

Motions and Protecting the Record

July 2015

Winning your motion or trial means making it stick!

Rule #1: PUT EVERYTHING ON THE RECORD! Describe, Define and Detail.

Rule #2: Make the judge articulate with specificity his/her rulings.

Rule #3: Know the standard. You can't make the appropriate record if you don't know the standard.

Topics

- I. Suppression Motions (PC §1538.5)
- II. Speedy Trial(PC §1382) and *Serna*
- III. *Wheeler* Motion
- IV. PC §1118.1 Motion
- V. Motion for Mistrial
- VI. Prosecutorial Misconduct
- VII. Violation of Probation Hearings

I. Suppression Motions (PC §1538.5)

Based on alleged 4th amendment violation (the search or seizure without warrant was unreasonable)

Grounds

Detention (initial stop, duration)

Search (person, property, vehicle, home)

Arrest

1. Statute requires that the motion be brought in writing setting forth the factual basis and legal authority relied upon. (1538.5(a)(2).) The motion must be filed with the court and served on the people at least 10 calendar days before the hearing. (Cal. Rule of Court, 4.111(a).)
2. This is a **pre-trial motion**. The statute specifies in misd. cases the motion shall be made and heard before trial. (1538.5(g).) Exception: no opportunity or grounds unknown. (1538.5(h).)
3. **ALWAYS** respond/oppose in writing. Must be filed with court and served on def atty 5days prior to hearing. (Cal Rule of Court 4.111(a).) –reply due 2 days prior.
4. Initial burden on def to show “no warrant”. (ok to stip when there wasn't a warrant) (If warrant: see EC §664 –warrant presumed lawfully issue & executed. Burden remains with def.)
5. Burden then shifts to People when no warrant. Standard of proof is Preponderance of the Evidence. (*People v. James* (1977) 19 Cal. 3d 99,106, n4.)
6. **ALWAYS** look at the issue of standing first. Challenge standing to bring motion whenever possible. (ie; def had no reasonable expectation of privacy)
7. Evidentiary hearing. Need witnesses. Be sure that you understand the grounds for the motion.
8. At the hearing: **Before** calling witnesses, ask that the defense articulate for the record the grounds for the motion. **Do not proceed** until you understand what is being challenged.
9. Put on only the necessary witnesses. Do NOT short cut your questioning in the area being challenged.
10. Be on top of your objections. Remember this hearing only goes to the issue challenged. It is not for purposes of discovery.
11. Always argue all possible theories. (When the matter goes up on appeal, we are stuck with whatever theory you argue. Ie; search: consent & PC)

12. If the motion is granted, ask the court to articulate the basis for granting the motion.
13. **DO NOT** move to dismiss the case if the motion is granted. Inform your supervisor so that a determination can be made whether or not to seek appellate review.

****4th Amendment case law is continually growing and being refined. ALWAYS shepardize cases. Know the proper legal terminology and standards.**

Detention: Reasonable Suspicion.

Pat down/frisk: lawfully detained, reasonable suspicion based upon “articulable facts that def is armed and/or dangerous” –outer clothing for weapons only!

Search: Probable Cause

Bodily Intrusion Searches: Probable Cause Plus

Arrest: Probable Cause

Know the exception to the warrant rule:

- 1) Plain View Seizures
- 2) Pat down
- 3) Consent
- 4) Exigent Circumstances
- 5) Automobile Exception (SIA – *Gant* –need PC to arrest + reasonable belief item of evidence related to arrest found in vehicle-def unsecured/reachable access.)
- 6) Search incident to arrest
- 7) Protective Sweeps
- 8) Probation/Parole Searches

Don’t forget about inevitable discovery! (the challenged evidence would have been eventually secured through legal means regardless of the improper official conduct, the inevitable discovery exception allows the evidence to be admitted. *People v. Superior Court (Tunch)* (1978) 80 Cal.App.3d 665, 673.)

Good resources: Westlaw/WestlawNext, Bell’s Compendium, LaFave S&S, CEB Criminal Law Procedure & Practice, Autobrief, brief bank, shared drive WPC folder, www.sdsheriff.net/legalupdates

II. SPEEDY TRIAL / SERNA MOTIONS/DUE PROCESS-State & Federal
(See additional handout from the Attorney General’s Office)

III. Batson/Wheeler motion

Peremptory challenges may not be used systematically to exclude any cognizable group of jurors because of membership in the group. (protected classes: race, religion, ethnicity, gender, etc.) *People v. Wheeler* (1978) 22 Cal. 3d 258.

Wheeler rules apply to both the prosecution and the defense. *Georgia v. McCollum* (1992) 505 U.S. 42, *People v. Pagel* (1986) 186 Cal App. 3d Supp. 1.

The party raising the motion must timely object stating grounds for the motion and must make a prima facie case. To make a prima facie showing the following must be established:

1. Make a complete record detailing circumstances of challenges used,
2. Establish that person(s) excluded are members of a cognizable group within the meaning of the representative cross-section rule and

3. based on circumstances, strong likelihood that persons were challenged because of their group association.

A presumption exists that the prosecutor has exercised the peremptory challenges in a constitutional manner. *People v. Crittenden* (1994) 9 Cal. 4th 83.

Once a prima facie showing is made, burden shifts to party being challenged to rebut. Always make a good, detailed record of the “race/membership neutral” reasons for excusing each of the challenged jurors.

**You may want to consider requesting the court allow you to make a record even in cases in which the court does not find that the defense has made a prima facie showing. –Do so outside the presence of the jury. This helps protect the case on appeal. On appeal *Wheeler* error is prejudicial per se; the conviction must be reversed.

If the trial court grants the motion, the entire jury panel will be excused and a new panel called up.

Key to defeating a *Wheeler* motion is to keep detailed notes during jury selection.

IV. PC § 1118.1 MOTIONS

Motion for the entry of an acquittal based upon insufficient evidence. (PC §1118.1 – jury trial, PC §1118 – court trial)

On it’s own motion or motion of the defendant, at the close of the evidence and before the case is submitted to the jury, the court shall order an acquittal of one or more of the offenses charged if the evidence then before the court is insufficient to sustain a conviction on appeal. (PC §1118.1)

In ruling on the motion, the court must use the same test as an appellate court reviewing a conviction. The trial court must determine whether from **the evidence presented, including reasonably drawn inferences, there is any substantial evidence of the existence of each element of the offense(s) charged.** *People v. Matthews* (1994) 25 Cal. App. 4th 89, 97.

Make a very detailed record of each piece of evidence admitted with regard to each and every element of the crimes charged in an effort to persuade the court to deny the motion.

Granting of the PC § 1118 or § 1118.1 motion is not appealable. Jeopardy has attached, and the judgment is an acquittal.

V. MOTION FOR MISTRIAL

GENERAL RULE: Prosecution can not request a mistrial without creating a bar to retrial of the case.

A motion for a mistrial is a request to the court to terminate the trial before verdict. The motion should be granted if there is prejudice that cannot be cured by instruction or jury admonition. *People v. Hines* (1997) 15 Cal. 4th 997, 1038, *Curry v. Superior Court* (1970) 2 Cal. 3d 707, 713.

Grounds for mistrial include:

- Prosecutorial misconduct
- Jury misconduct, jury deadlock

Erroneous admission of incurably prejudicial evidence
Witness improperly volunteers information that has been excluded by prior ruling

As a general rule, when the defense moves for a mistrial the defendant affirmatively waives a future claim of once in jeopardy. *People v. Gibbs* (1986) 177 Cal. App. 3d 763, 765-66.) Double jeopardy does not attach when a court's mistrial ruling is based on a finding of legal necessity. *People v. Marshall* (1996) 13 Cal. 4th 799, 825.). Exception: if mistrial is provoked by prosecutorial misconduct that "goaded" the defendant into making the motion. *People v. Pitts* (1990) 223 Cal. App. 3d 606, 817.)

VI. PROSECUTORIAL MISCONDUCT

(See Professionalism Manual: "Misconduct Accusations" Chapt 10.)

Never let an accusation of prosecutorial misconduct go unanswered. Go "on the record" to deny each accusation – even if the judge does not permit a special hearing.

Defend against the accusation AND make a clear record of no prejudice to the def has occurred.

Bad faith is not required for a finding of prosecutorial misconduct. Inadvertance that leads to prejudice of the def can form the basis for prosecutorial misconduct.

Definition: PM is use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*People v. Woods* (1991) 226 Cal.App.3d 1037, 1056; *People v. Haskett* (1982) 30 Cal.3d 841, 866.)

PM need not be product of intentional malfeasance but may be result of an unintentional error to sustain a reversal. (*People v. Bolton* (1979) 23 Cal.3d 208.)

Common Areas of PM:

Failure to provide discovery
Mistating evidence
Communicating with represented person
Interfering with Def's right to produce witnesses
Improper remarks during closing argument/rebuttal

CCP gives the Court jurisdiction to hear the accusations and impose sanctions (such as suppression of evidence, exclude testimony, dismiss charges, instruct jury, monetary sanction-not under CCP 128.5-attys fees , continuance, etc.)

VII. Violations of Probation Hearings

Burden of Proof: People have the burden of proof at VOP hearing.
Standard of Proof: Preponderance of the evidence.
(*People v. Rodriguez* (1990) 51 Cal.3d 437, 441.)

Reliable hearsay is admissible at VOP hearing. "As long as hearsay testimony bears a substantial degree of trustworthiness it may legitimately be used at a VOP proceeding." (*People v. Brown* (1989) 215 Cal.App.3d 452, 455 –officer's testimony regarding lab test results for cocaine sample were admissible at VOP hearing.)

Strict compliance with the Evidence Code is not required at probation revocation hearings. While documentary evidence such as business records may be admissible with a proper foundation, hearsay statements of witnesses generally are not admissible. (*In re Miller* (2006) 145 Cal.App.4th 1228.)

A showing of good cause required to introduce hearsay at VOP hearing. –declarant unavailable, declarant can only be brought to hearing through great difficulty or expense or declarant's presence would pose a risk of harm to declarant. (*People v. Shepherd* (2007) 151 Cal.App.4th 1193.)

***Crawford v. Washington* (2004) 541 U.S. 36** does not preclude admission of lab report for drugs because VOP hearings are not “criminal prosecutions” to which the 6th Amendment applies. (*People v. Johnson* (2004) 121 Cal.App.4th 1409.) However, the Due Process clause provides a limited right of confrontation at VOP hearings.