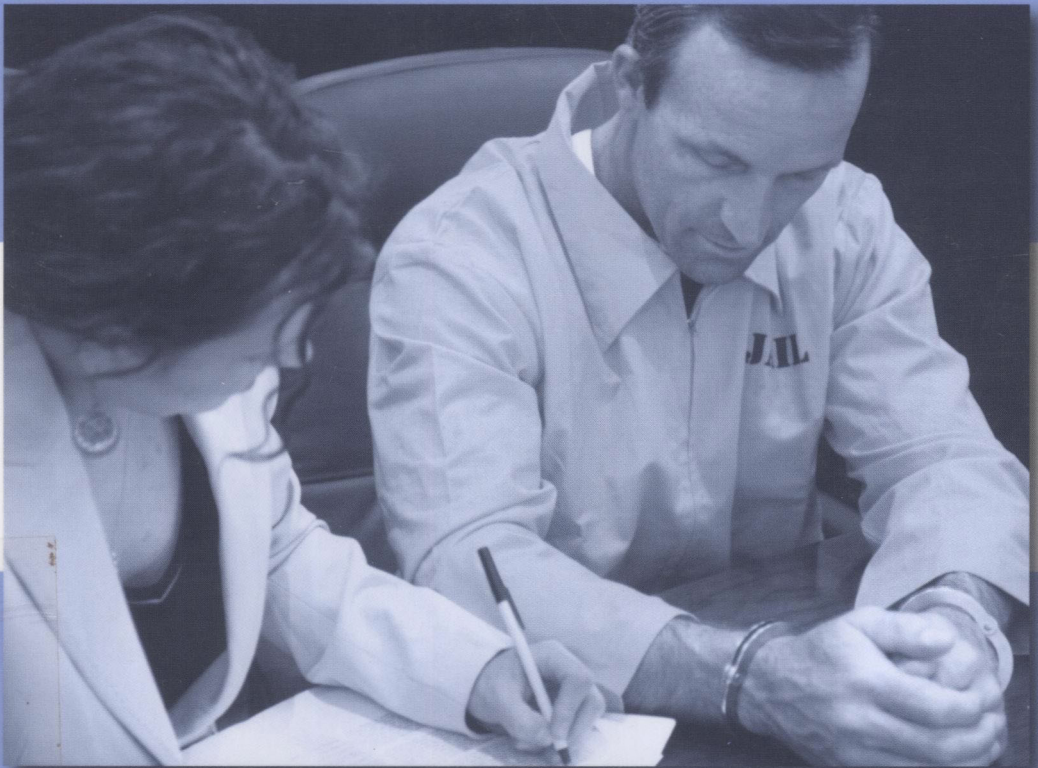


CRIMINAL LITIGATION IN ACTION

SECOND EDITION



LAURA BEREND & JEAN RAMIREZ

Criminal Litigation in Action

SECOND EDITION

Laura Berend & Jean Ramirez

PROFESSORS OF LAW
UNIVERSITY OF SAN DIEGO SCHOOL OF LAW



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Criminal Litigation in Action

*We dedicate the second edition of this book to our partners,
Bill Ziegler and Kellie Cardona.*

Introduction

The book is a primer on criminal litigation in the trial courts. The book is based on the fictitious but realistic criminal case of *People v. Roger Battistone* and tracks the case from arrest through sentencing. Students learn by doing. When the class addresses bail, students participate in a simulation exercise as a prosecutor, defense counsel, or judge at a bail review hearing. Similarly, students participate in simulation exercises on charging, interviewing and counseling, preliminary hearings, grand jury proceedings, discovery, motions, plea bargaining, and sentencing. Along the way, students become familiar with the various stages of a criminal case by applying the law found in judicial opinions, statutes, rules of court, professional responsibility rules, local rules, and jury instructions, to the facts of the *Battistone* case.

Jurisdiction, Disclaimer, and Dates

The case is set in the jurisdiction of Ocean Beach in San Diego County in the State of California. Ocean Beach and San Diego are very real and beautiful cities in a very real and beautiful San Diego County in Southern California where we have the good fortune to live and teach. Cases, statutes, and other legal and written sources are also real. However, any similarities to people, places, or fact situations are the product of our combined imaginations and are purely coincidental. References to years are in relation to the present; for example YR-0 refers to this year, and YR-22 refers to twenty-two years ago.

Second Edition

In addition to updating the materials, we have expanded references to professional responsibility obligations throughout the text. The materials are informed by our personal experiences in criminal trial practice for the prosecution (Professor Ramirez) and for the defense (Professors Berend and Ramirez), our teaching experience, our return to practice during sabbatical leaves, and the generous contributions and helpful critiques from the San Diego criminal practice community. As they have transitioned from students to alums to seasoned lawyers, our students have continued to enrich our teaching.

Acknowledgments

The first edition of this book benefitted greatly from the contributions of the following people and organizations:

Desirae Wooden, for creating Rosie's "injuries," and Sue Hegle, for modeling Rosie's injuries.

Gabrielle Cerda, M.D., and Barb Dodd-Waddington, R.N., for sharing their medical expertise.

Vince Brunkow, Federal Public Defenders of San Diego, Inc., Jacqueline Crowle, Department of the Alternate Public Defender, County of San Diego, and Lisa Rodriguez, Office of the District Attorney County of San Diego, for sharing their legal expertise.

Chéré Smith and Roger Stattel, University of San Diego School of Law, for providing technical support.

The former criminal clinicians at the University of San Diego School of Law, who may have contributed to the original Battistone arrest report.

Professor Daniel Rodriguez, Dean of the University of San Diego School of Law, for awarding research grants to prepare these materials.

For the second edition, Professors Berend and Ramirez thank the University of San Diego for approving their sabbaticals with the San Diego County Office of the Alternate Public Defender and the San Diego County Office of the District Attorney, respectively. Both sabbatical terms offered experiences that updated our criminal trial court skills and enriched our teaching and this book.

We thank former Dean Kevin Cole and the University of San Diego School of Law for supporting the completion of the second edition of this book with a research grant.

First and foremost, we express our gratitude to Deputy District Attorney Lisa Rodriguez for her extraordinary assistance with this edition, being available for questions, teaching classes with us, mentoring our students, critiquing this book, and for being generally a cheerful and indispensable resource. We are very proud of this University of San Diego School of Law alumnus and former student who became familiar with the case file and some of the materials in this book when she was a law student.

We thank Jacqueline Crowle, retired from the San Diego Office of the Alternate Public Defender, for her helpful comments and suggestions to both editions. We deeply appreciate Deputy District Attorney Chris Lindberg's assistance with the chapter on the grand jury and for bringing that chapter alive in the classroom. We are grateful to the many other capable and generous alums and other San Diego criminal practitioners who have contributed their expertise to our teaching and our classes over the years, and enabled us to forge a mutually beneficial relationship between our students and the criminal practice community.

We thank Andrew Burnett, University of San Diego School of Law class of 2012 for his extraordinary research assistance, technical abilities, steadfast support, and boundless energy in preparing this edition. We also thank Eric Yaeckle and Kevin Fard, University of San Diego School of Law class of 2010, for their research assistance.

We thank our indispensable executive assistant, Leilani Sharrett, for her creativity in preparing exhibits and documents, and for creating the CD that accompanies this book. We thank Leilani and Roger Stattel, our technology specialist, for their invaluable technical expertise, endless patience, and constant availability.

We appreciate Carolina Academic Press's Tim Colton's steadfast availability for unraveling a seemingly endless number of formatting and code dilemmas that surfaced as we prepared this edition.

Copyright Acknowledgments

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Criminal Litigation in Action

Chapter 1

Arrest

An arrest is a seizure of the person, governed by constitutional and statutory law.¹ An arrest occurs when a person is taken into custody by being physically restrained or by submitting to custody.² Either a law enforcement officer or a civilian may make an arrest.³

There are a variety of circumstances that can lead to an arrest. A person can be arrested without a warrant when he or she has committed a public offense in the arresting person's presence, and when the person effecting the arrest has probable cause to believe that the person has committed a felony.⁴ A person can also be taken into custody on a warrant issued by a judicial officer.⁵

The arrest report in the *Battistone* case follows. Roger Battistone was arrested without a warrant and has remained incarcerated since his arrest.

1. See, e.g., U.S. CONST. Amend. IV; CAL. PENAL CODE §§ 835, 836, 837 (West 2011) [hereinafter P.C.].

2. P.C. § 835.

3. *Id.* §§ 836 (law enforcement officers), 837 (civilians). Under some circumstances, a law enforcement officer can issue a citation to appear to a suspect rather than effect an arrest. *Id.* §§ 853.5 (infractions); 853.6 (misdemeanors).

4. A civilian making a felony arrest on the basis of probable cause must be correct that a felony was committed. Compare *Id.* 836 (arrests with and without warrants by law enforcement officers) with § 837 (arrests by private citizens).

5. An arrest warrant can be based on a complaint issued by a prosecutor containing, in addition to the statutory language of the charged offense, sworn information establishing probable cause (usually in the form of an affidavit). *Id.* § 813. A prosecutor may choose to request the issuance of a summons as an alternative to an arrest warrant, which notifies a defendant to appear in court. *Id.* An arrest warrant may be issued for a person charged with the commission of a crime, with violation of the terms of his bail, probation or parole, or with escape from or in another state. *Id.* § 1551. A judicial officer may also issue a warrant of probable cause for an arrest based on a declaration of probable cause by a law enforcement officer unaccompanied by a complaint. *Id.* § 817. A person who has been arrested or who has appeared in court may be taken into custody pursuant to a bench warrant if that person fails to appear in court as required by law. *Id.* § 978.5(a). A magistrate may issue a bench warrant for a defendant who has been released on bail or the deposit of other property, and who fails to appear in court. *Id.* § 979.

**OCEAN BEACH POLICE DEPARTMENT****ARREST REPORT****Arrest:**

Arrest Date/Time: 8/16/YR-0 at 1800 hours

Location of Arrest: 5017 Voltaire, Ocean Beach

Arresting Officer: C.E. Benson #1434

Admonished? Yes

Admonishing Officer: C.E. Benson #1434

Waived Rights? No.

Statement? Yes. See narrative.

Offense:

Charges: PC 211, PC 487(c), PC 496(a), PC 484f(b), PC 242, PC 148(a)(1), H&S 11550(a)

Offense Date/Time: 8/16/YR-0 at 1700 hours

Location of Offense: Newport & Abbott, Ocean Beach

Arrestee:

Name: Roger Battistone, AKA "Flyman"

Booking No.: YR-0/167062A

Driver's License No.: K0178434 (California)

Social Security No.: 523-62-1498

D.O.B.: 6/3/YR-29

Age: 29

Sex: Male

Race: White

Height/Weight: 5' 3", 125 lbs.

Hair/Eyes: Brown/Brown

Build: Light

Additional Description: Long, fine hair worn in a ponytail; clean-shaven, pock-marked face; needle tracks and scarring on inner left arm

Clothing Description: Torn blue jeans, red T-shirt with "cocaine" on front

Address: 5050 Cape May Avenue, Ocean Beach

Home Phone: 222-4990

Occupation: Car Washer

Employer: Unemployed

Business Phone: N/A

Business Address: N/A

Relationship to Victim? Acquaintance

Victim:

Name: Rosie Rawls

D.O.B.: 3/8/YR-38

Age: 38

Sex: Female

Race: White

Address: 4914 Voltaire, Ocean Beach

Home Phone: 223-7414 (cell phone)

Employer: N/A

Business Phone: N/A

Business Address: N/A

Relationship to Suspect? Acquaintance

Other Witness(es):

Name: Don Johnson

D.O.B.: 3/15/YR-41

Age: 41

Sex: Male

Race: White

Address: 2384 Bacon Street, Ocean Beach

Home Phone: 222-0608

Employer: N/A

Business Phone: N/A

Business Address: N/A

Relationship to Suspect? Acquaintance

Relationship to Victim? Acquaintance

Narrative:

Officer C.E. Benson and I were on routine patrol in uniform at 1710 hours on August 16, YR-0, when we were hailed by a woman in front of Reyad's Felafel Shop at 110 Newport Avenue in Ocean Beach. The woman, identified as Rosie Rawls, stated that her purse had been snatched by a white male adult known to her as "Flyman." She gave the following description of the suspect: 5'10", 160 lbs., wearing torn blue jeans and a red T-shirt with the word "cocaine" on the front, written in script resembling that used for the Coca-Cola trademark logo. Suspect has long brown hair and acne, and Rawls said he sells drugs.

The suspect struck the victim, Rawls, in the face with his fist three times and kicked her in the back, knocking her to the ground. He grabbed the handle of her purse and tried to take it. She held on and he dragged her by the purse until she had to let go. There was \$65 in the purse: six tens and one five. The suspect fled east on Newport Avenue.

We also contacted an eyewitness, Don Johnson. Johnson is known to this officer from numerous prior arrests for being under the influence of drugs, possession of paraphernalia, and felony possession charges. Johnson made the following statement, "I was kicking back when I heard Flyman and Rosie going at it. Rosie used to be my old lady and she's a rip-off. I heard Flyman shout something at her but I couldn't make out the words. He slapped her twice and she slapped him back. Then they struggled over a purse. Flyman pushed Rosie down and split." Johnson said he knows Flyman from previous contacts and would recognize him if he saw him again.

At 1800 hours, while on patrol in the same area, my partner and I saw a WMA with long hair and a "cocaine" T-shirt a few blocks from the site of the attack. We approached the suspect and asked him if he was Flyman. When he refused to respond and turned away, we began to arrest

him. As I began the arrest, the suspect pulled away, shouting "You fucking pigs ... I'll kill you." Officer Benson had to assist me in overcoming the suspect's resistance.

After handcuffing the suspect, a search of his pockets revealed a black leather tobacco pouch. A search of the pouch revealed \$63 (six tens and three singles), a credit card in the name of Rosie Rawls, a price tag, and a credit receipt for a pouch dated 8/16/YR-0 in the amount of \$26.10 from the Trip East on Newport Avenue, signed "Rosie Rawls." All of these items were impounded.

While searching and subduing the suspect, I noticed that his pupils were constricted and his voice was low and raspy. I also observed a fresh injection site. We transported the suspect in our marked patrol car to the victim's residence and contacted Rosie Rawls. She immediately identified the suspect as "Flyman," the man who had assaulted her and taken the money. She also told us she hadn't charged any merchandise at Trip East that day and did not recognize the credit card receipt we showed her.

En route to the county jail, the suspect began complaining of physical discomfort. We decided instead to transport him to City Hospital for treatment. While en route to the hospital, I asked the suspect where he got the money. He volunteered that "The money is mine. That fat slob, Rosie, owed it to me. She still owes me \$35 more." He made no further statements.

At the hospital, the suspect identified himself as Roger Battistone. A blood sample was drawn over his objection. The suspect had to be again physically restrained. After being advised of his rights, he was booked into the county jail. The blood sample was impounded.

Evidence:

Disposition: Impounded at Ocean Beach Police Department Evidence Room.

Property Tag Nos.: OBPD 1786217 (black leather tobacco pouch, six ten-dollar bills and three singles, credit card in the name of Rosie Rawls, price tag and credit card receipt); OBPD 1786218 (blood sample).

Report Preparation

Reporting Officer: Jason Sanford #2096

Report Date/Time: 8/16/YR-0 at 2300

Report Approval: LMB #1023