SAN FRANCISCO
Daily Journal
www.dailyjournal.com

VOL. 122 NO. 40 TUESDAY, MARCH 1, 2016

© 2016 Daily Journal Corporation. All Rights Reserved

GUEST COLUMN

Not your father's *Terry* stop

By Marc Rotenberg

The U.S. Supreme Court is currently considering *Utah v. Strieff*, a case that concerns a search after an unlawful police stop. Under the exclusionary rule, such evidence would normally be out of bounds. But the attenuation doctrine permits the use of the evidence if an intervening act, such as a voluntary confession, "weakens the taint" of the original unlawful search.

In this case, Mr. Strieff was stopped with less than reasonable suspicion. A subsequent check for outstanding warrants produced a hit for a minor traffic violation. Strieff was then arrested. A search followed and drugs were uncovered. Strieff was charged for the drug-related offenses. He moved to exclude the evidence. The Utah Supreme Court rejected the state's claim that the

See Page 6 — SCALIA'S

DAILY APPELLATE REPORT

CIVIL LAW

Administrative Agencies: U.S. Fish and Wildlife Service did not act arbitrarily or capriciously in designating Alaskan coast and islands as critical habitat for endangered polar bears. *Alaska Oil and Gas Association v. Jewell,* USCA 9th, DAR p. 2003

Administrative Agencies: Consumers lack public interest standing to challenge bureau of Dept. of Consumer Affair's public position regarding deductibility of wear and tear under Lemon Law. *California Dept. of Consumer Affairs v. Superior Court (Lewis),* C.A. 1st/3, DAR p. 1999

Employment Law: Employer unsuccessful in overturning denial of motion to compel arbitration of wage and hour claims where court correctly holds that arbitration provision is unconscionable. *Carbajal v. CWPSC Inc.,* C.A. 4th/3, DAR p. 2015

Real Property: Sweeping reduction in compensable hours due to certain flawed billing entries effectively denied homeowners compensation for time claimed in entries that were not flawed and must be overturned. *Mountjoy v. Bank of America N.A.,* C.A. 3rd, DAR p. 2030

Real Property: Because defendant's possession of property was achieved through landlord-tenant relationship, and not buyer-seller relationship, unlawful detainer properly used by plaintiffs to regain possession. *Taylor v. Nu Digital Marketing Inc.,* C.A. 3rd, DAR p. 2050

CRIMINAL LAW

Criminal Law and Procedure: Defendant ineligible for Prop 47 relief, as resentencing language does not pertain to defendant's particular crime of identity theft. *People v. Bias,* C.A. 4th/2, DAR p. 2027

Daily Journal

Former State Bar executive Joseph L. Dunn is alleging in a retaliation claim before an arbitrator that the bar's board was falsely told that Chief Justice Tani G. Cantil-Sakauye wanted Dunn fired.

Chief justice pulled into Dunn's suit against Bar

By Lyle Moran
Daily Journal Staff Writer

The State Bar's board was falsely told that California Chief Justice Tani G. Cantil-Sakauye wanted Joseph L. Dunn to be fired as the agency's executive director before the panel took that action, Dunn has alleged in his whistleblower retaliation claim before an arbitrator.

The bar has denied Dunn's new allegation and is seeking dismissal of the case by arguing that Dunn was not a whistleblower, but was terminated for "gross misconduct, repeated acts of dishonesty, and financial improprieties."

Meanwhile, JAMS arbitrator Edward A. Infante has agreed with the bar and Dunn that future proceedings in the case before him will be public, attorney John C. Hueston of Hueston Hennigan LLP said Monday. His Los Angeles firm is defending the bar and former bar president Craig Holden.

Dunn did not level the claim about the chief justice when he filed suit days after his November 2014 firing or in an April 2015 amended complaint. *Dunn v. State Bar,* BC563715 (L.A. Super. Ct., filed Nov. 13, 2014).

But his attorney, Mark J. Geragos, of Geragos & Geragos in Los Angeles, said Monday that new evidence was developed.

In a filing before Infante dated Feb. 12, Dunn alleged that it was then-bar president Holden and Beth Jay, the then-principal counsel to the chief justice, who told the board that Cantil-Sakauye wanted Dunn terminated.

Dunn, who is running for Congress and is a former state senator, also claimed that Holden and Jay falsely informed the board in 2014 that Dunn had misrepresented the chief's position regarding the bar's potential sale of its San Francisco headquarters.

An investigative report prepared for the bar's board by Munger, Tolles & Olson LLP found that Dunn misrepresented that the chief justice supported the bar relocating from San Francisco to Sacramento.

"When the [Munger Tolles] report provided no basis to terminate Senator Dunn 'for cause,' as Respondent Holden and Respondent Jay desired, they resorted to manipulating the [Board of Trustees'] vote to terminate Senator Dunn by invoking the chief and attributing false statements to the chief," stated Dunn's notice of claims, filed by Geragos and Ben J. Meiselas.

"These communications to the BOT were false and contradicted by the chief justice's written communications with others," the claim alleged, without identifying the others.

Dunn leveled the allegations to make his case that Holden and Jay should be found liable for his intentional interference with contractual relations cause of action.

A spokesman for the chief justice said Monday that Cantil-Sakauye could not comment on pending litigation. The bar is an administrative arm of the state Supreme Court.

In an anti-SLAPP motion filed Friday that seeks dismissal of four of Dunn's five claims, the bar and Holden stated that Holden never said the chief justice wanted Dunn to be fired.

"The reasons for the termination were on the basis of the findings produced by the Munger Tolles report," Hueston told the Daily Journal in an interview. "Therefore, Mr. Dunn's allegation is untrue."

Besides allegedly misrepresenting that the chief justice supported the State Bar moving its headquarters, the anti-SLAPP motion stated that Munger Tolles determined that Dunn failed to inform the board of the state Supreme Court's opposition to AB 852 in 2014.

The bill would have allowed the bar to bring civil actions against immigration consultants who pass themselves off as attorneys and collect penalties.

Furthermore, the bar alleged that Munger Tolles found that Dunn incorrectly told the agency's board that bar funds would not be used to finance a January 2014 trip to Mongolia taken

See Page 3 — DUNN

Lawyer in *Vergara* case pens justices

In unusual move, attorney wrote letter hours after arguments

By Matthew Blake
Daily Journal Staff Writer

The plaintiff's lawyer in a nationally debated case about teacher personnel statutes performed an uncommon maneuver following Thursday's state appellate court oral arguments: He sent the appellate justices a letter to rebut points he did not respond to at oral arguments.

A few hours after hotly anticipated oral arguments in *Vergara et. al v. State of California et. al*, B258589, Theodore J. Boutrous, a partner at Gibson, Dunn & Crutcher LLP and lawyer for nine plaintiff students, filed a missive to 2nd District Court of Appeal Presiding Justice Roger W. Boren, along with Justices Brian M. Hoffstadt, and Judith Ashmann-Gerst.

The letter offered no new information, but instead cited evidence from the plaintiff's trial court victory in which Los Angeles County Superior Court Judge Rolf M. Treu ruled unconstitutional five state education statutes, including laws governing teacher tenure and dismissal, declaring they violated the state's equal protection clause.

"Plaintiffs feel compelled to identify two particular misrepresentations that defendants and intervenors raised in their rebuttal arguments, leaving plaintiffs with no opportunity to respond orally," Boutrous wrote.

The purported misrepresentations regarded evidence as to whether the challenged statues had a disparate, negative impact on poor and minority students, and also if bad teachers are consistently shuttled to schools with a concentration of poor and minority students.

Messages left with on Boutrous on Monday went unreturned.

Michael Rubin, a partner at Alsthuler Berzon LLP and attorney for intervenors California Teachers Association and the California Federation of Teachers, called it "highly unusual" to write a letter advocating what was unsaid during timed oral arguments.

Rubin filed his own letter on Friday, stating in part, "Plaintiff's letter merely repeats arguments and evidence previously discussed in respondent's briefs and at yesterday's hearing."

Lawyers who specialize in appellate law said Boutrous's action were perhaps justified.

"It is uncommon, but not unheard of, to send letters like this after argument," said Paul W. Cane, a partner at Paul Hastings LLP. Cane pointed out Boutrous had no opportunity to rebut the defense's points, due to the court's appellate-respondent-appellate format.

Added Monique Olivier, a plaintiff-side lawyer at Duckworth Peters Lebowitz LLP, "It's fair to say this is an exceptional step Mr. Boutrous is making, but

See Page 3 — ATTORNEY

High court won't review San Jose housing law

By Saul Sugarman
Daily Journal Staff Writer

Opponents of a San Jose affordable housing law on Monday failed to persuade the U.S. Supreme Court to review the ordinance, which requires property developers to set aside some of their units for low- or middle-income residents.

The decision is a "disappointment" for the Pacific Legal Foundation, or PLF, which sought review.

"PLF has been trying to get this issue addressed by the Supreme Court for a long time, and we'll continue to do that in other appropriate cases," said Tony L. Francois, a Sacramento-based senior attorney with the organization.

Richard M. Frank, the director of California Environmental Law and Policy Center at UC Davis School of Law, speculated Monday's decision was swayed by the recent death of Justice Antonin Scalia.

"Had he still been on the court, Scalia quite likely would have supported the court's granting review in the San Jose case," said Frank, who is not involved in the case. "His death may well have deprived his conservative colleagues of the crucial fourth vote necessary for Supreme Court review."

PLF and others contend the ordinance, enacted in 2010, "penalizes" property developers by denying them money they could collect on units that must be offered below market value.

It similarly punishes new homebuyers who, opponents contend, face increased sale prices on properties from owners who have passed along their losses to the next purchaser. California Building Industry Association v. City of San Jose et al., 15-330

"As a practical matter, San Jose's costly demands on homebuilders mean that fewer homes get built, and the price of market-rate homes goes up, squeezing more and more buyers out of the market," said PLF principal attorney Brian T. Hodges in a statement.

The California State Association of Counties, which supports the law, estimated 170 cities and counties in the state have enacted similar "inclusionary housing" programs.

Appeal documents by PLF and its ally, the California Building Industry Association, argued the ordinance and those like it go against federal laws that prevent the government "taking" property.

The state Supreme Court has been similarly unconvinced by this reasoning.

In a 7-0 decision in June 2015 written by Chief Justice Tani Cantil-Sakauye, the state's high court voted to greenlight the ordinance.

San Jose's law requires property developers who are making buildings with 20 or more units to offer 15 percent of them at reduced rates.

saul_sugarman@dailyjournal.com

No Fear
After years traveling the globe, San Francisco County Superior Court Judge Rochelle C. East is known for her 'quiet cool.' Page 2

Apple gets victory in battle with government
A New York magistrate judge rejected the federal government's request to order the technology giant to hack a drug trafficker's iPhone. Page 3

Lead plaintiff wants out of Trump lawsuit
Donald Trump and his legal team are not letting the lead California plaintiff in the class action against his university escape without a fight. Page 3

Housing Solutions
Brian Brown is general counsel at Ellie Mae, which makes software utilized by mortgage lenders. Page 4

Dealmakers
Shearman & Sterling LLP advised Electronic Arts Inc. in its $1 billion notes offering with U.S. Bank National Association as trustee. Page 5

Courtroom interpretation
While interpreting everything said in the courtroom may sound good, certain realities must be taken into account. By Hiram Torres Page 6

Scalia's passing may change warrant case

Continued from page 1

search for the outstanding warrant was an intervening act because "attenuation should be limited to cases involving intervening acts of a defendant's free will." Utah appealed to the U.S. Supreme Court and the court heard arguments last week, on the same day that the passing of Justice Antonin Scalia was marked with black drapery in the courtroom.

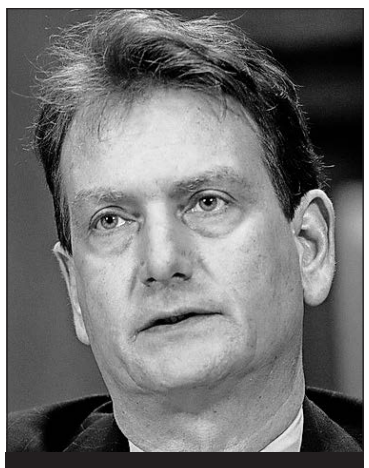
To say that the exclusionary rule is in a bit of disarray is hardly news. But the passing of Scalia and the recent focus on criminal justice issues in the media — Ferguson in particular — makes it unlikely that this case will bring clarity to the field.

The Utah Supreme Court offered a nice, bright-line rule without the need to second guess the motive of the police officer, a path courts are reluctant to go down. An alternative is to presume the search for warrants following the stop without regard to the intent of the officer. During oral argument, the chief justice suggested that the search for an outstanding warrant might well be justified during a Terry stop to ensure officer safety. The problem with that approach is that if the initial stop is impermissible, then the fact that evidence is later obtained defeats the purpose of the exclusionary rule which is to deter unlawful police conduct.

That explains why at least two members of the Supreme Court, Justices Elena Kagan and Sonia Sotomayor, expressed concern about the very high level of warrants in some parts of the country — most notably Ferguson, where 80 percent of residents have outstanding warrants, many for traffic violations. A police officer in such neighborhoods would have favorable odds stopping people on the street, knowing an outstanding warrant would likely be uncovered.

New York Times

When the Supreme Court heard oral arguments in Utah v. Strieff *last week, Justice Scalia's passing was marked with black drapery in the courtroom. Some commentators have suggested that Scalia's absence could change the outcome of the case.*



MARC ROTENBERG
Electronic Privacy Information Center

Of course, outstanding warrant rates vary across the country and it is not clear how such a rule would apply elsewhere, a point that Justice Samuel Alito made during argument.

The passing of Scalia also weighs on the case. Commentators have been quick to suggest that Scalia would have likely sided with the conservative block in overturning the Utah decision, but Scalia's vote may not have been so predictable in this case. In *Hudson v. Michigan* (2006), he wrote for the court that evidence seized in violation of the knock and announce rule need not be suppressed. That case tuned in part on his view that the evidence could still have been obtained with a warrant. In Strieff, the unlawful stop is the "but for" circumstance that did not exist in Hudson.

Also, Scalia's strong views on the Fourth Amendment were well known. "But there is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all," he wrote for the court in *Arizona v. Hicks* (1987). More recently, he wrote for the court that GPS tracking requires a warrant, *U.S. v. Jones* (2012), and castigated his colleagues for permitting the warrantless seizure of DNA evidence. "Perhaps the construction of such a genetic panopticon is wise. But I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection," he said in dissent.

Of course, it is not just the search of outstanding warrants that raises concerns about suspicionless police steps. With the rapid growth of police databases and the integration of commercial data with criminal justice information in fusion centers, the police now have access to a vast array of information about individuals. A query may not produce a warrant but it could provide sufficient information for further questioning.

The likely outcome is a 4-4 split, leaving the Utah decision intact, and the exclusionary rule free to fight another day.

Marc Rotenberg *is author of "Privacy Law and Society" (West Academic 2016) and president of the Electronic Privacy Information Center, a public interest research group in Washington, D.C. EPIC filed an amicus in support of Strieff, joined by 21 legal scholars and technical experts.*

Must we interpret everything that's said in a courtroom?

By Hiram Torres

An email from the California Federation of Interpreters (CFI) sent last October asked its members, myself included, to report certain "language access incidents," among them: "Violations of established interpreting standards, such as not providing team interpreting or *prohibiting interpreters from interpreting everything that's being said*." (Emphasis added.) Since defendants and relatives of minors cannot "prohibit" anything to an interpreter, this request appears directed at reporting lawyers and judges.

To say that "interpreting everything that's being said" is an "established interpreting standard" is quite a stretch, to say the least. The applicable California Rule of Court, Rule 2.890(b) states, in its relevant portion: "When interpreting for a party, the interpreter must interpret everything that is said during the entire proceedings."

The key word is "proceedings." Bouvier's Law Dictionary, the first dictionary of American legal terms going back to 1839 with many editions and revisions before its most recent three-volume encyclopedic dictionary, long ago derived (and still uses) the following definition from applicable case law:

"The proceedings of the courts of common law are records."

HIRAM TORRES
Interpreter

Because California is one of 49 common-law states (Louisiana being the exception), this applies to California courts. Bouvier's definition has been adopted verbatim by Merriam-Webster's online dictionary and other free online law dictionaries. Although Black's Law Dictionary is ambiguous under "proceedings," under "record" it says: "A written memorial of all the acts and proceedings in an action or a suit in a court of record." In other words, in the courts of record, all proceedings can be found in the record.

> Advocates of interpreting 'everything that's being said' argue that we should create a situation in which the person not proficient in English gets everything an English speaker could hear that may be related to 'the case.' While this may sound good at first, some courtroom realities must be taken into account.

Advocates of interpreting "everything that's being said" argue that we should create a situation in which the person not proficient in English gets everything an English speaker could hear that may be related to "the case." While this may sound good at first, some courtroom realities must be taken into account.

1. The judge may go off the record to talk about future dates with the attorneys. There is no need for the defendant or the minor's parents (in juvenile court) to hear all the details of the judges' and attorneys' vacation schedules. As a courtesy, many interpreters like myself let the person we interpret for know what's happening in general, as well as salient points that do not intrude on privacy while the court is off the record.

2. When the judge goes off the record, the reporter gets a break. Reporters generally need to rest every 60 to 90 minutes. But interpreters need to rest every 20 to 30 minutes when interpreting simultaneously, according to international standards. An interpreter who is talking his or her head off while proceedings are off-the-record will need relief more quickly, and if another interpreter is not immediately available, which is often the case, an unnecessary disruption in the proceedings will take place, or interpreter performance will go down.

3. Interpreters sometimes hear, if they try, at least part of what is being said in negotiations between the defense attorney and the prosecutor, which normally happen at the prosecutor's table. Should the interpreter convey whatever he or she can hear, which if done without the awareness of the parties in the conversation would constitute eavesdropping?

4. Similarly, the interpreter can sometimes hear references to the case in conversations before the court is in session, or during breaks. Should the interpreter convey to the defendant everything possibly related to the case said between the judge and the clerk or between the judge and the bailiff, which may involve confidential or security issues?

5. When the attorneys approach the bench to talk to the judge, there is an expectation of privacy. One interpreter I know who used the alleged standard of interpreting everything he could hear was called into chambers and told he could not interpret what is said at the bench when attorneys approach.

6. When the judge goes off the record, the conversation is often more informal, microphones are turned off or moved away, and the interpreter often hears a lot less. Should the interpreter pick any bits that are audible, and convey fragmented, even misleading information?

7. What goes on the record is what the judge considers important to understand the case, and both the judge and the attorneys can, and often do, put important information on the record that was stated off-the-record.

All California certified interpreters receive a handbook titled "Professional Standards and Ethics for California Court Interpreters," which is also available online at the Judicial Council website. Rule of Court 2.890(b) is quoted in its entirety and the word "proceedings" is mentioned five more times in the explanation that follows. And nowhere in the handbook is there a requirement that interpreters interpret "everything that's being said."

A follow-up to the October email was sent a few weeks later by Mary Lou Aranguren, a longtime CFI militant interpreter who is a member of the Commission on Judicial Performance, mentioning "our advocacy work on behalf of interpreters and those who rely on our services for meaningful language access."

Should we interpreters advocate for "those who rely on our services"? The principle of jury impartiality enshrined in the Sixth Amendment of the U.S. Constitution. It would be a serious contradiction if court clerks, court reporters and court interpreters were not bound by the same principle of impartiality. And indeed, the California Rules of Court, addressing this issue state, under Rule 2.890(c)(1): "An interpreter must be impartial and unbiased and must refrain from conduct that may give an appearance of bias."

A new request for interpreter reports came in an email from the CFI in January. We should soon know how many attorneys and judges have been reported in an upcoming CFI white paper for violating "standards" that are at variance with the California Rules of Court.

Hiram Torres *is a state and federally certified Spanish interpreter with over 30 years' experience in California courts, and a former member of the Judicial Council Court Interpreters Advisory Panel. He's currently an employee of Alameda County Superior Court.*

SUBMIT A COLUMN
The Daily Journal accepts opinion pieces, practice pieces, book reviews and excerpts and personal essays. These articles typically should run about 1,000 words but can run longer if the content warrants it. For guidelines, e-mail legal editor Ben Armistead at ben_armistead@dailyjournal.com.

WRITE TO US
The Daily Journal welcomes your feedback on news articles, commentaries and other issues. Please submit letters to the editor by e-mail to ben_armistead@dailyjournal.com. Letters should be no more than 500 words and, if referencing a particular article, should include the date of the article and its headline. Letters may not reference a previous letter to the editor.

Daily Journal

Charles T. Munger
Chairman of the Board
J.P. Guerin
Vice Chairman of the Board

Gerald L. Salzman
Publisher / Editor-in-Chief
Robert E. Work
Publisher (1950-1986)

David Houston
Editor

Ben Armistead
Legal Editor

Brian Cardile
Rulings Editor

Craig Anderson
Editor
San Francisco

Connie Lopez
Verdicts & Settlements Editor

Hannah Hartshorn
Associate Legal Editor
San Francisco

Dominic Fracassa
Associate Editor
San Francisco

Ryne Hodkowski
Associate Editor
Los Angeles

Alexandra Schwappach
Associate Editor
Los Angeles

Los Angeles Staff Writers
Kibkabe Araya, Matthew Blake, Melanie Brisbon, Steven Crighton, America Hernandez, Laurinda Keys, Justin Kloczko, Amanda Schallert, L.J. Williamson

San Francisco Staff Writers
Philip Johnson, Kevin Lee, Joshua Sebold, Fiona Smith, Saul Sugarman, Tim O'Connor

Bureau Staff Writers
Banks Albach, *Palo Alto*
Lyle Moran, *San Diego*

Legal Writers
Karen Natividad, Hetert-Qebu Walters, Maeda Riaz

Designer
Lester Jansz

Wes Marsh, *Video Editor*
Marites Santiago, *Rulings Department Clerk*

Advertising
Audrey L. Miller, *Corporate Display Advertising Director*
Monica Smith, *Los Angeles Account Manager*
Len Auletto, *San Francisco Account Manager*

Art Department
Kathy Cullen, *Art Director*

The Daily Journal is a member of the Newspaper Association of America, California Newspaper Publishers Association, National Newspaper Association and Associated Press