Harvey-Madden

When and how prosecutors must substantiate the transmission of "official channels" information

"The important consideration here is not whether a burglary was in fact being committed, but whether a radio call went out which justified the stop of appellant."[1]

In the preceding article ("Official Channels") we discussed how officers may detain, arrest, and search suspects in reliance on requests to do so from other officers. We also explained that officers may rely on information from other officers in determining whether there are grounds for such action.

But while such reliance is permissible, if the subsequent detention, arrest, or search results in the discovery of incriminating evidence, the defense may require that prosecutors prove the information was, in fact, transmitted.[2] As the California Supreme Court explained:

> It is well settled that while it may be perfectly reasonable for officers in the field to make arrests on the basis of information furnished to them by other officers, when it comes to justifying the total police activity in court, the People must prove that the source of the information is something other than the imagination of an officer who does not become a witness.[3]

As the court indicated, the purpose of this requirement—commonly known as *Harvey-Madden*[4]—is to prevent situations in which an unscrupulous officer could arrange to have a suspect detained, arrested or searched by disseminating false information from a nonexistent source.[5] In the words of the Court of Appeal:

> The *[Harvey-Madden]* requirement was not established to prove the information furnished the arresting officer was true; rather, it was established to prove that the officers furnishing the information to the arresting officers which triggered the arrest had actually received it; i.e., that the information was not falsely manufactured by those reporting it to the arresting officers to furnish ostensible grounds of probable cause for arrest.[6]

As a practical matter, *Harvey-Madden* is invoked mainly when the source's information leads to an arrest. But it also applies when the information results in a detention or search.[7] (To simplify things, however, we will discuss the issue as it pertains to arrests.)

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[1] *People* v. *Lazanis* (1989) 209 Cal.App.3d 49, 59.

[2] See *People* v. *Armstrong* (1991) 232 Cal.App.3d 228, 234 ["California courts have long and consistently rejected the contention that probable cause for an arrest is established where arresting officers are proven to have relied on information furnished by other officers in their own departments without further prosecution proof [that] the information on which the arresting officers acted was actually given to those officers who transmitted that information to the arresting officers."]; *In re Eskiel S.* (1993) 15 Cal.App.4th 1638, 1643 ["Justifying an arrest or detention based on information received by an officer through 'official channels' requires the prosecution to trace the information received by the arresting officer back to its source and prove that the [source] had the requisite probable cause or reasonable suspicion to justify the arrest or detention."]; *People* v. *Collins* (1997) 59 Cal.App.4th 988, 993 ["In California, certain evidentiary rules have been established to govern the manner in which the prosecution may prove the underlying grounds for arrest when the authority to arrest has been transmitted to the arresting officer through police channels. These evidentiary rules are often referred to as the '*Harvey-Madden* rule.'"]; *People* v. *Gomez* (2004) 117 Cal.App.4th 531, 540 ["*(Harvey-Madden)* governs the manner in which the prosecution may prove the underlying grounds for arrest when the authority to arrest has been transmitted to the arresting officer through police channels."]; *People* v. *Ramirez* (1997) 59 Cal.App.4th 1548, 1553 ["(W)hen the first officer passes off information through 'official channels' that leads to arrest, the officer must also show basis for his probable cause."].

[3] *Remers* v. *Superior Court* (1970) 2 Cal.3d 659, 666.

[4] See *People* v. *Harvey* (1958) 156 Cal.App.2d 516; *People* v. *Madden* (1970) 2 Cal.3d 1017.

[5] See *Remers* v. *Superior Court* (1970) 2 Cal.3d 659, 667; *People* v. *Orozco* (1981) 114 Cal.App.3d 435, 444 ["The whole point of the *Remers* rule is to negate the possibility that the facts which validate the conduct of the officers in the field are made up inside of the police department by somebody who is trying to frame a person whom he wants investigated."].

[6] *People* v. *Armstrong* (1991) 232 Cal.App.3d 228, 234.

[7] See *People* v. *Lazanis* (1989) 209 Cal.App.3d 49; *People* v. *Wooten* (1985) 168 Cal.App.3d 168, 172.

When Harvey-Madden applies

Harvey-Madden applies when the information that led to the defendant's arrest was furnished by a source who transmitted it to an intermediary who, in turn, disseminated it to the arresting officer.[8] The following situations are fairly typical:

Source		Intermediary		
Civilian	→	911	→	Arresting Officer
Civilian	→	Officer	→	Arresting Officer
Officer	→	Dispatcher	→	Arresting Officer
Officer	→	Officer	→	Arresting Officer

In each of these situations, if the prosecution sought to justify the arrest through the testimony of the arresting officer, the testimony would constitute hearsay-on-hearsay. This means that because the arresting officer did not talk with the source, he could not be cross-examined as to what the source said. In fact, he could not even be cross-examined as to the source's *existence*. He could only testify to what the absent intermediary told him.[9]

The following scenario will demonstrate how this issue might arise. A convenience store clerk [source] phones 911 and reports he just saw a gun under the jacket of a customer in his store. A police dispatcher [intermediary] assigns Officers A and B to the call and tells them what the source reported. As Officer A pulls up, he sees a man matching the customer's description outside the store. He pat searches him and finds a gun. While Officer A transports the suspect to jail, Officer B goes inside the store to get a statement from the clerk who had remained inside throughout the incident.

At a motion to suppress the gun, the prosecution's only witness is Officer A, the arresting officer. On direct examination he relates what the dispatcher told him and what he saw and did. On cross, the defendant's attorney wants to explore the possibility that Officer A fabricated the call in order to pat search the defendant. But when he starts asking questions about the source of the call, Officer A can only repeat what his dispatcher told him.

There is one other situation in which *Harvey-Madden* applies. When an officer arrests a suspect based on information from a dispatcher, computer database, or other officer that a warrant for the suspect's arrest is outstanding, the arresting officer will have no first-hand knowledge of the warrant. Thus, prosecutors may be required to prove that the warrant had, in fact, been issued.

It is important not to confuse *Harvey-Madden* with the rule that the source's information must have constituted probable cause. As noted, the objective of *Harvey-Madden* is to prove that the intermediary received the information from the source. The objective of the probable cause requirement is to prove the source's information justified the arrest.[10]

How DA's can satisfy Harvey-Madden

There are several ways in which prosecutors can prove that the source's information was disseminated to the intermediary. Depending on the circumstances, it could be done through testimony of the source or the intermediary, through communications records, court records, or circumstantial evidence.

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[8] See *Remers* v. *Superior Court* (1970) 2 Cal.3d 659, 664 ["(W)hen an officer furnished to another officer information which leads to an arrest, the People must show the basis for the former officer's information."]. COMPARE *People* v. *Poehner* (1971) 16 Cal.App.3d 481, 487 ["The reasons for the *[Harvey-Madden]* rule do not apply where the information furnished the arresting officer by another officer relates specific and articulable facts observed by the latter. . . . Such a situation does not involve the 'phantom informer.'"].

[9] See *People* v. *Harvey* (1958) 156 Cal.App.2d 516, 523 [conc. opn. of Dooling, J. and Draper, J.] ["To permit the subordinate to justify the arrest on the superior's unsworn statement to the subordinate that the superior has obtained information from another justifying the arrest would permit police officers to justify arrests by hearsay on hearsay, without requiring sworn testimony of anybody that the information upon which the arrest was made was actually given to any police officer."].

[10] See *People* v. *Ramirez* (1997) 59 Cal.App.4th 1548, 1553 ["(W)hen the first officer passes off information through 'official channels' that leads to arrest, the officer must also show basis for his probable cause."]; *In re Eskiel S.* (1993) 15 Cal.App.4th 1638, 1643 ["(W)here a police communication is the source of the information assertedly constituting cause to detain, the court must look to the transmitting officer and determine whether *that* officer had information constituting probable cause or reasonable suspicion."]; *People* v. *Orozco* (1981) 114 Cal.App.4th 435, 444 ["If the detaining officer himself does not have personal knowledge of facts justifying the detention, but acts solely on the basis of information or direction given him through police channels, the prosecution must establish in court, when challenged, evidence showing that the officer who originally furnished the information was in possession of facts [that justified the intrusion]."]; *Rogers* v. *Powell* (3rd Cir. 1997) 120 F.3d 446, 453 ["The legality of a seizure based solely on statements issued by fellow officers depends on whether the officers who *issued* the statements possessed the requisite basis to seize the suspect."].

SOURCE TESTIFIES: The prosecution may, of course, satisfy *Harvey-Madden* by presenting testimony from the source of the information; e.g., the victim, witness, officer.[11]

INTERMEDIARY TESTIFIES: As noted, in most cases the intermediary is an officer, police operator, or dispatcher. Consequently, testimony from any of these people will suffice.[12]

POLICE COMMUNICATION RECORD: In lieu of presenting testimony from a dispatcher, prosecutors may satisfy *Harvey-Madden* by presenting a certified police communication record documenting the source's call to the police or the transmission of the source's information.[13]

WARRANT ARRESTS: If the defendant was arrested on an outstanding warrant, prosecutors can satisfy *Harvey-Madden* by producing the original warrant, a certified copy,[14] an abstract of the warrant,[15] or an official law enforcement agency computer printout which describes the warrant by number and offense.[16]

CIRCUMSTANTIAL EVIDENCE: Prosecutors can also satisfy *Harvey-Madden* by means of circumstantial evidence.[17] This is commonly accomplished by presenting testimony from the arresting officer that he saw or heard something upon arrival that was consistent with what the intermediary told him the source had reported. Such testimony is usually sufficient because the defense attorney can cross-examine the officer about what he saw or heard. The following are examples of how circumstantial evidence has been used:

- ☐ SUSPECT FLEES: A police dispatcher broadcast a report from an anonymous caller that a certain house was being burglarized by two men. The responding officers testified that when they arrived they saw two men standing near the house, that the men matched the descriptions broadcast over the police radio, that the men fled when ordered to stop, and that the officers chased them. In ruling that this testimony satisfied *Harvey-Madden*, the court said, "[T]he in-

[11] See *Sanderson* v. *Superior Court* (1980) 105 Cal.App.3d 264, 268; *People* v. *Harvey* (1958) 156 Cal.App.2d 516, 524 [conc. opn. of Dooling, J. and Draper, J.]["If the informer should be produced by the prosecution and should testify that he had in fact given the information [the transmitting officer] which [the officer] transmitted to [the arresting officer] the trial court would be justified, if this was believed, in holding that [the arresting officer] had reasonable grounds for appellant's arrest."].

[12] See *People* v. *Senkir* (1972) 26 Cal.App.3d 411, 418 ["(I)nformation given to the arresting officer by another officer who himself received the information from a third person may furnish probable cause for an arrest. That is so where the officer who gave the information to the arresting officer himself testifies concerning his receipt of it and as to the circumstances that made it reasonable to accept the information as true."]; *People* v. *Orozco* (1981) 114 Cal.App.3d 435, 444 ["The court should have insisted that the people produce the dispatcher or other competent evidence if the dispatcher was not available."]. ALSO SEE *People* v. *Jourdain* (1980) 111 Cal.App.3d 396, 406 [prosecutors met their burden under *Harvey-Madden* when the intermediary, although he did not testify, was present at the hearing and available for questioning].

[13] See *People* v. *Lazanis* (1989) 209 Cal.App.3d 49, 52 ["The People offered a document which was certified as a true copy of an original police department document which noted the receipt of a telephone call by time stamp at 3:31 A.M. which bore the words 'Possible 459 into business now.'"]. BUT ALSO SEE *People* v. *Rice* (1967) 253 Cal.App.2d 789, 793 ["(T)he mere fact that the daily occurrence sheet, which was consulted by the arresting officers, contained sufficient information to justify the arrest is insufficient to prove its legality unless there is evidence concerning the matters which went onto the occurrence sheet."].

[14] See *People* v. *Armstrong* (1991) 232 Cal.App.3d 228, 245 [production of the arrest warrant or a certified copy is sufficient].

[15] See *People* v. *Alcorn* (1993) 15 Cal.App.4th 652, 660 ["We hold that when the prosecution produces an abstract showing the existence of a facially valid warrant, identifying the warrant with sufficient particularity to allow the defendant to obtain a copy of the warrant and its supporting documents, the prosecution has met its burden of producing evidence."].

[16] See *People* v. *Armstrong* (1991) 232 Cal.App.3d 228, 246 ["(I)t seems logically certain that proof of transmission to one police department of official information from a different police agency, of the fact a warrant for arrest exists, even more clearly, if circumstantially, negates an inference of the manufacture of probable cause for arrest by the dispatcher or the police department employing him."]. ALSO SEE *People* v. *Collins* (1997) 59 Cal.App.4th 988, 994 ["(W)here the prosecution has introduced come credible independent evidence of the existence of a facially valid warrant supporting the arrest, the prosecution has met its burden of producing evidence."].

[17] See *People* v. *Gomez* (2004) 117 Cal.App.4th 531, 541 ["Here, because the prosecution adequately demonstrated the reliability of the information derived from the wiretap investigation and related surveillance, the court properly overruled defendant's [*Harvey-Madden*] objections."]; *Sanderson* v. *Superior Court* (1980) 105 Cal.App.3d 264, 270; *People* v. *Johnson* (1987) 189 Cal.App.3d 1315; *People* v. *Sutton* (1976) 65 Cal.App.3d 341, 348 COMPARE *In re Eskiel S.* (1993) 15 Cal.App.4th 1638, 1644 ["Because of the general nature of the information contained in the radio broadcast heard by [the arresting officer], no amount of corroboration could have justified a detention based on the broadcast."].

formation transmitted by the police dispatcher was corroborated by what the officers observed at the scene, making it virtually impossible for the information to have been made up in the police department. The officers at the scene were thoroughly cross-examined and the court obviously believed that they, in fact, had received the dispatch."[18]

- ☐ PHYSICAL EVIDENCE CONSISTENT WITH BROADCAST: An anonymous caller phoned Pomona police and reported "shots being fired" from a vehicle which the caller described. When officers arrived at the scene and spotted the car, they detained the occupants. Shortly after that, one of the officers saw "two expended cartridges on the ground" near the car. In ruling this testimony satisfied *Harvey-Madden*, the court said: "The people never proved that such a call was made but they did prove that there were cartridges within four to five feet of the passenger door to the car when the police looked for them. That those cartridges were found was testified to by officers who were subject to cross-examination. The presence of the cartridges certainly supports a very strong inference that the police did not make up the information from the informant. Thus, the veracity of the dispatcher's statement that he received a call was circumstantially proved."[19]
- ☐ CONDITIONS CONSISTENT WITH BROADCAST: At about 2 A.M., LAPD received an anonymous phone call that small children had been left alone in a certain apartment. The prosecution presented testimony from one of the responding officers that he saw certain things that indicated there might be small children inside; e.g., the lights in the apartment were on, he could hear a TV or radio inside, and no one answered the door. Said the court, "[The officer] had verified the fact that if there were occupants in appellant's apartment, they were not capable of responding to his repeated knocks on the door. This was consistent with there being 'small children' too young to respond."[20]

The notice requirement

Prosecutors will be required to present *Harvey-Madden* testimony only if the defense gives notice that it is invoking the *Harvey-Madden* rule.[21] If notice is not given, the issue is deemed waived.

Although the courts have not specifically ruled on what kind of notice is required, it is apparent that the defense must give such notice in its moving papers, otherwise prosecutors would not know what witnesses they must subpoena.[22]

It is true, of course, that defense attorneys have the ability to subpoena officers, dispatchers, and other witnesses who can provide the necessary testimony. But because prosecutors have the burden of proof, the courts require that they do this. POV

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[18] *People* v. *Johnson* (1987) 189 Cal.App.3d 1315.
[29] *People* v. *Orozco* (1981) 114 Cal.App.3d 435.
[20] *People* v. *Sutton* (1976) 65 Cal.App.3d 341.
[21] See *People* v. *Sutton* (1976) 65 Cal.App.3d 341, 347 ["(A)ppellant's failure to demand a *Remers-Madden* showing requires us to assume that the officer who originated the radio report had probable cause to believe that there were, in fact, small children left alone at appellant's apartment."]; *People* v. *Rogers* (1978) 21 Cal.3d 542, 547-8; *People* v. *Collin* (1973) 35 Cal.App.3d 416, 421; *People* v. *Moore* (1971) 13 Cal.App.3d 424, 434; *People* v. *Suennen* (1981) 114 Cal.App.3d 192, 201-2, fn.2. ALSO SEE *People* v. *Collins* (1997) 59 Cal.App.4th 988, 991 ["Although defense counsel's objection ['Objection, *Harvey Madden'*] was in the form of rather compressed jargon . . . the objection was sufficient to put the court and the prosecutor on notice of the need for the prosecution to prove the existence of the arrest warrants."].
[22] See *People* v. *Williams* (1999) 20 Cal.4th 119, 123 ["(A) defendant must state the grounds for the motion [to suppress] with sufficient particularity to give notice to the prosecution of the sort of evidence it will need to present in response."].