughes neither dropped the knife nor even acknowledged their presence. Both Hughes and Chadwick appeared to be calm. Perhaps sensing what was about to happen, Chadwick told both Hughes and the officers to "take it easy." Not taking it easy, Officer Kisela, whose line of fire was blocked by the top bar of the chain-link fence, dropped to the ground and shot through the fence, hitting Hughes with four rounds. Paramedics were called. Hughes was transported to the hospital where she was treated for non-life-threatening injuries. Less than a minute had transpired from the moment the officers first saw Chadwick to when Officer Kisela shot Hughes. All three officers later testified that at the time of the shooting they subjectively believed Hughes was a threat to Chadwick. Chadwick, who was later discovered to be Hughes' roommate, testified that she did not feel threatened. The subsequent investigation revealed that Chadwick knew Hughes to have a history of mental illness and that she "occasionally has episodes in which she acts inappropriately," but "she is only seeking attention." Hughes subsequently sued Officer Kisela in federal court alleging that the officer had used excessive force in violation of the Fourth Amendment. The District Court granted summary judgment to Officer Kisela, dismissing the case. However the Ninth Circuit Court of Appeals reversed (*Hughes v. Kisela* (9th Cir. 2017) 862 F.3rd 775.), finding a Fourth Amendment violation to be "obvious." Officer Kisela then filed a petition for certiorari with the U.S. Supreme Court.

Held: The U.S. Supreme Court, in a 7-to-2 decision, reversed the Ninth Circuit. The general rules on the constitutionality of using force are well established. For the use of deadly force to be constitutional, the "officer (must have) probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, . . ." (*Tennessee v. Garner* (1985) 471 U. S. 1, 11.) Whether or not an officer has used excessive force "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." (*Graham v. Connor* (1989) 490 U. S. 386, 396-397.) The potential fact scenarios to which these rules apply, however, are endless. Until there is case law covering a fact scenario that is sufficiently similar to the particular set of circumstances at issue, a police officer making split-second decisions cannot reasonably be expected to know how to handle such a situation. Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (*White v. Pauly* (2017) 137 S. Ct. 548.) To put the officer on notice that his use of force violates the Fourth Amendment, there does not need to be case law directly on point. However, prior case law must be clear enough to place "the statutory or constitutional question beyond debate." "In other words, immunity protects all but the plainly incompetent or those who knowingly violate the law." In the instance case, the Court declined to decide whether Officer Kisela's use of force against Hughes actually violated the Fourth Amendment, finding instead that he is "at least" entitled to qualified immunity. *Tennessee v. Garner* and *Graham v. Connor* provide general rules only. And while such "generality" may in some circumstances put officers on notice that the force they intend to use is excessive, this is not always the case. The Court here noted that it has "repeatedly" told the lower courts ("and the Ninth Circuit in particular") "not to define clearly established law at a high level of generality," particularly in the Fourth Amendment context. In such a context, an officer is entitled to qualified immunity unless existing precedent "squarely governs" the specific facts at issue. Here, Officer Kisela testified that he shot Hughes because he

felt that upon observing her approach Chadwick with a knife in her hand, and knowing that she had been reported to the officers as hacking at a tree with a kitchen knife and acting erratically, that Chadwick was in imminent danger. Officer Kisela had seconds to act if he was to act at all. Under these circumstances, the Court found this to be "far from the obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment." The Court further found that there was no controlling precedent (including the cases cited by the Ninth Circuit) that would have put the officer on notice that the force he used was excessive under these circumstances. The Court therefore granted the petition for certiorari, reversing the Ninth Circuit's opinion, and remanded the case for further proceedings (thus granting Officer Kisela's motion for summary judgment).

Note: Although the Court does not tell us whether Officer Kisela violated Hughes' Fourth Amendment rights by shooting her under these circumstances, leaving us all in as much of the dark as we were prior to this decision, I briefed it anyway as a reminder of the general rules governing the use of deadly force. It is also important to note that two dissenting justices agreed with the Ninth Circuit, finding the shooting here to have been "*unreasonable*," and at least potentially in violation of Hughes' Fourth Amendment rights. But that debate aside, police officers today are catching a lot of heat over shootings that, although clearly lawful, might not have been really necessary. As a result, new legislation is being considered in Sacramento as we speak; AB 931. This bill, if passed, tightens up the rules on the use of deadly force by eliminating the long-standing rule that such force be "*reasonable*," as discussed above, and instead replacing it with a requirement that such force be "*necessary*." (AB 931 also proposes to eliminate a justifiable homicide defense if tactics prior to the shooting were "grossly negligent.") I've proposed before the idea that officers need to consider the necessity of using deadly force in any particular situation, at least when it is practical to do so, irrespective of the fact that it may, in the constitutional sense, be reasonable to kill someone. (See *California Legal Update*, Vol. 19, #7, July 5, 2015, and Vol. 19, #8, Aug. 9, 2015; Administrate Notes, "*Use of Deadly Force; Lawful vs. Necessary*.") Now AB 931 proposes to mandate something similar to this concept via statute without considering the impracticality of legislating an officer's thought processes during an exigent circumstance. *Really stupid*!

***Warrantless Residential Searches; Emergency Aid Exception*:**

People v. Pou **(Apr. 26, 2017) 11 Cal.App.5th 143**

Rule: Under the "emergency aid" exception to the search warrant requirement, police may make a warrantless entry into a residence when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury.

Facts: Los Angeles Police Department officers responded to a radio call at 12:10 p.m. on June 2nd, 2014, concerning a "screaming woman." The caller reported also hearing a "distressed moaning." The radio call sent the officers to 2314 Jupiter Drive in the Hollywood Hills area. As the officers approached the front door of the residence, they could hear several people inside, both male and female, in a loud argument. One officer could see two males inside making gestures as if engaged in an argument. It took knocking on the door several times, while announcing their presence as law enforcement officers, to get anyone to come to the door. Eventually, defendant

and another male opened the door. The officers explained that they had received a radio call concerning a woman screaming at that residence and that they needed to come in to make sure everybody was okay. Defendant objected, telling the officers several times that he did not want them to come into his house. Nonetheless, the officers entered. They first found two females sitting on a couch in the living room. Upon insuring that they were okay, the officers searched the rest of the house for additional occupants, intending to check on the well-being of anyone who might be there. Following standard procedures, the officers looked into closets and other rooms in what was described as a "very large residence." In so doing, the officers opened a door to what could have been another room or merely a closet. It turned out to be a closet. But inside, in plain sight, the officers observed what appeared to be narcotics. Narcotics officers were called, who, upon arrival, obtained a search warrant for the residence. Upon executing the warrant, 14.02 grams of cocaine, 0.08 grams of methylene or MDMA, scales, money, and a handgun (found in a safe under a nightstand) were recovered. Subsequently, a supervisor at the scene located and interviewed the person who had made the original call to the police (an Uber driver) who explained that his report about a screaming woman pertained to the house across the street from 2314 Jupiter Drive. Later checking an "incident recall" printout, it was revealed that the call did in fact relate to the house across the street, and not defendant's house. However, the call as it was broadcast apparently sent the officers to the 2314 address. Charged in state court with one count each of possession of cocaine for sale and possession of ecstasy for sale (H&S §§ 11352 & 11378), with an allegation that defendant was personally armed with a firearm (P.C. § 12022(c)), defendant filed a motion to suppress. Upon denial of the motion, defendant plead guilty to Count 2. Sentenced to 8 months imprisonment, running consecutively to another case he had pending, defendant appealed.

Held: The Second District Court of Appeal (Div. 5) affirmed. On appeal, defendant challenged the legality of the initial officers' warrantless entry into his house arguing that, as a Fourth Amendment violation, it poisoned the subsequent search warrant obtained by the narcotics officers. The issue, therefore, was whether the initial officers, in entering defendant's home without a search warrant during which defendant's drugs were observed, did in fact violate the Fourth Amendment. The Court ruled that under the so-called "*emergency aid exception*" to the search warrant requirement, the officer's entry was lawful. The United States Supreme Court has specifically set out the rule: "(P)olice may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury." (*Brigham City v. Stuart* (2006) 547 U.S. 398.) More specifically, the High Court ruled in *Brigham* that, "'[t]he need to protect or preserve life or avoid serious injury' was an exigency or emergency that obviated the requirement of a warrant." (pg. 403.) In establishing such an exigency, it is only necessary that the officers have "an objectively reasonable basis for believing . . . that a person within (the house) is in need of immediate aid. (*Michigan v. Fisher* (2009) 558 U.S. 45, 47.) The California Supreme Court has already reiterated this rule, noting that the standard of proof justifying a warrantless entry is something less than "probable cause." (*People v. Troyer* (2011) 51 Cal.4th 599.) Here, the Court found that the circumstances fall "squarely within the emergency aid exception as shaped by *Brigham City* . . . *Fisher* . . . and *Troyer* . . . ." The officers, having received a radio call concerning a screaming woman and distressed moaning, heard upon their arrival loud arguing involving both a male and female. One officer also observed through a window two males who appeared to be in an argument. Based upon this, the Court ruled that it was "objectively reasonable" for the officers to believe that an

immediate entry into the house was necessary in order to render emergency assistance to a screaming female victim and/or to prevent a perpetrator from inflicting additional immediate harm to that victim or others inside the house. The officers' suspicions were also bolstered by the fact that there was a suspicious delay in the occupants' response to the officers knocking at the front door. Defendant's objections to the officers' entry did not lessen the need to check on the welfare of other occupants of the house. Also, the scope of the officers' search inside the residence was held to be reasonable. The officers were legally entitled to conduct an emergency search of all places in the house where a body (victim or suspect) might have been hiding or lying in wait, including the closet in which the drugs were found. Finding several people in the house who indicated that they were okay did not prevent the officers from checking to see if there weren't other victims in the house. And finally, the fact that the officers mistakenly searched the wrong location does not undermine the reasonableness of their decision to conduct the search based on the information they had at the time, particularly in light of the fact that oral and visual observations upon arrival corroborated the information the officers had received from the police dispatcher. Without any reason to question the accuracy of the reported address, any information they received after developing probable cause for the later-obtained search warrant is irrelevant to the lawfulness of the officers' initial entry into the house. Defendant's motion to suppress the evidence, therefore, was properly denied by the trial court.

Note: An officer finding himself at the front door of a residence, having been sent there via a radio call concerning some sort of an emergency occurring inside, and being confronted by someone at the door who refuses the officer's request to enter, offering assurances that everyone inside is okay, is not an unusual event. Here, there was oral and visual corroboration that everyone inside was *not* okay. But what about the circumstance where there is no such corroboration? What do you do? I always look at such a situation like this: What if you decide *not* to force entry and later find out that there was in fact someone inside in distress who either dies or suffers additional injury as a result of your decision not to check? Compare that with the inevitable citizen's complaint for forcing entry when it is subsequently found that no one inside needed your assistance. Which circumstance is the greater of the two evils? For me, the decision is easy. But if you're uncomfortable with making an immediate entry, and you think you have the time, you should at least make contact with the person who made the 911 call, if possible, and find out more details upon which to base your decision. At least then, even if what you choose to do turns out to be the wrong decision, you can say you made an informed decision, first gathering as many facts as was possible and practical under the circumstances.

***Detentions of Visitors During a Fourth Waiver Search*:**
***Prolonged Detentions*:**

People v. Gutierrez **(Mar. 29, 2018) 21 Cal.App.5th 1146**

Rule: Although visitors to a residence that is subject to a Fourth waiver search may be temporarily detained, prolonging that detention beyond the time period necessary to insure officer safety or protect other articulable governmental interests is illegal.

Facts: On June 4, 2015, Kern County Sheriff's Deputies conducted a routine probation Fourth waiver search of the residence of a subject named Timothy Beltran, in Shafter, California.

Defendant Reynaldo Gonzalez Gutierrez, who did not live there, was visiting Beltran at the time this search was conducted. Both Beltran and defendant were removed from the residence while the search was conducted, detained at the front of the house, and, "for purposes of officer safety," patted down for weapons (nothing was found) and told to sit on the front porch. At that point in time, the officers had no information or basis to suspect that defendant was involved in any illegal activity. Deputy James Simmons, assigned to watch the subjects while other deputies were inside conducting the search, ran a warrant check on defendant while they waited, the radio check being done some 32 minutes after the probation search on Beltran's home had begun. The radio dispatcher notified Deputy Simmons "a couple of minutes" later that defendant was on PRCS (Post-Release Community Supervision) parole, which meant that he was also subject to search and seizure conditions. Pursuant to this information, Deputy Simmons conducted a more thorough search of defendant's person, recovering a "wad of cash" (i.e., $121) from his pocket. Other officers searched his car, recovering a 20-gauge shotgun round, a digital scale, and 0.93 ounces of methamphetamine. Defendant was arrested and subsequently charged in state court with one count each of possession of methamphetamine for sale (H&S § 11378) and possession of ammunition by a prohibited person (i.e., a felon; P.C. § 30305(a)(1)). Defendant's motion to suppress the evidence was denied. At the suppression hearing, however, evidence was presented to the effect that defendant had *not* in fact been on PRCS parole—that his parole had expired almost two years earlier on September, 2013—and that the computerized system through which he was checked was incomplete and not up to date. Upon the denial of the motion to suppress, defendant pled "no contest" and appealed from his two-year prison sentence.

Held: The Fifth District Court of Appeal reversed. Defendant's primary argument on appeal was that his detention on the front porch (from the inception of Beltran's probation search up until Deputy Simmons was told that he was subject to PRCS parole) was illegal, and that the subsequent searches of his person and his vehicle were the products of that illegal detention. The parties agreed that under the circumstances of this case, defendant was in fact detained (i.e., he was not free to leave). More importantly, defendant remained detained during the duration of the search of Beltran's house and up until he was formally arrested. This covered some 30 to 50 minutes. The searches of defendant's person and vehicle took place during this time span. A temporary detention of an individual, to be constitutionally reasonable, must be justified by an articulable suspicion that the person detained was, is, or is about to be involved in criminal activity. (*Terry v. Ohio* (1968) 392 U.S. 1.) It is the People's burden to prove that any particular detention is justified by a governmental interest that outweighs the invasion of a defendant's privacy rights. The legal justifications for detentions of visitors to a residence in these instances are well-established; i.e., (1) in order to prevent flight, (2) to minimize the risk of harm to the officers (i.e., "officers' safety"), and/or (3) to facilitate an orderly search through cooperation of the residents. However, the reasonableness of a detention under the Fourth Amendment requires a "dual" inquiry; i.e., whether the officer's actions in detaining a person was justified at its inception, and whether it continued to be reasonable throughout the duration of the detention; i.e., the "scope" of the detention was reasonable. The "scope" of defendant's detention—the length of the detention, lasting some 30 to 50 minutes—is the issue in this case. Prior cases have upheld the detention of visitors to a residence during the execution of a search warrant (*Michigan v. Summers* (1981) 452 U.S. 692.), during the execution of an arrest warrant (*People v. Hannah* (1997) 51 Cal.App.4th 1335.), and during a Fourth wavier search (*People v. Matelski* (2000) 82 Cal.App.4th 837; *People v. Rios* (2011) 193 Cal.App.4th 584.). In each of the above cases, however, there were articulable

reasons to believe that the person detained constituted a threat related to one or more of the above governmental interests. In the instant matter, both parties agreed that defendant was in fact detained at the inception of the probation search of Beltran's residence, and remained so for the duration of the search. The Court here had no problem with defendant's initial detention (even though it did not discuss the issue) in that at that point, defendant's relationship to Beltran and the residence itself was unknown. However, once he was removed from the house, patted down for weapons, and determined not to be a danger or otherwise offer any resistance to the officers' task of searching the house, the "scope" of the detention became unduly prolonged; i.e., no longer justified by any articulable governmental interests. The Court noted that there is no "general rule" that when police are at a residence for the purpose of executing a search warrant, arrest warrant, or conducting a Fourth waiver search, all occupants of a residence, including visitors, may be detained for the duration of the officers' presence. The People offered no legal justifications for holding onto defendant for as long as they did; i.e., beyond the initial detention during which he was identified and patted down for weapons. By the time he was searched more thoroughly, and his car was searched, defendant was no longer lawfully detained. The results of those searches, therefore, should have been suppressed.

Note: The Court declined to decide the issue of whether "good faith" applied to the erroneous conclusion that defendant was subject to warrantless searches as a PRCS parolee. (See pg. 1161, fn. 8.) Had they reached this issue, we would have had a strong argument that so long as the error was not part of "reoccurring or systematic negligence," a good faith reliance upon such a government source of information would have excused the mistake. (*Herring v. United States* (2009) 555 U.S. 135.) But the importance of this case is in the Court's conclusion that while you have a right to check out the occupants of a residence where you are serving a search or arrest warrant, or conducting a Fourth waiver search, when done for the purpose of determining each person's relationship to the residence or to the person who lives there, or his or her connection to suspected criminal activity that may be going on there, holding onto a visitor any longer is illegal absent another articulable reason for doing so. This is not an unreasonable rule.

***Search Warrants; the Particularity Requirement*:**
***Good Faith*:**

People v. Nguyen **(June 7, 2017) 12 Cal.App.5th 574**

Rule: Discovering during the execution of a search warrant authorizing the search of a residence that what was believed to be a "garage" or an "outbuilding" is actually a separate residence will require a new search warrant in order to lawfully search that second residence.

Facts: Detective Sean Pierce of the San Jose Police Department was able to determine in the course of his duties that a specific IP address (Internet Protocol address) used by an identified Comcast address was involved in sharing child pornography online. Comcast informed Detective Pierce that the account subscriber was a person named Jennie Reynolds, and that she lived at 309 South 23rd Street in San Jose. Subsequent investigation of the residence revealed three names associated with that residence; Jennie Reynolds, Joshua Blankenship, and Kevin Nguyen. The investigation also resulted in a determination that two distinct structures were located on the property; one in front of the other. Personally inspecting the property from the front sidewalk,

only one mailbox, one driveway, and one set of numbers (i.e., "309") affixed to the front of the house could be seen. Also, the rear structure appeared to be a garage in that there was a visible garage door at its front. Checking for wireless network signals in the area, Detective Pierce found there to be multiple closed (i.e., password-protected) wireless network signals. It was unknown, however, whether any of the signals were associated with Reynold's Comcast account. It was also unknown whether there were any wireless routers (used to route one's network to other computers) on the property. Two vehicles were observed to be parked on the property; one registered to Reynolds and the other to Kevin Nguyen with the listed address of the Mountain View Police Department. From this, it was discovered that defendant Nguyen was a Mountain View police officer. Detective Pierce subsequently obtained a search warrant authorizing the search of "(t)he residence located at: 309 South 23rd Street in San Jose, CA, described as a single story single family residence." The warrant described the appearance of the front house as viewed from the street. Believing the rear structure to be no more than a garage, the warrant also authorized the search of "any and all yards, garages, carports, outbuildings, storage areas and sheds assigned to the above-described premises." The supporting affidavit identified Jennie Reynolds as the subscriber to the Comcast account with the suspect IP address. The affidavit stated that "the person responsible for the trading of child pornography from this residence can be anyone with access to the internet signal associated with this residence." Neither the warrant nor the affidavit mentioned defendant by name, however. Detective Pierce later testified that at the time he sought the warrant he did not know that defendant lived in the rear structure and he had no information concerning the relationship between defendant and the residents of the front structure. Upon contacting Reynolds at the residence (defendant not being present in that he was being detained at the Mountain View Police Department at the time), Detective Pierce was told for the first time that defendant was the actual owner of the property and that Reynolds and her husband, Joshua Blankenship, rented the front residence from him. The detective was also told that defendant lived separately in the rear structure that had been converted from a garage into a residence. Searching the front residence, the officers found a computer network router. They did not know, however, whether the signal from the network extended to the rear structure. Nor did they know whether defendant had a password or otherwise had access to the network. With this limited information, the officers decided to search the rear residence using the existing warrant as their authority to do so. In order to gain entrance to the rear structure, officers had to use a battering ram to get the front door open in that Reynolds did not have a key. Searching the rear residence, officers found a bedroom, a bathroom, a living room, a kitchen, and windows. They also found a laptop computer that contained child pornography on it. In the front house, police also seized another computer containing child pornography. Defendant was charged in state court with one count of possessing child pornography (P.C. § 311.11(a)). (Joshua Blankenship was also charged with possession of child pornography, but in a separate case.) Defendant filed a motion to suppress, arguing a lack of probable cause to search his residence and that the search warrant, as written, did not authorize such a search. The trial court agreed and suppressed the resulting evidence. The People appealed.

Held: The Sixth District Court of Appeal affirmed the trial court's granting of defendant's motion to suppress. The issue on appeal was the lawfulness of the search of defendant's residence under the authority of the search warrant as it was written. The rules pertaining to this issue are well established. "The Warrant Clause of the Fourth Amendment categorically prohibits the issuance of any warrant except one '*particularly describing* the place to be searched and the persons or things to be seized.'" (Italics added) In any particular case where a search of an area not

specifically described in a warrant is the issue, the court must look at the "scope" of search that is conducted. "If the scope of the search exceeds that permitted by the terms of a validly issued warrant . . . , the subsequent seizure (of evidence) is unconstitutional without more." In other words, officers may not use a warrant as justification to search areas that are not described in the warrant. In this case, the issuing magistrate found probable cause to search the residence located at 309 South 23rd Street in San Jose. The warrant included an authorization to search any "garages" and "outbuildings" associated with this address. It did not, however, authorize the search of another person's residence even though located on the same property. Reviewing the warrant affidavit, the Appellate Court agreed with the trial court that there was no language in the warrant authorizing a search of any residence other than the one located at the front of the property, and in which Reynolds and her husband lived. Defendant's residence was, at the time of the issuance of the warrant, neither a garage nor an outbuilding attached to the main residence, but rather a whole separate residence. This rear structure had a bedroom, a kitchen, a bathroom, a living space, and a separate doorway apart from the garage door, and was where defendant actually lived. Had the officers not realized that the rear building was actually a separate residence until after they'd discovered defendant's computer, then the result might have been different. (See *Maryland v. Garrison* (1987) 489 U.S. 79.) But where the facts available to, and known by the police, *before* the discovery of the computer established that the rear structure was defendant's separate residence, searching that residence was illegal absent it being specifically described in the warrant. The Court also rejected the People's argument that even though not specifically mentioned in the warrant, there was still probable cause justifying the search of defendant's residence. The People had argued that "probable cause was established by the existence of an IP address assigned to an internet user at that property on the date and time the contraband images were transferred." Under this theory, it was argued that there was probable cause to search *all* the residences because the entire premises were suspect." However, the affidavit failed to establish any facts showing that defendant or anyone else in his residence had access to any Internet signal emanating from Reynolds' residence. There was also no evidence that defendant had a password to Reynolds' network, and the affidavit did not state that he did. There was also no evidence that defendant's residence was connected to the front house by an Ethernet cable or any other wire that could have carried a network signal. Based upon this, the Court held that it was not reasonable to assume that defendant's residence had access to the same Internet network as the front house. Lastly, the Court rejected the People's argument that the officers acted in good faith, providing an exception to the warrant requirement. "*Good faith*" does not apply where the officers are aware of the fact *prior* to initiating the search that the building they propose to search is not reasonably included within the scope of the warrant as written. Neither the warrant nor the affidavit in this case even mentions defendant or his residence. Also, nothing in the warrant or the affidavit could reasonably be interpreted as probable cause to believe that defendant had actually accessed the network associated with the suspect IP address. On this record, the officers could not reasonably believe the warrant established probable cause to search defendant's residence. Good faith, therefore, does not apply.

Note: The Court tells us how this problem could have been avoided, and that was to stop immediately upon discovering that the rear building was in fact *not* a garage or an outbuilding, but rather someone's private residence. At that point, a second warrant should have been obtained. The necessary probable cause could have been obtained by asking the residents of the main house some questions concerning the second residence's occupant and his access to the front residence's

Internet system. This was not done. Someone should have taken the time to look at the places the warrant authorized to be searched and then ask the question; "*Wait a minute. Someone lives in that back building. Not being a 'garage' or an 'outbuilding' as we originally believed, is it therefore a building that this warrant allows us to search*?" And then; "*What probable cause do we have that we can stick into a second search warrant for this back residence*?" This was not done here.

***Vehicle Inventory Searches*:**
***Inevitable Discovery*:**

People v. Wallace **(Sept. 7, 2017) 15 Cal.App.5th 82**

Rule: Inventory searches of vehicles that are to be impounded may not be done as a pretext concealing an investigatory police motive. The Inevitable Discovery doctrine is applicable only if it is determined that any resulting evidence would have inevitably been found by lawful means without having to result to speculation.

Facts: Defendant was stopped for having "false tabs" (i.e., expired vehicle registration tabs?) on his vehicle by Sgt. Reeves of the Fairfield Police Department. Officer Michael Ambrose heard defendant's name being broadcast over the radio and recognized him as someone they were looking for from an earlier domestic violence incident. Responding to the scene of the traffic stop, Officer Ambrose and Sgt. Reeves arrested defendant, handcuffed him, searched his person, and put him into the back seat of Officer Ambrose's car. Officer Ambrose then searched defendant's vehicle and found 24-inch long brown wooden baton with red tape on the handle end, stuck between the center console and the driver's seat. Officer Ambrose later testified that his legal reasoning for the search of the vehicle was both as a search incident to arrest (See Note, below) and as a pre-impound inventory search, necessary in order to note valuables left in the car and to prevent later false claims that the car contained non-existent valuables. Officer Ambrose then left the scene with defendant. Although he later testified that it was his department's policy to impound vehicles when the driver has been arrested and there is no one else there to take custody of it, he did not know whether defendant's car was ever actually impounded. He also did not know whether a "California Highway Patrol 180 (inventory) Form" (which contained a field in which an officer is supposed to inventory the items found in a towed vehicle) had been filled out although it was standard practice to do so. Defendant was charged in state court with one count of possessing a billy club, per P.C. § 22210. After his motion to suppress the billy (or "baton") was denied by the preliminary hearing magistrate and then again by the trial court, defendant pled no contest to the charge. Sentenced to three years in county jail pursuant to P.C. § 1170(h), with all but six month suspended, defendant appealed.

Held: The First District Court of Appeal (Div. 2) reversed. On appeal, the defendant argued that there was no legal justification for Officer Ambrose's inventory search of his vehicle. Apparently agreeing that an inventory search was not lawful under the circumstances of this case, the People countered only with the argument that the illegal baton would have inevitably been discovered anyway. The Court sided with defendant. Warrantless searches are presumed to be illegal. A recognized exception to this rule is when an inventory of the contents of a vehicle is done in the course of impounding it. The so-called "Community Caretaking" doctrine allows for the

impoundment of a vehicle, thus validating such an inventory search, but only under limited circumstances; i.e., where the location of the vehicle triggers a police officer's duty to prevent it from creating a hazard to other drivers or being a target for vandalism or theft. Accordingly, the community caretaking doctrine may not be used as "a pretext concealing an investigatory police motive." In other words, inventory searches are lawful only when done for the purpose of protecting the arrestee's valuables in a car that is to be impounded, and to prevent false claims that non-existent valuables later disappear (i.e., are stolen by tow company employees or the police). An inventory search may *not* be conducted for the purpose of looking for evidence of criminal wrong-doing. Thus inventory searches must be conducted in accordance with an established policy or practice governing such searches, and not as a pretext for seeking to discover evidence of a crime. In this case, although Officer Ambrose testified that he conducted an inventory search of defendant's vehicle pursuant to his department's policies, he did not know whether a CHP 180 inventory form was ever actually filled out, or whether the car was even impounded. On this record, there was no evidence that the officers conducted an inventory search in accordance with their department's polices, or whether the car was even impounded. Under these circumstances, the community caretaking functions were not implicated. And absent such evidence, it appears that Officer Ambrose's search of defendant's vehicle was nothing more than a pretext to look for evidence of criminal wrong-doing. The People conceded the above, but argued instead that defendant's baton would have inevitably been discovered anyway. It is the prosecution's burden to establish by a preponderance of the evidence that the evidence ultimately or inevitably would have been discovered by lawful means. And they must do so without resorting to speculation. Here, the People argued that the baton would have inevitably been found during a post-impound inventory search. The Court, however, determined that to argue the applicability of the inevitable discovery theory required the it to consider speculation on top of more speculation. First, there was no evidence supporting the argument that the community caretaking doctrine applied; i.e., whether it was necessary to impound the car to protect it from theft or vandalism, or that it was a hazard to other traffic. Secondly, even if it did, there was no evidence that the car was actually impounded. Officer Ambrose did not know if it had been impounded, and Sgt. Reeves did not testify. Based upon the above, the baton should have been suppressed.

Note: We can assume that the car was in fact impounded. If so, this case went in the toilet merely because the prosecution failed to present the necessary evidence at the suppression motion. If Officer Ambrose did not know, then Sgt. Reeves should have been called to testify. Inexcusable. Also, Officer Ambrose testified that he searched the vehicle as a pre-impound inventory search pursuant to his department's polices. But then he failed to follow such policies when he neglected to fill out a CHP 180 inventory form or cause defendant's car to be impounded, or at least insure that it was done. If you're going to impound a car, you need to not only testify that you're doing so in accordance with your department's established polices, but actually follow those polices. Note also that the "search incident to arrest" theory for conducting a vehicle search (defendant having been arrested on some domestic violence case that was not discussed) did not apply in that the U.S. Supreme Court has held that you cannot conduct a warrantless search of a vehicle after the suspect has already been secured, at least absent some reason to believe that evidence of that crime is contained in the vehicle. (*Arizona v. Gant* (2009) 556 U.S. 332.) Officer Ambrose apparently was also unaware of this well-established rule, based upon his testimony.