

## Chapter I

# Jurisdiction, Venue, and Vicinage in California High Tech Crime Felony Cases

*by Charles W. Barnes*

### I. Overview

#### A. Traditional Jurisdictional Laws in the Context of Computer Crime

As with most laws, those that govern jurisdiction, venue, and vicinage developed long before the emergence of digital technology. But while modern-day homicides are similar to homicides committed decades ago, the idea of a person's presence or location has radically evolved. "Virtual presence" and "cyberspace" are but two examples of concepts that are meaningless under common law. Due to this evolution, jurisdictional laws with their time-honored conventions of location and place may seem awkward when applied to the facts of a contemporary computer crime. For example, consider the following hypothetical.

#### B. An Illustrative Hypothetical—This Could Land on a Prosecutor's Desk

An Anywhere County criminal named A1 steals a laptop computer from a neighbor's home with the intent to commit an online fraud with the help of his friend, A2. When the laptop fails to boot, A1 and A2 set out on a drive to nearby Nextdoor County, where a crooked acquaintance of theirs, N1, has agreed to repair the machine.

A1 and A2 arrive in Nextdoor, and N1 performs the needed repairs. During the visit, A1 and N1 discuss their shared fondness for young girls. N1 mentions his cousin in New Mexico, who has access to elementary school students, and he and A1 agree to travel there in two months to take part in a pornographic photo shoot using minors as subjects. In preparation for this plan, they make a camera purchase online that same day.

The following morning, A1 and A2 begin the return trip to Anywhere County, passing through Bigtown and Smokestack Counties along the way. While en route, they park their car at the side of a residential street in Bigtown County where they find a signal from an unsecured wireless router installed in a house somewhere along the street. A1 and A2 use that signal to access the Internet with their newly repaired laptop, and successfully steal personal identifying information from a poorly secured employee database stored on a computer in distant Megaland County.

A1 and A2 also find that they can access files on a computer that is part of the home network that includes the wireless router. For laughs, they dump a "Trojan" on the local computer—and the next time the now-infected computer launches an e-mail program, a malicious message with

a subject line promising nude pictures of Paris Hilton will be sent to thousands of contacts in the current user's address book that happens to include business and personal contacts in every California county and nearly every state.

While A1 and A2 are out creating victims, A1's home desktop computer—which he leaves continuously running—is attacked by a worm and is made part of a “botnet.” A New Hampshire-based hacker launched this botnet weeks earlier, and it now scours the Internet searching for unsecured computers. It infects any vulnerable machine it finds with a Web robot. The New Hampshire hacker eventually intends to use this botnet for distributed denial-of-service attacks and other illegal and malicious activities.

Weeks after A1 and A2 return to Anywhere County, A2 uses some of the personal identifying information they stole from the Megaland-based employee database to apply for instant credit at a retailer in Capitol County. He purchases a high-definition television using the ill-gotten credit line. A month later, while A1 is off in New Mexico at the illegal photo shoot, A2 puts the television in the trunk of his car and takes it to Gold County, where he sells it to a stranger in a parking lot.

Given the above facts,

1. Which counties are proper venues for the defendants' violations of Penal Code section 502—unauthorized access of a computer system?
2. Which counties are proper venues for the defendants' violations of Penal Code section 530.5—identity theft crimes?
3. Which counties are proper venues for a trial of the fraudulent television purchase?
4. Does California have jurisdiction over the child pornography offenses? If so, which counties are proper venues for the defendants' child pornography offenses?
5. Does California have jurisdiction over the New Hampshire-based botnet attack?

See the final section of this article for suggested answers.

## II. Jurisdiction

A court may not decide a case unless it has personal jurisdiction over the defendant **and** jurisdiction over the subject matter of the offense. Subject matter jurisdiction is the fundamental power of the court to decide a case.<sup>1</sup> So when does a court in California have jurisdiction over a criminal case?

*Note:* This chapter deals exclusively with subject matter jurisdiction. The arguably less problematic issue of personal jurisdiction is not addressed here.

## A. The Law of Jurisdiction: Codes and Cases

### 1. Jurisdiction based on location

Unless a crime is an exclusively federal offense, California has jurisdiction over crimes committed, in whole or in part, within the state under the following California code sections:

#### a. Penal Code section 777—Crimes committed inside the state

“Every person is liable to punishment by the laws of this State, for a public offense committed by him therein, except where it is by law cognizable exclusively in the courts of the United States.”

#### b. Penal Code section 778—Crimes completed inside California but initiated out of state

When the commission of a public offense, commenced without the State, is consummated within its boundaries by a defendant, himself outside the State, through the intervention of an innocent or guilty agent or any other means proceeding directly from said defendant, he is liable to punishment therefore in this State.

#### c. Penal Code section 778a(a)—Crimes committed outside of California with in-state preparatory acts

“Whenever a person, with intent to commit a crime, does any act within this state in execution or part execution of that intent, which culminates in the commission of a crime, either within or without this state, the person is punishable for that crime in this state in the same manner as if the crime had been committed entirely within this state.”

One example of a preparatory act that establishes jurisdiction in California is detailed in *People v. Betts*.<sup>2</sup> This involved transporting persons out of California with the intent to assault them in another state. The defendant’s act of driving his victims to the place of the crime was conduct that “furthered the completion of the charged offenses”<sup>3</sup> and thereby established jurisdiction in California.

#### d. Crimes that have detrimental effects on California

California may exercise jurisdiction over out-of-state crimes that injure California and its residents. The United States Supreme Court stated the following in *Strassheim v. Daily*:<sup>4</sup>

Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if [the defendant] had been present at the effect.<sup>5</sup>

The California Supreme Court echoed this language in *People v. Betts*:

[A] state may exercise jurisdiction over criminal acts that take place outside of the state if the results of the crime are intended to, and do, cause harm within the state. [Citation.]<sup>6</sup>

Based on the fact that California may exercise jurisdiction over out-of-state crimes that injure the state and its residents, what are the limits of jurisdiction based on detrimental effects?

First, the injury must be intentional. The language of *Strassheim* and *Betts* limits California's and other states' extra-territorial jurisdiction to crimes that intentionally caused the in-state injury.<sup>7</sup>

Second, the defendant's activities inside of California may be significant. Dicta in *Strassheim* suggest that the defendant need not perform any crime-related acts within a state before that state can claim jurisdiction. Note, however, that both *Strassheim* and *Betts* did in fact involve in-state, crime-related conduct by defendants.<sup>8</sup>

**e. Penal Code section 778b—Crimes aided by an out-of-state person**

California may exercise jurisdiction over crimes committed with the help or encouragement of someone outside of the state:

Every person who, being out of this state, causes, aids, advises, or encourages any person to commit a crime within this state, and is afterwards found within this state, is punishable in the same manner as if he had been within this state when he caused, aided, advised, or encouraged the commission of such crime.

**2. Crime-specific jurisdictional statutes**

Special jurisdictional rules exist for specified crimes. For example, stolen items brought into California confer jurisdiction on California. Also, acts carried out in California to further a conspiracy to commit a crime in **another** state may also confer jurisdiction here.

**a. Penal Code section 497—Transportation of stolen and embezzled property into the state**

Every person who, in another state or country steals or embezzles the property of another, or receives such property knowing it to have been stolen or embezzled, and brings the same into this state, may be convicted and punished in the same manner as if such larceny, or embezzlement, or receiving, had been committed in this state.

**b. Conspiracies whose overt acts take place in California**

California courts have jurisdiction over conspiracies to commit out-of-state crimes if the defendants entered into an agreement to commit the offense and committed acts in furtherance of the conspiracy within the state of California.<sup>9</sup>

## **B. Trial Issues**

### **1. Jurisdiction is a question of law to be decided by the court before trial**

Jurisdiction is a question of law for the court and is a threshold matter that should be resolved before trial in order to give the defendant the opportunity to seek immediate review through a writ proceeding.<sup>10</sup>

### **2. Jurisdiction cannot be waived or conferred by consent**

An objection based on lack of jurisdiction can be raised at any time and may even be raised for the first time on appeal.<sup>11</sup> Compare this to venue (discussed below) where a defendant who fails to make a timely venue objection before trial forfeits his venue rights and may not later raise the issue either at trial or on appeal.<sup>12</sup>

### **3. Burden of proof**

The prosecutor has the burden of establishing jurisdiction by a preponderance of the evidence.<sup>13</sup>

### **4. The jurisdiction of every California superior court extends throughout the state**

In California, every superior court has subject-matter jurisdiction with regard to any felony offense committed within the state, no matter where in California the offense was committed.<sup>14</sup>

## **III. Venue**

While jurisdictional laws control whether a California court has authority to decide a criminal matter, venue laws determine which California counties are proper places for the trial.

Venue has a different constitutional status than jurisdiction. The right of a defendant not to be tried by a court that lacks jurisdiction is guaranteed under the United States Constitution. By contrast, venue rights are creations of statutory law.<sup>15</sup> Because of this distinction, a defendant can forfeit his right to a trial in a particular county, and may also voluntarily waive his rights of venue.<sup>16</sup>

Venue can be conferred on a county as a result of (1) the location of the crime; (2) the location of a crime's "acts and effects;" and (3) other statutorily defined factors (listed below) applicable only to specified crimes.

### **A. Venue Based on Location of the Crime**

A given California county is a proper venue for the following offenses:

**1. Penal Code section 777—Crimes committed entirely in the county**

“[E]xcept as otherwise provided by law the jurisdiction of every public offense is in any competent court within the jurisdictional territory of which it is committed.”

*Note:* This statute, like Penal Code sections 778 and 781, refers to “jurisdictional territories.” In fact, these sections govern venue.<sup>17</sup>

**2. Penal Code section 778—Crimes completed in the county, but initiated outside of California**

“When the commission of a public offense, commenced without the State, is consummated within its boundaries by a defendant, himself outside the State ... he is liable to punishment therefore in this State in any competent court within the jurisdictional territory of which the offense is consummated.”

**3. Penal Code section 781—Crimes committed partly in the county**

“When a public offense is committed in part in one jurisdictional territory and in part in another ... the jurisdiction of such offense is in any competent court within either jurisdictional territory.”

*Example:* If a defendant steals a name, address, and Social Security number in Sacramento County and subsequently uses that information to get a line of credit in Los Angeles County, either county is a proper venue for the offense because the elements of the offense were committed in each county.

**4. Penal Code section 782—Crimes committed near the county borders**

“When a public offense is committed on the boundary of two or more jurisdictional territories, or within 500 yards thereof, the jurisdiction of such offense is in any competent court within either jurisdictional territory.”

**5. Penal Code section 783—Crimes committed in vehicles that have passed through the county**

Offenses committed in cars and other vehicles in the course of travel may be tried in any county through which the vehicle passed, including the county where the trip ended.

“When a public offense is committed in this State, on board a vessel navigating a river, bay, slough, lake, or canal, or lying therein, in the prosecution of its voyage, or on a railroad train or car, motor vehicle, common carrier transporting passengers or on an aircraft prosecuting its trip, the jurisdiction is in any competent court, through, on, or over the jurisdictional territory of which the vessel, train, car, motor vehicle, common carrier or aircraft passes in the course of its voyage or trip, or in the jurisdictional territory of which the voyage or trip terminates.”

*Example:* When a rape occurs inside a vehicle that passes through more than one county, any of those counties is a proper venue for trial.

*Note:* Although venue provisions generally should be liberally interpreted in order to expand venue beyond a single county,<sup>18</sup> Penal Code section 783 has been interpreted more strictly. *People v. Bradford*<sup>19</sup> held that a murder committed directly outside of a car at the side of a highway could not be tried in a different county, where the defendant’s journey ended. *Bradford* reasoned that Penal Code section 783 was inapplicable insofar as it was intended to provide for venue in cases where the crime’s place of commission could not be determined with certainty.

## **B. Penal Code section 781—Venue Based on “Acts and Effects”**

A defendant’s crime-related acts, as well as the effects of his conduct, may confer venue even on a county where no single element of a crime was carried out.

When ... the acts or effects ... constituting or requisite to the consummation of [an] offense occur in two or more jurisdictional territories, the jurisdiction of such offense is in any competent court within either jurisdictional territory.

### **1. What kind of “acts” confer venue?**

#### **a. Preliminary arrangements for the crime**

In *People v. Malloy*,<sup>20</sup> the defendant drove minors from San Francisco County to Sonoma County where he sexually assaulted them. The court held that San Francisco County was a proper venue for the crimes based on the implied finding that the defendant had made preliminary arrangements for the crime in San Francisco, including “collecting the boys in San Francisco and driving them to the cabin” located in Sonoma County.<sup>21</sup>

*Betts* held that noncriminal, preliminary acts in Riverside County—taking a minor girl from her mother’s home and driving her to Los Angeles County with the intent to molest her there—conferred venue on Riverside County for the assaults later committed in Los Angeles County.

#### **b. Acts that share a “common purpose” with the crime**

When a defendant commits in one county acts that share a “common purpose” with a crime committed in a different county, the county where the acts were committed is a proper venue for the trial of the crime. These venue-conferring acts include attempts to thwart a law enforcement response to a crime.

*People v. Bismillah* (1989) 208 Cal.App.3d 80—When a defendant fleeing a traffic stop drives into a neighboring county where he assaults law enforcement in his continuing attempt to evade arrest, that assault can be tried in the county where the defendant first fled the arrest.

*People v. Hernandez* (1976) 63 Cal.App.3d 393—The defendants committed kidnapping and rape in Madera County. Later while in Fresno County, they stole the rape victim’s purse in order to conceal evidence of their crimes. Fresno County was held to be a proper venue for trial of the kidnapping and rape because the theft was committed to “thwart discovery of defendant’s involvement in the already-committed crimes of kidnapping and rape,” and was “necessary to successful completion of those offenses without detection by law enforcement officials.”

*People v. Gutierrez* (2002) 28 Cal.4th 1083—The defendants attempted to murder a police officer in order to avoid detection for a kidnapping in a neighboring county. The court held that the county of the kidnapping was also a proper venue for attempted murder, because the purpose of the attempt was to “thwart detection and arrest” and therefore was “requisite to the consummation of the [ongoing kidnapping].”

*Note:* “Common-purpose acts” may need to occur in close succession to confer venue. The *Bismillah* court noted that the crime-related act (collision) and the actual crime (assault) occurred “sequentially, without a gap in the flow, over a short period of time, and ... were linked together with a common purpose.”<sup>22</sup> *Hernandez* noted that the crime-related act (robbery) and the associated crimes (rape/kidnapping) “occurred consecutively over a comparatively brief time frame.”<sup>23</sup>

## 2. What kinds of “effects” confer venue?

The sole California case that addresses what kinds of effects can confer venue under section 781 is *People v. Posey*,<sup>24</sup> which based its holding on a defendant’s “preparatory effects.”<sup>25</sup>

### a. “Preparatory effects”: telephone calls into the forum county

The defendant in *Posey* made calls from a telephone in San Francisco County to undercover officers in Marin County for the purpose of arranging drug deals. The court held that the calls made by the defendant constituted “preparatory effects” in Marin County, and were sufficient to establish venue there for a trial on the drug charges.<sup>26</sup>

### b. Harmful effects

Many kinds of criminal conduct, and perhaps high tech criminal conduct particularly, have the power to cause harm in locations remote from the active criminal behavior. Do these harmful effects confer venue on a county that the defendant has never entered, communicated with, or targeted? If the answer is *yes*, what authorities support that answer?

In some cases, the supporting authority comes directly from statutes that provide specialized venue rules for specified crimes. These are listed below. However, in instances where no crime-specific statute expressly provides for jurisdiction, the policies underlying venue rules may be helpful in making the argument.

### c. Policies advanced by venue statutes

#### *The interests of the community*

- Venue is intended to protect the interests of a community that is affected by a crime.<sup>27</sup>
- Venue statutes call for a liberal interpretation, and their purpose is to expand venue beyond a single county.<sup>28</sup>
- Penal Code section 781 (which confers venue on a county where “acts and effects” take place) should be read in the light of common sense, and in light of the specific facts of a case, and should not be applied mechanically or rigidly.<sup>29</sup>

#### *The interests of the defendant*

- Venue in a county is proper if it does not unfairly force the defendant to stand trial in a distant locale.<sup>30</sup>
- “Venue shopping” should not be undertaken in order to gain a strategic advantage.<sup>31</sup> Instead, a prosecutor’s choice of venue should endeavor to protect the right of an offended community to pass judgment in criminal matters.<sup>32</sup>

If relevant, arguments in favor of venue in a particular county may also cite *Posey* for the proposition that defendant’s harmful effects on a community and its residents confer venue regardless of the defendant’s intentions vis-à-vis that county.

Defendant’s acts and effects need not target the forum in order to confer venue. *Posey* held that the defendant’s ignorance of the identity of the county he was making telephone calls to was irrelevant to the question of venue.<sup>33</sup> Compare this with the “detrimental effects” that establish jurisdiction: *Strassheim* held that jurisdiction is established by “acts done outside a jurisdiction but intended to produce and producing detrimental effects within it.”<sup>34</sup>

## C. Venue Statutes for Specified Crimes

The California Penal Code provides special venue rules for specified offenses. While many of these statutes address “traditional” rather than high tech crimes, they may still become relevant in a high tech case. Recall that under the reasoning of *Bismillah, et al.*, if a murder is committed to conceal a computer crime, the forum where the murder took place may also be a proper venue for the trial of the computer offense.

### 1. Identity theft

Penal Code section 786(b)(1) provides for venue where personal identifying information was stolen or used: “The jurisdiction of a criminal action for unauthorized use of personal identifying information, as defined in Section 530.5 of the Penal Code, shall also include the county where the theft of the personal identifying information occurred, or the county where the information was used for an illegal purpose.”

Penal Code section 786(b)(2) permits multiple offenses committed in multiple counties to be prosecuted at a single trial as long as the same victims and the same personal identifying information are involved. Joinder of cases under this statute requires a motion and evidentiary hearing.

If multiple offenses of unauthorized use of personal identifying information occur in multiple jurisdictions (all involving the same defendant or defendants and the same personal identifying information belonging to the one person) any one of those jurisdictions is a proper jurisdiction for all of the offenses.

## **2. Computer intrusion**

Penal Code section 502 criminalizes the unauthorized access of a computer and makes the county of the compromised computer the venue as well as the county where the defendant performed the acts of unlawful access. “(j) a person who causes, by any means, the access of a computer, computer system, or computer network in one jurisdiction from another jurisdiction is deemed to have personally accessed the computer, computer system, or computer network in each jurisdiction.”

## **3. Conspiracy**

In a prosecution for conspiracy, any county in which an overt act in furtherance of the conspiracy is committed is a proper venue.<sup>35</sup>

*Example:* A telephone call into the forum county by another co-conspirator was sufficient to support that county’s exercise of venue in a drug-transport case, even though the call was placed from outside the county.<sup>36</sup>

## **4. Stolen property**

In prosecutions where stolen property is brought across county lines, Penal Code section 786(a) provides for venue in the following places:

- The county into which the property was transported;
- The county where the property was stolen; and
- Any contiguous county where the defendant was arrested if the defendant consents, and he committed a property crime in the county of arrest.

When property taken in one jurisdictional territory by burglary, carjacking, robbery, theft, or embezzlement has been brought into another, or when property is received in one jurisdictional territory with the knowledge that it has been stolen or embezzled and the property was stolen or embezzled in another jurisdictional territory, the jurisdiction of the offense is in any competent court within either jurisdictional territory, or any contiguous jurisdictional territory. If the arrest is made within the contiguous territory, the prosecution secures on the record the defendant’s knowing, voluntary, and intelligent waiver of the right of vicinage, and the defendant is charged with one or more property crimes in the arresting territory.

## **5. Homicide**

Proper venue for trials of homicide offenses includes any of the following:

- Where the fatal injury occurred;
- Where the victim died;
- Where the body was found;
- In a contiguous county when relevant facts took place near the county border.

Section 790(a) The jurisdiction of a criminal action for murder or manslaughter is in the county where the fatal injury was inflicted or in the county in which the injured party died or in the county in which his or her body was found.

When the fatal injury was inflicted and the injured person died or his or her body was found within five hundred yards of the boundary of two or more counties, jurisdiction is in either county.

## D. Trial Issues

### 1. Venue is question of law

Whether or not a county is the proper venue is a question of law to be determined by the court.<sup>37</sup>

### 2. Failure to make a timely venue objection waives the issue permanently

An objection to the proposed venue of a felony trial must be specifically raised before the trial, or the objection is waived and may not be raised later, either at trial or on appeal.<sup>38</sup>

*Note:* *Simon's* holding, because it changed a longstanding rule that venue is a factual jury question, applies only prospectively from the date of the 2001 decision.

## IV. Vicinage

Vicinage refers to the geographical area from which a jury may be drawn consistent with constitutional and statutory law.<sup>39</sup> In California, the basic rule is simple: the jury may be drawn from the county that is a proper venue (i.e., boundaries of vicinage are coterminous with boundaries of county).<sup>40</sup>

### A. Cases

#### 1. A jury can be from a county other than the one where a crime was committed without violating the right of vicinage

In *Price v. Superior Court*,<sup>41</sup> the court held that a statute that permitted joinder of sexual offenses committed in multiple counties did not deprive a defendant of vicinage rights. The court held that as long as there is a “reasonable relationship” between the place of the trial and the offense, California constitutional requirements are satisfied.

*Note:* The reasoning of *Price* applies equally to Penal Code section 786(b)(2), which similarly authorizes certain identity theft offenses to be tried in counties where the offense may not have been committed.

## 2. Vicinage rights are not violated by drawing juries from counties where only preliminary acts occurred

Counties where preliminary acts are committed have a reasonable relationship to the offense, and therefore drawing a jury from that county is consistent with vicinage rights.<sup>42</sup>

## 3. Failure to object to vicinage waives rights

As with venue, vicinage rights can be deemed waived by failure to timely assert them.<sup>43</sup>

## V. Conclusion

Prosecutions that involve jurisdictional or venue theories not commonly seen in the courts may cause unnecessary litigation and delay. Prosecutors can often avoid this problem by including a brief statement of the jurisdictional or venue theory with citations to appropriate authority in the accusatory pleadings.

### ENDNOTES

1. *Greener v. Workers' Comp. Appeals Bd.* (1993) 6 Cal.4th 1028.
2. *People v. Betts* (2005) 34 Cal.4th 1039, cert. denied June 20, 2005.
3. *Id.* at 1056.
4. *Strassheim v. Daily* (1911) 221 U.S. 280.
5. *Id.* at 285.
6. *Betts, supra* at 1046.
7. *Strassheim, supra* at 285; *Betts, supra* at 1046.
8. *Strassheim, supra* at 284; *Betts, supra* at 1044.
9. *People v. Morante* (1999) 20 Cal.4th 403.
10. *Betts, supra* at 1052.
11. *Griffin v. Griffin* (1953) 122 Cal.App.2d 92.
12. *People v. Simon* (2001) 25 Cal.4th 1082.
13. *People v. Cavanaugh* (1955) 44 Cal.2d 252.
14. See, e.g., *People v. Sering* (1991) 232 Cal.App.3d 677; *People v. Remington* (1990) 217 Cal.App.3d 423.
15. See, e.g., *Price v. Superior Court* (2001) 25 Cal.4th 1046.
16. *People v. Campbell* (1991) 230 Cal.App.3d 1432.
17. See *Simon, supra* at 1095–1096.
18. See, e.g., *People v. Posey* (2004) 32 Cal.4th 193.
19. *People v. Bradford* (1976) 17 Cal.3d 8.
20. *People v. Malloy* (1962) 199 Cal.App.2d 219.
21. *Id.* at 225.
22. *Bismillah, supra* at 87.
23. *Hernandez, supra* at 403.
24. *Posey, supra*.
25. *Ibid.*
26. *Ibid.*
27. *Simon, supra*.
28. *Posey, supra* at 218.
29. *Bismillah, supra* at 84.
30. *Simon, supra*.
31. *Ibid.*
32. *Hernandez v. Municipal Court* (1989) 49 Cal.3d 713, overruled on a different point by *Price v. Superior Court* (2001) 25 Cal.4th 1046.
33. *Posey, supra* at 220.
34. *Strassheim, supra* at 285 (emphasis added).

35. *Campbell, supra.*
36. *People v. Price* (1989) 210 Cal.App.3d 1183.
37. *Posey, supra.*
38. *Simon, supra.*
39. *Bismillah, supra.*
40. *People v. Tamble* (1992) 5 Cal.App.4th 815.
41. *Price, supra.*
42. *Campbell, supra.*
43. *Tamble, supra.*

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