The California Legal Update

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

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THIS EDITION'S WORDS OF WISDOM:

"*As long as everything is exactly the way I want it . . . I'm totally flexible.*" (Anonymous)

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CASES:

***Fourth Waiver Searches*:**
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United States v. Job **(9th Cir. Mar. 14, 2017) 851 F.3rd 889**

Rule: For a Fourth waiver search to be valid, the existence of the Fourth waiver must be known by the officers at the time of the search. A suspicionless Fourth waiver search of a probationer is invalid unless the prior probationary offense is for a violent felony (But see Note, below). Protective sweeps are illegal absent a reasonable belief that someone is inside a residence who constitutes a threat to the officers or others. Upon excising illegally obtained information from a search warrant affidavit, the warrant is still good if probable cause supporting the issuance of the warrant remains.

Facts: Officers were investigating a major narcotics trafficking conspiracy case involving a person name Robert Rodriguez. Defendant was suspected of cutting (i.e., diluting) and selling methamphetamine for Rodriquez that was imported from Mexico. An extensive investigation, including wiretap evidence, tied defendant into the conspiracy. On October 3, 2012, Officer Nicholas Dedonato and other officers went to 2504 Snowdrop Street looking for a man named Richard Elliot. It is unknown if Elliot had anything to do with the Rodriquez investigation. Upon arrival at the address, defendant and another man—William Holt—were observed opening the garage door. Both men looked "very surprised to see the police." Defendant in particular appeared to be "very nervous." He was wearing a baggy shirt that concealed his waistband and baggy cargo shorts with pockets that appeared to be full of items. According to the police report (which was the only evidence submitted to the court on this issue, there being no evidentiary hearing), Officer Dedonato "felt it would be much safer for my partners and myself if I patted (defendant) down for weapons." Handcuffing him first, Officer Dedonato patted defendant down, feeling "a hard tube like object with a bulbous end" in defendant's left cargo pants pocket. Officer Dedonato, based upon his training and experience, recognized this object to be an illegal glass smoking pipe. Removing the pipe from defendant's pocket, it was noted to contain "a burnt white residue." Also in defendant's pockets was $1,450 in cash and defendant's car keys. Defendant was placed under arrest for possession of narcotics paraphernalia. Asked where he had parked his car, defendant "looked around nervously and said, 'I don't know.'" Officer Dedonato pressed the key fob, causing the car parked in the driveway to beep as it unlocked. A warrantless search of defendant's car resulted in the recovery of 3.9 grams of methamphetamine in two Ziploc-style bags, and a hand-rolled cigarette containing "Spice," recognized as an illegal street drug, another glass pipe containing burnt white residue, and a Blackberry cell phone. At

some unspecified point during the encounter, the officers conducted a records check which revealed that defendant was currently on probation with a Fourth Amendment waiver. It is unknown when, if ever, the officers learned the precise conditions of defendant's search waiver. Two months later (i.e., December 5), a search warrant was executed at defendant's San Diego apartment, resulting in the recovery of 56.4 grams of methamphetamine in a freezer, five scales, small stashes of methamphetamine totaling 15.28 grams, baggies, several glass pipes, and undisclosed amounts of Spice, bath salts, marijuana, and other drug processing paraphernalia. After the search, the San Diego County Department of Environmental Health inspected defendant's apartment and found that the downstairs portion was contaminated with methamphetamine residuals. Charged in federal court with conspiracy to distribute methamphetamine and possession of methamphetamine with intent to distribute, defendant's motions to suppress the evidence recovered from his person, his vehicle, and his residence, submitted for the most part on the police reports, were all denied. Convicted by a jury of all charges and sentenced to prison for 30 years, defendant appealed.

Held: The Ninth Circuit Court of Appeal reversed in part and affirmed in part. At issue on appeal was the search of defendant's person and his vehicle, and the later search his residence. (1) *Patdown Search of the Person*: The Government argued four theories for justifying the patdown search of his person, all of which the Court rejected. First, defendant was on probation and subject at the time to search and seizure conditions. However, it was undisputed that at the time defendant was stopped and patted down, the officers were unaware that he was on probation. The law is clear: "Police officers must know about a probationer's Fourth Amendment search waiver before they conduct a search in order for the waiver to serve as a justification for the search." Secondly, the Court ruled that even if the officers had known about defendant's probation, Fourth waiver searches for probationers (as opposed to parolees) are limited to individuals on probation for violent felonies only (Citing *United States v. King* (9th Cir 2013) 736 F.3rd 805; and *United States v. Lara* (9th Cir. 2016) 815 F.3rd 605; but see Note below). Per the Court, probationers, even if subject to search and seizure conditions, do not lose their privacy rights altogether; a least less so than do parolees. Defendant, at the time of the search in issue here, was on probation for unlawful possession of a controlled substance, in violation of California Health and Safety Code § 11377(a). While it is unknown whether defendant's probation was for a felony or misdemeanor (H&S Code § 11377 being a "wobbler" at the time, and a straight misdemeanor today), it is undisputed that it is a non-violent offense. Per the Court, a suspicionless probation Fourth waiver search of a probationer's person, his car, or his home, when the person is on probation for any non-violent offense, violates the probationer's expectation of privacy, and thus the Fourth Amendment. Third, it was not clear from the record (having submitted the issues on the police reports) why the officers were at the residence where he was patted down, other than that they were looking for a man named Richard Elliot. It is also unclear what defendant's relationship was to either Elliot or the residence where he was detained. While the type of offense involved is a factor to consider when determining the legality of a patdown search, there was no indication in the record in this case what it was that Mr. Elliot was wanted for. It is unknown whether his involvement in the methamphetamine distribution conspiracy was yet known. All that was clear is that when detained, defendant appeared

surprised and acted nervously. The record also showed that defendant was wearing baggy clothes and that his pockets appeared to be full of items. However, all these facts taken together are not sufficient to justify the conclusion that defendant was engaged in criminal activity or otherwise might be armed and dangerous. The Government lastly argued that the patdown could be justified as a protective sweep. Protective sweeps, however, are limited to checking a residence for other persons officers reasonably believe might be in the residence and who may constitute a danger, generally upon the lawful search of a residence or the arrest of an occupant. Here, it is not even known why the officers were at the scene other than to look for Richard Elliot, let alone why a protective sweep might be necessary. The patdown search, therefore, was unlawful. The resulting evidence found on his person should have been suppressed. (2) *Search of Defendant's Vehicle*: The Government argued that the warrantless search of defendant's car may be justified under the so-called automobile exception and because defendant was on a Fourth waiver. Again, the Court rejected both arguments. As for the Fourth waiver argument, the Court noted that it had already been ruled above that because it was unclear from the record when it was discovered that defendant was subject to a Fourth waiver, this theory is not available to justify the search of the car. As for the rule that with probable cause to search a vehicle no warrant is required (i.e., "the automobile exception"), the Court held that because all evidence found on defendant's person has been ordered suppressed, there was insufficient evidence remaining (under the fruit of the poisonous tree doctrine) from which probable cause could be found. The search of the car, therefore, was illegal. (3) *Warrant Search of Defendant's Home*: Two months later, officers executed a search warrant on defendant's residence, recovering some incriminating evidence. Again, the Government advanced a number of different theories justifying the search of defendant's home. The Court, however, considered only the fact that the officers had a search warrant, upholding the search on this basis. Although there were facts in the affidavit stemming from the earlier invalid search of defendant's person and his car, which under the fruit of the poisonous tree doctrine cannot be used, the Court found that even after striking that information from the warrant there was still enough evidence remaining to establish probable cause. "A search warrant is not rendered invalid merely because some of the evidence included in the affidavit is tainted." Aside from the tainted evidence, the warrant affidavit contained evidence from oral and written investigative reports, physical surveillance by law enforcement, a review of pen register data, statements by confidential sources, a review of telephone calls and text messages obtained through wiretapping of two codefendants' telephones, and information from law enforcement databases. All this established probable cause to believe that defendant had conspired with two co-defendants by "cutting" and distributing methamphetamine. Defendant also argued that this does not show that evidence of these activities might be found in defendant's home. The Court disagreed. "(A) magistrate is allowed to draw a reasonable inference that '[i]n the case of drug dealers, evidence is likely to be found where the dealers live.'" The warrant being valid, evidence found in defendant's home was properly admitted into evidence. In evaluating whether the admission into evidence of the items found on defendant's person and in his car was harmless error, the Court determined that the charge of "possession with the intent to distribute methamphetamine" must be reversed while the charge of "conspiracy to distribute methamphetamine" was upheld.

Note: I bumped this case up to the head of the line in order to discuss the Ninth Circuit's unique theory that suspicionless probationary Fourth waiver searches are invalid (or at least useless) unless the prior probationary offense is for a violent felony. To put it another way, the Ninth Circuit is saying that for a Fourth waiver search of a probationer (as opposed to a parolee) to be lawful, you must have either at least a reasonable suspicion that the person is engaged in renewed criminal activity *or* the prior probationary offense must be for a violent felony. This new rule is not supported by the case law the Ninth Circuit cites (i.e., *U.S. v. King* and *U.S. v. Lara*; although both cases do talk about how probationers don't give up all their privacy rights). In fact, *King* specifically says that it is not ruling on this issue. (736 F.3rd at p. 810.) And *Lara* held only that unless specifically listed in the search conditions, cellphones are not subject to search under a standard Fourth waiver (also a questionable decision). The California Supreme Court has specifically upheld suspicionless searches in probation Fourth waiver cases, regardless of the seriousness of the underlying conviction. (*People v. Bravo* (1987) 43 Cal.3rd 600; a non-violent drug-sales felony case.) The U.S. Supreme Court has specifically declined to decide the issue (*United States v. Knights* (2001) 534 U.S. 112, 120, and fn. 6.), although the High Court has noted that probationers do in fact retain more of their privacy rights than do parolees. (*Samson v. California* (2006) 547 U.S. 843, 850.) Now that *Job* is a published decision, whether or not California courts will continue to follow the rule of *Bravo* in future cases (given the fact that *Bravo* is now 30 years old with *Knights* and *Samson* coming subsequent to *Bravo*) remains to be seen. So unless you're a federal officer where you are bound by this rule, whether or not you want to follow it is pretty much up to you at least until we get a new California case telling us what to do. *Bravo* has never been overruled, so you are at least entitled to "good faith" in following it should a later state case decide that *Bravo* is no longer controlling and agree with the Ninth Circuit on this issue.

***Miranda*; *The Non-Custodial Interrogation*:**
***Probable Cause to Arrest*:**

People v. Zaragoza **(July 11, 2016) 1 Cal.5th 21**

Rule: Questioning of a suspect under circumstances where a reasonable person would not have believed he was in custody does not require a *Miranda* admonishment or waiver. Probable cause to arrest requires only that there be a strong suspicion in the guilt of the person arrested.

Facts: Eighty seven-year-old William Gaines owned Gaines Liquors in Stockton. His 36-year-old son, David, worked for him. On June 11, 1999, the two of them closed the store, as usual, at 11:00 p.m., and drove to their mutual home in separate cars. David parked his car in the garage as William parked in front of the house. William was carrying a brown paper bag in which he had a fluted Pyrex bowl with a blue lid which had been used for David's lunch that day. On rare occasions, William would bring home the day's receipts, but the paper bag on this day contained only the Pyrex bowl. As William got out of his car, he was sucker-punched by a man that William later identified as David Zaragoza; brother of the eventual defendant in this case, Louis Rangel Zaragoza. As William fell to one knee, David Zaragoza grabbed the bag containing the

Pyrex bowl and ran. William called to his son. David Gaines immediately responded, rushing outside with a canister of Mace in his hand and yelling "Hey" at David Zaragoza who was already 10 to 30 feet down the street. William suddenly heard gunshots although he did not see any muzzle flashes coming from the fleeing David Zaragoza. Seconds later, when the gunfire had ceased, William found his son on the driveway in a pool of blood. William also saw David Zaragoza and a second man running down the street, one trailing about 10 feet behind the other, some 50 to 100 feet away. Neighbors reported hearing four gunshots and seeing two men running from the scene. David Gaines was dead at the scene with four gunshot wounds, three of which were "contact wounds" and one, to the head, fired from no more than 18 inches away. Later, some papers were found on the ground near William's car which bore David Zaragoza's name and fingerprints. David Zaragoza was later contacted at a board and care facility where he lived. He had been diagnosed with severe mental and developmental issues; i.e., chronic paranoid schizophrenia, polysubstance abuse, severe personality disorder with paranoid, antisocial, and schizotypal features, a borderline intellectual functioning, a verbal IQ of 61, a second grade reading level, and a global assessment of functioning score indicating severe impairment and psychosis. He was later determined to be mentally incompetent to stand trial and thus severed from this case. But at the time, David Zaragoza denied being with defendant on the night of the murder. Two days later (June 13th), the investigation led detectives to where defendant lived with his sister, finding him sitting on the front porch. The detectives were in plainclothes and driving an unmarked police car. They contacted defendant and told him they were investigating a homicide and that they had already talked to his brother. They asked defendant if he would be willing to come to the sheriff's station for an interview. He said he would. Defendant remained on the porch, unsupervised, while the detectives went into the house to talk with defendant's sister. When the detectives exited the house, they asked defendant whether he was ready to accompany them to the sheriff's department. He said he was. After a "real quick patdown" for weapons, defendant got in the front passenger seat. He was not handcuffed or otherwise restrained. Before leaving the house, the detectives also checked a garbage bin outside the residence and found a fluted Pyrex glass bowl that William Gaines' wife later identified as hers. About 15 minutes later, defendant and the detectives arrived at the station and went to an interview room which remained unlocked throughout. Defendant was told that he was not under arrest, that the interview was voluntary and could be stopped at any time, and that they would drive him home at the end of the interview. Defendant appeared to understand. No *Miranda* admonishment was administered. During the course of the interview, defendant agreed to participate in a computer voice stress analysis and to allow photographs of his injuries. Also during this interview, while denying that he'd been involved in the murder of David Gaines, defendant admitted to being with his brother that evening. At the end of the interview, he rode with the detectives in the unmarked vehicle to his mother's house. The detectives arrested defendant and his brother the next day (June 14th). Upon his arrest, defendant was again taken to the Sheriff's station and interviewed for a second time during which he made some incriminating statements. (Although not described in the case decision, it is assumed that defendant was *Mirandized* in that he did not raise this issue on appeal.) Subsequent to this interview, the detectives returned to defendant's sister's house and, checking the trash again, found the lid to the Pyrex glass bowl. Charged in state court with first degree murder, along with

the special circumstances of a murder committed while lying in wait and during the commission of a robbery, defendant filed a motion to suppress his statements made in the two interviews. Defendant's motion was denied. A jury convicted defendant and found death to be the appropriate sentence. His appeal to the California Supreme Court was automatic.

Held: The California Supreme Court, while reversing the death sentence due to jury selection error (not discussed here), otherwise upheld defendant's conviction. Specifically, the Court found that defendant's statements made during the two interrogations to have been properly admitted into evidence. (1) *The June 13th Interview*: Defendant argued that his statements made during the first interview should have been suppressed in that he was never advised of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436. However, the rule is that unless the suspect is in custody, no *Miranda* admonishment is legally necessary. The record was clear that defendant was neither under arrest, nor even detained, during this interview. Defendant was told that he was not under arrest and that the interview was "voluntary." He was reminded that he could stop the questioning at any time and that he would then be driven back home. The detectives conducting the interview were dressed casually, they displayed no weapons, and uttered no commands. They asked defendant for his permission before each of the investigative steps they undertook. They at no time placed defendant under any restraints. Under these circumstances, the Court found that a reasonable person in defendant's situation would not have believed he lacked the freedom to leave, decline the detectives' requests, or that he could not terminate the encounter. Being a non-custodial interview, no *Miranda* admonishment was necessary. (2) *The June 14th Interview*: The second interview was conducted after defendant was formally arrested. Defendant argued that he was arrested without probable cause and that any statements made should have been suppressed as the product of that illegal arrest. The Court, however, found under the circumstances that defendant had been arrested with probable cause. "Probable cause is shown 'when the facts known to the arresting officer would persuade someone of "reasonable caution" that the person to be arrested has committed a crime.' (Citation)" Defendant's brother had been quickly tied to the murder when his personal papers were found at the scene. The investigation indicated that two people were involved with the second suspect firing the fatal shots. Neighbors described two suspects, who generally matched defendant's and defendant's brother's physical descriptions. Defendant admitted in his first interview that he had been with his brother that evening. Also, while at defendant's sister's house where defendant resided, the Pyrex glass bowl taken in the robbery, and later the lid to that bowl, were found in the trash. All taken together, these facts supplied the necessary strong suspicion that defendant was a participant, along with his brother, in the robbery/homicide. Being lawfully arrested, defendant's statements made to the detectives in this second interview were properly admitted into evidence.

Note: This case illustrates good investigative technique, at least as far as the Fifth Amendment/ *Miranda* issues are concerned. Without any real hard evidence yet connecting defendant to the crime, he was treated as nothing more than a witness during the first interview, with verbal assurances that he was not under arrest and under no compulsion to participate in the interview process; sometimes referred to as a "*Beheler* admonishment." (*California v. Beheler* (1983) 463

U.S. 1121.) And while the test is how a reasonable person in defendant's position would have interpreted the circumstances at the time of the interview, he was taken home afterwards, as promised. While common sense dictates that what happens after the interview should be irrelevant to the custody issue, the courts continue to rule that honoring a promise to take a suspect home after the fact is itself a factor the courts look at when determining whether a suspect was in custody when interviewed. This is perhaps because releasing him after the interview is indicative of the entire tone of the contact. So unless the suspect is a flight risk or a danger to others, it's always been my recommendation that he in fact be released as promised, even if only to be arrested the next day, as was done here.

***Possession of Burglary Tools, per P.C. § 466*:**

In re H.W. **(Aug. 9, 2016) 2 Cal. App.5th 937**

Rule: Possession of any tool with the intended purpose of using it to commit a burglary qualifies as an "*other instrument or tool*" under P.C. § 466 (possession of burglary tools) whether or not it is similar to the specific tools listed in the section.

Facts: Loss prevention officers working at the Yuba City Sears store observed defendant enter the store with a backpack that appeared to be empty, noticing that he was "looking around very suspiciously." They watched him as he removed the antitheft tag from a pair of jean using a pair of pliers he brought into the store with him. He then took the jeans and his backpack into a restroom. When he came out, he was no longer carrying the jeans. A quick check of the restroom failed to locate the jeans. As defendant left the store he was stopped by one of the loss prevention officers and brought back into the store. The jeans and the pliers were found in his backpack. Defendant did not have a wallet, money, credit cards, or identification, all circumstantial evidence of his intent to steal. A Juvenile Court W&I § 602(a) delinquency petition was filed alleging that defendant had committed petty theft (P.C. § 484), was in possession of burglary tools (P.C. § 466), and trespass (P.C. § 602.5). A Yuba City police officer later testified at the jurisdictional hearing that "[p]liers are commonly used as a tool to remove tags from clothing items that have a metal pin-type securing device that cannot be broken or cut with, say, a knife." The Juvenile Court Magistrate found true the petty theft and burglary tool allegations (dismissing the trespass). Defendant appealed the burglary tool finding only.

Held: The Third District Court of Appeal affirmed. Defendant argued on appeal that the evidence was insufficient to sustain the Juvenile Court's finding that he possessed a "burglar tool," or that he did so with the felonious intent to commit a burglary, within the meaning of P.C. § 466. Section 466 provides: "Every person having upon him or her in his or her possession a picklock, crow, keybit, crowbar, screwdriver, vise grip pliers, water-pump pliers, slidehammer, slim jim, tension bar, lock pick gun, tubular lock pick, bump key, floor-safe door puller, master key, ceramic or porcelain spark plug chips or pieces, *or other instrument or tool* with intent feloniously to break or enter into any building, railroad car, aircraft, or vessel, trailer coach, or vehicle as defined in the Vehicle Code, . . . is guilty of a misdemeanor." (Italics added) Case law

has given a broad interpretation to the "*intent feloniously to break or enter into a* (listed place)" language, noting that "(t)he offense is complete when tools or other implements are procured with intent to use them for a burglarious purpose." (*People v. Southard* (2007) 152 Cal.App.4th 1079.) But the problem here is that pliers are not specifically listed in the section as a burglary tool. Defendant's true finding in this case was based upon the Juvenile Court's determination that pliers come under the "*other instrument or tool*" category. Defendant argued that this is not enough. In determining whether pliers were intended by the Legislature to be a burglary tool under section 466, the Appellate Court here discussed two lines of prior cases. First, *People v. Gordon* (2001) 90 Cal.App.4th 1409, and *People v. Diaz* (2012) 207 Cal.App.4th 396, both determined that by employing the common law rule of "*ejusdem generis*," the instrument at issue must be "restricted to those things that are similar to those which are enumerated specifically" in order to be a burglary tool. In *Gordon*, decided by Division One of the Fourth District Court of Appeal, the defendant used small pieces of porcelain from a spark plug to shatter a car's windows in committing a vehicle burglary. (Although "spark plug chips or pieces" are now listed in section 466, they were not when the *Gordon* burglary was committed.) Under *Gordon*, because spark plug chips were not "similar to those which are enumerated specifically" in the section, they could not be considered a burglary tool. Similarly, Division Three of the Fourth District Court of Appeal determined eleven years later in *People v. Diaz*, that latex gloves, also not being similar to those tools listed in the section, are not burglary tools for purposes of section 466. In between those two cases, however, Division Three of the First District Court of Appeal reached the opposite conclusion in *People v. Kelly* (2007) 154 Cal.App.4th 961, holding that a slingshot (used to fire spark plug pieces at a van's window), a box cutter (to cut car stereo wiring inside a vehicle), and a flashlight (to see what the burglar is doing), were all burglary tools despite the lack of similarity to the tools listed in the section. The *Kelly* Court held that *if* the doctrine of *ejusdem generis* is to be used as "a rule of construction to aid in ascertaining the meaning of the Legislature," then it should be "used to carry out, but not to defeat the legislative intent." The Legislature's intent in including the phrase "*other instrument or tool*" in the statute is obviously to include those items, whatever they may be, that are carried by the burglar for the purpose of aiding in the commission of a burglary. The fact that the tool in question is not similar to those already listed is irrelevant. The Court here chose to agree with *Kelly*, rejecting the arguments made in *Gordon* and *Diaz*. Per the Court, "the plain import of '*other instrument or tool*,' and the only meaning that effectuates the obvious legislative purpose of section 466 includes (any and all) tools that the evidence shows are possessed with the intent to be used for burglary." Under these circumstances, and with an officer's expert opinion as to defendant's purpose in carrying pliers in a case such as this, the pliers were clearly an "instrument or tool" used in the commission of this commercial burglary.

Note: However, this split of opinion between the Fourth District, with its narrow interpretation, and the First District (now joined by the Third District), with its broad interpretation of the meaning of "*other instrument or tool*," is not resolved. (*Southard* is also a First Appellate District (Div. 2) decision, following *Kelly*.) So whether you can abide by the rule of this new case depends upon where you work, with the other three (Second, Fifth and Sixth) Appellate Districts being open to go either way. If you don't know which appellate district governs your

area, you'll have to ask someone. Note also that the Court here further held that "the offense is complete when the tools are 'procured with a design *to use them for a burglarious purpose*,' and it is 'not necessary to allege or prove an intent to use them in a particular place, or for a special purpose, *or in any definite manner*.'" (Italics in original; Citing *People v. Southard*, *supra*.) In other words, a would-be burglar is guilty of P.C. § 466 even though he has not yet committed a burglary if we can prove he possessed the tools in question with the specific intent to use them in a burglary somewhere, even without proof that he had intended to use those tools "in a particular place, or for a special purpose, or in any definite manner." We may not always be able to prove that intent until he actually uses them to commit a burglary, but it's a great tool for stopping and even arresting a would-be burglar when caught prowling an area where we have cause to believe that he's looking for a place to burgle.

***Arson of an Inhabited Structure, per P.C. § 451*:**

People v. Vang **(July 11, 2016) 1 Cal.App.5th 377**

Rule: The death of a structure's inhabitant renders that structure uninhabited within the meaning of the arson statute, even if it was the arsonist who murdered the inhabitant before setting fire to the structure.

Facts: Defendant and his cousin, Ronnie Vang, went looking for residences to burglarize in the Meadowview neighborhood of Sacramento on the morning of June 23, 2009. They eventually knocked on the door of Keith Fessler's residence. When no one answered, defendant and Ronnie entered through a rear window or sliding glass door and began searching for stuff to steal. This woke up Fessler who, coming out of his bedroom, confronted the suspects. Ronnie pointed a nine-millimeter handgun at Fessler. Defendant and Ronnie "roughed him up" and then hog-tied him with several of his neckties. Concerned that Fessler would be able to identify them, Ronnie executed Fessler with two shots to the back of the head. After murdering Fessler, defendant and Ronnie stole several of his guitars and windsurfing boards, among other items, loaded them into Fessler's small SUV, and drove away in the vehicle. After unloading the stolen property, defendant and Ronnie returned with some gasoline and set fire to Fessler's house to eliminate any potential evidence. They then did the same to Fessler's car at another location. Statements both subjects made to others and attempting to pawn Fessler's guitars led to their arrest and prosecution for first degree murder with special circumstances (i.e., during the commission of a burglary and a robbery), first degree burglary, robbery, auto theft, and arson of an inhabited dwelling. Convicted of everything, defendant was sentenced to life without parole plus nine years and eight months. (The result of Ronnie Vang's trial was not described in this decision.) Defendant appealed.

Held: The Third District Court of Appeal reduced the arson conviction to that of an arson of an *uninhabited* structure, but otherwise affirmed. Among the issues on appeal was whether the evidence was sufficient to support defendant's conviction for arson of an inhabited structure when the sole occupant of the residence was dead at the time it was burnt down. P.C. § 451

provides that; "A person is guilty of arson when he or she willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of, any structure, forest land, or property." Subdivision (b) of section 451 provides a punishment of three, five, or eight years when the structure or property burned is "*inhabited*." If the structure or property is not inhabited, the sentence is reduced to two, four or six years (P.C. § 451(c)). Pursuant to P.C. § 450(d); "'*Inhabited*' means currently being used for dwelling purposes whether occupied or not." Defendant argued that the evidence was insufficient to support his "arson of an inhabited structure" conviction because Fessler was dead when they set fire to his house and there was no evidence anyone else lived there or intended to live there. In determining whether or not a structure is "inhabited" for purposes of arson, "it is the present intent to use the [structure] as a dwelling which is determinative." It was undisputed that Fessler was already dead at that point in time when defendant and Ronnie set fire to his house. The fact that Fessler, before he died, may have fully intended to continue living there is irrelevant. The statute requires that the structure is "*currently* being used for dwelling purposes." (Italics added; P.C. § 450(d)) Once Fessler was dead, he was no longer "*currently*" inhabiting his home. The Court, therefore, remanded the case for resentencing after reducing the arson of an inhabited structure to an uninhabited structure.

Note: While there is no prior California state case on this issue, the federal Ninth Circuit has already decided this issue in *Douglas v. Jacquez* (9th Cir. 2010) 626 F.3rd 501; ruling consistently with this new decision. The Court here, however, addressed this issue to the Legislature several times to amend the arson statutes so that a future arsonist doesn't get the benefit of this rule by merely murdering the resident before setting fire to his or her house. It even suggested the wording of such an amendment to P.C. § 450(d), changing "*currently being used for dwelling purposes*" to "*usually occupied as a dwelling*." The Court cites some out-of-state authority (i.e., *State v. Campbell* (1992) 332 N.C. 116, 122 [418 S.E.2nd 476] for the argument that "a dwelling is 'occupied' if the interval between the mortal blow and the arson is short, and the murder and arson constitute parts of a continuous transaction." Justification for this rule was found in something called the "*continuous transaction doctrine*," under North Carolina's arson statute. As I was reading this case, I was thinking that this should be the rule for California as well. But, as the Court here points out, the California's Supreme Court has already held that stealing from a dead body cannot be a robbery. (*People v. Davis* (2005) 36 Cal.4th 510, 561.) Also, having intercourse with a dead victim is at worst an attempted rape. (*People v. Kelly* (1992) 1 Cal.4th 495, 524.) It only follows, therefore, that burning the home of a dead person cannot be an arson of an inhabited dwelling. The continuous transaction doctrine, therefore, cannot be used in this circumstance.

Criminal *Threats, per P.C. 422*:
***Deterring an Executive Officer, per Penal Code § 69*:**

People v. Orloff **(Aug. 25, 2016) 2 Cal.App.5th 947**

Rule: (1) For purposes of P.C. § 422, criminal threats, the fact that a threat is made over the telephone and by a man who is confined to a wheelchair does not mean that a reasonable trier of fact (i.e., a jury) cannot find the necessary "gravity of purpose and an immediate prospect of execution of the threat" to support the charge. (2) Threatening a peace officer with death if he continues an investigation is sufficient to constitute a violation of P.C. § 69; deterring an executive officer in the performance of his or her duties by threat or violence.

Facts: Life had not been good to defendant, and he was bound and determined to take out his frustrations on everyone else. Defendant needed a motorized wheelchair to get around. He also had prescriptions for pain medications which he would get filled at a CVS Pharmacy. But he couldn't seem to get his prescriptions without verbally abusing the employees, swearing at staff, and calling them names. On one occasion, he threatened to get Dennis Masino, the store manager, fired for his "incompetency and being rude." Finally, in February, 2014, Masino told defendant that he was no longer welcome at that CVS Pharmacy and that he should get his prescriptions filled elsewhere. As a result, on February 25th, defendant telephoned Masino and told him to "expect something when you least expect it." About 90 minutes later, defendant called back and told Masino; "*You're dead*," and then hung up. Masino understood the threat to mean that his "life (was) at risk." He later testified that he was more scared than he had been in his entire life. Upon advice of his district manager, Masino reported this threat to the police. For several months afterward, Masino felt it necessary to take "extra precautions" while working at the store. Although he knew that defendant was in a wheelchair, he considered defendant's death threat credible because "[a]nybody could carry a gun." Officer David Kelly was assigned to investigate a citizen's complaint (presumably Masino's complaint, although the case narrative does not specify) that defendant had made "threats of bodily harm or death." Officer Kelly had had prior contacts with defendant and was aware of his disability. He telephoned defendant to get his side of the story, only to be cussed at and referred to several times by a number of derogatory terms, including one for African Americans (i.e., the "*N*" word). Defendant finally told Officer Kelly; "Hey, you're a f--kn' dead n----r if you keep this s--t up." (I know that I should be able to use these terms in a clinical fashion without all the dashes, but my mother brought me up otherwise. So just live with it; the one form of "political correctness" I feel it necessary to adhere to.) Officer Kelly believed that the death threat was credible because defendant, despite being in a wheelchair, was capable of pulling the "trigger" of a firearm "to hurt, injure, (or) kill someone." He was therefore concerned that defendant might shoot him. Defendant was later charged in state court with making a criminal threat (P.C. § 422) and attempting, by means of a threat, to deter an executive officer from performing his duties. (P.C. § 69.) Convicted of both counts by a jury, defendant appealed.

Held: The Second District Court of Appeal (Div. 6) affirmed. As to both charges, defendant argued on appeal that the evidence was insufficient to support his conviction.
(1) *P.C. § 422*: To prove this crime (what we used to call a "*terrorist threat*," until the term "*terrorist*" became popular in other contexts), the prosecution must establish all of the following: (1) That the defendant willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person; (2) that the defendant made the threat with the specific intent

that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out; (3) that the threat . . . was on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat; (4) that the threat actually caused the person threatened to be in sustained fear for his or her own safety or for his or her immediate family's safety; and (5) that the threatened person's fear was reasonable under the circumstances. The criminal threat at issue here was defendant's comment to Dennis Masino; "*You're dead*." Defendant's argument was that, with such an alleged threat made over the telephone by a man in a wheelchair, a reasonable trier of fact could not find that such a comment carried with it "a gravity of purpose and an immediate prospect of execution of the threat," and that Masino's fear for his safety was unreasonable under these circumstances. The Court disagreed. To the contrary, the Court found that Masino's fears, despite defendant's disability and the fact that the threat was not made face-to-face, were in fact reasonable. Nothing prevented defendant from coming to the pharmacy at any time, and to bring and fire a gun. "A reasonable trier of fact could find that (defendant's) threat conveyed to Masino 'a gravity of purpose and an immediate prospect of execution of the threat,' and that Masino's fear for his safety was 'reasonabl[e]' under the circumstances."

(2) *P.C. § 69*: The crime of deterring an executive officer by threat or violence (now subdivision (a) of P.C. § 69) requires proof of a specific intent to interfere with the executive officer's performance of his duties. The term "executive officer" includes peace officers "such as police officers or deputy sheriffs." Officer Kelly is such a peace officer. By telling Officer Kelly that he was "dead" if he "keep(s) this s--t up," "a reasonable trier of fact could find beyond a reasonable doubt that (defendant) was attempting to deter Officer Kelley from performing his duty of investigating a citizen's complaint that (defendant) had made threats of bodily harm or death." That is enough to uphold the jury's guilt determination.

Note: The Court compared the circumstances of this 422 charge with the case of *In re Ricky T.* (2001) 87 Cal.App.4th 1132. In *Ricky T.*, a teacher opened a classroom door which struck a 16-year-old student. The student cursed the teacher and threatened him, saying, "*I'm going to get you*." The Court there concluded that the evidence was insufficient to support the juvenile court's finding that the student had made a criminal threat pursuant to P.C. § 422, writing it off as "angry adolescent's utterances," and "ambiguous on its face and no more than a vague threat of retaliation without prospect of execution." It is indeed a fine line between the circumstances of *Ricky T.* and this case. I mean, where do you draw that line between immature "utterances" "without prospect of execution" and a true threat? All I can say is, when in doubt, charge it and we'll see if it flies. Also, specifically for prosecutors, there's a section on the admissibility of evidence of other threats defendant had made in a prior case that you should read. (pgs. 956-958.) While such "character evidence" is often hard to get admitted into evidence, there are exceptions such as when it shows a "common scheme or plan." And we have to contend with Evid. Code § 352; balancing the probative value of the evidence with its prejudicial effect. The prosecutor in this case was able to get into evidence such prior threats with the Appellate Court upholding that decision. Good reading for both prosecutors and defense attorneys, alike.