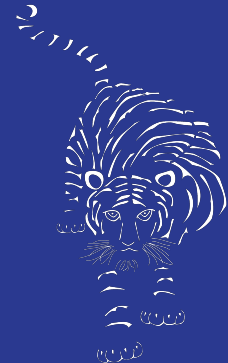


# Handle with Care:

Address and Suppress Improper Treatment of Evidence

Qiana Washington  
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(925) 278-1791 ext. 102



**WHY DO YOU HAVE**

**COOKIE CRUMBS ON YOUR  
FACE ?**

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**WHY DO YOU HAVE**

**COOKIE CRUMBS ON YOUR  
FACE ?**

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# What I will not cover

- The Basics/Nuts & Bolts
- Searches incident to Arrest
- Inventory Searches
- Prolonged Detentions/De Facto Arrests
- Probation/Parole Searches
- Stop and Frisk/Pat Searches
- Consent Searches
- Any other warrant/less searches



# Statements

- 4th Amendment Grounds People v. Campa, 36 Cal.3d 870, 885 (1984); People v. DeVaughn, 18 Cal.3d 889, 896-897 (1977)
- Miranda v. Arizona (5th Amend)
  - In-custody
    - Under arrest, deprived of freedom of action in a significant way, or a reasonable person in the suspect's position would not feel free to leave. Miranda v. Arizona, 384 U.S. 436, 477 (1966); Berkemer v. McCarty, 468 U.S. 420 (1984); Thompson v. Keohane, 516 U.S. 99 (1995)
    - De Facto arrest People v. Pilster, 138 Cal.App. 4th 1395 (2006) (the handcuff exception)
    - Even at home in bed Orozco v. Texas, 394 U.S. 324, 327 (1969)



# Statements, cont.

- Interrogation--express questioning or functional equivalent
  - Any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response Rhode Island v. Innis, 446 U.S. 291 (1980)
  - Christian burial speech Brewer v. Williams
  - Child might find weapon Innis
  - Some FST questions Pennsylvania v. Muniz, 496 U.S. 582 (1990) (estimate 30 seconds in Romberg)
  - Question first tactics/intentional violations Missouri v. Seibert, 542 U.S. 600 (2004)

# Statements, cont.

- Miranda admonitions
- Waiver
  - Expressed
  - Implied
- Invocation (Hint: Do it for them)
- Involuntary Statements
- Challenge Early and Often
  - Preliminary Hearing
  - 402 hearing
  - In writing (but not required)







# Exculpatory Evidence and its Destruction



- California v. Trombetta, 467 U.S. 479 (1984)
- Arizona v. Youngblood, 488 U.S. 51 (1988)
- Bad faith failure to preserve exculpatory evidence when the exculpatory value was evident



# Snitches (AKA Informants, if you're polite)



## Evidence Code 1042 (c)

1. When?
  - a. PX, Criminal Trial or other criminal proceeding
  - b. When challenging reasonable cause to search or arrest
2. Who? Confidential Informant but not material witness to guilt or innocence
3. What? Reliability established in open court

# Search Warrants



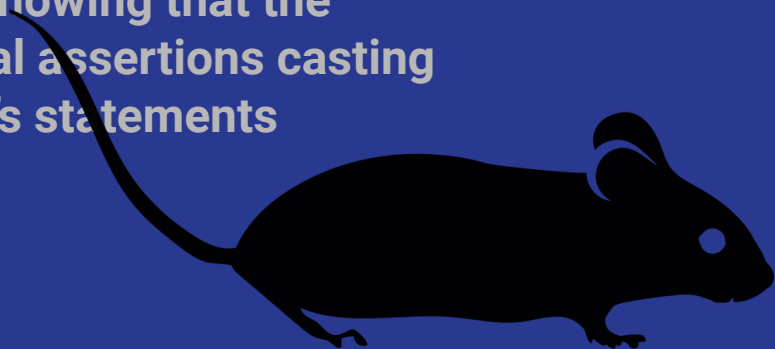
# Search Warrants, cont.

- Hobbs Motion
  - Motion to unseal search warrant affidavit or portions thereof (7 Cal.4th 948 (1994)) when it is sealed to protect CRI
  - Does not reveal the CRI
  - File 1538.5 motion
  - *In camera* review either at hearing or before
  - DA and affiant appear
  - On the record
  - In the absence of the defense
  - Defense can submit questions



# Search Warrants, cont.

- Luttenberger Motions (People v. Luttenberger, 50 Cal. 3d 1 (1990))
  - Motion to disclose documents related to the CRI's veracity/reliability in the form of documents and police reports and anything else that might undermine informant's credibility
  - Defense must make a preliminary showing that the affidavit includes "substantial factual assertions casting doubt on the accuracy of the affiant's statements"
  - Only prosecution and cop present
  - On the record
  - Does not reveal informant's identity



# Search Warrants, cont.

- CRI Motion (AKA Motion to Disclose Identity of Informant)
  - Who? Informant is a material witness on issue of guilt
  - Where? Hearing in open court where both sides can present evidence
  - What? Defense must show a reasonable possibility that informant might have exonerating testimony (e.g. rat is percipient exonerating witness)
  - If EC 1041 claimed-->in camera hearing  
If defense wins, disclose ID or dismiss case EC 1042(d)



# Search Warrants, cont.

- **Motion to Quash (PC 1538.5(a)(B))**
  - **Facially invalid warrant**
  - **i.e. warrant lacks probable cause**
- **Motion to Traverse (AKA Franks Motion)**
  - **Franks v. Delaware, 438 U.S. 154 (1978)**
  - **Warrant contains lies, half-truths, fraud, reckless disregard for the truth**
  - **Burden is on the defense to make a substantial preliminary showing with affidavits of reckless or deliberate false statements and what remains is insufficient probable cause**
  - **Can't be merely conclusory**
  - **Looks beneath the surface of the SW affidavit**
  - **Defense can only have an evidentiary hearing if preliminary showing made**

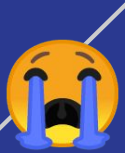




# Special Considerations

- If property taken is not that which is described in the warrant-->must be returned (PC 1540)
- If they went beyond the scope of the warrant-->suppress
- Upon making a motion to challenge the search warrant, the defense is entitled to discover any previous application for a search warrant in the case which was refused by a magistrate for lack of probable cause (PC 1539(c))
- Out of county warrants--Magistrate can properly issue warrant for her county only unless the search relates to a crime committed in magistrate's county and magistrate has reason to evidence relates to present or future prosecution in magistrate's county People v. Smead, 175 Cal.App.3d 1101 (1985); People v. Fleming, 29 Cal.3d 698, 701 (1981); e.g. Cal. Penal Code 1524(j)

What if I lose???



“‘Tis better to have fought and lost, than never to have fought at all.” Arthur Hugh Clough

# Options: Live to Fight Another Day

- **Pretrial Appeal (Misdemeanor)--If 1538.5 motion made no later than 45 days after arraignment. Deadline to file the notice of appeal is 30 days after denial of the motion. (PC 1510; PC 1538.5(j))**
- **If motion brought at preliminary hearing, file 995 within 60 days of arraignment on the information and then file a writ of mandamus within 15 days of denial of the 995 (writ review is discretionary)**
- **If motion made post-preliminary hearing, writ of mandamus if filed within 30 days after denial of the motion but review is discretionary and practically worthless (PC 1538.5(i))**
- **Appeal post conviction**
  - **Right to appeal survives plea (PC 1538.5 (m))**
  - **Non-fourth Amendment motions: may only be appealed post-conviction. Right to appeal does not survive a plea**



Code:  Section:

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### HEALTH AND SAFETY CODE - HSC

**DIVISION 10. UNIFORM CONTROLLED SUBSTANCES ACT [11000 - 11651]** (*Division 10 repealed and added by Stats. 1972, Ch. 1407.*)

### CHAPTER 8. Seizure and Disposition [11469 - 11495] (*Chapter 8 added by Stats. 1972, Ch. 1407.*)

**11479.** Notwithstanding Sections 11473 and 11473.5, at any time after seizure by a law enforcement agency of a suspected controlled substance, except in the case of growing or harvested cannabis, that amount in excess of 10 pounds in gross weight may be destroyed without a court order by the chief of the law enforcement agency or a designated subordinate. In the case of growing or harvested cannabis, that amount in excess of two pounds, or the amount of cannabis a medicinal cannabis patient or designated caregiver is authorized to possess by ordinance in the city or county where the cannabis was seized, whichever is greater, may be destroyed without a court order by the chief of the law enforcement agency or a designated subordinate. Destruction shall not take place pursuant to this section until all of the following requirements are satisfied:

- (a) At least five random and representative samples have been taken, for evidentiary purposes, from the total amount of suspected controlled substances to be destroyed. These samples shall be in addition to the 10 pounds required above. When the suspected controlled substance consists of growing or harvested cannabis plants, at least one 2-pound sample or a sample in the amount of medicinal cannabis a medicinal cannabis patient or designated caregiver is authorized to possess by ordinance in the city or county where the cannabis was seized, whichever is greater, shall be retained. This sample may include stalks, branches, or leaves. In addition, five representative samples of leaves or buds shall be retained for evidentiary purposes from the total amount of suspected controlled substances to be destroyed.
- (b) Photographs and videos have been taken that reasonably and accurately demonstrate the total amount of the suspected controlled substance to be destroyed.
- (c) The gross weight of the suspected controlled substance has been determined, either by actually weighing the suspected controlled substance or by estimating that weight after dimensional measurement of the total suspected controlled substance.
- (d) The chief of the law enforcement agency has determined that it is not reasonably possible to preserve the suspected controlled substance in place, or to remove the suspected controlled substance to another location. In making this determination, the difficulty of transporting and storing the suspected controlled substance to another site and the storage facilities may be taken into consideration.

Subsequent to any destruction of a suspected controlled substance pursuant to this section, an affidavit shall be filed within 30 days in the court that has jurisdiction over any pending criminal proceedings pertaining to that suspected controlled substance, reciting the applicable information required by subdivisions (a), (b), (c), and (d) together with information establishing the location of the suspected controlled substance, and specifying the date and time of the destruction. In the event that there are no criminal proceedings pending that pertain to that suspected controlled substance, the affidavit may be filed in any court within the county that would have jurisdiction over a person against whom those criminal charges might be filed.

(Amended by Stats. 2017, Ch. 27, Sec. 154. (SB 94) Effective June 27, 2017.)