

THE PROSECUTOR'S PERSPECTIVE

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 Shasta County

ANOTHER HURDLE FOR LAW ENFORCEMENT, THE ELECTRONIC COMMUNICATIONS PRIVACY ACT!

By: Senior Deputy District Attorney, Emily Mees

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As if we all don't have enough hurdles put up in order to keep our community safe, the legislature has put up another. A new law, the Electronic Communications Privacy Act (ECPA), Penal Code sections 1546 et seq., came into effect on January 1, 2016 dramatically changing the way police officers do their job when looking at cell phones, computers, I-pads or any other electronic device or getting information for electronic service providers. Most importantly, if the new code sections are not followed the remedy is to suppress the evidence that was obtained and any additional evidence or further investigation obtained from following up on that evidence.



This new law got rid of the *Riley* exception that allowed officers to physically search a cell phone incident to arrest when they suspected there was evidence on the cell phone related to the arrest, like in a narcotics case when a person is trafficking a large quantity of methamphetamine for sales. Officers can no longer search the phone without specific consent of the authorized possessor of the phone or a search warrant. Authorized possessor means "the possessor of the electronic device when that person is the owner of the device or has been authorized to possess the device by the owner of the device." There are also a few exceptions that allow a limited search of the phone only to locate who owns the phone if the officer has a good faith belief that the phone has been lost, stolen or abandoned. There is an exigency exception that allows for a search of the phone if there is a good faith belief that an emergency involving danger of death or serious physical injury to any person requires access to the electronic information. This exception requires that within three days of accessing the information, the officer get approval from the court for his or her actions or a search warrant for the search that was conducted.

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ELECTRONIC COMMUNICATION ...*continued from page 1*

The ECPA also changed the rules related to search warrants for searching electronic devices or obtaining electronic communications information. It requires contemporaneous notice be served with the execution of the search warrant. For example, if a fax search warrant is being sent to Verizon for phone records, the officer would have to notify the target of the warrant that their records were being seized. The statute itself lays out the specific notice requirements, which are very detailed in what must be provided to the target. If an officer has good reasons to delay notification, like an active investigation that they do not want the target to know about, they can request the Judge issue an order delaying notification to the target for up to 90 days. This is a separate order that is issued at the time of the search warrant and the initial order can be based on the original search warrant. If you need additional time due to the investigation, prior to the expiration of the 90 days or whatever delay the court allowed, the officer must write a new ex parte request for delay specifying why additional time is needed. When the delay order expires, notice must be provided immediately. If the officer does not know who to notice, for instance, all you have is an email address without any name or other identifying information, you must notice Department of Justice within three days of the issuances of search warrant.

Additionally, a general search waiver for someone on probation or mandatory supervision is not sufficient to search a phone or computer or other electronic device. When "specific consent" is defined in these new sections it states that consent is provid-

ed "to the government entity seeking the information." This means that unless the specific agency is listed a general fourth amendment waiver listed "any law enforcement agency" is not specific enough to allow for a search. It does appear that the waiver is given to the Court and the law enforcement arm of the Court is the Probation Department and that only a probation officer would be allowed to search a phone or other electronic device if there is this waiver. This does not allow another agency to call probation and get permission. The way the law is written only the specific agency that the consent was given to can conduct the search.

This new law has specific requirements related to the form of search warrants and notice that have not previously existed. It is important to know the ins and outs of this new section prior to searching any type of electronic device or writing a search warrant for electronic information. Do not do either without first knowing the law or talking to someone who knows the law. The Shasta County District Attorney's Office has templates and training videos that we have borrowed from other agencies to assist in staying on top of these new changes.

Please contact our office if you have any questions, need access to the training videos or need any of the templates that we have in our possession. Also, if any of you have gone to a training or have received sample search warrants, please forward any helpful information to our office so we can all muddle over this hurdle together.

REMINDER FOR AUTO THEFT CASES*By Senior Deputy District Attorney, Ben Hanna*

When submitting a VC 10851 or PC 496d case to the DA's office, make sure you include the original stolen vehicle report, even if it is not from your agency. This will ensure that the DDA reviewing the case is aware of all of the circumstances of the theft. The original report is also necessary in the event that the officer who took the original report is needed to testify at the preliminary hearing.



“TRIAL PREPARATION” MEANS GETTING *PREPARED* FOR TRIAL

By Deputy District Attorney, Craig Omura

Over the past 25-plus years of prosecuting criminal jury trials, one of the most common questions I've heard from officers a couple days before trial is, "What do you need from me?" My first response is, "Don't look like a fool in front of the jury!" Of course, I keep this to myself, and say something a bit more diplomatic, like referring the officer to the sections of the report that are pertinent to his or her testimony.

When I get this question, it is usually asked by supporting officers who often don't write the main report of a case, if they write a report at all. The officer is often a back-up officer who observed one thing, or found one piece of evidence, or perhaps talked to one or two witnesses. "You really don't need me to testify, do you...?" Yes, all supporting officers, no matter how big or small their role, are important to the case.

Proper trial preparation is essential to proper trial presentation. Both the attorneys and the witnesses need to adequately prepare for the rigors of combat in the courtroom. Whether the defense attorney is the most obstructionist, obstreperous snake-in-the-grass who will call you a liar, a cheater, and a violator of his client's Fourth, Fifth, Sixth, and Fourteenth Amendment rights; or the defense attorney who meekly repeats most of your direct testimony, if you don't know the facts of your case, you can easily end up hurting our chances for a conviction.

Trial preparation does not begin the morning of the jury trial, the day before the trial, or even a week before the trial. Reading, and re-reading the investigative report(s) is an essential part of preparing for trial, but simply reading a report doesn't prepare a witness for testifying.

Trial preparation starts the minute after the first witness interview starts. The information the officer learns during that first statement can shape the investigation and the rest of the case, including the trial, months or even years down the road. Asking the right questions is critical in an investigation of a crime, but fully documenting the information will assist everybody involved in the trial when the time comes.

For instance, oftentimes a defense attorney will ask a question based upon the defense's theory of the case, or a particular defense witness' statement. If the officer responds, "I don't recall that," does that mean the officer doesn't remember that statement, or that's not how the officer remembers that statement. There is a big difference. If the officer prepared for trial when the report was written, the officer would know exactly what that witness said and there would be no ambiguity at trial.

Also, when documenting what another officer did during an investigation, make sure the details are recorded accurately. Nothing kills a prosecution quicker than two officers who contradict each other regarding what one told the other he or she had done, or who did it in the first place.

Which brings me to the next point, if you do something, write a report yourself! Too many times we read reports where the lead officer refers to another officer's supplemental report. If we are lucky, the lead officer will give us a small clue what to expect in the supplemental report. Oftentimes, we do not receive the supplemental report because the second officer "told the lead officer all the information, so there was no need to cut a supp." Now we are all in a bind because all that information is essentially lost. There will be contradiction on the witness stand. There will be information lost to faded memories. AND the defense attorney will have a field day questioning every witness about what other information has not been written into the reports.

Additionally, the lead officer may get some of the information wrong or incomplete. If the second officer has not written a report, the only report we have is wrong and we have nothing to combat the obvious and unimaginative defense argument that we are now making stuff up to bolster a weak case.

When it comes to writing a report, **JUST DO IT!**

A week or two before the trial, a testifying officer should review all the reports, not just his or her own, to make sure they are accurate and complete. If a report inaccurately states that an officer participated in part of the investigation, that officer should notify the author of the report as well as the prosecutor as soon as possible. We can do many things to correct a mistake given time to correct it. The morning of trial is not enough time to correct anything.

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Trial Preparation...

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When reviewing the reports, the officer should also pay attention to items of evidence that were collected and mentioned in the reports. If an item was collected, where is it and do we need it for trial? If it wasn't collected, why not? And is that important to the trial?

An officer should also be thinking of what might be a weakness in the case. Since the officer was at the scene, and the prosecutor was not (aside from homicides and other major cases), the officer is in the best position to assess the case from the perspective of the people directly involved. Were there obvious animosities between the witnesses? Were some witnesses noticeably nervous, evasive, vague, etc.? The dynamics of the scene is something that is almost totally lost on the written page.

What was thought of in the past as "trial preparation" by officers should begin the week before trial begins. This part of preparation is the reading of the reports to remember details of the investigation, including witness statements, quotes if you have them, the order of events, details of the scene, items of evidence, etc. This is where accurate and complete reports are critical. An officer should not rely on a one-time reading of the reports to adequately prepare for trial.

In a recent jury trial one officer wrote the only report in the case. At trial six officers testified to parts of that report. The lead investigator could only testify to one interview and seeing a few pieces of evidence at the end of a search warrant that took hours to complete. Needless to say, all of the testimony of the six officers did not go well. Some of the witnesses could not remember details, and the report didn't help them. The report didn't include some of the details needed by those officers to refresh their memories. The information that was included in the report was incomplete, but the author couldn't have known that. The recording officer did not record which officer found which item of evidence. The recording officer didn't write complete descriptions of the items to include precisely where each was found. The recording officer did not write his own report, but merely "dictated" to the reporting officer a summary description for each item. The officers seized or photographed over 100 items. That case went to jury two and a half years after the service of that search warrant. Memories were faded. But the report was just as fuzzy as the day it was written. The recording

officer read the lead officer's report one time the morning of his testimony. It did not go well. "That's all I have to say about that."

Think of the trial testimony of witnesses as a collage of overlapping pieces of information that form a three-dimensional object, rather than a two-dimensional puzzle. The "picture" we are trying to paint in the jurors' minds is one that has depth and width, one that is not shallow and flat. For this fully developed picture to be presented to a jury, everyone needs to be prepared for trial. That means the reports were written by the officer who conducted that part of the investigation, the reports are complete with the important details to remind us what happened three years ago, and that we have read and understood and remembered the events of yesteryear, and can tell the jury what had happened.

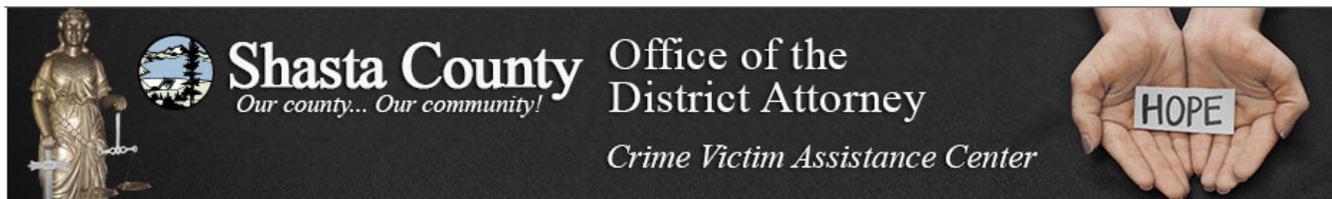
I know that most, if not all, of this material is old news, things that most, if not all, officers have been taught since day one at the academy. Nothing in this article should be new or earth-shaking. Sometimes we all need a reminder. DDAs know that no officer wants to cut paper all the time. "It's a waste of my time." "I didn't do much." "The lead officer can write out my part." But it will help secure a conviction if you write the report.



*Deputy District Attorney Craig Omura
2005*

We would not be calling you to testify if it was not important to our case.





FAQ With Crime Victims Assistance Center

What does an advocate do?

Crime Victim Assistance Center advocates can assist victims in navigating the confusing criminal justice process. As part of the prosecution team, we keep victims up to date on the status of a criminal case, attend investigative interviews, inform victims of their rights according to Marsy's Law, act as a single point of contact between the victim and prosecutor, assist victims in applying for the Victim Compensation Program, find necessary resources for victims and make appropriate referrals for additional services.

I want to make sure the Judge knows my side of things. What can I do?

An advocate from Crime Victims Assistance Center can assist victims to communicate with the court through the prosecutor. Advocates encourage victims to put their thoughts and feelings about a case in writing so the attorney can fully articulate those thoughts to the court. At the conclusion of a case the advocate can assist the victim and the victim's family in writing a Victim Impact Statement. These compelling statements are read or given to the court at the time of sentencing and can impact the outcome of a sentence.

What is the Victim Compensation Program?

The California Victim Compensation Program may assist qualifying victims with the following: Home security, relocation assistance, counseling services, medical bills for crime related injuries, funeral/burial costs, dental, crime scene clean up, home and vehicle modifications and income loss. The Program is a payer of last resort and all reimbursement sources (i.e. medical insurance, vehicle insurance, workers compensation or civil suit) will need to be exhausted first.

What is the difference between a Civil Restraining Order and a Criminal Protective Order?

Both of the above listed orders are Clets orders. An advocate from Crime Victim Assistance Center can assist a victim of Domestic Violence, Sexual Assault or Stalking in obtaining a Criminal Protective Order. These orders are good for the life of the criminal case and can be renewed at sentencing for up to 10 years. Our office does not assist with civil restraining orders. Advocates often refer victims to other agencies for assistance with civil restraining orders. Civil Restraining orders are sometimes important because they can address child custody and other issues that a Criminal Protective Order does not.

My windshield was broken as part of a crime. Can you pay to fix it?

The California Victim Compensation Program (CalVCP) does not pay for property damage. These losses can be reimbursed through an order on a criminal case. Property damage may be covered by CalVCP if the damaged property presents a personal safety issue and is a direct result of the qualifying crime. For example: The front door or window of a residence was broken in the commission of a crime presenting a significant risk for revictimization, the Program may cover the cost to repair the damage with a law enforcement recommendation.

What is the difference between direct victim restitution and Victim Compensation Restitution?

Restitution is addressed at the sentencing of a criminal case. Direct victim restitution is an order made by the judge at the time of sentencing to reimburse the victim's loss as a direct result of the crime. Examples of this type of loss can include: property damage to home or vehicle, stolen property, impound fees or other crime related expenses that were not covered by any other source. The victim's loss must be documented in the crime report. Victim Compensation Restitution is also an order made by the judge for the defendant to pay back CalVCP any money it may have paid for crime related expenses on the behalf of the victim.

Can you provide me with a copy of the police report?

Crime Victims Assistance Center is unable to provide reports to anyone. Should a victim request a copy of a police report our office refers the victim to the agency where the report originated.

**For more information or questions please contact the
Crime Victims Assistance Center at 530-225-5220.**



“CIVIL PROSECUTIONS BY A DISTRICT ATTORNEY’S OFFICE”

By: Senior Deputy District Attorney Anand “Lucky” Jesrani

Often people are surprised when they hear the District Attorney’s Office can file civil actions. However, a civil prosecution can be an effective means of getting a business to cease their unlawful activity. The primary goal of a civil prosecution is to protect consumers, but it also protects honest businesses that comply with the law and helps ensure a fair marketplace.

Authority for filing civil prosecutions comes from California Business & Professions Code (“BPC”) section 17200. BPC section 17200 is California’s unfair competition law. Basically, unfair competition includes anything that can be called a business practice and that at the same time is forbidden by the law. (*Stop Youth Addiction, Inc. v. Lucky Stores* (1998) 17 Cal.4th 553, 560). What this means, is that BPC section 17200 borrows violations of other laws and treats those violations as unlawful practices by a business. So, when there is a violation of some other law, BPC section 17200 can be used to treat the action as unfair competition and be independently actionable by prosecutors.

Some of the remedies available under BPC section 17200 are: an injunction, civil penalties, restitution, and reimbursement of an agency costs. An injunction is a court order that prohibits a business from continuing its unlawful activity. Civil penalties under BPC section 17200 are mandatory if a violation is found and a business can be penalized up to \$2,500.00 for each violation it committed. A business can also be ordered to pay back restitution to victims if individuals lost any money due to the business’s unlawful acts. Additionally, the costs incurred by an agency to investigate a business’s unlawful activities can be recovered by the agency.

One important distinction between a criminal prosecution and a civil prosecution is that at trial, a civil prosecution requires proof only by a “preponderance of evidence” rather than “beyond a reasonable doubt.”

An example of a recent case where BPC section 17200 was successfully utilized in Shasta County concerned a local pawn shop. The pawn shop failed to comply with certain regulations and failed to produce items to law enforcement as required by statute. In working collaboratively with Redding Police Department, our office reached a settlement where the company, besides paying financial penalties and reimbursing RPD for its investigative costs, is now under a strict injunction prohibiting it from continuing its unlawful practice. Since the enforcement action, the company has complied and cooperated with local law enforcement and no new serious violations have occurred. A few other examples where civil prosecutions can be used are: a motel/apartment that serves as a hub for criminal activity, false advertising, unlicensed activity by a person/business, or violations of auto repair laws.

While BPC section 17200 can be an effective tool to combat businesses that break the law, it is important to note that just because a matter turns out to be a “bad” case for criminal prosecution, it does not follow that it will necessarily make for a good civil prosecution. Civil prosecutions work best in circumstances where the remedies described above, will help achieve law enforcement goals of compliance, punishment, and deterrence.

Our office has a team with a full-time prosecutor, investigator, and staff to handle these type cases. For additional information about civil prosecutions, please call us at 530-225-5339.



THE CONFUSION OF HEALTH & SAFETY CODE 11364, HYPODERMIC NEEDLES, AND WHAT QUESTIONS TO ASK THE SUSPECT

By Deputy District Attorney Margarita Velikanov

A few months ago, an article was released in the Prosecutor's Perspective acknowledging the new changes of HS 11364 after HS 11364.1 took its "sunset." Well consider this article version 2.0.

First, it is imperative for officers to ask where the needle came from. This not only helps prosecute these cases, but it also helps establish any defenses which the prosecution must overcome. At this time, without that information, cases are being declined at a high rate. This could all be resolved by one simple question, "where did you get that/how did you obtain that/etc."

Second, although where an individual obtained the needle is not an element of a crime, it is an affirmative defense which the Prosecution MUST overcome BEYOND A REASONABLE DOUBT. We can only do this with your help.

Third, the Jury Instructions on this matter, specifically Jury Instruction Number 2410, are pretty clear as to what must be shown:

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant [unlawfully] possessed an object used for unlawfully injecting or smoking a controlled substance;
2. The defendant knew of the object's presence; AND
3. The defendant knew it to be an object used for unlawfully injecting or smoking a controlled substance.

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

BUT the most problematic aspect of the Jury Instruction on this section is the Affirmative Defenses Provision:

[The defendant did not unlawfully possess [a] hypodermic (needle[s]/ [or] syringe[s]) if (he/she) was legally authorized to possess (it/them).

The defendant was legally authorized to possess (it/them) if:

1. (He/She) possessed the (needle[s]/ [or] syringe[s]) for personal use; [AND]
2. (He/She) obtained (it/them) from an authorized source (;/.) [AND]
3. (He/She) possessed no more than 10 (needles/ [or] syringes).]

The People have the burden of proving beyond a reasonable doubt that the defendant was not legally authorized to possess the hypodermic (needle[s]/ [or] syringe[s]). If the People have not met this burden, you must find the defendant not guilty of this crime.]

Voila! There is the problem. *People v. Mower (2002) 28 Cal. 4th. 57* and *People v. Fuentes (1990) 224 Cal. App.3d 1041* are the only two cases which mention defenses to Health and Safety Code 11364, and even they are outdated considering that the new legislation was put into effect in January of 2015. In both; however, the Court stated that the Defendant merely had to raise a reasonable doubt as to his/her possession of the hypodermic needle. This could be done by someone testifying (the Defendant, a family member, a witness, etc.) as to where the needle came from, and if it was obtained through a pharmacist, a needle exchange, or another authorized source. An authorized source, as defined by the Health and Safety Code, is *a physician, pharmacist, hypodermic needle and syringe exchange program, or any other source that is authorized by law to provide sterile syringes or hypodermic needles without a prescription. (HS 11364)*. Because of that, the problem then becomes – where did the Defendant get it. Stemming back to the very question you must ask. The question which will help us prosecute these cases. The question which will help obtain convictions. And the question which will prevent cases from being declined, despite the Defendant's actual possession.

So with that, version 2.0 comes to a close and asks you to always ask WHERE DID THE NEEDLE COME FROM?



IDENTITY: A NECESSARY PIECE OF THE PUZZLE*By: Senior Deputy District Attorney Ben Hanna*

Every officer has experienced the situation: you respond to take a report of a crime from a victim and the suspect is known to the victim but is no longer there. Maybe it is a domestic violence situation where the suspect assaulted the victim and then fled before police arrived. Or, maybe the suspect took advantage of a relationship with the victim to steal from him.

Standard procedure in this situation would be to take the report and submit it to the DA for filing and issuance of an arrest warrant. After all, we know who should be arrested since the suspect is a friend/acquaintance/ significant other of the victim and the victim can tell you their name, right?

Not so fast. This information, standing alone would not be sufficient evidence of the suspect's identity to issue an arrest warrant. Not only does the DA need to know who committed the crime, but we need to discern how you know who committed the crime. Even if the victim can ID the suspect by name and description, we need to be sure of their identity before a judge will issue a warrant.

The best way to solve this problem is to simply show the victim an official photo of the suspect, such as a DMV photo or jail booking photo. If the suspect is a known person to them, a lineup is not necessary. However, the photo identification will go a long way toward making sure the court will issue the arrest warrant for the right person to be charged and brought to court.



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A NOTE FROM THE EDITOR

As yet another hurdle is put in front of Law Enforcement, by working diligently we will still be able to hold offenders accountable for their actions. Working together, being prepared for court and having a firm grasp on the law that is always changing, our community will be a safer place.

Thank you for all your hard work and stay safe.

Curtis Woods
Senior Deputy District Attorney
Shasta County

