

POINTS AND AUTHORITIES

The District Attorney of Alameda County Presents a Weekly Video Survey of
Criminal Law Approved for Credit Toward California Criminal Law Specialization: 172--
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Week Of	Topic	Guests	General
Nov. 26 2018	Enforceable Search Conditions in CRIMS for Electronic Devices Part III of Overview of SB 1437	Micheal O'Connor John Jay	30 min

This P&A includes a discussion with John Jay on how to draft electronic device search conditions for entry into CRIMS that will be enforceable.

It also includes the final part of Micheal O'Connor's discussion of the impact of SB 1437, the new felony murder rule, focusing on the resentencing provisions that may be applicable to those person convicted under the old felony murder rule or the natural and probable consequences doctrine.

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to Mary Pat Dooley at (510) 272-6249. Technical questions should be addressed to Gilbert Leung at (510) 272-6327. Participatory students: MCLE Evaluation sheets are available on location and certificates of attendance are constructively maintained in your possession in the Ala. Co. Dist.Atty computer banks.

The Law Permitting Searches of Electronic Devices

Mary Pat Dooley

CalECPA, specifically Penal Code section 1546.1, subdivision (c)(10) allows the government to access electronic device information “if the device is seized from an authorized possessor of the device who is subject to an electronic device search as a clear and unambiguous condition of probation, mandatory supervision, or pretrial release,” except where prohibited by state or federal law.

Penal Code section 1546, subd. (f), another provision of CalECPA, broadly defines an electronic device as “a device that stores, generates, or transmits information in an electronic form.”

As to password disclosure requirement, the Court of Appeal in *People v. Ebertowski* (2014) 228 Cal.App.4th 1170, 1175, reasoned: “The evident purpose of the password conditions was to permit the probation officer to implement the search . . .” The password conditions did not abridge the defendant's privacy rights any more than they had previously been abridged by the search condition. (*Id.* at p. 1176.)

A condition of probation will not be upheld, however, if it (1) has no relationship to the crime of which the defendant was convicted, (2) relates to conduct that is not criminal, and (3) requires or forbids conduct that is not reasonably related to future criminality. (*People v. Olguin* (2008) 45 Cal.4th 375, 379–380.) The California Supreme Court has clarified that this “test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term.” (*Olguin*, at p. 379.)

However, judicial discretion to set conditions of probation is further circumscribed by constitutional considerations. “A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.” (*In re Sheena K.* (2007) 40 Cal.4th 875, 890

There are court decisions going both ways on these questions. The issue of the validity of an electronics-search condition under California Supreme Court case authority is pending before our high court. (See, e.g., *People v. Ermin* (July 10, 2017, H043777) [nonpub. opn.], review granted Oct. 25, 2017, S243864; *People v. Nachbar* (2016) 3 Cal.App.5th 1122, review granted Dec. 14, 2016, S238210; *In re A.S.* (2016) 245 Cal.App.4th 758, review granted May 25, 2016, S233932; *In re Mark C.* (2016) 244 Cal.App.4th 520, review granted Apr. 13, 2016, S232849; *In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted Feb. 17, 2016, S230923.)

Additionally, there is a split of authority regarding the validity of broad electronics-search conditions of probation, and those cases are also pending before the California Supreme Court. (See *People v. Trujillo* (2017) 15 Cal.App.5th 574, review granted Nov. 29, 2017, S244650; *People v. Bryant* (2017) 10 Cal.App.5th 396, review granted June 28, 2017, S241937; *In re R.S.* (2017) 11 Cal.App.5th 239, review granted July 26, 2017, S242387; *In re Patrick F.* (2015) 242 Cal.App.4th 104, review granted Feb. 17, 2016, S231428; and more.)

As of the date of this summary of law, the First District (the appellate district that includes Alameda County cases) recently addressed an electronic search condition in *People v. Guerrero*, 2018 WL 3301628, unpublished, July 5, 2018. The defendant did not argue that the electronic device search condition was unreasonable, but instead argued that it must be modified because it infringed on her constitutional right to privacy as recognized in *Riley v. California* (2014) 134 S.Ct. 2473, and was not narrowly tailored to the purpose for which it was imposed. The appellate court rejected her argument and affirmed the probation order.

Simply put, the California Supreme Court has not yet addressed electronic device search conditions. While there are differing views among lower courts, there is no binding authority preventing the imposition of such conditions.

Creating Enforceable Electronic Device Search Conditions

by Retired Annuitant John Jay

1. Electronic device search conditions are recorded in the Odyssey Court Case Management System. The electronic device search condition orders must be enforceable, and prosecutors can request the language of these orders to ensure their enforcement.

2. Generally, a search condition can be either a three-way or four-way search condition. A three-way search condition covers the defendant's person, vehicle and property under his or her control. A four-way search condition covers the defendant's person, vehicle, property under his or her control and also residence.

3. An electronic device search condition must be tied to either a three-way search clause or a four-way search clause. (see below).

4. John's suggestions for creating an enforceable electronic device search condition:

- Ask the court for an electronic device search condition *every* time the case warrants it. Do not assume that a search warrant for these devices is sufficient.

- Be precise in your request. An electronic device search condition is not a stand-alone search condition. It must be tied to a three-way or four-way search clause. In some cases, the deputy DA can ask the court to order that *all* electronic devices are covered by the order. Penal Code section 1546, subd. (f) defines electronic devices in general terms so it is unnecessary to list every imaginable electronic device. If only certain electronic devices are being covered, specify these devices.

- In *all* cases, ask the court to require the defendant provide his or her passwords and access in order that the electronic devices can be opened.

5. Suggested language for requesting the court to impose an electronic device search condition:

- "Your Honor, we're asking that you impose a [four-way search clause] [three way search clause] that includes ALL electronic devices and requires passwords and access to those devices."

- If only one device is at issue, “Your Honor, we’re asking you to impose a [four-way search clause] [three-way search clause] that includes a cell phone and requires passwords and access to unlock that device.”

- The particular facts of the case will dictate which order can apply.

6. Certain electronic device search conditions orders are not use-able for the officers. So listen carefully to the order being imposed by the court and request correction if necessary. Some examples of unenforceable orders:

- Some judges have imposed a “five-way search clause.” There is no such thing.

- Some judges impose a search condition for “devices.” Which devices, some or all?

- Some judges impose a search condition for “electronics.” Which electronics, some or all?

*** Ask the court to require the defendant provide his or passwords and access in order that the electronic devices can be opened.*

7. The remedy if an unenforceable search condition appears in CRIMS.

- Most of these cases involve new sentencing that will have future court dates, so there will be an opportunity to fix the search condition.

- If no future court date is set for a case with a search condition that needs to be modified, the deputy DA can set a PFN Booking Alert or Docket Alert and have the defendant re-sentenced at the next court appearance.

8. Where is the Electronic Device Search Condition Displayed in CRIMS?

a. Person Summary Tab

(i) Enter PFN. Hit Personal Data.

(ii) Over the mugshot, you will see “May Have Search Clause.” This a direct link to the terms and conditions of probation found in the Probation Tab.

(iii) There will two columns on the screen. The one on the left labeled Supervision Conditions will display the three or four-way search, and *the existence of an electronic device search condition order. Do not rely on this language for the scope of the order.*

(iv) Go to the column on the right side labeled Comments.

(v) Under Comments, you will find the specific electronic devices that are covered by the order, and also the order for passwords and access.

b. Probation Tab [*Quickest Way to Search*]

(i) Insert the PFN, which will take you directly to the Terms and Conditions of Probation.

(ii) On the left side of the screen you will see Supervision Conditions, which will display the existence of the electronic search condition.

(iii) The right side of the screen lists the electronic devices and the order for passwords and access.

c. Rap Sheet

(i) In court, you can check the Probation Detail of a defendant's rap sheet.

(ii) But the rap sheet only displays the Supervision Conditions, in other words, only the information located on the left side of the Probation Tab screen.

(iii) You will see only that an electronic device search condition was ordered. But you will still have to go the Probation Tab to get the scope of the order.

9. LEWI and AWS

- For law enforcement officers who use LEWI and AWS, the Court authorized two new search codes: S8 and S9.
- S8 is a standard three-way search clause that includes an electronic device search condition. S9 is a standard four-way search conditions
- The S8 and S9 appear on the Green Screen where the search codes reside. The electronic devices covered by this order are in CRIMS.
- So law enforcement must go to the Probation Tab in CRIMS to see which electronic devices are covered.

10. Want a summary of all of the above?

Go to the CRIMS header, hit "Resources," scroll down and you'll find a memo entitled "Electronic Device Search Conditions."

Enter PFN:

Case #	CEN	Held	Start Date	Type	Term
18-CR-009107B	8392669	No	10/29/2018	Formal Probation	3 Years

Supervision Conditions

Effective Date	Supervision Conditions	St
10/29/2018	Report forthwith to the Probation Officer	Ac
10/29/2018	Obey all laws of the community and be of good conduct	Ac
10/29/2018	Seek and maintain regular employment and/or schooling	Ac
10/29/2018	If arrested, give true name, correct address, birthdate	Ac
10/29/2018	Do not leave the State of California	Ac
10/29/2018	4 Way Search - Felony	Ac
10/29/2018	Electronic Search Clause	Ac
10/29/2018	Do not own, use, possess or in any way traffic in narcotics	Ac
10/29/2018	Submit to such Education, Counseling, Treatments, Tests	Ac
10/29/2018	Do not associate with	Ac
10/29/2018	Do not possess any identification, checks, credit cards	Ac
10/29/2018	Do not own, use or possess burglary tools, jingle keys,	Ac
10/29/2018	Compliance with Blood and Saliva Testing pursuant to PC296	Ac
10/29/2018	Pay Restitution fine (PC 1202.4(b))	Ac
10/29/2018	Probation Violation Revocation Restitution fine suspended	Ac
10/29/2018	Restitution Reserved	Ac
10/29/2018	Pay fine of	Ac
10/29/2018	Pay Court Operations Assessment fee (PC 1465.8(a)(1))	Ac
10/29/2018	Pay Criminal Conviction Assessment (GC 70373)	Ac
10/29/2018	Further Conditions	Ac

Probation Display

Enter PFN: XXXXXXXXXX

Name: _____

Supervision Detail

Case #	CEN	Held	Start Date	Type	Term	Original Term Date (Calculated / User Entered)	Ser
18-CR-004504A	8383119	No	07/23/2018	Formal Probation	3 Years	07/23/2021 (User Entered)	000
						Status Change	
						Active on 07/23/2018	

Supervision conditions

Effective Date	Supervision Conditions	Status	Comment
07/23/2018	Report forthwith to the Probation Officer	ACT	Immediately upon release to Probation Officer.
07/23/2018	Obey all laws of the community and be of good conduct	ACT	
07/23/2018	Seek and maintain regular employment and/or schooling	ACT	If change of employment or
07/23/2018	If arrested, give true name, correct address, birthdate	ACT	Report in writing to Probation
07/23/2018	Do not leave the State of California	ACT	Without permission from Probation
07/23/2018	4 Way Search - Felony	ACT	Submit to search and seizure day or night with or without under your control.
07/23/2018	Electronic Search Clause	ACT	Any electronic device (inclu
07/23/2018	Submit to Blood and Saliva testing pursuant to 268 PC	ACT	Satisfied

SB 1437: LIMITATIONS ON ACCOMPLICE MURDER RULES
Micheal O'Connor, Assistant District Attorney
Alameda County District Attorney's Office

Petitions for Resentencing under Section 1170.95¹

¹ This section is part of a larger P&A handout on SB 1437. If you would like a copy of the full handout, contact Mary Pat Dooley marypat.dooley@acgov.org 510-272-6249

V. PETITIONS FOR RESENTENCING UNDER SECTION 1170.95

A. Section 1170.95 Gives Murder Defendants a Right to Petition for Resentencing If:

1. The petitioner was convicted of murder
 - a. under a felony murder theory OR
 - b. under a natural and probable consequences theory.
2. The conviction occurred at trial or by plea.
3. The petitioner could not be convicted of murder under the new law that takes effect after January 1, 2019.

B. Summary

1. The petitioner must file a petition that shows that he or she is eligible to be considered for resentencing because she or he would not have been convicted under the revised law.
2. The prosecutor must file a response within 60 days of receipt of the petition.
3. The petitioner has 30 days to reply.
4. If the court determines that the petitioner has made a prima facie showing of eligibility, the court issues an OSC and sets a resentencing hearing within 60 days of the OSC.
5. If the record reflects an earlier court finding that the petitioner did not act with reckless indifference or was not a major participant, the court must grant the petition and resentence.
6. Unless the parties reach an agreement, the resentencing hearing is held before the court sitting without a jury.
7. At the hearing the prosecutor has the burden of proving beyond a reasonable doubt that the petitioner is not eligible for resentencing. The parties can rely on evidence in the record of conviction and may introduce new evidence.
8. If the prosecution fails to sustain its burden, the court must vacate the murder conviction, and leave intact the target offense. If the target offense was not charged, the murder will be redesignated as whatever the target offense was, without regard to any statute of limitations issues.
9. A resented petitioner “shall be given credit for time served”, but the judge may place the petitioner on parole for up to three years following completion of the sentence.

C. Timing

1. There is no deadline for the filing of the petition. There is no requirement that the petitioner be in custody at the time of filing. It appears that a defendant could bring this petition for convictions going back decades, and it appears that the defendant could wait decades before seeking relief.
2. 90 day period imposed on parties after filing of petition. Once the petitioner has filed, the District Attorney has 60 days to file a response, and the defendant has 30 days to reply.
3. No deadline for court to issue or decline an OSC.
Though initial briefing is scheduled to take 90 days, nothing in the statute sets a deadline for ruling on the prima facie case.

4. Hearing within 60 days of OSC.

The statute requires the evidentiary hearing to be heard within 60 days of the OSC.

5. Deadlines can be extended for good cause.

The statute provides flexibility as to how long the process of repititioning should take.

That's probably wise because there is certain to be a flood of petitions. The statute does not provide for additional court staffing, so it is reasonable to expect that the courts will be heavily burdened by adding these petitions to its regular, already heavy duties.

D. Costs.

1. The new legislation provides that local agencies may be reimbursed for expenses "If the Commission on State Mandates determines that this act contains costs mandated by the state."

2. There is no mention in the act of reimbursing or otherwise funding the court.

E. Vagueness in the Statute.

1. There are ambiguities in the statute that will generate litigation, so the interpretations advanced here may be subject to revision or correction depending on future court rulings.

2. Example: Can a defendant petition who is convicted of non-murder offense? New Penal Code section 1170.95(a)(2) states that a defendant may petition if the defendant "accepted a plea offer in lieu of a trial at which the petitioner could be convicted of murder."

- I would argue that subparagraph (2) must be read in conjunction with the first part of paragraph (a), which states that "a person convicted of ... murder" may petition. This interpretation is supported by the discussion of remedy in paragraphs (d) and (e) which specifically address vacation of "the murder conviction".

- Expect defense argument, and therefore litigation, from defendants who read (a)(2) in isolation and claim that they are eligible to petition even if they were convicted or manslaughter or some other related non-murder offense.

3. Example: Is successful petitioner entitled to immediate release?

- Section 1170.95(g) states that a person resentenced under the statute "shall be given credit for time served."

- That phrase has caused litigation in the past. (*See, e.g. People v. Morales* (2016) 63 Cal.4th 399).

F: Duties of Petitioner, Court and Prosecutor.

Petitioner

1. Complete a petition which sets forth:

a. A declaration by the petitioner that he or she is eligible for resentencing;
- Note that the statute does not describe the level of detail required. Is it enough simply for a defendant to say "I'm eligible."? Or can the court require that the defendant set forth the factual basis on which the petition rests? It seems reasonable that at the very least the defendant should set forth that he was not the actual killer, that his role was

lookout or driver etc.; that he was not a major participant, and that he did not demonstrate reckless indifference to human life.

- b. The court case number and year of conviction.
- c. Whether the petitioner wants appointed counsel
2. File the petition in the court of conviction.
3. Serve the petition on the district attorney, and either actual trial counsel for the defense or the public defender in the trial county.
4. File and serve a reply within 30 days of service of the prosecutor's response.

The Court

1. Review the petition to see whether it is correctly filled out.
 - a. If not the court may deny the petition without prejudice if there is missing information.
2. Appoint counsel, if requested.
3. Receive and review any response by the prosecutor, and any reply by the petitioner.
4. Determine whether the petitioner has made a prima facie case.
 - a. The exact time by which the court must make this determination is not spelled out.
 - b. If the petitioner has made a prima facie showing, the court must issue an order to show cause, and set the matter for hearing
5. Hold an evidentiary hearing.

The Prosecutor

1. File and serve a written response within 60 days of service of the petition.
 - This will require the prosecutor to locate and peruse the petitioner's file for evidence in the record that would prove or disprove eligibility.
 - In some instances, it may be possible to ask the court to take judicial notice of parts of the record that would disqualify the petitioner from consideration without the need for an OSC.
2. Concede the petition if required by a prior ruling in the case.
3. Factually investigate the murder to determine whether the defendant is eligible.
 - Historically, it was unnecessary to determine whether a felony murderer was the actual killer or a major participant who acted with reckless disregard for human life. Thus, the prosecution may not have produced evidence or called witnesses as to these issues.
4. Put on a contested evidentiary hearing in appropriate cases.
5. Participate in resentencing or in returning the defendant to prison or both, depending on the circumstances.

VI. POTENTIAL CHALLENGES TO SB 1437

1. As mentioned above, there are difficulties with statutory drafting that are likely to be challenged in court.
2. Constitutional challenges. A group of prosecutors working through CDAA, including Santa Clara Deputy D.A. Jeff Rubin, have raised concerns about the constitutionality of SB 1437. They point out that SB 1437 amends Penal Code section 189. The problem is that in June of 1990, Proposition 115 amended section 189. Since Proposition 115 was

passed by the initiative process, changes to it can only be accomplished by a new initiative or by 2/3 vote in the State Senate and Assembly respectively. It appears that the Assembly passed the bill with just over 50%. If changes to section 189 were invalidated, this might spell trouble for the changes to section 188 because the two statutes are so functionally intertwined. So it's possible that the amendments could be invalidated.

3. As of October, 2018, no challenges have actually been filed, and it is not certain whether any challenges will be filed. The prudent approach is to hope for the best but prepare for the worst.

VII. POTENTIAL SCOPE OF 1170.95

- In Alameda County there are over 1000 inmates in custody for murder. There are dozens more who have been convicted of murder but are now out of custody. I expect the majority of these defendants to petition for resentencing even though they may prove to be ineligible. They have everything to gain, and nothing to lose by trying. Furthermore, there is always the chance that we will be unable to reconstruct the record for very old cases, and thus unable to meet our burden of proving ineligibility. Thus I expect that at least half of the in-custody defendants will file, which means that in Alameda County alone the D.A. will have to file something like 600 responses in the next few years.

- The process of reviewing cases will be especially difficult in places like Alameda County where the felony murder or natural and probable consequences theory are never alleged in charging documents or tracked in any statistical way. Thus it will be necessary to manually file underlying each petition in order to see whether in fact a defendant's case is even eligible for consideration.

- It is difficult to say at this time what percentage of defendants will be able to make a prima facie case. If a third of petitioners were eligible that would put the number at upwards of 200 in Alameda County. These two hundred cases would need to be factually investigated to determine whether on the one hand, the petitioner is a minor participant who deserves consideration under the new law, or on the other, whether the defendant is a dangerous killer who should be retained in custody to serve out the original term.

- Any hearings actually held would likely be heavily contested, even though there would be no juries. Some hearing might last an afternoon, others would require a virtual retrial of the original murder and could last weeks.

- This problem is by no means unique to Alameda County. I would imagine that thousands of cases will be contested statewide in the coming years.