The California Legal Update

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

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THIS EDITION'S WORDS OF WISDOM:

"*One advantage of talking to yourself is that you know at least somebody's listening*." (Franklin P. Jones)

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ADMINISTRATIVE NOTES:

Medical Marijuana (Oops, I mean "Cannabis"): On January 1, 2016, the Legislature enacted the "*Medical Marijuana Regulation and Safety Act*," contained at Bus. & Prof. Code §§ 19300 to 19360. The Act includes all sorts of regulatory provisions on the cultivation, packaging, labeling, transportation, distribution, and taxation of medical marijuana. Well, someone in Sacramento did some thinking and felt it necessary to enact new legislation, effective June 27, 2016, amending almost every one of these statutes while deleting a few and adding a few others, and substituting the more politically correct term "*cannabis*" wherever "*marijuana*" had previously appeared. For instance, it is now called the "*Medical Cannabis Regulation and Safety Act*," and is administered by the newly formed "*Bureau of Medical Cannabis Regulation*;" a department contained within the Department of Consumer Affairs. So I made the necessary additions, deletions, and corrections to the Medical Marijuana Proposition 215 training outline I've had out for some time. If your copy of this outline is dated any earlier than July, 2016, then what you have is out of date. The updated version is available upon request.

***Being Impersonated*:** Someone using the e-mail address "BobPhillipsDA@hajaj.biz," directing you to a specific link (that I won't temp you with by repeating it), was sent to a limited number of *Legal Update* subscribers on August 13th. How that was done, considering that I don't share the *Update* e-mail list with anyone, I don't know. It wasn't so much that I was "hacked" as impersonated. If you get anything weird like this, or anything directing you to a link without any meaningful text, and purporting to be from me, check with me first before opening it. The Updates are mailed out through "info@legalupdate.com" and the only e-mail address I use is as listed on the first page of this *Update*. An e-mail from any other address is a fake and should not be opened.

CASES:

***Probation Fourth Waiver Searches*:**

***People v. Carreon* (June 30, 2016) 248 Cal.App.4th 866**

Rule: The search of a separate room (and its contents) of a Fourth wavier subject's residence, apparently occupied by another person, is illegal absent circumstances indicating that the person subject to the search and seizure conditions had joint access or control over that room.

Facts: Naomi Anderson was on searchable probation (i.e., a "Fourth wavier"). With information that Anderson was dealing drugs, probation officers and officers from various other agencies showed up at her door in Salinas, California, intending to do a warrrantless Fourth waiver search. Defendant Leslie Carreon was living at the time with her young son in Anderson's garage, converted into a bedroom. She and Anderson were detained in the kitchen while the house was searched.

Anderson admitted to the officers that it was her house. Defendant, on the other hand, was not asked what her living arrangements in the house might be, or even if she was paying rent. The officers assumed that any room that was not locked was one that Anderson, the person subject to search and seizure conditions, had access to. One of the officers testified that, "it's a common practice for us, especially when it's a drug related search, you know, in this type of household, that I would consider it more of a flop house, where there's in and out—people in and out of the dwelling, primarily drug users. And it's been common practice that they will, you know, stash drugs in other party's rooms to deter law enforcement. So based on that, the door was unlocked (referring to the door leading to the garage), which gave us access to that room." The garage/bedroom was accessible from inside the house through a laundry room and a closed, but unlocked, door.

Defendant told the officers that her young son was asleep in the garage/bedroom. Despite knowing that defendant, who was not on probation, appeared to be living in the garage, and after having defendant remove her son from that room, the officers searched it without her consent. Finding pay/owe sheets in a dresser drawer, and a plastic bag containing methamphetamine in a purse, both in the garage, defendant was arrested. Defendant admitted that it was her meth. Charged in state court with possession of methamphetamine for purposes of sale (H&S § 11378) while released on bail (P.C. § 12022.1; she being out on bail while awaiting sentencing on two second degree burglary cases), defendant filed a motion to suppress. Upon the trial court's denial of her motion, with the court specifically finding that Anderson had "joint control" of the entire house thus making the garage/bedroom subject to search under her (Anderson's) Fourth wavier, defendant pled "no contest," and appealed.

Held: The Sixth District Court of Appeal reversed, finding that the warrantless search of the garage was illegal. It was not an issue that Anderson's probation search conditions authorized officers to enter and search her residence. The issue here was whether such authority extended to a bedroom being used by another, and to objects in that room, such as a dresser and a purse. This, in turn, must be decided by considering whether it was objectively reasonable for the officers to believe under the circumstances whether Anderson's Fourth wavier extended to defendant's bedroom. In such a circumstance, the officer's state of mind is relevant. "Officers who are aware of a probation search condition (Citation) 'generally may only search those portions of the residence they reasonably believe the probationer has complete or joint control over.'"

On the other side of this coin is recognition of the fact that persons living with a probationer or parolee retain valid privacy expectations in residential areas subject to their own exclusive access or control. The officers in this case knew that defendant was living, at least temporarily (there being no evidence of a landlord-tenant relationship, or that defendant was paying rent), in the garage, converted into a bedroom. There was no evidence to indicate that Anderson had free access to that room. To the contrary, the officers all believed that the converted garage was defendant's own room, based upon what Anderson had told the officers, the fact that Anderson had her own room, and that defendant's sleeping child was in the room when the officers arrived. Absent some reason to believe that Anderson, the probationer, had at least joint access or control over the bedroom/garage, defendant's privacy interests must take precedence.

From here, the Court skips into a discussion of the search of defendant's purse, noting the privacy interests a person has in the contents of such a "container." Rejecting the People's argument that as a woman's purse—with Anderson and defendant both being women—the officers could have reasonably believed that both had access to the purse, the Court noted that there was no testimony that any officer subjectively entertained this belief, but that even if they had, such a belief would not have been objectively reasonable. There was no evidence of a family relationship or equivalent familiarity between the probationer and defendant that would have justified such a belief. Although the Court did not go through a similar analysis of the search of the dresser in which the pay/owe sheets were found, it did finally conclude "that the prosecution did not present sufficient evidence to justify a warrantless search or an objectively reasonable belief that the probationer had authority over the contents of either the (dresser) drawers or the purse in defendant's bedroom." The resulting evidence, therefore, should have been suppressed.

Note: The Court never specifically states that the warrantless entry into the garage was illegal, finding the illegality of the search of the purse and the dresser enough to justify reversing the trial court's conclusions. But it strongly infers that searching the garage was illegal in itself by noting that "(t)he presence of an overnight guest should prompt a searching officer to pause and consider the guest's privacy expectations before intruding into an area assigned to the guest." In the Court's opinion, "it flouts widely held social expectations to define joint access as simply having the physical ability to open a door, walk into a room, and open drawers." In other words, an officer cannot just assume, as was done in this case, that all unlocked rooms in a dope (or "flop") house are subject to search under the home-owner's search and seizure conditions. While it is noted that officers need not ask the residents whose room it is, and that they are not required to believe the response should they ask, they at least have to consider all the surrounding circumstances in determining whether it is reasonable to believe that the Fourth waiver suspect had joint access or control over that room. An officer's training and experience is but one factor to consider. But a blanket conclusion that everyone in a "dope (or 'flop') house" will always, and inevitably, have free access to the entire house is not reasonable. The courts aren't going to make it that easy.

***Search Warrants to Eliminate Suspects*:**
***Buccal Swab Evidence*:**

Bill v. Brewer **(9th Cir. Aug. 31, 2015) 799 F.3rd 1295**

Rule: Search warrants seeking evidence for any purpose that may aid in a particular apprehension or conviction for a particular offense are valid, even if written to eliminate someone as a suspect.

Facts: On October 18, 2010, Phoenix Police Sergeant Sean Drenth's body was found with a fatal shotgun wound to the head, lying in an empty lot near the Arizona State Capitol. A shotgun was lying across his chest. A second weapon was by his ankle. His service weapon was found at the other end of the lot. Sgt. Drenth's patrol car was parked nearby. The physical evidence indicated either a suicide staged to look like a homicide, or a homicide staged to look like a suicide. During the initial investigation, it was estimated that some 100 people or more had

entered the area where Sergeant Drenth's body had been discovered, including the three plaintiffs; officers who were assigned to canine search teams.

Detective Warren Brewer led the investigation with the assistance of Detective Heather Polombo. The investigation revealed unknown male DNA left on Sgt. Drenth's patrol car and the weapons. Over the ensuing months, Detective Polombo received consent to collect DNA samples by buccal mouth swabs from more than 100 individuals who had entered the crime scene, collected for the purpose of eliminating them as contributors of the unknown DNA. Each of the approximately fifty Phoenix Police Department officers who entered the crime scene consented to give samples, with the exception of the three plaintiffs and two others. Although each of these five individuals had been excluded as suspects in Sgt. Drenth's death through analysis of their portable radio communications and the mobile digital communicators in their vehicles, confirming where they were on that night, the investigators still needed to exclude them as possible sources of the unknown DNA left at the scene.

To alleviate their privacy concerns, the plaintiffs were specifically told that their DNA samples would be used only for this limited purpose, would not be entered into any computerized systems or used to identify DNA found at future crime scenes, and would be destroyed after this case was resolved. Plaintiffs continued to refuse to provide DNA samples. The detectives therefore sought court orders pursuant to Arizona Revised Statutes § 13-39052 to obtain buccal swab samples for DNA testing from the plaintiffs. Section 13-39052, similar to a search warrant, allows for the detention of an individual for the purpose of collecting "identifying physical characteristic evidence," based upon a "(r)easonable cause for belief that a felony has been committed," and upon approval of a magistrate. An affidavit submitted with the request for court orders described the five officers' presence at the Sgt. Drenth crime scene, noting their "potential to (have) inadvertently deposit(ed) their DNA on the collected evidence," and avowing that the DNA samples "may contribute to the identification of the individual who committed" the homicide. A superior court judge issued the orders, and buccal swabs were taken from the five officers.

The samples were analyzed and the results included in investigative reports along with the results of analysis of swabs taken from others at the scene. The swabs were then impounded pursuant to state law. On December 7, 2012, the three plaintiffs filed a 42 U.S.C. § 1983 civil suit in federal court, alleging that Detectives Brewer and Polombo had violated the Fourth Amendment by obtaining, analyzing, and retaining plaintiffs' DNA samples. The federal district court dismissed the complaint for "failure to state a claim." Plaintiffs appealed.

Held: The Ninth Circuit Court of Appeal affirmed. In so doing, it was first noted that the use of "a buccal swab on the inner tissues of a person's cheek in order to obtain DNA samples is (in fact) a search" under the Fourth Amendment. The Fourth Amendment requires, absent an exception, that such a search be accomplished only through the use of a search warrant supported by probable cause. Plaintiffs alleged in their law suit that the taking of buccal mouth swabs was done without a search warrant and without probable cause to believe that they had committee a criminal offense, and thus violated the Fourth Amendment.

Although section 13-39052 refers only to "court orders," and requires no more than a "reasonable suspicion" (i.e., "a reasonable cause for belief"), the Court noted that Arizona state authority has referred to such an order as a "warrant," and held it to a "probable cause" standard.

The Court, therefore, analyzed the issues here as it would under the Fourth Amendment Warrant Clause. In so doing, it was noted that the Fourth Amendment requires three things in order to uphold the validity of a search warrant: "*First*, warrants must be issued by neutral, disinterested magistrates. *Second*, those seeking the warrant must demonstrate to the magistrate their probable cause to believe that the evidence sought will aid in a particular apprehension or conviction for a particular offense. *Finally*, warrants must particularly describe the things to be seized, as well as the place to be searched." The only issue was whether the second element was met; i.e., "*the evidence sought will aid in a particular apprehension or conviction for a particular offense*." It was conceded that the orders here did not seek to obtain evidence that plaintiffs had committed a crime. But it is not legally necessary that the target of a search warrant be suspected of committing a crime. It need only be shown that execution of a search warrant is necessary to "aid in a particular apprehension or conviction for a particular offense."

Here, there was probable cause to believe that *someone* had committed a homicide. As explained in the affidavits filed in support of the requested court orders, the plaintiffs' DNA samples were being sought for the purpose of eliminating them as possible depositors of the questioned DNA. By doing so, thus "excluding public safety personnel as the source of DNA," the requested buccal swab samples "would plainly 'aid in' the conviction of an eventual criminal defendant by negating any contention at trial that police had contaminated the relevant evidence." The court orders, therefore, satisfied the three requirements of the Fourth Amendment.

It was also noted, however, that even if the Fourth Amendment warrant requirements are met, a search may still be constitutionally unreasonable if the intrusion on the plaintiffs' personal privacy rights are disproportionate to the likely governmental benefits of obtaining the requested evidence. In other words, the extent of the intrusion on the plaintiffs' privacy interests by the collection of evidence must be balanced with the State's need for that evidence. In balancing the interests involved here, it was noted that the need to preserve the integrity of a police department "may justify some intrusions on the privacy of police officers which the Fourth Amendment would not otherwise tolerate."

Also, it is a factor to consider that buccal swabs themselves constitute a brief and minimal physical intrusion involving virtually no risk, trauma, or pain. The strong governmental interest in solving homicides is indeed strong. Balancing these interests with the plaintiffs' privacy rights, the Court held that need to collect the plaintiffs' buccal swab samples outweighed any minimal intrusion involved, particularly when considered in light of the government's promise that the results will not be entered into any crime information data base and will be destroyed upon resolution of this case. The trial court, therefore, properly dismissed the Plaintiffs' lawsuit.

Note: When assigned to the positon of one of the San Diego District Attorney's "liaison deputies," working directly with various law enforcement agencies, I was occasionally asked to review and approve search warrants seeking exonerating evidence as opposed to evidence needed to prove one's guilt. Common sense dictated that these warrants were valid. We in fact never had one rejected by an issuing magistrate. Now, however, we have some case law upholding such a search warrant. When considering the fact that prosecutors (not to mention all law enforcement officers and the courts themselves) have an ethical and professional obligation to protect the innocent and not just to convict the guilty, this just makes sense. Police investigators are often accused at trial of "tunnel vision," concentrating on the charged defendant

to the exclusion of other possible suspects. Seeking exonerating evidence for anyone and everyone possibly involved is therefore an important aspect of an officer's investigative duties that can make or break a case.

***The Posse Comitatus Act*:**

***United States v. Dreyer* (9th Cir. Nov. 4, 2015) 804 F.3rd 1266**

Rule: The direct active participation of any military agency, including civilian agents of the Naval Criminal Investigative Service, is a violation of the Posse Comitatus Act and illegal.

Facts: Naval Criminal Investigative Service (NCIS) agents stationed in Georgia were involved in conducting investigations into the distribution of child pornography on the Internet. Using a software investigative tool called "*RoundUp*" that monitors online distribution of known child pornography files around the world, Agent Steve Logan, at the request of NCIS agents in Washington State, agreed to search "Gnutella," a peer-to-peer file-sharing network. The RoundUp query, however, encompassed the entire state of Washington in that with geographic parameters only, it was not able to limit the search to military service members only.

During the requested search, Agent Logan detected a computer at a specific Internet Protocol ("IP") address that had shared several files identified as child pornography, verified by downloading and viewing a sample two images and a video from that IP address. Agent Logan contacted NCIS's representative at the National Center for Missing and Exploited Children and requested an administrative subpoena for the name and physical address associated with the IP address. The Center forwarded the request to the FBI, and the FBI sent an administrative subpoena to Comcast. Comcast identified defendant, living in Algona, Washington, as the person associated with the subject IP address. It was determined, however, that defendant had no military affiliation. So Agent Logan prepared a report of his investigation and sent the file to the Washington State NCIS office, which in turn passed it along to the Algona Police Department.

With the preliminary investigation being done for them, investigators from that agency obtained a search warrant from a state court judge. Algona police officers executed the warrant on defendant's residence on July 6, 2011, resulting in the seizure of his computer and the discovery of several images and videos of child pornography. Defendant was was subsequently charged in state court with possessing depictions of minors engaged in sexually explicit conduct. However, in December of 2011, a special agent of the United States Department of Homeland Security obtained a federal warrant to do a more thorough search of defendant's computer**.** This search resulted in the recovery of 21 videos and over 1,300 images of child pornography. Defendant was therefore charged in federal court with the distribution of child pornography in violation of 18 U.S.C. § 2252(a) and (b)(1), and possessing child pornography in violation of 18 U.S.C. § 2252(a)(4)(B) and (b)(2). (It's assumed the state case was dismissed.) Defendant's motion to suppress was denied by the federal magistrate. Convicted by a jury, defendant was sentenced to 18 years in prison. On appeal, a three-judge panel of the Ninth Circuit Court of Appeal, in a split 2-to-1 decision, reversed (*United States v. Dreyer* (9th Cir. 2014) 767 F.3rd 826.), ruling that the evidence should have been suppressed. However, an 11-justice en banc panel of the Ninth Circuit agreed to rehear the case.

Held: The en banc panel of the Ninth Circuit Court of Appeal unanimously affirmed the trial court's denial of defendant's suppression motion. However, nine justices held (in several written

opinions) that the seizure of the evidence in defendant's case did in fact violate the "Posse Comitatus Act" ("PCA"), and was therefore illegal. Two justices disagreed with the conclusion that the PCA was violated. All justices agreed, however, that the Exclusionary Rule was not called for in this case. The Court provided an exhaustive (and exhausting) opinion describing the federal Posse Comitatus Act" as contained in 18 U.S.C. § 1385. Section 1385 provides simply that: "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both."

The statute makes illegal the direct active use of federal military personnel by civilian authorities, prohibiting the Army and Air Force from participating in civilian law enforcement activities. This provision has been held both by case law and statute (see 10 U.S.C. § 375) to apply to the Navy and the Marine Corps as well. Prior authority has also held that it applies to civilian agents of the Naval Criminal Investigative Service, or "NCIS." The theory behind the PCA is to enforce this country's "traditional and strong resistance of Americans to any military intrusion into civilian affairs." The issue in this case was whether Agent Logan's investigation constituted "direct," or "indirect," assistance to local law enforcement in the discovery and investigation of defendant's illegal activities. The former is prohibited while the latter is permitted.

Nine of the eleven justices held that Agent Logan's activities constituted the former, thus violating the PCA. Specifically, it was noted that Agent Logan used RoundUp to conduct a statewide audit of all computers engaged in file sharing, and was in no way limited to members of the military, necessarily encompassing mostly civilian-owned computers. Finding a suspect IP address, Agent Logan requested an administrative subpoena for the purpose of identifying the guilty party, which, when obtained, led to defendant; a civilian. The results of Agent Logan's investigation was then passed onto NCIS agents in Washington State who finally passed it onto local civilian authorities. This, the majority of the Court held, was a clear violation of the PCA. However, suppression of the evidence developed from a statutory violation is rare, and only applied when the violated statute has "constitutional underpinnings."

Here, although there is a constitutional basis for the PCA, the Court found that suppression of the resulting evidence was unnecessary. Agent Logan testified that he believed that his investigation in this case was lawful, and in fact constituted a "standard practice" (i.e., that "he had a standard practice of 'monitor[ing] all computers in a [certain] geographic area' without regard to military status.") that was approved by his superiors. However: "(A)n exclusionary rule should not be applied to violations of (the PCA) until a need to deter future violations is demonstrated." Here, it appears that Agent Logan's actions were based upon "institutional error," i.e., an agency-wide misconception of the authority the Navy had in such a situation. The Government had already acknowledged, however, the PCA violation in Agent Logan's actions and immediately took steps to correct the problem to avoid future violations. "The military is best suited to correct this systemic violation, and it has initiated steps to do so." The Court therefore ruled that at least "at this juncture, . . . the facts of this case do not demonstrate 'a need to deter future violations' by suppressing the results of Logan's investigation."

Note: Although not so stated in the opinion, the obvious purpose of the federal Posse Comitatus Act is to prevent the military from getting so involved in local civil affairs that the opportunity

for something like a military coup, as is so common in so many countries, is enhanced. This fear of a military takeover of the country is why, for instance, everyone panicked on March 30, 1981 (if you were old enough to remember), when President Ronald Reagan was shot by John Hinckley, incapacitating him. With Vice-President George H.W. Bush's temporarily out of Washington D.C. and unavailable, Secretary of State and former Army General Alexander Haig told what has been described as a "startled Cabinet" that "(t)he helm is right here." Shortly thereafter, General Haig announced to the world in a hastily organized press conference: "As of now, I am in control here in the White House."

So the concept is a good thing, although the line between "direct" and "indirect" involvement of the military in local criminal investigations is not always clear, and was in fact the subject of some disagreement between some of the justices in this case. Two justices felt that Agent Logan was in fact conducting a military investigation and did no more than turn it over to civilian law enforcement once he discovered that he had "inadvertently" targeted a civilian. The majority, however, noted that given how broad the net was that he cast, which inevitably would include non-military targets, you can't get away with labeling Agent Logan's activities as a military-only investigation. Somewhere in between those two theories is the line between legal and illegal. If this topic interests you, reading the entire decision would be of great benefit.

***Estimations of Speed as Reasonable Suspicion for a Traffic Stop*:**

People v. Nice **(May 26, 2016) 247 Cal.App.4th 928**

Rule: A trained and experienced police officer's estimate of a vehicle's speed, particularly when the difference between the estimated speed and the posted speed limit is significant, is sufficient reasonable suspicion to justify a traffic stop.

Facts: Between April and June, 2012, San Jose police officers responded to co-defendant Carlo Delconte's home approximately ten times, answering calls from the neighbors complaining about generator noise, fumes, and numerous junk cars on the property. Officer Marc Baretta responded to two of those calls, talking with Delconte both times. Delconte admitted to Officer Baretta that the cars were his, and that he was leasing the property. Finally, on June 3, while parked in a marked patrol car in the same residential area, Officer Baretta and his partner noticed a white Chevrolet pass them "fairly quickly." Officer Baretta recognized the car as one of Delconte's cars that he'd seen on the property during one of his visits there earlier.

As the Chevrolet passed the officers, Officer Baretta observed the driver look in the rearview mirror at him and then make a "quick right turn" without using its turn signal. Starting out after the Chevrolet, the officers made the same right turn, noting as they did so that the vehicle had gotten to somewhere between halfway down to the block and the end of the block. Based upon his observations and the vehicle's location, Officer Baretta estimated that the car was traveling at about 35 to 40 miles per hour in the 25 mph residential zone. Officer Beretta later testified to having taken a 40-hour in-house speed radar estimation class and had probably completed at least a thousand speed estimations with or without radar during his 14 years as a police officer. His training and field experience included making visual speed estimates while standing still, as well as while moving.

As the vehicle made a couple more turns, slowing only to complete each turn, Officer Baretta had to accelerate to about 35 mph in order to get close enough to activate his lights. Upon stopping the vehicle, Officer Baretta contacted co-defendant Delconte, who was the driver. Defendant Steven Nice was in the passenger seat. Delconte appeared "nervous and fidgety," exhibiting signs of stimulant influence. Defendant, when contacted, exhibited the same symptoms. Upon questioning defendant Nice, he admitted that he had used methamphetamine the night before and that the drugs were in a black bag or suitcase on the back passenger seat. The drug influence in both defendants was confirmed by field sobriety tests (and later, blood tests). Both were arrested.

A search of the vehicle resulted in the recovery of all sorts of drugs and drug paraphernalia along with an IntratecTEC-9 assault weapon that was not registered to either defendant. A search warrant was obtained for Delconte's property, resulting in the recovery of more drugs and firearms. Both defendants were charged in state court with a pile of drug and illegal firearm-related offenses. Their mutual motion to suppress the evidence, alleging that the recovered evidence was the product of an illegal traffic stop, was denied. After entering negotiated no contest, pleas, both defendants appealed.

Held: The Sixth District Court of Appeal affirmed. A traffic stop is a Fourth Amendment seizure. But it only requires a "reasonable suspicion" for it to be lawful, although it must be based upon something more than mere speculation or a hunch. Defendants argued in this case that the traffic stop, based upon no more than Officer Baretta's estimation of his speed, was illegal. (Failing to signal while turning was not argued as a basis for the stop, probably because turning without signaling is *not* a violation of the relevant section, Vehicle Code § 22107, unless there is another vehicle close enough to be affected by the defendant's failure to signal. (*People v. Carmona* (2011) 195 Cal.App.4th 1385.)) The issue, therefore, was whether an officer's estimation of one's speed was sufficient to constitute a "*reasonable suspicion*" that the driver of the vehicle was in fact speeding.

There is case law from another jurisdiction indicating that an officer's estimate of a suspect's speed might not be sufficient to justify a traffic stop. (*United States v. Sowards* (4th Cir. 2012) 690 F.3rd 583.) *Sowards* held, however, only that if the estimated speed was but a "slight" difference over the speed limit, then there must be "additional indicia of reliability (in order to) to support the reasonableness of the officer's visual estimate." In this case, Officer Baretta's estimate being that co-defendant Delconte was driving 10 to 15 miles over the posted speed limit, was not "slight." And even if it was, the Court held that the officer having had training and extensive experience in estimating the speed of vehicles supplied the "additional indicia of reliability." The traffic stop, therefore, was lawful and the trial court properly denied the defendants' motion to suppress.

Note: I can remember once many years ago, as a cop, I stopped one of two cars I'd observed engaging in a speed contest. The other got away. My probable cause (or more correctly, "reasonable suspicion") was entirely based upon my estimate of the speed of the two cars as they raced down Clairemont Blvd. in the City of San Diego late one night, with my observation being made from a stopped position. The one guy I caught and cited contested the charge in court. The short court trial resulted in a quick "*not guilty*," without the judge even allowing the

attorneys to argue the case, indicating that I wasn't even close. When I asked the Deputy City Attorney "*Why*?", his response to me was a simple: "Because it was all based on your estimate of the speed." But then I'd never taken a 40-hour course in estimating speeds, and the deputy city attorney didn't attempt to have me testify to whatever-number-of-years of experience in the field I'd had at that point in my career (probably no more than 2 or 3) in estimating the speed of vehicles. So it wasn't that the guy was not guilty. (I know for a fact that he was guilty.) It was just because there was insufficient evidence presented in court to support a finding of "*proof beyond a reasonable doubt;*" obviously a much higher standard of proof than what was necessary for me to legally stop and cite him. It's called "*laying a sufficient foundation*," and is the prosecutor's responsibility to see that it is done.

But as a cop, it helps if you inform your assigned prosecutor before trial, even if he or she doesn't think to ask, of whatever training and experience you've had in whatever topic (e.g., speed estimations) that is to be an issue in your case. In fact, I've always encouraged officers to keep current an up-to-date resume (or, more formally, "*curriculum vitae*"), listing ALL your professional training and experience, and give it to every prosecutor before testifying so that he or she will know what to ask you any time "laying a foundation" is necessary. Keep in mind, however, that a written resume is discoverable, and defense counsel will get a copy of it as well.

***Residential Burglaries and Recreational Vehicles*:**

People v. Trevino **(July 5, 2016) 1 Cal.App.5th 120**

Rule: A recreational vehicle, when being used as a residence, may be the subject of a first degree burglary when entered with the intent to commit a felony.

Facts: Cathy Coggins-Allen and her husband, Mike Allen, lived in a recreational vehicle (i.e., "RV"), and had lived in it for several years. The RV, commonly described as a class C-style motorhome, was comprised of a living area attached to a truck-style cab with a sleeping area over the cab, and a side door. On August 29, 2013, Coggins-Allen and Allen had dinner with defendant and his wife, Linda. Alcohol was consumed. After dinner, defendant drove Coggins-Allen and Allen to their RV, and dropped them off. Defendant and Linda apparently stayed in their van, parking it in front of the Allens' RV.

At around 2:15, a drunk and now distraught defendant woke Allen and Coggins-Allen up, asking for a cigarette. A short while later, Coggins-Allen heard defendant arguing with Linda. Defendant then drove away, only to return a short time later at which point he could be heard punching and kicking Linda. After defendant drove away again, Coggins-Allen invited Linda into their RV. Defendant subsequently returned, pounded on the RV's side door, and demanded that Linda come out. She refused. Defendant kicked the door numerous times, causing severe damage. When Allen and Coggins-Allen refused to open the door, defendant climbed into the RV through an open window, fighting off Allen as he did so.

Once inside the RV, defendant grabbed Linda by her clothing and pushed her down. He proceeded to kick her in the shins and hit her about the shoulders. He finally exited the RV and drove away again in his van. Coggins-Allen called 911. Linda was taken to a hospital by an ambulance while Allen drove himself to the emergency room in the RV. Allen and Linda both suffered some minor injuries (scratches and bruises). Defendant was subsequently charged with

first degree residential burglary (P.C. §§ 459, 460(a)); corporal injury to spouse (P.C. § 273.5(a)); battery with serious bodily injury (P.C. § 243(d)); vandalism exceeding $400 (P.C. § 594(b)(1)); and misdemeanor domestic violence contempt of court (P.C. § 166(c)(1)). It was also alleged that the burglary was of an inhabited dwelling (§ 460(a)). During trial, the trial judge denied defendant's motion to dismiss the first degree burglary allegation, rejecting his argument that the RV was a motor vehicle and not an "inhabited dwelling house," as required by P.C. § 460(a).

Defendant was convicted on all counts (except for the P.C. § 243(d) charge, for which the jury found him guilty of the lesser included offense of simple battery (P.C. § 242)), including the first degree burglary allegation. Sentenced to 240 days in county jail and probation, defendant appealed.

Held: The Second District Court of Appeal (Div. 6) affirmed. Defendant argued on appeal, as he did during his trial, that the entry into the Allens' RV with the intent to commit a felony was only a second degree burglary in that the RV did not qualify as an "inhabited dwelling house." In his argument, defendant pointed out that P.C. § 459 describes as a burglary the entry with the intent to commit a felony any "house car" or a "vehicle." But neither of these is specifically listed in P.C. § 460(a), which describes the limited category of first degree burglaries, leaving the entry of anything not listed as a second degree burglary only. By not listing an RV in section 460(a), defendant's contention was that when he entered into the Allens' RV with the intent to commit a felony battery on Linda, the Legislature intended his act to be no more than a second degree burglary.

The Court rejected this argument, ruling that it is not necessary that section 460(a) specifically describe an RV for it to be considered the subject of a first degree burglary. Section 460(a) *does* list an "inhabited dwelling house." Per the Court, an "inhabited dwelling house" includes an RV that is being used for living purpose. It is not necessary that an inhabited dwelling house be a structure that is fixed to the ground in that "it is the element of habitation, not the nature of the structure that elevates the crime of burglary to first degree." Even a tent, by prior case authority, can be the subject of a first degree burglary as an "inhabited dwelling house" when it is used for sleeping and storage of the inhabitants' possessions. (See ***People v. Fleetwood*** (1985) 171 Cal.App.3rd 982.) In this case, it is undisputed that the RV was Coggins-Allen and Allen's sole place of abode. They had inhabited it for several years, using it for sleeping and storing their possessions. Their RV therefore qualified as an "inhabited dwelling house" for purposes of P.C. §460(a). Because defendant unlawfully entered an "inhabited dwelling house" with the intent to commit a felony, the jury properly convicted him of first degree burglary.

Note: I've briefed cases in the past that talk about various types of habitation, including RVs, being a residence for purposes of the search and seizure rules and one's expectation of privacy. But being an "inhabited dwelling house" for purposes of the first degree burglary statute (P.C. § 460(a)) is a whole different issue. The California Supreme Court's decision in ***People v. Cruz*** (1996) 13 Cal.4th 764, is the leading authority on this issue, and is cited liberally throughout this new decision. In *Cruz*, it was held that "*inhabited dwelling house*" was to be given a "broad, inclusive definition," with the deciding factor being "whether the dwelling was being used as a residence." In this case, the Allens' RV certainly qualified. What this case does not cover, however, is when the RV is being used for camping or traveling purposes only. Based upon the

reasoning of this case, I suspect that in such a case an RV is *not* an "inhabited dwelling house." But we'll have to wait for a case with such a circumstance.