POINT of VIEW

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This edition of Point of View
is dedicated to the memory of
Officer Kirk Greiss
of the California Highway Patrol
who was killed in the line of duty
on August 10, 2018

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Untested Police Informants

"Any rookie officer knows uncorroborated, unknown tipsters cannot provide probable cause for an arrest or search warrant."[1]

The problem with police informants is that many, maybe most, are "denizens of the underground."[2] It's not that they are necessarily "bad" people. It's because being an underground denizen is a virtual qualification for the job. As the Seventh Circuit observed, an informant's value "stems from his opportunity to gain the confidence of participants in a criminal enterprise" and this opportunity is "seldom available to ordinary, honest, law-abiding citizens."[3]

To make matters worse, informants seldom provide their information out of an abundance of civic responsibility. Instead, their motive frequently has something to do with staying out of jail or at least reducing an impending sentence. In the words of the California Supreme Court, "All familiar with law enforcement know that the tips they provide may reflect their vulnerability to police pressure or may involve revenge, braggadocio, self-exculpation, or the hope of compensation."[4] For these reasons, the use of informants is viewed by many as "dirty business."[5] And just about everybody views the information they provide as "suspect on its face."[6]

This problem could easily be avoided by simply prohibiting officers from using informants. But that would be a lousy idea because, as the Supreme Court observed, "Society can ill afford to throw away the evidence produced by the falling out, jealousies, and quarrels of those who live by outwitting the law."[7] Or, as the Ninth Circuit put it, "Without informants, law enforcement authorities would be unable to penetrate and destroy organized crime syndicates, drug trafficking cartels, bank frauds, telephone solicitation scams, public corruption, terrorist gangs, money launderers, espionage rings, and the likes."[8]

One way the courts address this problem is to distinguish between informants who are "tested" and "untested." A tested informant (also known as a "confidential reliable informant" or "CRI") is an informant who has a history or track record of providing accurate information to law enforcement; e.g., his previous tips resulted in the issuance of productive search warrants. And if officers can prove that an informant qualifies as "tested," the courts may view the information he is providing as reliable unless there was reason to believe otherwise.[9] In the words of the Court of Appeal, "If the informant has provided accurate information on past occasions, he may be presumed trustworthy on subsequent occasions."[10]

Untested informants, on the other hand, are people who have no track record of accuracy or reliability. Commonly known as "confidential informants" or "CIs," the information they provide is virtually useless unless officers can provide sufficient circumstantial evidence of its accuracy. How can they accomplish this?

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[1] *Higgason v. Superior Court* (1985) 170 Cal.App.3d 929, 952 (conc. opn. of Crosby, J.).
[2] *Beck v. Ohio* (1964) 379 U.S. 89, 91.
[3] *U.S. v. Feekes* (7th Cir. 1989) 879 F.2d 1562, 1564.
[4] *People v. Kurland* (1980) 28 Cal.3d 376, 393.
[5] *On Lee v. United States* (1952) 343 U.S. 747, 757.
[6] *People v. Lopez* (1985) 173 Cal.App.3d 125, 134. Also see *U.S. v. Bernal-Obeso* (9th Cir. 1993) 989 F.2d 331, 333.
[7] See *On Lee v. United States* (1952) 343 U.S. 747, 756. Also see *U.S. v. Simpson* (9th Cir. 1987) 813 F.2d 1462, 1464.
[8] *U.S. v. Bernal-Obeso* (9th Cir. 1993) 989 F.2d 331, 335.
[9] See *U.S. v. Nolen* (8th Cir. 2008) 536 F.3d 834, 840; *U.S. v. Jones* (1st Cir. 2012) 700 F.3d 615, 621-22.
[10] *People v. Terrones* (1989) 212 Cal.App.3d 139, 146.

In most cases, by proving that *some* of the material information that the CI is currently supplying is true. This is known as "corroboration," and it works on the theory that "[b]ecause an informant is right about some things, he is more probably right about other facts."[11] Or, as the Eighth Circuit put it, "[W]hen information is shown to be reliable because of independent corroboration, then it is a permissible inference that the informant is reliable and that therefore other information that the informant provides, though uncorroborated, is also reliable."[12]

How much corroboration is sufficient? It depends on the intrusiveness of the officer's response. Thus, not much is required to detain a suspect, but more would be needed to make an arrest, conduct a warrantless search, or obtain a search warrant.

While corroboration can come in many forms,[13] the following are the most significant.

Corroborating "Inside" Information

One of the strongest forms of corroboration is proof that the informant's tip included accurate "inside" information, meaning information that directly pertained to the suspect's current criminal activities. The theory here is that such information would normally be possessed only by people who had a "special familiarity" with the suspect's operations, such as accomplices, collaborators, or trusted friends.[14]

It follows that officers cannot corroborate a tip by proving the accuracy of information that could have been obtained without much difficulty or was commonly known, such as the suspect's physical description or the location of his house. As the court observed in *Higgason v. Superior Court*, "The courts take a dim view of the significance of such pedestrian facts."[15]

A good example of corroborated inside information is found in the Supreme Court's decision in *Massachusetts v. Upton*.[16] Here, an unidentified person phoned police and reported that (1) Upton lives in a motor home at a certain location; (2) the motor home is "full of stolen stuff"; (3) the stolen stuff includes jewelry, silver, and gold; (4) Upton bought the stolen property from a man named Ricky Kelleher; and (5) Upton is nervous because he learned that the police had just "raided" Kelleher's motel room. All of this information, except the location of Upton's motor home, constituted "inside" information, which meant that if the officers could prove that some of it was accurate, a court could find that the rest was also accurate.

So, after confirming that Upton lived in a motor home at the location described by the caller, they learned the following: (1) the caller's description of the stolen property "tallied" with items taken in recent burglaries; and (2) officers had recently executed a search warrant on Kelleher's motel room. In ruling that this corroboration was sufficient, the Supreme Court said, "The informant's story and the surrounding [corroborated] facts possessed an internal coherence that gave weight to the whole."

In another such case, *People v. Rosales,*[17] police in South Gate received an anonymous call from a woman who said she had witnessed a murder that had occurred one day earlier when a man in a pickup truck opened fire on a house. The woman

[11] *Illinois v. Gates* (1983) 462 U.S. 213, 244. Also see *People v. Spencer* (2018) __ Cal.5th __ [2018 WL 3384851].
[12] *U.S. v. Ford* (8th Cir. 2018) 888 F.3d 922. Also see *U.S. v. Glover* (7th Cir. 2014) 755 F.3d 811, 818 ["Where information about credibility is not available, other factors such as extensive corroboration may overcome the doubt inherent in relying on an informant without a track record."].
[13] See *People v. Levine* (1984) 152 Cal.App.3d 1058, 1065.
[14] *Adams v. White* (1990) 496 U.S. 325, 332. Also see *U.S. v. Hauk* (10th Cir. 2005) 412 F.3d 1179, 1189 ["inside" information "is defined broadly as knowledge that the informant could not acquire from any source but the suspect, whether directly or indirectly, providing reason to believe that the informant has 'inside' information"].
[15] (1985) 170 Cal.App.3d 929, 940. Also see *Florida v. J.L.* (2000) 529 U.S. 266, 272.
[16] (1984) 466 U.S. 727.
[17] (1987) 192 Cal.App.3d 759.

said (1) she was inside the house at the time, (2) the shooting was gang-related, (3) she saw the shooter and he was known as "Big Tudy," (4) Big Tudy was a member of the Elm Street Gang, and (5) he was planning to flee to Texas because he was wanted in California for a robbery.

In ruling that the informant's tip had been sufficiently corroborated, the court noted that the informant "possessed a wealth of specific information about the shooting," including the identity of the two gangs and that they were enemies, how the shooting occurred, and when it occurred. In addition, the officers confirmed that Rosales had fled to Texas several years earlier, and that he was wanted for armed robbery.

Here are other examples of corroborated "inside" information that helped establish the reliability of a CI's tip:

- The routine that a suspected drug trafficker followed to obtain drugs.[18]
- That when a suspected drug trafficker traveled to another city to sell drugs, he would stay at a certain hotel and would register under a false name.[19]
- The race of the person who was murdered by the suspect, a detail that had not been released to the news media.[20]
- The method that a commercial burglar had used to bypass the victim's burglar alarm system.[21]
- The approximate time that a murder victim had been shot.[22]
- The location where the body of a murder victim had been dumped.[23]
- That certain bonds in the suspect's possession had been reported stolen.[24]
- That the suspect was a parole violator, and that a warrant for his arrest had been issued.[25]
- That a suspected methamphetamine cook recently purchased meth precursors under a false name."[26]

Corroborating Predictions

For the same reason that a CI's possession of "inside" information is a sign of reliability, his possession of information pertaining to the suspect's *future* criminal activities, when corroborated, will ordinarily suffice. This is true even if the corroborated activities were not illegal or suspicious. What counts is that they were consistent with the tip.[27]

For example, in *Alabama v. White*[28] a CI told an officer that, on a certain date, White would drive a brown Plymouth station wagon from the Lynwood Apartments to Dobey's Motel, and she would be carrying an ounce of cocaine. When officers saw White on that route at the appointed time, they detained her and she consented to a search of her car which resulted in the seizure of cocaine. In ruling that the officers had sufficient reason to detain White, the Supreme Court said, "What was important was the caller's ability to predict [White's] *future behavior*."

The Court also addressed this issue in the landmark case of *Illinois v. Gates.*[29] Here, the police in Bloomingdale, Illinois received an anonymous letter claiming that Lance and Sue Gates were local drug dealers, and that they obtained their drugs in Florida. Included in the letter was a description of

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[18] *People v. Aston* (1985) 39 Cal.3d 481, 496. Also see *People v. Spencer* (2018) __ Cal.5th __ [2018 WL 3384851] [officers confirmed a tip that robbbery-murder suspects were getting ready to leave town].
[19] *U.S. v. Brown* (1st Cir. 2007) 500 F.3d 48, 56.
[20] *People v. McCarter* (1981) 117 Cal.App.3d 894, 902. Also see *U.S. v. Elmore* (2nd Cir. 2007) 482 F.3d 172, 182.
[21] *People v. Costello* (1988) 204 Cal.App.3d 431. Also see *People v. Stewart* (1983) 140 Cal.App.3d 11,15.
[22] *People v. Lara* (1967) 67 Cal.2d 365.
[23] *People v. Cooks* (1983) 141 Cal.App.3d 224.
[24] *People v. Dumas* (1973) 9 Cal.3d 871, 876.
[25] *U.S. v. Hauk* (10th Cir. 2005) 412 F.3d 1179, 1191.
[26] *People v. Glenos* (1992) 7 Cal.App.4th 1201, 1207.
[27] See *U.S. v. Gonsalves* (1st Cir. 2017) 859 F.3d 95, 104; *U.S. v. Brack* (7th Cir. 1999) 188 F.3d 748, 756
[28] (1990) 496 U.S. 325, 332.
[29] (1983) 462 U.S. 213.

how they would ordinarily obtain the drugs: Lance would fly to Florida, Sue would drive the family car; after they hid the drugs in the car, Lance would drive it back to Illinois. The CI also said that Sue would be leaving for Florida almost immediately, and that Lance would be flying down "in a few days." Here is the information that officers were able to corroborate:

- Two days after receiving the tip, a person identified as "L. Gates" boarded a flight from Chicago to Florida.
- When Gates arrived, he entered a motel room that had been registered to his wife.
- The next day, the couple drove back to Chicago in the family car.

This information was used to obtain a warrant to search the Gates's home, and this resulted in the seizure of drugs. Although the officers did not see Gates or his wife do anything illegal, the Supreme Court ruled that the corroboration of the CI's tip as to the Gates's future activities was sufficient to credit the CI's other information, and that the totality of this information established probable cause for the warrant. Said the Court, "[T]here was a fair probability that the writer of the anonymous letter had obtained his entire story either from the Gates or someone they trusted. And corroboration of major portions of the letter's predictions provides just this probability."

In another Supreme Court case, *Draper v. United States*,[30] the CI told a narcotics officer that Draper was "peddling narcotics to several addicts" in Denver. Three days later, the CI notified officers that Draper had just left for Chicago by train to buy three ounces of heroin, that he would be returning by train within the next two days, and that he would be carrying a tan zipper bag. The CI also described the clothing that Draper was wearing when he left, and said that Draper usually "walked real fast."

Two days later, an officer who was watching the train station in Denver saw a man arrive on a train from Chicago, the man had "the exact physical attributes" and clothing described by the informant, that he was carrying a tan zipper bag, and that he was walking "fast." Based on this corroboration, the officer arrested Draper and, during a search incident to arrest, found heroin. In ruling that the officer had probable cause for the arrest, the Supreme Court pointed out:

> [The officer] had personally verified every facet of the information given him by [the CI] except whether [Draper] had accomplished his mission and had the three ounces of heroin on his person or in his bag. And surely, with every other bit of information being thus personally verified, [the officer] had reasonable grounds to believe that the remaining unverified bit of information—that Draper would have the heroin with him—was likewise true.

Suspicious Activity

Corroboration of a CI's tip may also be found if officers saw the suspect engage in activities that, while not illegal, were sufficiently consistent with the incriminating information furnished by the CI.[31] In the words of the Court of Appeal, "Even observations of seemingly innocent activity suffice alone, as corroboration, if the anonymous tip casts the activity in a suspicious light."[32]

For example, in *U.S. v. Landis*[33] a CI told officers that Lee Clark was a physician in Chico and that he "did not work but derived his income from selling 'speed.'" He also said that he had seen "several strange chemicals" inside Clark's house, and that Clark's son had told him that Clark was manufac-

[30] (1959) 358 U.S. 307.
[31] See *Illinois v. Gates* (1983) 462 U.S. 213, 245, fn.13; *U.S. v. Greenburg* (1st Cir. 2005) 410 F.3d 63, 69; *U.S. v. Warford* (8th Cir 2006) 439 F.3d 836, 842 ["although a number of these details did not pertain directly to the alleged criminal activity under investigation, the verification enhanced the general credibility of the sources"].
[32] *People v. Costello* (1988) 204 Cal.App.3d 431, 446.
[33] (9th Cir. 1984) 726 F.2d 540.

turing methamphetamine in the basement. The officers were able to confirm, among other things, that Clark was a physician but that he "apparently did not practice"; his listed place of business was his home "at which there was no visible evidence of a medical practice"; and he had recently made several phone calls to suppliers of chemicals that were "apparently unrelated to medical practice." This corroboration, said the court, was "an acceptable basis for a probable cause determination."

Similarly, in *People v. Sotelo*[34] a CI told officers that Vito and Esther Sotelo were selling heroin from their home in Los Angeles, that there was a lot of foot traffic in and out, and that the buyers often injected heroin in an adjoining garage. An officer checked the area outside the garage and found "balloon fragments, many of which were knotted in the end." Later, officers saw "numerous" people going in and out of the house. They detained one of them and determined that he was on heroin. They then obtained a warrant to search the house and found heroin. On appeal, the court summarily ruled that this corroboration was sufficient, although we think that finding the tied balloon fragments might have been sufficient.

Here are some other examples of suspicious activity that was sufficiently consistent with the CI's tip to establish grounds for a detention, arrest, or the issuance of a search warrant:

- Responding to a CI's report of an impending shooting at a certain location, officers saw a group of men just standing around; and, just then, one of the men "broke away" from a group and started walking off.[35]
- As officers arrived at the scene of reported assault in progress, "possibly involving a weapon," they saw one of three men at the scene start to walk away from them "with his hands in his pockets."[36]
- Officers received an anonymous report that someone was doing or selling drugs in the hallway of a building; when they arrived, they saw the defendant "crouched over in the corner" of a darkened hallway.[37]
- The informant's tip that defendant was taking bets over the telephone for professional football games was partially corroborated when the informant engaged him in a conversation (overheard by officers) in which the suspect discussed "point spreads for professional football games."[38]
- After the CI said that the suspect was selling meth from his motel room, officers knocked on the door and "heard considerable movement, opening and closing of doors, and a toilet flushing."[39]
- After the CI informed officers that the suspect was a drug trafficker, they followed him and saw him engage in countersurveillance driving.[40]

Detailed Information

Another indication of a CI's reliability is that he provided officers with detailed information pertaining to the suspect or his criminal activities, as opposed to vague or generalized assertions. "[E]ven if we entertain some doubt as to an informant's motives," said the Supreme Court, "his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case."[41] The theory here, or so it appears, is that informants are seldom so imaginative and crafty that they can invent a false story that is both plausible and full of particulars. Thus, the courts have taken note of the following circumstances in ruling that an untested informant was sufficiently reliable:

[34] (1971) 18 Cal.App.3d 9.
[35] *People v. Turner* (2013) 219 Cal.App.4th 151, 168. Also see *People v. Johnson* (1987) 189 Cal.App.3d 1315.
[36] *U.S. v. Simmons* (2nd Cir. 2009) 560 F.3d 98, 108. Also see *U.S. v. Graham* (6th Cir. 2007) 483 F.3d 431, 439.
[37] *People v. Johnson* (1991) 231 Cal.App.3d 1, 11.
[38] *People v. Rooney* (1985) 175 Cal.App.3d 634, 648.
[39] *U.S. v. Hendrix* (10th Cir. 2011) 664 F.3d 1334, 1339.
[40] *U.S. v. Fiasche* (7th Cir. 2008) 520 F.3d 694, 698.
[41] *Illinois v. Gates* (1983) 462 U.S. 213, 234.

- "What [the informant] supplied was more akin to a full scenario naming the cast of characters, the castle at Elsinore and the modus operandi of the crimes."[42]
- "The caller described the individuals involved and their clothing, and reported that they were walking toward Colonia Park."[43]
- "Walker's information was detailed: he knew the type of drugs that Hansmeier dealt, the quantity that he could get from Hansmeier, and the price that Hansmeier charged."[44]
- "[T]he information is highly detailed, reporting the presence of drugs in the ceiling, hall closet by the bedroom, night stand next to the bed."[45]

Still, details alone will not always render a tip reliable. As one court put it, "The quantification of the information does not necessarily improve its quality; the information does not rise above its doubtful source because there is more of it."[46]

Other Forms of Corroboration

Although not as formidable as the previous types of corroboration, the following are often cited by the courts as supporting the reliability of a CI's information:

SUSPECT'S CRIMINAL HISTORY: It is relevant that the suspect had been previously arrested or convicted of a crime that was similar to the one reported by the CI.[47] As the Supreme Court pointed out, such information is "a practical consideration of everyday life upon which an officer (or a magistrate) may properly rely in assessing the reliability of an informant's tip."[48]

SUSPECT'S GANG AFFILIATION: Officers confirmed the suspect was a member of a street gang that had been involved in the crime under investigation.[49]

INFORMANT CORROBORATED BY OTHER INFORMANT: A tip that a suspect was engaging in certain criminal activities may be deemed sufficiently reliable if one or more other untested informants provided officers with the same or substantially the same information.[50] As the Court of Appeal said in such a case, "If the smoke is heavy enough, the deduction of a fire becomes reasonable."[51] But multiple tips will have little significance if the tipsters merely provided general or "pedestrian" facts.[52]

STATEMENTS AGAINST PENAL INTEREST: Information from an informant that implicates the suspect in a crime may be deemed reliable if (1) the information also implicated the informant, and (2) the informant knew that he was giving the information to an officer or to a person who might disclose it to officers.[53] However, an informant's statement may not be against penal interest if it places major responsibility for the crime on the suspect.[54]

SWORN TESTIMONY BY INFORMANT: If officers are seeking a search or arrest warrant, the accuracy of the informant's tip may be established, or at least bolstered, by having the informant appear before the issuing judge in chambers, swear to the truthfulness of his information, and submit to questioning by the judge, prosecutor, or investigating officer.[55] These are known as *Skelton* hearings, and the theory here is that, because judges routinely determine the credibility of sworn witnesses in court, they may do the same with sworn CIs. POV

[42] *People v. Kershaw* (1983) 147 Cal.App.3d 750, 758.
[43] *In re Richard G.* (2009) 173 Cal.App.4th 1252, 1258.
[44] *U.S. v. Hansmeier* (7th Cir. 2017) 867 F.3d 807, 812.
[45] *US v. Hauk* (10th Cir. 2005) 412 F.3d 1179, 1191
[46] Compare *People v. Jordan* (2004) 121 Cal.App.4th 544, 560; *U.S. v. Roberson* (3rd Cir. 1996) 90 F.3d 75, 80.
[47] *People v. Murphy* (1974) 42 Cal.App.3d 81, 87; *People v. Kershaw* (1983) 147 Cal.App.3d 750, 760.
[48] *United States v. Harris* (1971) 403 U.S. 573, 583.
[40] See *People v. Rosales* (1987) 192 Cal.App.3d 759, 768.
[50] See *People v. Coulombe* (2000) 86 Cal.App.4th 52, 58; *People v. Camarella* (1991) 54 Cal.3d 592, 606.
[51] *People v. Hirsch* (1977) 71 Cal.App.3d 987, 991, fn.1
[52] *People v. French* (2011) 201 Cal.App.4th 1307, 1321-22.
[53] *United States v. Harris* (1971) 403 U.S. 573, 583; Evid. Code § 1230; *In re Christopher R.* (1989) 216 Cal.App.3d 901, 904.
[54] *People v. Campa* (1984) 36 Cal.3d 870, 882; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 327-42.
[55] Pen. Code §§ 1526(a), 1526(b)(1), 1528(a), 1529, 1534, 1537; *Skelton v. Superior Court* (1969) 1 Cal.3d 144.

Duration of Detentions and Traffic Stops

[A]n investigative detention must last no longer than is necessary to effectuate the purpose of the stop.[1]

One of the recurring legal issues pertaining to investigative detentions and traffic stops is their permissible length. It's a problem because detentions are much too diverse and unpredictable to be subject to absolute or even general time limits. Instead, the courts have been forced to deal with the issue by simply saying that detentions must be carried out diligently.[2] As the Supreme Court explained, "In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly."[3]

In this article, we will discuss how the word "diligently" has been interpreted by the courts, especially in situations where officers were confronting unforeseen or unusual circumstances. We will also discuss the (muddled) restrictions on the investigation of crimes other than the one for which the detainee was stopped. Then we will cover the duration of "pretext" traffic stops and how officers can convert detentions into contacts.

One other thing: Although traffic stops are technically "arrests" when, as is usually the case, they are based on probable cause to believe the driver committed a traffic infraction, they are subject to the more restrictive rules pertaining to detentions.[4]

"Diligence"

In the context of detentions and traffic stops, "diligence" means what it means in everyday conversation: staying focused on the matter at hand. Thus, *Merriam-Webster* defines diligence as "persevering application" and "the attention and care legally expected or required of a person."[5]

In applying this definition, however, the courts have ruled that "diligence" does not mean that officers must "move at top speed,"[6] or that they must terminate the detention at the earliest possible moment,[7] or even that they employ the least intrusive method of conducting their investigation.[8] As the Supreme Court explained, "The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it."[9]

For example, in *Gallegos v. Los Angeles*[10] the defendant argued that his detention lasted too long

[1] *Florida v. Royer* (1983) 460 U.S. 491, 500. Edited.
[2] See *Hayes v. Florida* (1985) 470 U.S. 811, 815-16 ["at some point in the investigative process, police procedures can qualitatively and quantitatively become intrusive with respect to a suspect's freedom of movement and privacy interests as to [require probable cause]."].
[3] *United States v. Sharpe* (1985) 470 U.S. 675, 686.
[4] See *Rodriguez v. United States* (2015) __ U.S. __ [135 S.Ct. 1609, 1614] ["A relatively brief encounter, a routine traffic stop is more analogous to a so-called *Terry* stop than to a formal arrest."]; *People v. Hernandez* (2008) 45 Cal.4th 295, 299 ["Ordinary traffic stops are treated as investigatory detentions"].
[5] *Merriam-Webster's Collegiate Dictionary* (Eleventh Edition). Also see *In re Carlos M.* (1990) 220 Cal.App.3d 372, 382, fn.4 ["[N]othing suggests [the officer] dallied."].
[6] See *U.S. v. Hernandez* (11th Cir. 2005) 418 F.3d 1206, 1212, fn.7.
[7] See *U.S. v. Hernandez* (11th Cir. 2005) 418 F.3d 1206, 1212, fn.7; *U.S.* v. *Harrison* (2nd Cir. 2010) 606 F.3d 42, 45.
[8] See *City of Ontario v. Quon* (2010) 560 U.S. 746, 763; *Atwater v. City of Lago Vista* (2001) 532 U.S. 318, 350 [the "least-restrictive-alternative limitation" is "generally thought inappropriate in working out Fourth Amendment protection"].
[9] *United States v. Sharpe* (1985) 470 U.S. 675, 686. Also see *People v. Bell* (1996) 43 Cal.App.4th 754, 761, fn.1.
[10] (9th Cir. 2002) 308 F.3d 987, 991.

because he was held for almost an hour. The court disagreed, explaining that "[w]hile the length of Gallegos's detention remains relevant, more important is that [the officers'] actions did not involve any delay unnecessary to their legitimate investigation." Similarly, in *Ingle v. Superior* Court[11] the court ruled that the defendant's detention was conducted diligently because "[e]ach step in the [detention] proceeded logically and immediately from the previous one."

Two other things should be noted about the "diligence" requirement. First, it necessarily means that officers must terminate their detentions within a reasonable time after they have determined that grounds to detain did not exist, or that further detention was unlikely to confirm or dispel their suspicions or, in the case of traffic stops, when they have issued a citation or warning.[12] Second, if a detention is unduly prolonged it becomes a "de facto arrest" which, like any arrest, is unlawful unless the officers had probable cause at the time the detention became unduly prolonged.[13] As the Fifth Circuit observed, "A prolonged investigative detention may be tantamount to a *de facto* arrest, a more intrusive custodial state which must be based upon probable cause rather than mere reasonable suspicion."[14]

Responding to Complications

There are essentially only three things that officers may do during most detentions: (1) take reasonable steps to maintain officer safety, (2) identify the detainee, and (3) investigate the crime for which reasonable suspicion exists. But because "[b]revity can only be defined in the context of each particular case,"[15] the courts have consistently ruled that in determining whether a detention became a de facto arrest, judges must consider the totality of circumstances. These might include the weather (wind and rain will slow things down), the time of day or night (detentions that occur in dark places will usually take longer because visibility is necessary restricted), the location of the stop (a stop in a highly traveled area may require officers to closely monitor oncoming traffic), and distractions caused by passersby or onlookers.

Additional delays may result from problems in obtaining necessary information, such as confirming the detainee's identity, confirming outstanding warrants; waiting for backup, arranging and conducting field showups; questioning multiple detainees, and attempting to obtain additional information from supervisors, dispatchers, witnesses, and other officers.

While all of these things take time, the resulting delay will not transform the detention into a de facto arrest if (1) it was reasonably necessary for the officers to deal with the matter, and (2) the officers were diligent in doing so.[16] Thus, the First Circuit observed that "the circumstances and unfolding events during a traffic stop allow for an officer to shift his focus and increase the scope of his investigation by degrees with the accumulation of information."[17] Or as the Court of Appeal put it,

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[11] (1982) 129 Cal.App.3d 188, 196.

[12] See *Rodriguez v. United States* (2015) __ U.S. __ [135 S.Ct. 1609, 1614-15] ["a traffic stop can become unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a warning ticket"].

[13] See *People v. Espino* (2016) 247 Cal.App.4th 746, 760; *In re Carlos M.* (1990) 220 Cal.App.3d 372, 384 ["When the detention exceeds the boundaries of a permissible investigative stop, the detention becomes a de facto arrest requiring probable cause."]; *People v. Gorrostieta* (1993) 19 Cal.App.4th 71, 83.

[14] *U.S. v. Shabazz* (5th Cir. 1993) 993 F.2d 431, 436.

[15] *U.S. v. Torres-Sanchez* (9th Cir. 1996) 83 F.3d 1123, 1129. Also see *U.S. v. Charley* (9th Cir. 2005) 396 F.3d 1074, 1080.

[16] See *U.S. v. Dion* (1st Cir. 2017) 859 F.3d 114, 125 ["as an investigation unfolds, an officer's focus can shift, and he can increase the scope of his investigation by degrees when his suspicions grow during the stop]; *U.S. v. Stepp* (6th Cir. 2012) 680 F.3d 651, 661 ["the police may extend a stop beyond the scope of what was originally permissible if something happened during the stop to cause the officer to have a reasonable and articulable suspicion that criminal activity is afoot"]; *U.S. v. Ruidiaz* (1st Cir. 2008) 529 F.3d 25, 29 ["the officer's] ensuing actions must be fairly responsive to the emerging tableau"].

[17] *U.S. v. Orth* (1st Cir. 2017) 873 F.3d 349, 354.

"Levels of force and intrusion in an investigatory stop may be legitimately escalated to meet supervening events."[18]

For example, in *People v. Soun*,[19] the Court of Appeal ruled that Oakland police officers were justified in prolonging the stop of a car containing six murder suspects because, in addition to the unusual number of detainees, the crime took place in San Jose (which necessitated telephone discussions with SJPD investigators on how to proceed); and the nature of the crime (robbery-murder) which required additional officer-safety precautions. In ruling that the officers were diligent, the court said that they "fully accounted for this period of time."

Delays might also result from the actions of the detainee or his companions. But these types of delays are seldom significant because, as the Tenth Circuit observed, "When a defendant's own conduct contributes to a delay, he or she may not complain that the resulting delay is unreasonable."[20]

The following are some examples of other things that happen during detentions that will necessarily require additional time:

- "At the point where Castellon failed to follow [the officer's] order to remain in the car [the] focus shifted from a routine investigation of a Vehicle Code violation to officer safety."[21]
- "The delay in this case was attributable almost entirely to the evasive actions of [a second suspect], who sought to elude the police."[22]
- "[T]he computer problem causing a delay of 25 minutes [did] not transform this admittedly legal initial detention into an unlawful *de facto* arrest."[23]
- "Once defendant had provided false information which needed to be checked further, the officers had reason to extend the detention."[24]
- The "failure to produce a valid driver's license necessitated additional questioning."[25]
- "[T]his case involved the detention of four detainees by two officers."[26]
- The detainee gave suspicious, evasive, and incomplete answers.[27]

Investigating Other Crimes

Officers who have detained a suspect for one reason may see or hear something or otherwise obtain information that indicates the suspect may

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[18] *People v. Johnson* (1991) 231 Cal.App.3d 1, 13.

[19] (1995) 34 Cal.App.4th 1499. Also see *People v. Huerta* (1990) 218 Cal.App.3d 744, 751.["The officers were having to make decisions. 'We had a lot of things going on.'"]; *U.S. v. Mouscardy* (1st Cir. 2013) 722 F.3d 68, 74-75 [a detainee "cannot profit from the delay he himself caused"].

[20] *U.S. v. Shareef* (10th Cir. 1996) 100 F.3d 1491, 1501. ALso see *United States v. Montoya De Hernandez* (1985) 473 U.S. 531, 543 ["Our prior cases have refused to charge police with delays in invesigatory detention attributable to the suspect's evasive actions."].

[21] *People v. Castellon* (1999) 76 Cal.App.4th 1369, 1374.

[22] *United States v. Sharpe* (1985) 470 U.S. 675, 687-88. Also see *U.S. v. Clark* (1st Cir. 2018) 879 F.3d 1, 5 [OK to extend traffic stop because the officer reasonably believed that a passenger had provided inconsistent birthdates].

[23] *U.S. v. Rutherford* (10th Cir. 1987) 824 F.2d 831, 834.

[24] *People v. Huerta* (1990) 218 Cal.App.3d 744, 750. Also see *People v. Grant* (1990) 217 Cal.App.3d 1451, 1459 ["T]he officer needed to exhaust all avenues to reliably identify the driver."].

[25] *U.S. v. Long* (7th Cir. 2005) 422 F.3d 597, 602. Also see *People v. James* (1969) 1 Cal.App.3d 645, 648-49 [driver had no license or registration, no current registration tag, driver said his cousin owned the car but he didn't know her name].

[26] *Muehler v. Mena* (2005) 544 U.S. 93, 100.

[27] *People v. Webster* (1991) 54 Cal.3d 411, 430-1 [the suspect disclaimed ownership of the car, stating that it belonged to a passenger, but also said the passengers were hitchhikers"]. Also see *U.S. v. Mouscardy* (1st Cir. 2013) 722 F.3d 68, 74-75 ["Mouscardy's unresponsiveness to Officer Selfridge's reasonable inquiries prevented the officers from completing their investigation more quickly."].

be involved in another crime. If this information constitutes reasonable suspicion, they may, of course, extend the detention to investigate. But if they do not have reasonable suspicion, the question arises: Can they investigate nevertheless if they do so diligently? Unfortunately, it is impossible to answer this question because of unnecessary and conflicting verbiage in three Supreme Court cases. As the result, there are currently three possible and seemingly inconsistent answers.

THE "MEASURABLY EXTEND" TEST: In *Arizona v. Johnson*, the Supreme Court said, "An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not *measurably extend the duration of the stop*."[28]

The Court's claim that it has "made plain" its rulings on this subject is ludicrous. For example, what does "measurably extend" mean in the context of detentions? Wouldn't any extension of time have to be "measurable" in order to qualify as an extension?

We must therefore speculate and say that, by prohibiting only *measurable* extensions—instead of prohibiting *any* extensions—the Court may have meant that some extension is permitted if it was moderate. This also appears to have been the conclusion of the First Circuit which recently ruled that an extension that was only "negligibly burdensome" would not convert a detention into a de facto arrest.[29] Similarly, the Seventh Circuit observed that "[q]uestions that hold potential for detecting crime, yet create little or no inconvenience, do not turn reasonable detention into unreasonable detention. They do not signal or facilitate oppressive police tactics."[30]

THE "REASONABLY REQUIRED" TEST: Four years before the Court announced its "measurably extend" test, it said in *Illinois v. Caballes* that a brief extension of a detention is permitted if it did not prolong the top "beyond the time reasonably required to complete that mission."[31] We call this the "reasonably required" test, and it makes no sense for two reasons.

First, there is no way for judges to determine—other than by guessing—the amount of time that was "reasonably necessary" to respond to the unique, various, and changing circumstances that occur in the course of virtually every detention. In fact, the Court has repeatedly condemned such a practice which is commonly known as "judicial second-guessing." For example, in *United States v. Sharp* the Supreme Court observed that a "creative" judge "can almost always imagine some alternative means by which the objectives of the police might have been accomplished."[32] And in *San Francisco v. Sheehan* the Court said that courts "must not judge officers with the 20/20 vision of hindsight."[33]

Second, the result of the "reasonably required" test would often depend on the efficiency and experience of the officer who happened to detain the suspect. This is because experienced officers can almost always carry out their duties faster than newer ones. As Justice Thomas pointed out in his dissenting opinion in *Rodriguez v. United States*, "If a driver is stopped by an particularly efficient officer, then he will be entitled to be released from

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[28] (2009) 555 U.S. 323, 333. Emphasis added. Also see *Rodriguez v. United States* (2015) __ U.S. __ [135 S.Ct. 1609]

[29] *U.S. v. Clark* (1st Cir. 2018) 879 F.3d 1, 5. Compare *U.S. v. Peralez* (8th Cir. 2008) 526 F.3d 1115, 1121 ["The off-topic questions more than doubled the time Peralez was detained."].

[30] *U.S. v. Childs* (7th Cir. 2002) 277 F.3d 947, 954. Edited. Compare *U.S. v. Peralez* (8th Cir. 2008) 526 F.3d 1115, 1121 ["The off-topic questions more than doubled the time Peralez was detained."].

[31] (2005) 543 U.S. 405, 407.

[32] (1985) 470 U.S. 675, 686-67. Also see *Thompson v. County of Los Angeles* (2006) 142 Cal.App.4th 154, 165 [courts must view the facts "from the perspective of the officer at the time of the incident and not with the benefit of hindsight"]; *Martinez v. County of Los Angeles* (1996) 47 Cal.App.4th 334, 343 ["We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day."].

[33] (2015) __ U.S. __ [135 S.Ct. 1765, 1777]

the traffic stop after a shorter period of time than a driver stopped by a less efficient officer. I cannot accept that the search and seizure protections of the Fourth Amendment are so variable and can be made to turn upon such trivialities."[34]

THE "ADDS TIME" TEST: Adding to the confusion it had already caused, the Court in *Rodriguez*[35] indicated that a detention becomes unlawful if it was prolonged for *any* amount of time ("measurable" or "unmeasurable"). Said the Court, the "critical question" is whether the investigation into other matters "adds time" to the stop. Taken literally, this would mean that any delay whatsoever would render the detention a de facto arrest. Such an interpretation would seem to be inconsistent with the Court's other two tests. But maybe not. Who knows?

In any event, it would lead to nonsensical results. For example it would render a detention unlawful if the officer started off with a brief pleasantry such as, "How are you doing today? In addition, officers would be prohibited from seeking the detainee's consent to search for evidence pertaining to another crime because asking for consent necessary "adds time" and/or "measurably extends" and/or is not reasonably required. And yet, the Court has consistently encouraged officers to seek consent; e.g., "Police officers act in full accord with the law when they ask citizens for consent."[36]

THE THIRD CIRCUIT SPEAKS OUT: If you, too, are wondering how the Highest Court In The Land can be so sloppy, you have good company. Just before we went to press, the Third Circuit in *U.S. v. Green*[37] carefully reviewed the cases we just discussed and essentially concluded that the Supreme Court simply does not understand that its rulings on this subject are nonsensical. For example, the court noted the following:

> In describing an extension as anything that "adds time to" or "measurably extends" a stop, the Court [in *Rodriguez*] seems to imply that nearly anything an officer does outside the valid, traffic-based inquiries will be unconstitutional. Yet, other language in the opinion suggests a more forgiving approach toward non-traffic based actions.

The Third Circuit provided a devastating example of this ambiguity and sloppiness by pointing out the impossibility of making sense of the following ruling in *Rodriguez*:

> An officer may conduct certain unrelated checks during an otherwise lawful traffic stop. But he may not do so in a way that prolongs the stop.

Scratching their collective heads, the judges in *Green* observed, "Left unexplained is how a police officer could possibly perform multiple tasks simultaneously without adding any time to a stop." Kudos to the Third Circuit.

Pretext Traffic Stops

A so-called pretext traffic stop is a detention that, although based on a traffic violation, was conducted for the purpose of investigating a crime for which grounds to detain did not exist.[38] As the Ninth Circuit explained:

> A pretextual stop occurs when the police use a legal justification to make the stop in order to search a person or place, or to interrogate a person, for an unrelated serious crime for which they do not have the reasonable suspicion necessary to support a stop.[39]

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[34] (2015) __ U.S. __ [135 S.Ct. 1609, 1618] (dis. opn. of Thomas, J.). Edited.
[35] (2015) __ U.S. __ [135 S.Ct. 1609].
[36] *United States v. Drayton* (2002) 536 U.S. 194, 207.
[37] (3rd Cir. 2018) __ F.3d __ [2018 WL 3559216].
[38] See *People v. Valenzuela* (1999) 74 Cal.App.4th 1202, 1207, fn.2 ["In a pretext case, only the investigative motive is bona fide."]; *U.S. v. Perez* (9th Cir. 1994) 37 F.3d 510, 513 ["A pretextual stop occurs when the police use a legal justification to make the stop in order to search a person or place, or to interrogate a person, for an unrelated serious crime for which they do not have the reasonable suspicion necessary to support a stop."]. **NOTE**: The term "wall stop" is sometimes used to describe a pretext traffic stop undertaken as a result of information from a court-ordered wiretap.
[39] *U.S. v. Perez* (9th Cir. 1994) 37 F.3d 510, 513.

While some have argued that pretext stops should be prohibited, the courts have consistently ruled otherwise. Thus, the Eighth Circuit said that "[a]n officer's observation of a traffic violation, however, minor, gives the officer probable cause to stop the vehicle, even if the officer would have ignored the violation but for a suspicion that greater crimes are afoot."[40] There are some other things about pretext stops that should be noted.

First, like any detention, a pretext stop will become unlawful if officers unduly prolonged the stop to investigate a crime for which they lacked reasonable suspicion or probable cause. As the result, pretext traffic stops are problematic because officers must, at least at first, focus their attention on the traffic violation while, at the same time, watching and listening for any additional information that would provide them with grounds to investigate the crime. This subject is covered in the section "Investigating Other Crimes," above.

Second, officers are not required to issue the driver a citation in order to prove that they observed a traffic violation.[41] Third, it is immaterial that the officer lied to the driver about the reason for the stop. As the Ninth Circuit observed, "The standard for determining whether probable cause or reasonable suspicion exists is an objective one; it does not turn either on the subjective thought processes of the officer or on whether the officer is truthful about the reason for the stop."[42]

Third, some potentially serious legal problems might arise if a pretext stop leads to the discovery of evidence. Specifically, officers will sometimes omit from their arrest report any mention of the true reason for the stop. In many cases, the reason is that the disclosure would imperil an informant or compromise an ongoing investigation. This, in turn, might trigger the following problems:

Discovery violation: If the suspect was charged with a crime as the result of the stop, and if prosecutors were aware of the true motivation for the stop, their failure to disclose it to the defense might constitute a discovery violation.

False police reports: A police report that was written so as to conceal relevant information might be deemed a false police report.

Perjury: An officer might commit perjury if he failed to disclose the true purpose of the stop if he was asked at a suppression hearing why he stopped the defendant.

To our knowledge, none of these things have happened, but they should be kept in mind.

Detentions Into Contacts

Many of the problems pertaining to the duration of detentions can be avoided by converting them into "contacts" or consensual encounters. As the Tenth Circuit explained, "[I]f the encounter between the officer and the driver ceases to be a detention, but becomes consensual, and the driver voluntarily consents to additional questioning, no further Fourth Amendment seizure or detention occurs."[43] To do this, the officers must make it clear to the suspect that he is now free to leave which generally requires that they do two things. First, they must return all identification documents they had obtained from him, such as his driver's license. Second, although not technically a requirement, officers should tell him that he may leave. The delivery of such a warning, said the Court of Appeal "weighs heavily in favor of finding voluntariness and consent."[44] However, telling a suspect that he is free to go will have little significance if there were other circumstances that reasonably indicated he could not leave.[45] POV

[40] *U.S. v. Barragan* (8th Cir. 2004) 379 F.3d 524, 528.
[41] See *Brierton v. DMV* (2005) 130 Cal.App.4th 499, 510; *U.S. v. Willis* (9th Cir. 2005) 431 F.3d 709, 717.
[42] *U.S. v. Magallon-Lopez*,(9th Cir. 2016) 817 F.3d 671, 675.
[43] *U.S. v. Anderson* (10th Cir. 1997) 114 F.3d 1059, 1064.
[44] See *People v. Profit* (1986) 183 Cal.App.3d 849, 877.
[45] *U.S. v. Bowman* (4th Cir. 2018) 884 F.3d 200, 212; *U.S. v. Rodriguez-Escalera* (7th Cir. 2018) 884 F.3d 661, 671

The "Reasonable Officer" Test

I tried being reasonable. I didn't like it.

—Clint Eastwood

It is well-known that Clint Eastwood's most famous character—the hardboiled cop "Dirty Harry" Callahan—was steadfastly unreasonable. But Harry was able to keep his job because he wasn't a real cop. If he were, he would be spending most of his time testifying at suppression hearings, at police discipline and termination hearings, and at multi-million dollar civil trials.

In fact, the ability to act "reasonably" is not just a positive character trait for officers; it is what the Fourth Amendment *requires* of them when they conduct searches and make arrests. As the Supreme Court observed, "[W]hat is generally demanded of the many factual determinations that must regularly be made by agents of the government is not that they always be correct, but that they always be reasonable."[1] In fact, all of the rules pertaining to searches and seizure are just a court's idea of how a reasonable officer would have acted.

Because reasonableness is so important, there ought to be some criteria by which it can be identified and cultivated. Hardly. But that's because reasonableness "embodies a concept, not a constant. It cannot be usefully defined in order to evolve some detailed formula for judging cases."[2] For that reason, most courts employ one of the standard dictionary definitions of the word; e.g., to "think in a connected or logical manner; to use one's reason in forming conclusions."[3] So, to determine whether a search or seizure was lawful, the courts apply the "reasonable officer test," whereby a police action will be upheld if a court finds that a reasonable officer might have done the same thing. How can the courts figure out what a reasonable officer would have done under the circumstances? They will ordinarily take note of the following:

What did the officer know? To determine whether officers acted in a reasonable manner, it is necessary to determine what information they possessed. For example, in ruling that officers did not act reasonably, the courts have pointed out that "in the absence of any underlying facts as to why [the officer] suspected the house was a 'stash house,' this [information] is entitled to little, if any, weight";[4] and "[t]he officer was acting solely upon a general report of a 'suspicious person,' which did not provide any articulable facts that would suggest the person was committing a crime."[5]

What the officer should have known: In addition to determining what the officers knew, the courts consider whether they were unaware of relevant information that they should have had, and which they could have obtained with reasonable effort.

Making inferences from facts: Officers are permitted to make inferences as to the meaning and significance of the facts, so long as the inferences themselves are reasonable. Thus, the Court of Appeal pointed out that "[r]unning down a street is indistinguishable from the action of a citizen engaged in a program of physical fitness. Viewed in context of immediately preceding gunshots, it is highly suspicious."[6]

Training and experience: An officer's training and experience are also relevant because they often give meaning or significance to the facts that others might think were insignificant. As the Court of Appeal observed, "[T]he officer's training and ex-

[1] *Illinois v. Rodriguez* (1990) 497 U.S. 177, 185.
[2] *U.S. v. Rodriguez-Morales* (1st Cir. 1991) 929 F.2d 780, 785.
[3] *The New Shorter Oxford English Dictionary* (Volume 2, 1993) pages 2495-2496.
[4] See *United States v. Leon* (1984) 468 U.S. 897, 919-20.
[5] *U.S. v. Cervantes* (9th Cir. 2012) 678 F.3d 798, 803.
[6] *People v. Juarez* (1973) 35 Cal.App.3d 631, 636.

perience can be critical in translating observations into a reasonable conclusion."[7] Or, in the words of the Supreme Court, "The evidence must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."[8]

KNOWLEDGE OF THE LAW: Although the courts do not expect officers "to understand legal nuances the way that an attorney would," they do expect them to be "reasonably well-trained" in the law of search and seizure.[9] This means, among other things, that officers must have "a reasonable knowledge of what the law prohibits."[10]

For example, the Supreme Court observed that evidence should be suppressed if the officer "had knowledge, or may properly be charged with knowledge that the search was unconstitutional."[11] Consequently, officers are expected to stay current on significant changes in the law. As the result, an officer "can gain no Fourth Amendment advantage through sloppy study of the laws he is duty-bound to enforce."[12]

This does not mean that their legal determinations must always be correct, especially in cases where the law is unsettled or ambiguous. Thus, in a case in which the existence of probable cause was contested, the court ruled that the officers reasonably believed they had it because, as the trial judge said, "I tell you, it belongs on the bar exam. It's not something that you can just call in a hot minute."[13]

In contrast, in *Stoner v. California*[14] officers obtained consent from a hotel night clerk to search the defendant's hotel room for evidence pertaining to a robbery. In ruling that the search was illegal, the Supreme Court said it was plainly unreasonable for the officers to believe that a hotel employee had the authority to consent to the search of a guest's room. Said the Court, "[W]hen a person engages a hotel room he undoubtedly gives implied or express permission to such persons as maids, janitors or repairmen to enter his room in the performance of their duties. But the conduct of the night clerk and the police in the present case was of an entirely different order."

"REASONABLENESS" IN EMERGENCIES: Officers often find themselves in situations where they have little or no time to ruminate about what action they should take. When this happens, the reasonableness of the officers' response may also depend on the potential harm that might result from a delay. Thus, the seriousness of the crime under investigation becomes an important issue. Thus, in *Florida v. J.L.,* the Supreme Court made the following observation (which is frequently quoted by the lower courts): "We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk."[15]

One other thing before we close: Some readers might be wondering how the "reasonable officer" test differs from the "good faith rule." While the former is used to determine whether an officer obtained evidence in violation of a Fourth Amendment rule, the good faith rule applies if a court determines that a violation did occur, but that the circumstances were such that the officer cannot be faulted. Thus, in announcing the good faith rule, the Supreme Court explained that suppression is unwarranted if "the officer [was] acting as a reasonable officer would and should act in similar circumstances."[16]

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[7] *People v. Ledesma* (2003) 106 Cal.App.4th 857, 866.
[8] *Illinois v. Gates* (1983) 462 U.S. 213, 232.
[9] *U.S. v. Workman* (10th Cir. 2017) 863 F.3d 1313, 1321.
[10] *United States v. Leon* (1984) 468 U.S. 897, 919, fn.20.
[11] *Illinois v. Krull* (1987) 480 U.S. 340, 348.
[12] *Heien v. North Carolina* (2014) __ U.S. __ [135 S.Ct. 530, 539-40].
[13] *In re Christopher R.*, (1989) 216 Cal.App.3d 901, 904.
[14] (1964) 376 U.S. 483.
[15] (2000) 529 U.S. 266, 273-74.
[16] *United States v. Leon* (1984) 468 U.S. 897, 920.

MISTAKES OF FACT AND LAW: The Supreme Court is aware that the law "cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures on law enforcement and the vagaries of human nature would make such an expectation unrealistic."[17] Thus, the Court ruled that, "[b]ecause many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability."[18] Accordingly the law punishes only those mistakes that are deemed "unreasonable."

Although the courts sometimes say that suppression is not required if a mistake was "honest" or "understandable," in reality these are just other names for reasonable mistakes. As the Court of Appeal explained, "The touchstone inquiry in all Fourth Amendment cases is the reasonableness—not certainty—of the official's conduct."[19]

There are two types of mistakes: mistakes of fact and mistakes of law. A mistake of fact occurs when officers were wrong about one or more of the circumstances that caused them to act. If the mistake was reasonable, the courts will analyze the reasonableness of the officer's conduct as if the circumstance did, in fact, exist. The Supreme Court provided the following example: "An officer might stop a motorist for traveling alone in a high-occupancy vehicle lane, only to discover upon approaching the car that two children are slumped over asleep in the back seat. The driver has not violated the law, but neither has the officer violated the Fourth Amendment."[20]

Another example is found in *Maryland v. Garrison*[21] where officers in Baltimore obtained a warrant to search McWebb's apartment for drugs. Before they applied for the warrant, they obtained information that McWebb's apartment was the only one on the third floor. In fact, this information came from three sources: a reliable informant, the officers' examination of the exterior of the three-story building, and information they received from a utility company. But it turned out that there were two apartments on the third floor, and the officers inadvertently searched the wrong one. The case went to the Supreme Court which ruled that, although the officers had made a mistake that resulted in the seizure of evidence, the evidence should not be suppressed because the actions they took beforehand were "consistent with a reasonable effort to ascertain and identify the place intended to be searched."

Similarly, if an officer pat searched a detainee because he mistakenly thought that a bulge under his jacket was a handgun, the search will be lawful if the size and shape of the bulge was consistent with that of a gun, even though it was actually a cell phone.

Mistakes of law are a little more complicated. In the past, an officer's mistake as to a law or an interpretation of a law would ordinarily be deemed unreasonable because officers are expected to know the laws they enforce. In 2014, however, the Supreme Court ruled that a mistake of law might be tolerated if it was "objectively reasonable."[22] This might occur, for example, if officers "suddenly confront a situation in the field as to which the application of a statute is unclear—however clear it may later become." Thus, the Court in *Heien v. North Carolina* ruled that an officer's misunderstanding of a law requiring only one brake light was reasonable because the law was ambiguous.[23] We have provided some additional examples of these two types of mistakes on the next page. POV

[17] *Michigan v. Tucker* (1974) 417 U.S. 433, 446.
[18] *Brinegar v. United States* (1949) 338 U.S. 160, 176.
[19] *People v. Glick* (1988) 203 Cal.App.3d 796, 801-802.
[20] *Heien v. North Carolina* (2014) __ U.S. __ [135 S.Ct. 530, 534]. Also see *U.S. v. Mariscal* (9th Cir. 2002) 285 F.3d 1127.
[21] (1987) 480 U.S. 79.
[22] *Heine v. North Carolina* (2014) __ U.S. __ [135 S.Ct. 530].
[23] (2014) __ U.S. __ [135 S.Ct. 530, 540].

Mistakes of Fact and Law

It is sometimes difficult to determine whether an officer's mistake is one of fact or law. As the Court of Appeal observed, "What is an error of fact and what is an error of law in a given matrix is not always capable of easy resolution."* Still, the following examples may help.

Detention

MISTAKE OF FACT: An officer detained a pedestrian at 10:30 P.M. for violating his city's 10 P.M. curfew for minors. He misjudged the pedestrian's age: he was actually 21-years old. This was a reasonable mistake of fact because he looked young.

MISTAKE OF LAW: The officer was correct in his belief that the detainee was a minor, but he was wrong about the language of the curfew ordinance: curfew began at 11 P.M., not 10 P.M. This was a mistake of law that was probably unreasonable.

Traffic Stop

MISTAKE OF FACT: An officer stopped a driver because he believed his license plate light was out when, in fact, is was somewhat dim. A reasonable mistake of fact.

MISTAKE OF LAW: An officer stopped a car with an out-of-state license plate because no plate was attached to the front of the vehicle. It turned out the issuing state did not issue front plates. This was a mistake of law that was probably unreasonable.

Pat Search

MISTAKE OF FACT: An officer pat searched a detainee because he mistakenly believed that the bulge under the detainee's jacket was a gun. Actually, it was a large baggie of marijuana. This was a mistake of fact that would be reasonable if the officer could articulate why the bulge appeared to be a gun.

MISTAKE OF LAW: An officer pat searched a detainee because he believed the law permitted officers to pat search every person they detain. This was an unreasonable mistake of law because pat searches are generally permitted only if there was reason to believe that the particular detainee was armed or dangerous.

Consent Search

MISTAKE OF FACT: An officer conducted a consent search of a house after obtaining consent from the person who answered the door. Although person was actually just a visitor, the mistake of fact might have been reasonable because most people who answer doors and give consent to search are residents. Still, a court might rule that the mistake was unreasonable because the officer did not question the consenting person to determine his relationship to the house or authority to consent.

MISTAKE OF LAW: The officer in the above example was aware that the consenting person was a neighbor, but he believed that any person who answers the door can legally consent to a search of the house. This was an unreasonable mistake of law because the officer was unaware that consent can only be given by a person who reasonably appeared to have common authority over the premises.

Probable Cause

MISTAKE OF FACT: An officer arrested a man because his physical description and clothing were similar to those of a man who had just robbed a nearby convenience store. Although the man was not the robber, this would be a reasonable mistake of fact if the descriptions were sufficiently close.

MISTAKE OF LAW: An officer arrested a man because an anonymous 911 caller said the man was selling drugs on a certain street corner. Although the officer found drugs when he conducted a search incident to the arrest, the arrest was unlawful because it was based on the officer's unreasonable belief that probable cause to arrest can be based on nothing more than information from an anonymous source.

* *People v. Washington* (1982) 131 Cal.App.3d 434, 439.

Recent Cases

Collins v. Virginia

(2018) __ U.S. __ [138 S.Ct. 1663]

Issues

(1) If officers have probable cause to search a suspect's vehicle, may they do so without a warrant if the vehicle was parked on the suspect's driveway? (2) If not, did the officers in this case have implied consent to enter?

Facts

An officer in Virginia attempted to make a traffic stop on an orange and black motorcycle with an extended frame, but the driver eluded him. A few weeks later, another officer in the same department attempted to stop the same motorcycle for speeding but, again, the driver got away. When the two officers compared notes, they discovered that the motorcycle had "likely" been stolen and that the driver was Collins. So they checked Collins' Facebook page and found a photo of just such a motorcycle. It appeared that the motorcycle was parked in the driveway of a house and, after some detective work, they located the house and determined that Collins was staying there.

One of the officers then went to the house where he saw a motorcycle parked on the driveway. The motorcycle was under a tarp but it appeared to have an extended frame. But because the officer needed to make sure, he walked up the driveway, lifted the tarp, and confirmed it. As the result, Collins was arrested and charged with possession of stolen property. His motion to suppress the officer's observations of the motorcycle in the driveway was denied, and he was convicted. He appealed to the United States Supreme Court.

Discussion

To determine whether Collins' motion to suppress should have been granted, the Court had to address two issues: (1) the scope of the so-called automobile exception to the warrant requirement, and (2) whether officers have implied consent to enter a suspect's property if they remain on normal access routes.

The automobile exception: Under the "automobile exception," officers with probable cause to search a vehicle may do so without a warrant.[1] Although this rule was established over 35 years ago, the Supreme Court has never had to decide whether the existence of probable cause also authorizes officers to enter private property for the purpose of inspecting or searching the vehicle. The Court ruled that it didn't. Specifically, it ruled that, while the automobile exception authorizes officers with probable cause to search a vehicle that is located in a public place, it does not also constitute authorization to walk onto a suspect's private property for the purpose of searching or examining it. This ruling was consistent with the Court's previous ruling that a "search" results if officers walk onto private property for the purpose of obtaining evidence of a crime.[2] Accordingly, the Court ruled that the officer's warrantless entry onto the driveway "invaded Collins' Fourth Amendment interest in the covered motorcycle," and also invaded his Fourth Amendment privacy interest in the property immediately surrounding his home.

Implied consent: Although the automobile exception did not apply, the officer's entry would nevertheless have been legal if visitors had implied consent to do so.

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[1] See *United States v. Ross* (1982) 456 U.S. 798, 809 ["[A vehicle] search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained."]; *People v. Carpenter* (1997) 15 Cal.4th 312, 365 ["The police had probable cause to search the vehicle. Under the 'automobile exception' to the warrant requirement, they did not need a warrant at all."].

[2] See *Florida v. Jardines* (2013) 569 U.S. 1.

As a general rule, implied consent to enter private property surrounding a residence will be found if (1) the officers remained on normal access routes to the front door; and (2), while on the property, they did not engage in activities that were beyond those that residents would normally expect from visitors. As the Court previously explained, implied consent to enter "typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave."[3]

To reach the front door of Collins' house, visitors would ordinarily walk up the driveway until it intersected with a pathway that led directly to the front door. Said the Court, "A visitor endeavoring to reach the front door of the house would have to walk partway up the driveway, but would turn off before entering the [area in which the motorcycle was parked]."

Consequently, the officer's failure to use the pathway rendered his continued presence on the driveway unlawful. In addition, his act of lifting the tarp constituted an illegal search because it was not something that visitors normally do. As the Court noted in *Florida v. Jardines*, "To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police."[4]

For these reasons, the Court ruled that the officer's entry onto the driveway was not consensual and, therefore, his observation and search of the stolen motorcycle should have been suppressed.

People v. Case

(2018) 5 Cal.5th 1

Issue

Did a detective violate a murder suspect's *Miranda* rights when he continued to question him after he invoked his right to remain silent?

Facts

At about 8 P.M,, Case held up The Office bar in Sacramento County. When he entered, the only people in the bar were the bartender and a customer. Case brandished a .45 caliber handgun, ordered the bartender and customer into a restroom where he shot each of them twice in the head. After cleaning out the cash register ($320), he went to the home of Mary Webster, a former girlfriend, and showed her a "big wad of money" and a .45 caliber handgun. Webster noticed that Case's shirt was "full of blood" and that his arms were saturated with "just layers and layers" of it. Case told Webster he shot two men over a dispute during a card game, and he told her to get "rid of the stuff." She put his gun in a closet and tossed his bloody shirt and boots in a dumpster at a nearby apartment complex.

The next morning, after Case had left, Webster phoned a Sacramento police detective she knew and told him what happened. The detective told her to retrieve the shirt and boots from the dumpster, then flag down a sheriff's patrol car and explain the situation. She did as instructed and later repeated her story to two homicide detectives. She also agreed to accompany them to her home to recover the gun. But before leaving, she phoned her home because she wanted to talk with her son. But, unexpectedly, it was Case who answered the phone. She signaled the detectives who then recorded her subsequent conversation with Case in which he reminded her to get "rid of the stuff." She assured him that she had already done so. The detectives then drove to Webster's home, arrested Case and recovered the gun.

At the sheriff's station, one of the detectives told Case that they were investigating a robbery and murder, and asked him if he was willing to talk about it. Case responded, "No, not about a robbery-murder. Jesus Christ." The interview ended but, after obtaining some basic identification information from Case, the detective asked, "Care to tell us where you were at last night?" Case admitted that

[3] *Florida v. Jardines* (2013) 569 U.S. 1, 8.
[4] *Florida v. Jardines* (2013) 569 U.S. 1, 9.

he was at The Office bar and that he had stayed there "[d]amn near all night until about 9 o'clock."

Apparently concerned that he might have violated Case's *Miranda* rights, the detective asked, "[L]et me see if I'm understanding something. When I advised you of your rights, you just didn't want to talk about the murder and the robbery, but you wanted to talk about your alibi and that sort of thing; is that right?" Case's response was nonsensical: "Well, that's what it is, ain't it?"

Case filed a motion to suppress his admission on grounds that he had invoked his right to remain silent when he told the detective that he didn't want to talk "about the robbery-murder." The motion was denied and Case's statements were used against him at trial. He was found guilty and sentenced to death.

Discussion

In the past, the courts would rule that a *Miranda* invocation resulted whenever a suspect expressed any reluctance to discuss his case "freely and completely." In retrospect, this was illogical because a suspect's refusal or reluctance to discuss a particular subject or answer a certain question does not necessarily demonstrate a desire to terminate the interview. Consequently, it is now the law that a suspect's act of placing limits or conditions on an interview demonstrates a willingness to speak with officers if they accept his conditions.[5]

At the suppression hearing, the detective who questioned Case testified he thought Case's refusal to talk "about a robbery-murder" was a limited invocation. Specifically, he testified that, although it was apparent that Case did not want to provide specifics about the physical act of committing the crimes, he was willing to talk about related matters, and that one such matter was Case's whereabouts when the crimes occurred.

The court did not, however, address the issue of whether Case's remark constituted a full or limited invocation. Instead, it ruled that, even if his invocation was limited, the detective violated *Miranda* by ignoring it and asking him his whereabouts when the robbery-murder occurred. The court also ruled that the detective violated *Miranda* when he followed up Case's response by asking, "Oh, you were there with your girlfriend?" to which Case made his most damaging admission, "Yeah, Damn near all night until about 9:00 o'clock. (As noted, the robbery-murder occurred about 8 o'clock.)

Thus, the court ruled that his admission was obtained in violation of *Miranda* because the detective was effectively asking Case "to talk about the robbery-murder—the very subject defendant told them he was not willing to speak about." The court also ruled, however, that the error in admitting the statements was harmless in light of the overwhelming additional evidence of Case's guilt. The court affirmed Case's conviction and death sentence.

Comment

The court seemed skeptical about the detective's testimony that he did not think Case had fully invoked. One big reason for its skepticism was that the detective said at the suppression hearing that it was "his habit" to ignore *Miranda* invocations and continue interviews in order to obtain a statement that could be used to impeach the suspect at trial. In response, the court said, "Lest there be any doubt, we emphasize that the general tactic [the detective] described is clearly improper: Officers may not deliberately continue to question a suspect after the suspect has invoked his right to remain silent, no matter how useful they might find the suspect's answers."

People v. Vannesse

(2018) 23 Cal.App.5th 440

Issue

If an officer reasonably believes that a DUI arrestee was under the influence of drugs or a combination of drugs and alcohol, is it a violation of California law to inform him that he must provide a blood sample? Or must the officer inform him that he can choose between a blood or breath test?

[5] See *Michigan v. Mosley* (1975) 423 U.S. 96, 103-4; *People v. Johnson* (1993) 6 Cal.4th 1, 25-26.

Facts

An officer with the Ventura Police Department was investigating a collision in which the defendant, Alexander Vannesse, was one of the drivers. After speaking with Vannesse, the officer concluded that he was under the influence of alcohol and/or drugs. And because of the possibility that Vannesse was impaired due to drugs or a combination of drugs and alcohol, and because the only way to test for drugs is by means of a blood test, the officer did not notify him that he could comply with the implied consent law by submitting either a blood or breath sample. Instead, he informed him of the following: "A sample of your blood will be taken by nursing staff at the hospital. If you fail to adequately provide a sample, it will result in the suspension of your driving privilege for a period of one year." As the result, Vannesse submitted a blood sample and the test results confirmed the officer's conclusion.

Vannesse filed a motion to suppress the test results on grounds that the officer violated California law by not informing him that he could choose between a blood or breath test. The motion was denied. Vannesse appealed.

Discussion

Under California law, officers who have arrested a driver for DUI must notify him that he "has the choice of whether the [chemical] test shall be of his or her blood or breath."[6] As noted, the officer in this case did not give Vannesse a choice but, instead, told him that he must submit a sample of his blood. So, the issue was whether a DUI arrestee's blood test results may be suppressed if the officer does not notify him that he could comply with the implied consent law by providing only a breath sample.

The court ruled that an officer's failure to provide such a warning cannot result in the suppression of the blood test results for two reasons. First, it is the law in California that evidence obtained by means of a search or seizure may be suppressed only if was obtained in violation of the Fourth Amendment. And the Fourth Amendment does not require that DUI arrestees be given such a choice.

Second, pursuant to the so-called Inevitable Discovery Rule, evidence may not be suppressed if it would have been acquired inevitably by lawful means.[7] Applying this rule to DUI cases, the court concluded that a blood draw is inevitable if officers have probable cause to believe that a driver is under the influence of drugs and/or alcohol. This is because Vehicle Code § 23612(a)(2)(C) states that a DUI arrestee is *required* to submit a blood sample under those circumstances. As the court pointed out, "If the officer had complied with the letter of the implied consent law by giving the statutory advisement and [Vannesse] had chosen a breath test, the officer could and would have required him to submit to a blood test."

Consequently, the court ruled that Vannesse's blood test results were admissible.

People v. Meza

(2018) 23 Cal.App.5th 604

Issue

If a DUI arrestee was treated at a hospital for injuries, under what circumstances can officers obtain a blood sample without a warrant?

Facts

At about 6:30 P.M., Meza and another driver engaged in a speed contest in Concord. While traveling at about 90 m.p.h. in a 45 m.p.h. zone, Meza lost control of his car which then catapulted across the median and onto embankment. Both Meza and his passenger were injured. At least four officers arrived at the scene and addressed the various issues that result from injury accidents. One of the officers spoke with Meza and concluded that he was under the influence of alcohol.

Meza and his passenger were transported by ambulance to a hospital where, pursuant to emergency department protocol in trauma cases, a sample

[6] Veh. Code § 23612(a)(2)(B).

[7] See *Murray v. United States* (1988) 487 U.S. 533, 539; *Nix v. Williams* (1984) 467 U.S. 431, 444, 447.

of Meza's blood was taken. About 30 minutes later, the blood test results were in: 0.148 percent. About one hour later, an officer who had gone to the hospital to investigate Meza's sobriety directed a phlebotomist to draw another sample of his blood. It tested at 0.11 percent.

Meza was charged with felony DUI among other things. His motion to suppress the results of the second blood test was denied. The case went to trial and the results of both blood tests were admitted into evidence. Meza was convicted and sentenced to six years in prison.

Discussion

On appeal, Meza did not challenge the admissibility of the blood sample that was obtained by hospital personnel as a matter of routine. He did, however, challenge the test results of the sample obtained at the officer's direction without a warrant. The court agreed with Meza that those test results should have been suppressed.

In 1966, the Supreme Court ruled in *Schmerber v. California*[8] that exigent circumstances justify a warrantless blood draw from anyone arrested for DUI. The Court reasoned that an immediate blood draw was needed because the natural metabolization of alcohol in the bloodstream will undermine the reliability of the test results.

In 2013, however, the Court in *Missouri v. McNeely*[9] overturned that ruling on grounds that, due to advances in electronic communications technology such as fax and email, it is it now possible for officers to apply for and obtain warrants from on-call judges so quickly that a categorical exemption for DUI cases was no longer necessary. Consequently, the Court in *McNeely* ruled that, while the metabolization of alcohol remains a relevant circumstance in determining the need for an immediate blood draw, it does not, in and of itself, constitute an exigent circumstance. Instead, warrantless blood draws are permissible only if the totality of the surrounding circumstances demonstrates a sufficient threat to the reliability of the test results.

Did any such circumstances exist in *Meza*? The court ruled the answer was no because the investigating officer had plenty of time to seek a warrant if she had not remained at the scene and engaged in activities that other responding officers could have handled. Said the court, "Her activities are ones we expect her colleagues could have undertaken, or she could have put off until later, so that she had time to prepare an affidavit and use a fax machine at the hospital to submit a warrant application."

Although the court ruled that the results of the second blood test should have been suppressed, it affirmed Meza's conviction on grounds that the results from the first test were sufficient to support his conviction.

U.S. v. Maxi

(11th Cir. 2018) 886 F.3d 1318

Issues

(1) Did officers illegally enter the property surrounding the defendant's home to conduct a "knock and talk?" (2) Did the defendant voluntarily open the door when an officer knocked? (3) If not, was the officers' warrantless entry into the home justified by exigent circumstances?

Facts

Narcotics officers with the Miami-Dade Police Department obtained information from an untested informant that the occupants of a certain duplex were selling drugs. While conducting surveillance of the property, the officers saw two men leave the duplex and drive off. The officers stopped the car about a quarter of a mile away but later released the two occupants. As the men drove away, however, the driver immediately turned and headed back toward the duplex. Because of the possibility that the reason for this maneuver was to alert any other occupants of the duplex that some police action might be imminent, the officers followed them back.

[8] (1966) 384 U.S. 757.
[9] (2013) 569 U.S. 141.

When they arrived, four or five of the officers covered "strategic positions surrounding the duplex," while the others went to the front door which was situated behind a metal security gate. The gate consisted of bars about five inches apart. One of the officers reached through the bars and knocked of the door but did not announce that the callers were officers. The door was opened by the defendant, Willis Maxi. While speaking with Maxi, one of the officers saw crack cocaine in plain view.

When asked to step outside, Maxi claimed that he couldn't because he did not have a key to the security gate. So the officers forced the gate open and detained him. They then conducted a protective sweep of the premises and saw rock cocaine, trafficking paraphernalia, weapons, and a "stack of money" in plain view. So they secured the duplex while they obtained a warrant to search it. The affidavit was based solely on information the officers obtained *before* they conducted the sweep.

A grand jury subsequently indicted Maxi and seven others on a variety of drug conspiracy charges. Maxi's motion to suppress the evidence was denied, and he was convicted of virtually all of the charged crimes.

Discussion

On appeal, Maxi argued that the evidence should have been suppressed because the officers had unlawfully entered his property, that Maxi did not voluntarily open the door to the officers, and that the officers illegally forced their way into the duplex. The court rejected all of the arguments.

ENTRY ONTO THE PROPERTY: As discussed earlier in the report on *Collins v. Virginia*, an entry by officers onto the property immediately surrounding a residence constitutes a "search" if the officers' purpose was to obtain evidence.Such a search is, however, lawful if (1) the officers entered only those areas to which visitors are normally given implied authorization to enter, and (2) their words and actions demonstrated an intent to conduct a casual, non-accusatory interview. Neither of these things happened here.

As for restricting their presence to areas to which visitors are given implied consent to enter, some of the officers in *Maxi* took up strategic positions "around the perimeter" of the duplex. And it is safe to say that visitors rarely engage in activities of this sort.

In addition, the conduct of the officers did not demonstrate that their intent was to conduct an informal interview. For one thing, there were about ten of them which is a lot more than the number of people who usually pay unannounced visits. Or, as the court put it, people do not normally "invite an armed battalion into the yard to launch a raid." Accordingly, the court ruled that the officers' entry onto the property constituted a "search."

The court also ruled, however, that evidence discovered as the result of their entry need not be suppressed. This was because the Supreme Court has ruled that suppression is not required when the officers' illegal conduct did not directly or indirectly result in the discovery of the evidence.[10] To make this determination, the court needed to examine the officers' conduct as follows:

OPENING THE DOOR: A resident's act of opening the front door to his home is involuntary if he did so in response to an unlawful police command. As the court pointed out, "When a person opens their door in response to a show of official authority, that act cannot be seen as consensual." But this rule was not violated here because the overwhelming evidence was that Maxi was unaware that the person who knocked on the door was an officer until he opened it. And at that point the officer had already seen the crack cocaine. Accordingly, Maxi's decision to open the door (thus exposing the crack cocaine) was not the result of the officers' entry onto his property.

THE WARRANTLESS ENTRY: Although the officer at the door had probable cause to arrest Maxi (because the cocaine was in plain view), he could not lawfully enter without a warrant unless there was an exigent circumstance. Did one exist? One such circumstance arises if officers reasonably believed

[10] See *Murray v. Unitted States* (1988) 487 U.S. 533, 539; *Nix v. Williams* (1984) 467 U.S. 431, 444, 447.

they had probable cause to believe that evidence on the premises would be destroyed if they did not make an immediate entry. And that was the situation facing here because he saw "a substantial quantity of drugs" in the front room, and he reasonably believed the drugs would be gone by the time they returned with a warrant.

THE PROTECTIVE SWEEP: Finally, Maxi argued that the officers' entry and the subsequent protective sweep of the duplex were unlawful. But it was unnecessary for the court to address this issue because, even if true, the drugs were effectively seized before the sweep occurred. Thus, pursuant to the "inevitable discovery" rule, the drugs could not be suppressed because the drugs would have been observed and seized regardless of whether the officers had entered and swept the premises.

U.S. v. Artis

(N.D. Cal. 2018) __ F.Supp.3d __ [WL 3241400]

Issues

(1) Can California Superior Court judges authorize federal agents to execute search warrants without assistance from local law enforcement officers? (2) If not, does this mean that California judges are prohibited from issuing any search warrants to federal agents?

Facts

In the course of a joint federal-state investigation into credit card fraud, an FBI agent obtained a warrant from an Alameda County judge to search a cell phone that had been dropped by Donnell Artis during a foot pursuit in Oakland. Two days later, the agent obtained a warrant from another Alameda County judge that authorized federal agents to utilize a cell-site simulator in the case. At the request of the agent, both warrants specified that federal agents could execute them without assistance from officers in Alameda County.

After Artis was arrested and charged in federal court, he filed a motion to suppress the evidence that had been obtained as the result of the two searches. The motion was heard by a federal district court judge in San Francisco who granted it.

Discussion

The judge's reasons for suppressing the evidence were set forth in two written opinions, one of which he ordered published. In the judge's unpublished opinion, he ordered that the evidence be suppressed mainly because the supporting affidavits failed to establish probable cause. Since the opinion was not published, and since it contained nothing of interest, we will not discuss it.

In his published opinion, however, the judge, Vince Chhabria, announced two new rules that are quite worthy of discussion. First, he ruled that California judges cannot issue search warrants to federal agents if, as here, the warrant authorized the agents to execute the warrants without assistance from local law enforcement. This ruling was based on a California statute which states that search warrants must be directed to "any peace officer" in the county in which the search will be conducted,[11] and another statute says that federal agents are not "peace officers" in California.[12] Because the judge provided some legal reasoning and authority for this ruling, we will assume that, for purposes of this report, he was correct.

He also ruled, however, that California judges are strictly prohibited from issuing search warrants to *any* and all federal agents. Although this ruling was unnecessary to resolve the matter (it was mere *dicta*), the judge decded to rule on it anyway. He also suggested that a violation of this "rule" might result in the suppression of evidence, especially since he decided to publish his ruling.

Finally, he said the FBI was negligent in failing to inform its agents in California of this "rule" (before it became one). Specifically, he said the FBI agent in the case "should have received training from his employers, the Federal Bureau of Investigation and the United States Marshals Service, about the limits of his authority under state law."

[11] Pen. Code § 1523.
[12] Pen. Code § 830.8.

Although rulings of federal district court judges are not binding on other judges, they may be persuasive if based on solid analysis. It is therefore necessary to determine whether this ruling was sound. It was not. On the contrary, it was based on nothing more than the following blatantly false inference:

> Because California judges cannot authorize federal agents to execute search warrants without assistance from local law enforcement, it follows that California judges are prohibited from issuing search warrants to *any* federal agents.

Moreover, the judge's ruling was contrary to a published California ruling that anyone (even FBI agents) can apply for search warrants from California judges. Specifically, when this issue was raised in the case of *People v. Bell* the court responded: "Appellants contend these references to peace officers [in the Penal Code] evidence an intent not only that [state] officers must execute warrants, but that only they may seek them. We have found no case suggesting such an intent."[13] Neither did Judge Chhabria, but that didn't seem to bother him.

It gets worse. As noted, the judge also took the unusual step of ordering that his opinion be published. He said this was necessary so that judges, attorneys, and law enforcement officers will have the benefit of his knowledge. Said the judge, "[T]his is an important issue about which many people in the California criminal justice community may still be unaware," and that, by publishing his opinion, he will "put the relevant actors in the criminal justice system on notice that California law prevents state judges from issuing search warrants to federal law enforcement officers."

Among those who need to be re-educated, according to the judge, are "the Federal Bureau of Investigation, the relevant local supervisors in the United States Marshals Service, the Alameda County District Attorney, the Oakland City Attorney (who represents the Oakland Police Department), the presiding judge of the Alameda County Superior Court, the United States Attorneys for the other districts in California, and the California Judicial Counsel." It seems strange, however, that so many smart and experienced people have—for decades!—failed to comprehend something that was so obvious to Judge Chhabria.

In addition, the judge claimed in his published opinion that the FBI agent in this case (whom, for some reason) he decided to identify) was "neither well-trained nor particularly concerned with complying with the law in conducting his enforcement activities." While such a sweeping denunciation *might* have been appropriate (albeit harsh) if it was based on facts that were set forth in the published opinion (which is the only opinion the public will see), that opinion contained no factual basis whatsoever; and, therefore, the judge's criticism of the agent was conclusory and, we think, imprudent.

Finally, the judge ruled that "evidence obtained from these searches will be suppressed." This was also baseless. Evidence cannot ordinarily be suppressed unless it was obtained in violation of the United States Constitution.[14] And yet, the judge failed to identify a single rule or principle that even remotely fell into this category. This omission also caught the attention of University of Southern California law professor Orin Kerr who recently wrote the following in the *Harvard Law Review*: "But Chhabria's opinion is odd to me, as it jumps from the idea that the execution violates state statutory law immediately to suppression. It doesn't separately ask if the statutory violation means that the search violates the [Fourth Amendment]."[15]

The Justice Department has filed an appeal with the Ninth Circuit. POV

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[13] (1996) 45 Cal.App.4th 1030, 1055.

[14] See *United States v. Calandra* (1974) 414 U.S. 338, 347; *People v. Brannon* (1973) 32 Cal.App.3d 971, 975.

[15] 132 Harv. L. Rev. __. Also see *Utah v. Strieff* (2016) __ US __ [136 S.Ct. 2056, 2059 ["even when there is a Fourth Amendment violation, this exclusionary rule does not apply when the costs of exclusion outweigh its deterrent benefits"];

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