POINT of VIEW

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Lineups and Showups

That man there is the one. He's the one that shot me.
— Lineup ID, *Colman* v. *Alabama*[1]

That man there is in trouble. Big trouble. Even if he didn't fire the shot, he could easily be found guilty at trial because a witness's positive identification of a suspect at a lineup or showup is, in the words of the California Supreme Court, "frequently determinative of an accused's guilt."[2] Or, as the United States Supreme Court put it, "The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation."[3]

One reason that a pretrial identification carries so much weight is that a witness who has picked out a person at a lineup is "not likely to go back on his word later on."[4] In addition, if the witness appears to be credible to the jury, his identification of the defendant is apt to be convincing because a crime victim or witness will seldom have reason to lie about the identity of the perpetrator. And, as if that weren't enough, prosecutors will usually be permitted to buttress the reliability of the witness's in-court identification of the defendant by presenting testimony that the witness had also identified him at a lineup or showup when, as is usually the case, the perpetrator's features would have been fresh in the witness's memory.[5]

Simply put, the combination of the witness's pretrial identification of the defendant and his positive identification in the courtroom generates such convincing force that, from the defendant's perspective, it is devastating.

This is, of course, a good thing—*if* the defendant was the perpetrator. But what if he wasn't? What if the witness was mistaken? And what if he was mistaken because the lineup or showup was intentionally or inadvertently structured so as to induce or otherwise prompt him to identify the defendant? The Supreme Court had this possibility in mind when it observed that "the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined."[6]

To help prevent this from happening and also to combat the inherent "vagaries of eyewitness identification,"[7] the courts require that officers employ certain procedures that are designed to minimize suggestiveness and maximize reliability. As we will discuss later, if officers fail to comply with these requirements, a court may find that the resulting ID was unreliable and, therefore, inadmissible.

There is another reason that compliance is important. Assuming the witness's ID of the defendant was not so unreliable as to render it inadmissible in court, its impact on jurors will be severely weakened if they think the lineup or showup was unfair. As the Supreme Court cautioned in *Manson* v. *Brathwaite*, "Suggestive procedures often will vitiate the weight of the evidence at trial and the jury may tend to discount such evidence."[8] For these reasons, it is essential that officers understand exactly what they are required to do, and what they are prohibited from doing, when conducting lineups and showups.

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[1] (1970) 399 U.S. 1, 5.
[2] *Evans* v. *Superior Court* (1974) 11 Cal.3d 617, 623.
[3] *United States* v. *Wade* (1967) 388 U.S. 218, 235.
[4] *United States* v. *Wade* (1967) 388 U.S. 218, 229.
[5] See *Gilbert* v. *California* (1967) 388 U.S. 263, 273 ["[T]he witness' testimony of his lineup identification will enhance the impact of his in-court identification on the jury."]; *People* v. *Gould* (1960) 54 Cal.2d 621, 626 ["Evidence of extrajudicial identification is admissible, not only to corroborate an identification made at the trial, but as independent evidence of identity."].
[6] *United States* v. *Wade* (1967) 388 U.S. 218, 229 [quoting from Wall, "Eye-Witness Identification in Criminal Cases"].
[7] *United States* v. *Wade* (1967) 388 U.S. 218, 228.
[8] (1977) 432 U.S. 98, 112, fn.12. Also see *People* v. *Carter* (1975) 46 Cal.App.3d 260, 266 ["[T]he probative value of an identification depends on the circumstances under which it was made."].

In addition to the reliability of the ID, there are several other legal issues that officers and prosecutors commonly confront, and which will also be covered in this article. They include a suspect's right to have counsel at a lineup and the attorney's role, what officers can do when a suspect refuses to stand in a lineup, the issuance of Appearance Orders, and defense motions for lineups. But first, the basics.

Types of Lineups and Showups

There are four types of lineups and two types of showups. Although they all serve the purpose of identifying the perpetrator of a crime, they are used in different situations and, as we will discuss later, are subject to different requirements.

LIVE LINEUPS: In common usage, the term "lineup" means a live or "corporeal" lineup in which the suspect is displayed to the witness in the company of five or more people who ressemble him; i.e., "fillers" or "foils." As the Court of Appeal explained, a lineup is "a relatively formalized procedure wherein a suspect is placed among a group of other persons whose general appearance resembles the suspect."[9]

To say that lineups are "formalized" simply means they usually take place in lineup rooms in police stations and jails where the suspect and fillers stand on a stage. Bright lights directed at the stage prevent the suspect from seeing the witnesses, which gives them a much-needed sense of security.

Because live lineups require the suspect's presence, they are usually used only when the suspect is in custody for the crime under investigation or some other crime. If he is not in custody, the usual procedure is to conduct a photo lineup.

RECORDED LINEUPS: In a recorded lineup, officers conduct a live lineup, but without the witness in attendance. Instead, they record the lineup on videotape or digitally, and show it to the witness later. While this procedure is often used when the witness cannot attend a live lineup, it may also be useful if the suspect has a right to have counsel present but an attorney is not available. This is because, as we will discuss later, a suspect does not have a right to counsel when a witness views a recorded lineup.

PHOTO LINEUPS: In a photo lineup, the witness is shown photographs of the suspect and the fillers, usually booking or DMV photos. In most cases, officers will utilize this procedure when it is impractical to conduct a live lineup, usually because the suspect had not yet been arrested.[10] A photo lineup may also be necessary if the suspect changed his appearance after the crime occurred, and officers had obtained a photograph of him that better depicted his appearance then.

PHOTO COLLECTIONS: If officers have no suspect, but there is reason to believe that the perpetrator belonged to a certain group, they may show the witness photos of members of that group; e.g., gang books, sexual assault registries, school yearbooks.

VOICE-ONLY LINEUPS: If the witness heard the perpetrator speak, but did not see him, officers may conduct a voice-only lineup in which the witness listens to the voices of the suspect and fillers, but does not see their faces.[11] In most cases, the suspect and fillers will say something that the perpetrator said. Voice-only lineups may be live or prerecorded.

FIELD SHOWUPS: The most common pretrial identification procedure is the field showup in which the suspect is displayed to the witness alone (i.e., without fillers) and the witness is essentially asked, "Is this the perpetrator?" Such a procedure is, of course, highly suggestive, but the courts permit it if there was an overriding reason for not conducting a live or photo lineup.[12]

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[9] *People* v. *Dampier* (1984) 159 Cal.App.3d 709, 712-13. Edited.

[10] **NOTE**: There is no rule requiring that officers conduct live lineups instead of photo lineups. See *People* v. *Brandon* (1995) 32 Cal.App.4th 1033, 1052, fn. 16 ["there is no constitutional requirement that a live lineup be conducted"]; *People* v. *Lawrence* (1971) 4 Cal.3d 273, 277 [although it might have been "better" to conduct a live lineup, "the failure to take such action is not the crucial factor in the determination of the case at bench"]; *People* v. *Whittaker* (1974) 41 Cal.App.3d 303, 309 [no requirement that "once [the defendant] was in custody, officers were limited to use of a corporeal lineup"]; *People* v. *Suttle* (1979) 90 Cal.App.3d 573, 581 ["we will not go farther by holding that a corporeal lineup should have been used since appellant was in custody"].

[11] See *People* v. *Ellis* (1966) 65 Cal.2d 529, 534 ["The speech patterns of individuals are distinctive physical characteristics that serve to identify them just as do other physical characteristics"]; *People* v. *Clark* (1992) 3 Cal.4th 41, 135-37.

[12] See *People* v. *Sandoval* (1977) 70 Cal.App.3d 73, 85 ["Such a procedure should not be used, however, without a compelling reason because of the great danger of suggestion from a one-to-one viewing which requires only the assent of the witness."]; *People* v. *Bisogni* (1971) 4 Cal.3d 582, 587 ["a single person showup is not necessarily unfair"].

In most cases, the overriding reason is that the crime had just occurred, that officers had detained a suspect and they needed to quickly confirm or dispel their suspicion that he was the perpetrator.[13] In these situations a showup is justified because, as the Court of Appeal pointed out, "A prompt on-the-scene confrontation between a suspect and a witness enables the police to exclude from consideration innocent persons so a search for the real perpetrator can continue while it is reasonably likely he is still in the immediate area."[14] Furthermore, the suggestiveness that is inherent in showups will ordinarily be "offset by the likelihood that a prompt identification within a short time after the commission of the crime will be more accurate than a belated identification days or weeks later."[15]

Two other things should be noted about showups. First, there are some procedural restrictions in addition to those relating to suggestiveness. For example, officers must be diligent in conducting showups and they must not transport the suspect to another location for a showup unless he consented or there was good cause. We covered these restrictions in the article "Investigative Detentions" in the Spring 2010 *Point of View*.

Second, the California Legislature is now considering an addition to the Penal Code which would prohibit officers from conducting showups of suspects if they had probable cause to arrest them. We have discussed some of the problems with such a rule in a comment on page 22 entitled "Showups: Should probable cause make them illegal?"

CONFIRMATORY SHOWUP: Officers have sometimes attempted to confirm that an arrested suspect was the perpetrator by displaying him without fillers, whether live or by photograph. Such a procedure is, of course, highly suggestive.[16] For example in the case of *People* v. *Sandoval*[17] officers arrested a suspect in a purse snatch that had occurred about 15 minutes earlier. As they drove him to the police station, the victim, who was already seated in a room at the station, was informed by other officers that the suspect "would be brought through the hallway." As he walked by, the victim identified him, but the court ruled the ID should have been suppressed because this procedure "in effect suggested to the victim that defendant was the robber." Also see "Pre-lineup photo display" on pages 12-13.

Misidentification: The "Primary Evil"

The main legal issue in most ID cases is whether the investigating officers said or did something that was apt to result in misidentification. This, said the U.S. Supreme Court, is the "primary evil to be avoided."[18] As we will now discuss, the courts try to prevent this from happening by prohibiting testimony pertaining to a pretrial ID unless there was sufficient reason to believe it was reliable.

Before going further, it should be noted that there may be some confusion about this issue. In the past, a witness's pretrial identification testimony would be suppressed if officers employed procedures that were unduly "suggestive."[19] But this changed in 1977 when the Supreme Court in *Manson* v. *Brathwaite* pointed out that suggestiveness, while relevant, does not necessarily lead to misidentification; that the admissibility of a pretrial ID should depend simply on whether it was reliable.[20] Said the Court, "Reliability is the linchpin in determining the admissibility of identification testimony." The question, then, is how can the courts determine whether an ID was sufficiently reliable?

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[13] See *Stovall* v. *Denno* (1967) 388 U.S. 293, 302; *People* v. *Martinez* (1989) 207 Cal.App.3d 1204, 1219.
[14] *People* v. *Cowger* (1988) 202 Cal.App.3d 1066, 1072.
[15] *People* v. *Odom* (1980) 108 Cal.App.3d 100, 110.
[16] See *People* v. *Bisogni* (1971) 4 Cal.3d 582, 586-87 [witnesses "were asked to look through a hole in a door or wall [at the police station] where they observed [the suspect] alone in a room"; a "highly suggestive" procedure]; *People* v. *Contreras* (1993) 17 Cal.App.4th 813, 820 ["After Lopez failed to identify appellant from the photo lineup, the deputy district attorney showed him a single photo of Contreras two days before the preliminary hearing and asked if Lopez could identify him as his assailant"].
[17] (1977) 70 Cal.App.3d 73.
[18] *Neil* v. *Biggers* (1972) 409 U.S. 188, 198.
[19] See *Neil* v. *Biggers* (1972) 409 U.S. 188, 198.
[20] (1977) 432 U.S. 98, 114.

The test for admissibility

To determine whether a witness's identification of a defendant at a lineup was sufficiently reliable to be admitted into evidence at trial, the courts employ a two-part test. First, they look to see whether the officers utilized a procedure that was unduly suggestive. If it wasn't, the ID will be admissible.[21] If it was, they will determine whether, despite such suggestiveness, the witness's identification of the defendant was sufficiently trustworthy; i.e., whether, despite such suggestiveness, there was no "substantial likelihood of misidentification."[22] And if the identification was sufficiently reliable, the ID will be admissible; if not, it will be suppressed. (We will discuss how the courts calculate the trustworthiness of an identification later in this article.)

To recap, the test for determining the admissibility of a lineup identification is as follows:

(1) SUGGESTIVE? Was the lineup unduly suggestive?
 No: The ID testimony will be admissible.
 Yes: Proceed to part (2).

(2) TRUSTWORTHY? Despite such suggestiveness, was the witness's identification of the defendant trustworthy?
 No: The lineup results will be suppressed.
 Yes: The lineup results will be admissible.

Note that if the lineup ID is suppressed, the witness will not be given an opportunity to identify the defendant in court unless prosecutors can prove "by clear and convincing evidence that the in-court identification is based upon observations of the suspect other than the lineup identification."[23]

What is suggestiveness?

A lineup or showup will be deemed "suggestive" if it was conducted in a manner that would have communicated to the witness that the suspect was, in fact, the perpetrator. As the Court of Appeal explained, a lineup is suggestive "if it suggests in advance of a witness's identification the identity of the person suspected by the police."[24] Or, in the words of the California Supreme Court, to warrant the suppression of a witness's identification of a defendant, "the state must, at the threshold, improperly suggest something to the witness; i.e., it must, wittingly or unwittingly, initiate an unduly suggestive procedure."[25]

"UNDULY" SUGGESTIVE: As noted, a witness's identification resulting from a suggestive lineup or showup may be suppressed only if the suggestiveness was "undue" or excessive.[26] The reason that suggestiveness, in and of itself, will not result in suppression is that, as the Court of Appeal observed in *People* v. *Perkins*, "No identification can be completely insulated from risk from suggestion."[27] For example, field showups are inherently suggestive because the witness views only a single person. And lineups are suggestive because the number of fillers is, by necessity, relatively small; plus it is often difficult to locate fillers who closely resemble the suspect.

MERE SUGGESTIVENESS GOES TO WEIGHT: Any suggestiveness that does not rise to the level of "undue" goes to the weight of the identification, not its admissibility.[28]

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[21] See *Manson* v. *Brathwaite* (1977) 432 U.S. 98, 114; *People* v. *Virgil* (2011) 51 Cal.4th 1210, 1256 ["If the answer to the first question is 'no,' because we find that the challenged procedure was not unduly suggestive, our inquiry into the due process claim ends."]; *People* v. *Avila* (2009) 46 Cal.4th 680, 699 ["Because we have concluded the lineup was not unduly suggestive, we need not consider whether it was reliable"].

[22] *Neil* v. *Biggers* (1972) 409 U.S. 199, 198.

[23] *People* v. *Bisogni* (1971) 4 Cal.3d 582, 587. Also see *United States* v. *Crews* (1980) 445 U.S. 463, 473.

[24] *People* v. *Brandon* (1995) 32 Cal.App.4th 1033, 1052. Also see *Foster* v. *California* (1969) 394 U.S. 440, 443.

[25] *People* v. *Ochoa* (1998) 19 Cal.4th 353, 413.

[26] See *Neil* v. *Biggers* (1972) 409 U.S. 199, 198-99; *People* v. *Kennedy* (2006) 36 Cal.4th 595, 610.

[27] (1986) 184 Cal.App.3d 583, 590.

[28] See *Manson* v. *Brathwaite* (1977) 432 U.S. 98, 116 ["We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill."]; *Foster* v. *California* (1969) 394 U.S. 440, 442, fn.2 ["The reliability of properly admitted eyewitness identification, like the credibility of the other parts of the prosecution's case is a matter for the jury."]; *People* v. *Perkins* (1986) 184 Cal.App.3d 583, 591 ["Here, Perkins's counsel was able to effectively develop and cross-examine witnesses about the facts of Maria's identification. No more was required."]; *People* v. *DeVaney* (1973) 33 Cal.App.3d 630, 636 ["[I]t was for the jury to determine whether Pendleton's in-court identification was believable."]; *U.S.* v. *Williams* (7th Cir. 2008) 522 F.3d 809, 811 ["The normal way of dealing with [errors] is to expose the problem at trial so that a discount may be applied to the testimony, rather than to exclude relevant evidence."].

UNINTENTIONAL SUGGESTIVENESS: If the actions of the officers rendered the lineup or showup unduly suggestive, it is immaterial that they did not intend to do so.[29]

BURDEN OF PROOF: The defense has the initial burden of proving that the lineup or showup was unduly suggestive.[30] Furthermore, it must prove such suggestiveness "as a demonstrable reality, not just speculation."[31] If the defense sustains its burden, the prosecution must prove—by clear and convincing evidence—that the identification was nevertheless trustworthy.[32]

Suggestiveness: Relevant Circumstances

In determining whether a lineup or showup was unduly suggestive, the courts examine the overall procedure—the totality of circumstances.[33] As a practical matter, however, the circumstances we discuss next are almost always decisive.

But first it should be noted that, while we included most of these circumstances because of their longstanding influence on the courts, some were added as the result of a report by the California Commission on the Fair Administration of Justice (CCFAJ) entitled "Report and Recommendations Regarding Eyewitness Identification Procedures." In its report, the CCFAJ suggested that the reliability of lineups and showups would be improved if law enforcement agencies made certain changes in their procedures. Although these suggestions are not mandated by the courts, we have incorporated them in the following discussion, but with notations that they are CCFAJ recommendations. The California Legislature is, however, considering a bill that would require that "law enforcement study and consider adopting" these procedures.[34]

Similarity between suspect and fillers

While the suspect and the fillers should be similar in age and general appearance, "there is no requirement that [the suspect] be surrounded by people nearly identical in appearance."[35] As the California Supreme Court pointed out, "Because human beings do not look exactly alike, differences are inevitable."[36] Still, officers should attempt to locate fillers who were sufficiently similar in appearance to the suspect so as to enhance the reliability and significance of the witness's identification. The following comments by the courts illustrate what they look for in evaluating the composition of lineups:

LIVE LINEUPS

- "The five men were of substantially equivalent race, height, and weight."[37]
- "The participants all appeared to be of comparable age and of similar build."[38]
- "All six participants were bearded and wore identical clothing . . . with one exception, the others resembled defendant very much."[39]
- "[T]he men in the lineup were dressed in street clothes consisting of sport shirts and slacks of varying designs and colors. All were black men of similar height and physical build."[40]

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[29] See *People* v. *Rodriguez* (1977) 68 Cal.App.3d 874, 881 ["it matters not" whether suggestiveness "was caused by inadvertence"].
[30] See *People* v. *Avila* (2009) 46 Cal.4th 680, 700 ["Defendant does bear the burden of demonstrating the identification procedure was unduly suggestive."]; *People* v. *Cunningham* (2001) 25 Cal.4th 926, 989 ["The defendant bears the burden of demonstrating the existence of an unreliable identification procedure."]; *In re Carlos M.* (1990) 220 Cal.App.3d 372, 386 ["The burden is on the defendant to demonstrate unfairness in the manner the show-up was conducted"].
[31] *People* v. *DeSantis* (1992) 2 Cal.4th 1198, 1222; *People* v. *Perkins* (1986) 184 Cal.App.3d 583, 589.
[32] See *People* v. *Cooks* (1983) 141 Cal.App,3d 224, 306; *People* v. *Rodriguez* (1977) 68 Cal.App.3d 874, 881; *People* v. *Ratliff* (1986) 41 Cal.3d 675, 689.
[33] See *People* v. *Ware* (1978) 78 Cal.App.3d 822, 839; *People* v. *Blum* (1973) 35 Cal.App.3d 515, 520 ["The fairness of a lineup is to be assessed in the light of the totality of the circumstances."].
[34] Assembly Bill 308 — 2011-2012 Regular Session.
[35] *People* v. *Wimberly* (1992) 5 Cal.App.4th 773, 790. Also see *People* v. *Brandon* (1995) 32 Cal.App.4th 1033, 1052 ["[T]here is no requirement that a defendant in a lineup, either in person or by photo, be surrounded by others nearly identical in appearance."].
[36] *People* v. *Carpenter* (1997) 15 Cal.4th 312, 367.
[37] *People* v. *Mosher* (1969) 1 Cal.3d 379, 396.
[38] *People* v. *Lawrence* (1971) 4 Cal.3d 273, 280.
[39] *People* v. *Carpenter* (1997) 15 Cal.4th 312, 367.
[40] *People* v. *O'Roy* (1972) 29 Cal.App.3d 656, 662.

- Defendant and one of the fillers "had braids or dreadlocks in their hair, while two others appear to have similar type of hair."[41]
- "All of the men have a mustache and some have other facial hair. Several have a hairstyle similar to that of defendant."[42]
- "[A]ll the participants had different types of facial hair, some with mustaches, some with beards, goatees, etc."[43]

PHOTO LINEUPS

- The men depicted in the photographs "are all Caucasian, of a reasonably similar build and within the same age group."[44]
- "All of the men depicted in the photographs are White; all have long hair in various shades from blond to brown; and all have beards."[45]
- "All of the photographs were of Black males, generally of the same age, complexion, and build, and generally resembling each other.... Minor differences in facial hair among the participants did not make the lineup suggestive."[46]
- "Each lineup consists of five identically sized photographs of Caucasian males of apparently similar age and with similar facial features. Four of the men . . . appear to have similarly colored light red hair.... The color photographs show the subjects against identical blue backgrounds."[47]
- "[A]ll six of the pictures are of Caucasian males in the same age range, with similar skin, eye, and hair coloring. Each photo depicts a subject wearing distinctive glasses. Four of the six photos show men with similar length hair, with two having somewhat shorter hair. All except for one are clean-shaven."[48]
- "All [of the five Caucasian women in the photo lineup] are of medium build. The four at the left appear to be of the same general age, that is, between 40 and 50, the tall woman at the extreme right being somewhat younger. None bears a facial resemblance to any of the others. None has extremely distinctive features. The facial idiosyncrasies among the five women are no more marked than those which normally distinguish one person from another."[49]

VOICE-ONLY LINEUPS: The participants' voices should be "similar in tone, pitch, volume and accent."[50] Thus, in rejecting an argument that a voice-only lineup was suggestive, the court in *People* v. *Vallez* said, "While none of the five imitators was especially talented in impersonating the defendant's voice, the differences between the voices was not so great as to be unfair or impermissibly suggestive."[51]

Did the suspect "stand out?"

If the suspect and fillers were similar in appearance, it is ordinarily immaterial that there was something about the suspect that caused him to stand out. This is because there is usually something about everyone in a lineup that is arguably distinctive; e.g., the tallest, heaviest, best dressed, most uncouth. Consequently, so long as the suspect was not "marked for identification" (discussed later), the fact that there was something distinctive about him will seldom affect the validity of the lineup. As the California Supreme Court explained, the issue is not whether the defendant stood out, but whether he stood out "in a way that would suggest the witnesses should select him."[52] For example, in rejecting arguments that the defendant stood out in this manner, the courts have noted the following:

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[41] *People* v. *Johnson* (2010) 183 Cal.App.4th 253, 272.
[42] *People* v. *Cunningham* (2001) 25 Cal.4th 926, 990.
[43] *People* v. *Adams* (1982) 137 Cal.App.3d 346, 353.
[44] *People* v. *Holt* (1972) 28 Cal.App.3d 343, 350.
[45] *People* v. *Wash* (1993) 6 Cal.4th 215, 245, fn.11.
[46] *People* v. *Johnson* (1992) 3 Cal.4th 1183, 1217.
[47] *People* v. *Yeoman* (2003) 31 Cal.4th 93, 124-25, fn.6.
[48] *U.S.* v. *Beck* (9th Cir. 2005) 418 F.3d 1008, 1012.
[49] *People* v. *Malich* (1971) 15 Cal.App.3d 253, 260.
[50] *People* v. *Vallez* (1978) 80 Cal.App.3d 46, 55.
[51] (1978) 80 Cal.App.3d 46, 54.
[52] *People* v. *Carpenter* (1997) 15 Cal.4th 312, 367. Also see *People* v. *Faulkner* (1972) 28 Cal.App.3d 384, 391 ["[T]he crucial issue is whether appellant has been singled out and his identification made a foregone conclusion"].

- While the defendant was the shortest person in the lineup, he was not "significantly" shorter than the others.[53]
- "[A]lthough defendant was the tallest, all the others were tall as well."[54]
- "Although the other men may have been darker in complexion and not as thin, the men in the lineup were sufficiently similar in appearance"[55]
- "[A]ppellant notes that he was wearing a bright white sweatshirt or sweater. However, so long as the defendant is not alone dressed in a striking manner, there is no need for the police to match outfits of everyone in the lineup anymore than the police are required to match the physical proportions of the other men with scientific exactitude."[56]
- "While defendant's profile is facing the opposite direction from the other five pictures, the point of concern to the witness is the person's features, not the direction he is facing."[57]
- "[A]ny discoloration in defendant's photograph would not suggest it should be selected."[58]
- "[T]he fact defendant's face has a 'yellow cast' is unimpressive as photograph number six has a distinctly 'red cast,' number four has an 'orange cast,' and others have differing color characteristics."[59]
- Although the defendant was the only person in the photo lineup wearing a gold shirt and gold sweater, this clothing "was not similar to that described to the police by [the witness]."[60]
- "[D]efendant's tattoo did not make the live lineup impermissibly suggestive. None of the witnesses observed a tattoo on the gunman's head."[61]

In contrast, the court in *People* v. *Carlos*[62] ruled that a photo lineup was suggestive because the suspect's name and ID number were printed below his photo, while none of the other photos were similarly marked. Said the court, "Although the name placement is not quite an arrow pointing to Carlos, it is plainly suggestive."

LINEUP POSITION: The suspect's position in the lineup is irrelevant. As the California Supreme Court noted, "[N]o matter where in the array a defendant's photograph is placed, he can argue that its position is suggestive."[63]

NUMBER OF FILLERS: The number of fillers is sometimes noted, but it is seldom a significant circumstance because it is common practice to include at least five. An especially large number of fillers will, of course, reduce any suggestiveness; e.g., witness looked for the perpetrator in gang books, mug books, sexual assault registries, school yearbooks.[64]

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[53] *People* v. *Cook* (2007) 40 Cal.4th 1334, 1355. Also see *People* v. *Mosher* (1969) 1 Cal.3d 379, 396 ["While it has been suggested that a lineup with a tall defendant among short men could be unfair, the California cases have held that the height disparity in a lineup is not per se suggestive."]; *People* v. *Rist* (1976) 16 Cal.3d 211, 218 ["Aside from the fact that defendant may have been the shortest member of the lineup there is no evidence that he differed in appearance from the other members."]; *People* v. *Blair* (1979) 25 Cal.3d 640, 661["[D]efendant does not appear to be significantly taller, heavier, or older than the other participants."].

[54] *People* v. *Gordon* (1990) 50 Cal.3d 1223, 1243. Also see *People* v. *Davis* (1969) 2 Cal.App.3d 230, 237 [suspect was the tallest].

[55] *People* v. *Floyd* (1970) 1 Cal.3d 694, 712. Also see *People* v. *Guillebeau* (1980) 107 Cal.App.3d 531, 557 ["While in the six-picture color photo lineup appellant was darker complected than the other Negroes, this does not by itself render the identification unduly suggestive."].

[56] *People* v. *Wimberly* (1992) 5 Cal.App.4th 773, 790.

[57] *People* v. *West* (1984) 154 Cal.App.3d 100, 105.

[58] *People* v. *Gonzalez* (2006) 38 Cal.4th 932, 943. Also see *People* v. *Hicks* (1971) 4 Cal.3d 757, 764 [court rejects the argument that a photo lineup was unreliable because his photo "had a gray background while the others had a white background"]

[59] *People* v. *West* (1984) 154 Cal.App.3d 100, 105.

[60] *People* v. *Lawrence* (1971) 4 Cal.3d 273, 280.

[61] *People* v. *Gonzalez* (2006) 38 Cal.4th 932, 944.

[62] (2006) 138 Cal.App.4th 907, 912.

[63] *People* v. *Johnson* (1992) 3 Cal.4th 1183, 1217. Also see *People* v. *De Angelis* (1979) 97 Cal.App.3d 837, 841 ["[T]he contention of 'strategically' placing defendant's photo toward the center of the display fails of merit. No matter where placed, a like complaint could be made."]; *People* v. *Davis* (1969) 2 Cal.App.3d 230, 237-38 [immaterial that defendant was at the end of the line]; *People* v. *Faulkner* (1972) 28 Cal.App.3d 384, 392 ["the positions of the lineup participants were allotted by chance drawing"].

[64] See *In re Cindy E.* (1978) 83 Cal.App.3d 393, 402 [school yearbook]; *People* v. *Pervoe* (1984) 161 Cal.App.3d 342, 357 [scrapbook]; *People* v. *Posten* (1980) 108 Cal.App.3d 633, 647 ["mug" book]; *People* v. *Wells* (1971) 14 Cal.App.3d 348, 355 [book of parolees]; *People* v. *Phan* (1993) 14 Cal.App.4th 1453, 1462 ["All together well over 20 person are depicted"].

MULTIPLE LINEUP APPEARANCES: A suspect in a lineup may stand out because the witness had seen him in a previous showup or photo lineup. But, so long as there was a legitimate need for multiple lineup appearances, this circumstance will not render an identification unduly suggestive.[65]

SUSPECT DIRECTS ATTENTION TO HIMSELF: While a suspect will certainly "stand out" if he said or did something that drew attention to himself, the courts will disregard this circumstance in determining whether a lineup or showup was suggestive. As the California Supreme Court observed, the rule prohibiting suggestive lineups and showups "speaks only to suggestive identification procedures employed by the People."[66]

For example, in *People* v. *Boyd*[67] the defendant claimed that his lineup was unduly suggestive because he "hung his head, moved it back and forth and continued to look at the floor for some seconds." In rejecting the argument, the Court of Appeal ruled that "a defendant may not base his claim of deprivation of due process in a lineup on his own behavior." Similarly, in *People* v. *Wimberly,*[68] a robbery case, the suspect and the fillers in a live lineup were asked to say certain words that the robber had said. Because Wimberly spoke too softly to be heard clearly, an officer asked him to repeat the words. On appeal, Wimberly contended that the officer's request rendered the subsequent ID suggestive, but the court, citing *Boyd*, ruled that a suspect may not challenge a lineup "when his own conduct has caused the procedure to be suggestive."

COVERING UP A DISTINCTIVE FEATURE: In some cases it may be possible to reduce or eliminate any suggestiveness resulting from a single feature by covering it up. For example, in *People* v. *De Santis*,[69] where the suspect was much shorter than the fillers in a live lineup, officers eliminated the problem by having the suspect stand on some books that were concealed from the witnesses. And in *People* v. *Adams*,[70] where officers were concerned that the photo of the suspect stood out because of a bandage on his forehead, they covered it up with a piece of paper—then covered all the other photos in the same way. Finally, in *People* v. *De Angelis*,[71] where the photos of comparable fillers were in black and white, but the only photo of the suspect was in color, the officers reproduced it in black and white.

Was the suspect "marked for identification"?

The most obvious example of a suggestive lineup is one in which the suspect was "marked for identification," which occurs if both of the following circumstances existed: (1) the witness provided officers with a particular description of the perpetrator or his clothing, or reported that he had a distinctive feature; and (2) the suspect was the only person in the lineup who matched that description or possessed that feature. As the Second Circuit put it, "A lineup is unduly suggestive as to a given defendant if he meets the description of the perpetrator previously given by the witness and the other lineup participants obviously do not."[72]

For example, in *People* v. *Caruso*[73] two robbery victims described the driver of the getaway car as "big, with dark wavy hair and a dark complexion." Caruso was arrested and placed in a lineup with four other men. But while he was big, dark, "of Italian descent" with "dark wavy hair," the other four "were not his size, not one had his dark complexion, and none had dark wavy hair." In ruling that the lineup was unduly suggestive, the court said, "During the robbery [the witnesses] noted the driver's large size and dark complexion, and if they were to choose anyone in the lineup, defendant was singularly marked for identification."

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[65] See *People* v. *Johnson* (2010) 183 Cal.App.4th 253, 272; *People* v. *Cook* (2007) 40 Cal.4th 1334, 1355.
[66] *People* v. *Yeoman* (2003) 31 Cal.4th 93, 125.
[67] (1990) 222 Cal.App.3d 541.
[68] (1992) 5 Cal.App.4th 773. Also see *U.S.* v. *Jones* (4th Cir. 1990) 907 F.2d 456, 459-60 ["Johnson may have been asked to repeat 'Hit the floor!' but only because he had spoken softly the first time."].
[69] (1992) 2 Cal.4th 1198.
[70] (1982) 137 Cal.App.3d 346.
[71] (1979) 97 Cal.App.3d 837.
[72] *Raheem* v. *Kelly* (2nd Cir. 2001) 257 F.3d 122, 134.
[73] (1968) 68 Cal.2d 183. COMPARE *People* v. *Lawrence* (1971) 4 Cal.3d 273, 280; *People* v. *Thomas* (1970) 5 Cal.App.3d 889, 900.

Similarly, in *Torres* v. *City of Los Angeles*[74] the court ruled that a suspect was marked for identification in a photo lineup because "only one other photo in the six-pack besides the photo of [the suspect] was of a visibly overweight individual and thus of a person who fit [the victim's] description."

The same principle applies to clothing worn by the perpetrator. For example, in *Foster* v. *California*[75] the Supreme Court invalidated a lineup because "petitioner stood out from the other two men . . . by the fact that he was wearing a leather jacket similar to that worn by the robber." And in *People* v. *Ware*[76] the court ruled that a photo lineup was suggestive because the defendant was "the only person in the photos wearing a blue denim jacket of the type [that the victim] reported her assailant was wearing."

On the other hand, if the feature was not particularly distinctive, or if it was shared by other fillers, the courts will usually admit the ID and let the jury decide its weight. Thus, in ruling that the defendant was not marked for identification, the courts have noted the following:

- "While it is true that defendant's photograph has the mustache with the most pronounced gap in the center [the perpetrator had a gapped mustache], others of the photographs have mustaches with at least slight gaps."[77]
- "The mere fact that defendant was wearing the same color pants worn by the robber did not make the lineup unfair."[78]
- Although the perpetrator wore a bandana, and although the defendant was the only person in the photo lineup who wore a bandana, "two of the other photos showed persons with different headgear."[79]
- While the man who robbed a liquor store was wearing a blue jacket, and although the defendant was wearing a blue jacket at the lineup, all of the eight men in the lineup were wearing similar blue jackets.[80]

Pre-lineup communications

A lineup or showup that was otherwise fair may be deemed suggestive if officers said or did something beforehand that would have prompted the witness to select the suspect. As the United States Supreme Court observed, "Persons who conduct the identification procedure may suggest, intentionally or unintentionally, that they suspect the witness to identify the accused. Such a suggestion, coming from a police officer or prosecutor, can lead a witness to make a mistaken identification."[81]

PROVIDING SUGGESTIVE INFORMATION: Officers must, of course, say nothing to the witness that could be reasonably interpreted as directing attention to the suspect.[82] Thus, the Court of Appeal warned against "[s]uggestive comments or conduct that single out certain suspects or otherwise focus a witness's attention on a certain person in a lineup."[83] For example, in *Torres* v. *City of Los Angeles*[84] the court ruled it was

[74] (9th Cir. 2008) 548 F.3d 1197, 1208.
[75] (1969) 394 U.S. 440, 442-43.
[76] (1978) 78 Cal.App.3d 822, 839.
[77] *People* v. *Dontanville* (1970) 10 Cal.App.3d 783, 792. Also see *People* v. *DeSantis* (1992) 2 Cal.4th 1198, 1222 ["This hardly uncommon apparel cannot be termed a badge of identity here"]; *People* v. *McDaniels* (1972) 25 Cal.App.3d 708, 711 [blue shirt]; *People* v. *Cunningham* (2001) 25 Cal.4th 926, 990 ["at least one of the other men is dressed in a three-piece suit, and another is wearing a suit jacket"]; *People* v. *Arias* (1996) 13 Cal.4th 92, 169-70 [the witness's "recollection and use of a distinct aspect of the robber's appearance [i.e., 'a bad case of acne'] enhances, rather than undermines, the inference that his photo identification was accurate"].
[78] *People* v. *Harris* (1971) 18 Cal.App.3d 1, 6.
[79] *In re Charles B.* (1980) 104 Cal.App.3d 541, 544-45.
[80] *People* v. *Davis* (1969) 2 Cal.App.3d 230, 237.
[81] *Moore* v. *Illinois* (1977) 434 U.S. 220, 224-25. Also see *Simmons* v. *United States* (1968) 390 U.S. 377, 383 ["The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime."].
[82] See *Moore* v. *Illinois* (1977) 434 U.S. 220, 230, fn.4 [as the defendant was led into the lineup, a prosecutor identified him as the suspect and told her that evidence pertaining to the crime had been found in his apartment]; *People* v. *Arias* (1996) 13 Cal.4th 92, 167 [DA's process server told witness that the suspect "had already been convicted of murder and rape"]. COMPARE *Simmons* v. *United States* (1968) 390 U.S. 377, 385 ["There is no evidence to indicate that the witnesses were told anything about the progress of the investigation, or that the FBI agents in any other way suggested which persons in the pictures were under suspicion."].
[83] *People* v. *Perkins* (1986) 184 Cal.App.3d 583, 588.
[84] (9th Cir. 2008) 548 F.3d 1197, 1208.

suggestive to tell the witness that officers had "possibly identified the 15 to 16 year-old chubby boy" who was involved in a drive-by murder, and there were only two overweight boys in the lineup, one of whom was the defendant.

IMPLYING A SUSPECT OR PERPETRATOR IS IN LINEUP: It has been argued that officers must not even inform a witness that they have arrested someone, or that one of the people in the lineup is a "suspect." While officers should avoid suggesting that the perpetrator is in the lineup ("Which one of these guys did it?"[85]), the courts have consistently rejected arguments that it was unduly suggestive to inform a witness that someone in the lineup was a suspect. This is because witnesses who are asked to view a lineup will naturally assume that officers did not grab six people off the street at random in hopes that one of them might have been the perpetrator.[86] Still, when suggestiveness is an issue, the courts often note, at least in passing, whether the officers did or did not tell the witness that they had a "suspect" or that a "suspect" was in the lineup.[87]

"ANOTHER WITNESS MADE AN ID": If another witness had previously identified someone in a lineup, officers should keep this confidential as it may be viewed as pressuring the witness to make an identification.[88]

CAUTIONARY INSTRUCTIONS: It is considered standard procedure for officers to help reduce any inherent suggestiveness by giving the witness certain information and instructions.[89] The following are fairly common:

LINEUPS

- The perpetrator may or may not be in the lineup. (Or, do not assume that we have identified the perpetrator merely because we are asking you to attend a lineup.)
- You are not obligated to identify anyone.
- Do not discuss your case with other witnesses or anyone else in the room.
- Do not call out a person's number or do anything that might indicate to others that you have identified someone.
- If you want to have a certain person say or do something, make your request to the officer conducting the lineup. All people in the line will then be asked to say or do the same thing.
- Our investigation in this case will continue regardless of whether you identify or do not identify anyone. (CCFAJ recommendation)

SHOWUPS

- Do not assume that the person you will be seeing is the perpetrator merely because we are asking you to look at him [or because he is handcuffed] [or because he is sitting in a patrol car].
- Do not speak with the other witnesses who will be going with us.
- When we arrive, do not say anything in the presence of other witnesses that would indicate you did or did not recognize someone. You will be questioned separately.
- Our investigation in this case will continue regardless of whether you identify or do not identify anyone. (CCFAJ recommendation)

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85 See *People* v. *Vanbuskirk* (1976) 61 Cal.App.3d 395, 400 ["Which man is the man that came in the store that night?"].

86 See *People* v. *Carpenter* (1997) 15 Cal.4th 312, 368 ["Anyone asked to view a lineup would naturally assume the police had a suspect."]; *People* v. *Contreras* (1993) 17 Cal.App.4th 813, 820 ["Telling a witness suspects are in custody … is not impermissible."]; *People* v. *Ballard* (1969) 1 Cal.App.3d 602, 605 [not suggestive to inform witnesses that "the police had two suspects who fit the description that she had given them"]; *People* v. *Dominick* (1986) 182 Cal.App.3d 1174, 1196 [not suggestive to tell the witness "that one or more of the suspects 'might' be in the lineup"]; *People* v. *Nguyen* (1994) 23 Cal.App.4th 32, 39 [not suggestive for an officer to tell the witness, prior to a showup, "that he had been able to catch a few people but that he needed a witness to identify them."]; *People* v. *Johnson* (1992) 3 Cal.4th 1183, 1218.

87 See *In re Carlos M.* (1990) 220 Cal.App.3d 372, 386; *People* v. *Johnson* (1989) 210 Cal.App.3d 316, 323.

88 See *People* v. *Vanbuskirk* (1976) 61 Cal.App.3d 395, 402, fn.4.

89 See, for example, *People* v. *Avila* (2009) 46 Cal.4th 680, 698; *People* v. *Yeoman* (2003) 31 Cal.4th 92, 124 ["Before each lineup, Trimble admonished Ford that the suspect's photograph might or might not be included and that she should not feel obligated to choose one."]; *People* v. *Arias* (1996) 13 Cal.4th 92, 169 [the officer told the witness that "the suspect might be in here, he might not"]; *People* v. *Sequeira* (1981) 126 Cal.App.3d 1, 16 ["The witnesses were separated, told not to talk with each other, and to designate their identifications by writing the suspect's number on a car provided them."]; *People* v. *Cunningham* (2001) 25 Cal.4th 926, 990 [the witness "was instructed that he was not to assume the person who committed the crime was pictured therein, that it was equally important to exonerate the innocent, and that he had no obligation to identify anyone."].

Post-lineup communications

After a live or photo lineup, officers will ordinarily want to talk to the witness about his identification of the suspect or his failure to make an identification. As we will now discuss, such communications are ordinarily appropriate and will not affect the admissibility of subsequent identifications.

HOW CONFIDENT? If the witness identified someone, the CCFAJ recommends that officers inquire as to his degree of confidence that he picked the perpetrator; and that his responses be recorded or included in the lineup report. The Seventh Circuit also addressed this issue in *United States* v. *Williams* when it said, "Obtaining immediate estimates of confidence also reduced the chance of error. People often profess greater confidence after the fact; their memories realign to their earlier statements, so that trial testimony may reflect more confidence than is warranted."[90]

"ANYONE CLOSELY RESEMBLE?" If the witness did not identify anyone, or if he made only a tentative ID, it is not suggestive to ask whether anyone in the lineup closely resembled the perpetrator. In fact, the court in *People* v. *Perkins*[91] pointed out that such a question was "a logical one" after the officer's chief witness failed to identify a suspect. Said the court, "In order to continue the investigation and make certain he was on the right track, [the officer] needed to explore [the witness's] recollection and description of the robber."

WITNESS REACTS TO SEEING SOMEONE: If the witness did not make an ID, but said or did something that indicated he recognized someone in the lineup, it is appropriate to question him about this. Said the Court of Appeal, "It is not impermissible or unduly suggestive for a police officer to question witnesses further if the officer believes the witnesses may actually recognize someone in the lineup."[92]

WITNESS REQUESTS INFORMATION: Officers at a lineup may provide information about the suspect to a witness if (1) the witness made a positive or tentative identification of a suspect, and (2) the witness requested the information. For example, in *People* v. *Ochoa*[93] a rape victim picked the defendant's photo but added that, to be sure, she would need to see a profile photo; so the officer showed her one. In rejecting the argument that the officer's act of providing this information rendered the procedure suggestive, the California Supreme Court said, "Due process does not forbid the state to provide useful further information in response to a witness's request, for the state is not suggesting anything."

Similarly, in *People* v. *Perkins*[94] the victim of a robbery noticed that one of the robbers had a tattoo of a lightning bolt on his neck. During the lineup, the victim recognized Perkins as the robber but said she "could not be sure" until she knew whether he had such a tattoo; the officer then confirmed that he did. On appeal, the court ruled that the officer's confirmation did not render the lineup unduly suggestive because the victim had recognized Perkins as the robber before she learned about the tattoo, and that the purpose of her question was only to confirm a "key detail."

"YOU PICKED THE RIGHT ONE": Officers should not inform a witness that he picked the "right" person in a lineup or otherwise confirm that he selected the suspect because it may have a "corrupting effect" on his subsequent identifications.[95] This is especially true if the witness made only a tentative ID. For example, in *People* v. *Gordon*[96] police arrested Gordon for the robbery-murder of an armored car guard. At a live lineup, a witness told officers that Gordon "looks familiar, but I'm not certain." Later that day, an officer phoned the witness to inquire about her comment. According to the court, in the course of the conversation the officer essentially told her that she had "picked the right person." As the result, all subsequent identifications of Gordon by the witness were suppressed.

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[90] (7th Cir. 2008) 522 F.3d 809, 812.

[91] (1986) 184 Cal.App.3d 583, 590. Also see *People* v. *Nation* (1980) 26 Cal.3d 169, 180.

[92] *People* v. *Perkins* (1986) 184 Cal.App.3d 583, 590. Also see *People* v. *Contreras* (1993) 17 Cal.App.4th 813, 820 ["questioning a witness further if the officer believes the witness actually recognized someone in the lineup is not impermissible"].

[93] (1998) 19 Cal.4th 353.

[94] (1986) 184 Cal.App.3d 583.

[95] *People* v. *Gordon* (1990) 50 Cal.3d 1223, 1242.

[96] (1990) 50 Cal.3d 1223.

Even if the witness positively identified the suspect, officers should not inform him that there was additional evidence of his guilt. For example, in *People* v. *Slutts*[97] two witnesses to an indecent exposure tentatively identified Slutts, after which an officer told them that Slutts "had committed a prior similar offense" and needed psychiatric help. The court observed that this statement "was made apparently to persuade the girls to hold to their identification of defendant." And although this did not result in the suppression of the ID (because the ID occurred beforehand), it was a legitimate issue on appeal.

Other relevant circumstances

WERE THE WITNESSES SEPARATED? Whenever two or more witnesses will be viewing a lineup or showup, it would be inherently suggestive if one of them were to hear another witness identify the suspect. As the court explained in *People* v. *Ingle*,[98] "It has been recognized that permitting one eyewitness to a crime the opportunity to observe another eyewitness make a photo lineup identification before he himself is asked to make his own identification is unnecessarily suggestive and fraught with the potential for irreparable misidentification." It has also been noted that a witness who identifies a suspect after hearing another witness identify him may subconsciously become unduly confident of his identification due to "mutual reinforcement."[99]

For this reason, it has become standard procedure to segregate the witnesses before the viewing occurs, and question them separately.[100] For example, in *People* v. *Sequeira*[101] the court ruled that one of the circumstances that rendered a lineup "eminently fair" was that the witnesses "were separated, told not to talk with each other, and to designate their identifications by writing the suspect's number on a card provided them."

DOUBLE-BLIND LINEUPS: To help prevent suggestiveness, the CCFAJ has recommended that live and photo lineups be "double-blind," meaning that the officers who conduct the lineup do not know the identity of the suspect. The advantage of this procedure is that the officers cannot possibly say or do anything—whether intentionally or inadvertently—that would have called attention to the suspect.[102] (By the way, it is called a *double* blind lineup because neither the officers nor the witnesses are informed beforehand of the suspect's identity.)

SEQUENTIAL LINEUPS: When officers are conducting double-blind live or photo lineups, the CCFAJ recommends that they display the suspect and the fillers to the witness one at a time. These are known as "sequential" lineups, as opposed to simultaneous live lineups in which the suspect and the fillers appear on stage at the same time, and simultaneous photo lineups in which the photographs are displayed all at once.

According to some psychologists, witnesses who view simultaneous lineups may tend to compare the people in the lineup with one another instead of comparing each one with their mental picture of the perpetrator. And this tendency, they contend, may result in misidentifications because, if the perpetrator was not in the lineup, the witness may identify the person who most resembles him. To date, only one California court has discussed the subject of sequential lineups, and its conclusion was positive. The case was *People* v. *Brandon* and the court said, "The circumstances surrounding the photographs being shown to [the witness] (loose, in a stack and shown one at a time) reflect she was not influenced by any so-called 'filler' photographs."[103]

PRE-LINEUP PHOTO DISPLAY: Just before conducting a lineup, officers have sometimes shown surveillance photos of the perpetrator to the witness. Such a

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[97] (1968) 259 Cal.App.2d 886.
[98] (1986) 178 Cal.App.3d 505, 513.
[99] See *People* v. *Nation* (1980) 26 Cal.3d 169, 180.
[100] See *Manson* v. *Brathwaite* (1977) 432 U.S. 98, 116 ["And since Glover examined the photograph alone, there was no coercive pressure to make an identification arising from the presence of another."]; *People* v. *Dontanville* (1970) 10 Cal.App.3d 783, 793 ["Each child was called in separately to view the photographs and admonished not to discuss what transpired with the others."].
[101] (1981) 126 Cal.App.3d 1, 16.
[102] See *U.S.* v. *Williams* (7th Cir. 2008) 522 F.3d 809, 811 [suggestiveness may be reduced if "the officer conducting [the lineup is] ignorant of the suspect's identity"].
[103] (1995) 32 Cal.App.4th 1033, 1052.

procedure is, to put it mildly, "arguably suggestive."[104] Nevertheless, the courts have not strictly prohibited it when there was good reason to believe the ID was reliable; e.g., the witness got a good look at the perpetrator.[105] It is also probably because the perpetrator's ID is not apt to be a significant issue at trial if prosecutors have photographs of him committing the crime. But if ID will be a contested issue, this procedure should be avoided because, even if the identification is ruled admissible, it is apt to have little weight with the jury.[106]

RECORDING LINEUPS; RETAINING PHOTOS: To prove that live lineups were fair, the CCFAJ recommends that they be recorded. As for photo lineups, it is already standard practice to retain the photos.[107]

Identification Trustworthiness

As noted, even if a lineup or showup was unduly suggestive, the resulting identification will not be suppressed if it was nevertheless trustworthy. While the courts will consider the totality of circumstances in determining whether an identification was trustworthy,[108] the following circumstances are usually key:

OPPORTUNITY TO OBSERVE PERPETRATOR: The courts almost always note the extent to which the witness had an opportunity to see the perpetrator before, during, or after the crime. This is because the danger of misidentification is particularly grave "when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest."[109] Of particular importance are the length of time the witness saw the perpetrator, the distance between them, whether the witness's view of the perpetrator was obstructed, and the lighting conditions. For example, in ruling that witnesses had a good opportunity to see the perpetrator, the courts have noted the following:

- "two to three minutes . . . within two feet . . . natural light"[110]
- "up to half an hour . . . under adequate artificial light in her house and under a full moon outdoors"[111]
- "The robbery took place in the afternoon in a well-lighted bank. The robbers wore no masks. Five bank employees had been able to see the robber for periods ranging up to five minutes."[112]
- "close range for at least three minutes"[113]
- a "clear and unobstructed view [for 15-20 minutes] . . . well-lighted conditions"[114]
- the victim had an "unobstructed view . . . for at least three minutes"[115]
- "well-lit bedroom for a couple of minutes"[116]
- "20-to-30 second opportunity . . . with lighting provided by the headlights of both cars and a streetlight"[117]
- "Her view of his face with the nylon covering (which did not distort his features) from a foot away lasted about a minute and a half."[118]

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[104] *U.S.* v. *Lawson* (D.C. Cir. 2005) 410 F.3d 735, 740 [it was "arguably suggestive" to show witnesses surveillance photos of the bank robbers]; *U.S.* v. *Sanders* (8th Cir. 1980) 626 F.2d 1388, 1389.
[105] See, for example, *People* v. *Kennedy* (2005) 36 Cal.4th 595, 611; *People* v. *Ingle* (1986) 178 Cal.App.3d 505, 513; *People* v. *Johnson* (2010) 183 Cal.App.4th 253, 273; *People* v. *Alexander* (2010) 49 Cal.4th 846, 903; *U.S.* v. *Beck* (9th Cir. 2005) 418 F.3d 1008, 1013.
[106] See *Manson* v. *Brathwaite* (1977) 432 U.S. 98, 116.
[107] See *People* v. *Bethea* (1971) 18 Cal.App.3d 930, 938 [it may be difficult to prove the fairness of a photo lineup without the photos].
[108] See *Neil* v. *Biggers* (1972) 409 U.S. 188, 199; *People* v. *Kennedy* (2006) 36 Cal.4th 595, 610; *People* v. *Cook* (2007) 40 Cal.4th 1334, 1354 ["The cases hold that despite an unduly suggestive identification procedure, we may deem the identification reliable under the totality of the circumstances"].
[109] *United States* v. *Wade* (1967) 388 U.S. 218, 229. Also see *People* v. *Cook* (2007) 40 Cal.4th 1334, 1354 ["we consider such factors as the witness's opportunity to view the suspect at the time of the offense"].
[110] *Manson* v. *Brathwaite* (1977) 432 U.S. 98, 114.
[111] *Neil* v. *Biggers* (1972) 409 U.S. 188, 200.
[112] *Simmons* v. *United States* (1968) 390 U.S. 377, 385.
[113] *People* v. *York* (1980) 108 Cal.App.3d 779, 786.
[114] *People* v. *Ware* (1978) 78 Cal.App.3d 822, 839, fn.11.
[115] *People* v. *Rist* (1976) 16 Cal.3d 211, 216.
[116] *People* v. *Fortier* (1970) 10 Cal.App.3d 760, 764.
[117] *People* v. *Martinez* (1989) 207 Cal.App.3d 1204, 1220.
[118] *People* v. *Edwards* (1981) 126 Cal.App.3d 447, 454.

Attention directed at perpetrator: A witness's identification is especially likely to be deemed trustworthy if his attention had been directed at the perpetrator.[119] For example, in *People* v. *Gomez*[120] the court ruled that a robbery victim's ID of the defendant was trustworthy because, among other things, she "kept reminding herself to study the face of the robber because she knew she would be called upon later to identify him." And in *People* v. *Sanders*[121] the court noted that a man who survived an attack in which his friend was killed testified that he "focused on his attackers' faces in order to identify them if he survived the attack."

Conversely, the trustworthiness of an identification may become an issue if the witness had only a glance at the suspect, or if he was just a casual or passing observer.[122]

Something distinctive: In some cases, a witness's attention may be directed to the perpetrator because there was something distinctive or unusual about him.[123] For example, in *People* v. *Cunningham*[124] the witnesses to a robbery-murder testified that their attention was initially drawn to the perpetrator because of his unusual appearance which included a "burgundy three-piece pinstripe polyester suit and tie," "thick glasses with dark rims," "a mustache that connected with a goatee-like beard," and his "hair in back was shoulder-length in the middle."

Detailed description: The courts often consider whether the witness had initially provided officers with a detailed description of the perpetrator, or whether the description was vague or general. For example, in ruling that a witness's description appeared to be trustworthy, the courts have noted the following:

- The description included "the assailant's approximate age, height, weight, complexion, skin texture, build, and voice."[125]
- The description included the perpetrator's "race, his height, his build, the color and style of his hair, and the high cheekbone facial feature. It also included clothing [he] wore."[126]
- The witness "described his age, facial appearance and his wearing apparel in some detail."[127]
- The witness described his "clothing, hair, complexion, facial hair, height, weight, and condition of intoxication."[128]

Accuracy of initial description: A strong indication of trustworthiness is the accuracy of the witness's initial description of the perpetrator; i.e., the number

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119 See *Neil* v. *Biggers* (1972) 409 U.S. 188, 200 ["She was no casual observer, but rather the victim of one of the most personally humiliating of all crimes."]; *Manson* v. *Brathwaite* (1977) 432 U.S. 98, 115 ["Glover was not a casual or passing observer, as is so often the case with eyewitness identification."]; *People* v. *Bauer* (1969) 1 Cal.3d 368, 374 ["This was not a case of a hurried look in circumstances where there was no reason to observe with particularity."]; *People* v. *Phan* (1993) 14 Cal.App.4th 1453, 1462 ["[The witness] 'looked straight in his face,' and made a conscious effort to 'stare at him.' Her degree of attention could hardly have been higher: appellant Phan was a threat not only to her but to her children."]; *People* v. *Kilpatrick* (1980) 105 Cal.App.3d 401, 412 ["[T]he victim took time while in the motel room to get a clear view, under daylight, of her assailant."]; *In re Cindy E.* (1978) 83 Cal.App.3d 393, 402 ["their degree of attention [during a 'tense conversation'] can hardly be passed off as that of casual observers"]; *People* v. *Cowger* (1988) 202 Cal.App.3d 1066, 1072 ["Her degree of attention was high: she kept fighting off defendant, who was trying to remove her clothes."]; *People* v. *Nguyen* (1994) 23 Cal.App.4th 32, 39 ["[The victim's] degree of attention was high since there were no other customers in the store, and appellant's companion [had] asked for [the victim's] assistance."].

120 (1976) 63 Cal.App.3d 328.

121 (1990) 51 Cal.3d 471.

122 See *Moore* v. *Illinois* (1977) 434 U.S. 220, 229 ["only 10 to 15 seconds" after awakening from a nap]; *People* v. *Bisogni* (1971) 4 Cal.3d 582, 587 [only "two short looks" and "a glance"]; *People* v. *Caruso* (1968) 68 Cal.2d 183, 188 ["fleeting glance"]; *People* v. *Nation* (1980) 26 Cal.3d 169, 181 [a "glance"].

123 See *People* v. *LeBlanc* (1972) 23 Cal.App.3d 902, 906 [the "oddity" of the perpetrator's hair styling caused the victim to notice him]; *People* v. *Arias* (1996) 13 Cal.4th 92, 169-70 [the witness recalled "a distinct aspect of the robber's appearance"]; *People* v. *Malich* (1971) 15 Cal.App.3d 253, 261-62 ["small wire on her upper right teeth"]; *People* v. *Harpool* (1984) 155 Cal.App.3d 877, 886 ["very distinct dental features"]; *People* v. *Faulkner* (1972) 28 Cal.App.3d 384, 392 ["unusual high forehead" and "chuke"].

124 (2001) 25 Cal.4th 926, 958, 990.

125 *Neil* v. *Biggers* (1972) 409 U.S. 188, 200. Also see *People* v. *Blum* (1973) 35 Cal.App.3d 515, 519 ["a detailed description"].

126 *Manson* v. *Brathwaite* (1977) 432 U.S. 98, 115.

127 *People* v. *Rodriguez* (1970) 10 Cal.App.3d 18, 32.

128 *People* v. *Martinez* (1989) 207 Cal.App.3d 1204, 1220.

of descriptive details that matched.[129] For example, in *People* v. *Guillebeau*[130] the court explained that one of the reasons a rape victim's identification of the defendant was reliable was that she was able to help make a composite picture of her assailant "which strongly resembled appellant." While inaccuracies are also relevant,[131] the courts understand that witnesses are often unable to provide detailed descriptions, and that discrepancies are inevitable. Consequently, a somewhat inaccurate description may be offset by other circumstances that tend to show the ID was reliable.[132]

INCONSISTENCIES: If an identification was otherwise reliable, some inconsistencies in the witness's description of the perpetrator will go to the weight of the ID, not its admissibility.[133]

ID BASED ON MULTIPLE FACTORS: For the same reason that the specificity of a witness's initial description is a sign of trustworthiness, the courts also consider whether the witness's subsequent identification of the defendant was based on several characteristics or just one.[134] For example, although a witness in *People* v. *Flint*[135] "had difficulty" identifying a burglar by his facial features, the Court of Appeal ruled the identification was sufficiently trustworthy because it was also based on "his clothing, posture, build, hairstyle, and race."

WITNESS TRAINED TO PAY ATTENTION: The trustworthiness of an identification may be bolstered by the fact that the witness had been trained to pay special attention to people he thinks he might need to identify later; e.g., bank tellers, police officers.[136] As the United States Supreme Court observed in *Manson* v. *Brathwaite,* "[A]s a specially trained, assigned, and experienced officer, [the witness] could be expected to pay scrupulous attention to detail, for he knew that subsequently he would have to find and arrest his [drug] vendor. In addition, he knew that his claimed observations would be subject later to close scrutiny and examination at any trial."[137]

WITNESS HAD SEEN PERPETRATOR BEFORE: An ID is naturally likely to be more trustworthy if the witness was acquainted with the perpetrator or had seen him before.[138] For example, in ruling that a rape victim's identification of her attacker was reliable, the court in *People* v. *Nash* noted that she "had seen appellant

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[129] See *In re Carlos M.* (1990) 220 Cal.App.3d 372, 387 ["generally accurate description"]; *People* v. *Sanchez* (1982) 131 Cal.App.3d 718, 731 ["substantial congruity"]; *People* v. *Johnson* (1989) 210 Cal.App.3d 316, 323 ["[H]is description of the perpetrator matched Johnson precisely."]; *People* v. *Kilpatrick* (1980) 105 Cal.App.3d 401, 412 ["Her descriptions of defendant's vehicle and personal appearance as well as her clothing . . . were all accurate."].

[130] (1980) 107 Cal.App.3d 531, 557.

[131] See *United States* v. *Wade* (1967) 388 U.S. 218, 241 [it is relevant whether there was "any discrepancy between any pre-lineup description and the defendant's actual description"].

[132] See *In re Carlos M.* (1990) 220 Cal.App.3d 372, 387 ["The accuracy of her description of appellant, while inaccurate as to the type of pants he was wearing, was an otherwise generally accurate description."]; *People* v. *Arias* (1996) 13 Cal.4th 92, 169 ["These estimates are not so disparate as to cast particular suspicion on Lam's reliability at trial."]; *People* v. *Blair* (1979) 25 Cal.3d 640, 662 ["In spite of these discrepancies, there are significant factors pointing in the direction of reliability."]. ALSO SEE *People* v. *Smith* (1970) 4 Cal.App.3d 41, 48 ["Crime victims often have limited opportunity for observation; their reports may be hurried, perhaps garbled by fright or shock."].

[133] See *People* v. *Virgil* (2011) 51Cal.4th 1210, 1256 ["Inconsistencies in her descriptions of the man she saw, and in her accounts of her activities on the day of the murder, are matters affecting the weight of her eyewitness testimony, not its admissibility."].

[134] See *Neil* v. *Biggers* (1972) 409 U.S. 188, 200 [witness's description "included the assailant's approximate age, height, weight, complexion, skin texture, build, and voice"]; *People* v. *Lewis* (1966) 240 Cal.App.2d 546, 548 [ID based on defendant's "build, walk, and mannerisms"].

[135] (1986) 180 Cal.App.3d 13, 18.

[136] See *People* v. *Fortier* (1970) 10 Cal.App.3d 760, 765 [officers are "trained to notice a suspect's physical characteristics"]; *U.S.* v. *Duran-Orozco* (9th Cir. 1999) 192 F.3d 1277, 1282 ["[H]e gave them the attention an alert police officer would give to possible suspects"]; *U.S.* v. *Gallo-Moreno* (6th Cir. 2009) 584 F.3d 751, 758 ["Tovar's status as a DEA agent bolsters our conclusion about his degree of attention"]; *People* v. *Bethea* (1971) 18 Cal.App.3d 930, 934 [liquor store manager "had been the victim of three robberies"]; *U.S.* v. *Sanders* (8th Cir. 1980) 626 F2 1388, 1389 ["the witness' degree of attention was enhanced by special training for bank personnel"].

[137] (1977) 432 U.S. 98, 114.

[138] See *People* v. *LeBlanc* (1972) 23 Cal.App.3d 902, 906 ["defendant had been a customer of the store before on several occasions"]; *People* v. *Phan* (1993) 14 Cal.App.4th 1453, 1462 [the witness "had seen him before, four days earlier when he had attempted to open her garage"]; *People* v. *Rodriguez* (1977) 68 Cal.App.3d 874, 882 [the witness "had seen [the pepetrator] on *two* separate occasions *before* she saw the photograph of him"].

around the neighborhood on one or two occasions prior to this event."[139]

ACCURACY IN EARLIER LINEUPS: It may be logical to infer that the witness's identification was accurate if he previously failed to identify anyone in a lineup in which the defendant was not present.[140] Thus, in *Neil* v. *Biggers* the Supreme Court pointed out that "the victim made no previous identification at any of the showups, lineups, or photographic showups. Her record for reliability was thus a good one."[141] On the other hand, there may be problems if the witness identified a filler, especially if he did not resemble the defendant.[142]

LEVEL OF CERTAINTY: The courts frequently note whether, and to what extent, the witness had expressed certainty that the person he picked was the perpetrator.[143] A lack of certainty will not, however, render an ID untrustworthy. As the Court of Appeal explained in *People* v. *Lewis*, "Lack of positiveness in identification does not destroy the value of the identification but goes onto to its weight."[144] (For additional cases that are related to this subject, see "Mere suggestiveness goes to weight" on page 4.)

IMMEDIATE ID: Although it is relevant that the witness immediately identified the defendant,[145] it is seldom a significant circumstance because the courts know that witnesses often take their time in making such an important decision. Furthermore, officers often instruct the witnesses to take their time.[146]

TIME LAPSE BETWEEN CRIME AND LINEUP: Because memories fade, the length of time between the crime and the lineup or showup is relevant.[147]

INDEPENDENT EVIDENCE OF GUILT: It is logical to infer that a witness's ID of the defendant was trustworthy if there was additional independent evidence of his guilt; e.g., the defendant confessed to the crime, his fingerprints were found at the crime scene, he was identified by other witnesses.[148]

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[139] (1982) 129 Cal.App.3d 513, 515.

[140] See *People* v. *Alexander* (2010) 49 Cal.4th 846, 902-903 ["Bulman's history as a witness showed he was not susceptible to making a false identification"]; *People* v. *Wells* (1971) 14 Cal.App.3d 348, 355 [witness ID'd the defendant "following her examination of hundreds of photographs of various parolees in the area"]; *People* v. *Ware* (1978) 78 Cal.App.3d 822, 839 ["Shortly after the incident she was shown a mug book of some 200 photos and positively stated that none of the pictures was that of her assailant."]; *People* v. *Nash* (1982) 129 Cal.App.3d 513, 518 ["the victim was shown but did not identify many men before she saw appellant"] *People* v. *Bauer* (1969) 1 Cal.3d 368, 374 ["Each of the witnesses rejected a number of mug shots"]; *People* v. *Sanchez* (1982) 131 Cal.App.3d 718, 731 [witness "declined to identify anyone out of a photo lineup that did *not* contain a photograph of appellant"]; *People* v. *Spencer* (1972) 22 Cal.App.3d 786, 796 ["Miss Lawson did not identify anyone in the first lineup, from which appellant was absent"].

[141] (1972) 409 U.S. 188, 201.

[142] See *United States* v. *Wade* (1967) 388 U.S. 218, 241; *People* v. *West* (1984) 154 Cal.App.3d 100, 105; *People* v. *Dominick* (1986) 182 Cal.App.3d 1174, 1197.

[143] See *Manson* v. *Brathwaite* (1977) 432 U.S. 98, 115 ["no question whatsoever"]; *Neil* v. *Biggers* (1972) 409 U.S. 188, 200-1 ["no doubt"]; *Simmons* v. *United States* (1968) 390 U.S. 377, 385 ["none of the witnesses displayed any doubt"]; *People* v. *Kennedy* (2005) 36 Cal.4th 595, 611 ["Oh, my God, that's him"]; *People* v. *Greene* (1973) 34 Cal.App.3d 622, 641 ["My God, that's him"]; *People* v. *Jardine* (1981) 116 Cal.App.3d 907, 915 ["That's the two guys right there."]; *People* v. *Wash* (1993) 6 Cal.4th 215, 245 ["no uncertainty"]; *People* v. *Clark* (1992) 3 Cal.4th 41, 137 [ID was "positive and unshaken"]. Also see *People* v. *Brown* (1969) 273 Cal.App.2d 109, 112 [Robbery victim: "I just know that I would always know him if I ever saw him again."]; *People* v. *Guillebeau* (1980) 107 Cal.App.3d 531, 557 [the witness "emphasized that she would never forget appellant's face"].

[144] (1966) 240 Cal.App.2d 546, 548. Also see *People* v. *Rist* (1976) 16 Cal.3d 211, 216 ["Confusion, or lack of clarity and positiveness in a witness' identification testimony goes to the weight, not the admissibility of the testimony."]; *People* v. *Prado* (1982) 130 Cal.App.3d 669, 674 ["Hansen's failure to make a positive identification of appellant based on photographic displays merely goes to the weight of the evidence, not its sufficiency."].

[145] See *People* v. *Wells* (1971) 14 Cal.App.3d 348, 355 ["instantaneous" ID]; *People* v. *Harris* (1971) 18 Cal.App.3d 1, 6 ["immediately"]; *People* v. *Hawkins* (1970) 7 Cal.App.3d 117, 123 ["unhesitatingly"]; *People* v. *LeBlanc* (1972) 23 Cal.App.3d 902, 906 ["unhesitantly"]; *People* v. *Dontanville* (1970) 10 Cal.App.3d 783, 793 ["immediately"]; *People* v. *Cowger* (1988) 202 Cal.App.3d 1066, 1072 ["instantaneously"]; *People* v. *Brandon* (1995) 32 Cal.App.4th 1033, 1052 ["immediately"].

[146] Also see *People* v. *Arias* (1996) 13 Cal.4th 92, 169 [veteran officer testified "a witness typically selects a photo, if at all, within five minutes or so," but that taking 15 to 20 minutes would indicate indecision which he would include in his report].

[147] See *People* v. *Clark* (1992) 3 Cal.4th 41, 137 ["the ability to remember a perceptive experience diminishes over time"].

[148] See *People* v. *Farham* (2002) 28 Cal.4th 107, 184 ["Significantly, defendant had given a detailed confession to the police"]; *In re Richard W.* (1979) 91 Cal.App.3d 960, 971 [the other incriminating evidence was "strong and persuasive"]; *People* v. *Nguyen* (1994) 23 Cal.App.4th 32, 39 ["appellant's fingerprint was found at the crime scene"]; *People* v. *Anthony* (1970) 7 Cal.App.3d 751, 765 ["overwhelming" circumstantial evidence]; *People* v. *Bauer* (1969) 1 Cal.3d 368, 374 ["substantial corroborating evidence"].

Right to Counsel

Under certain circumstances, a suspect has a right to have counsel present for the purpose of observing the manner in which the lineup was conducted. As we will now discuss, there are essentially three legal issues pertaining to this right: (1) When does a suspect have a right to counsel? (2) What is the attorney permitted to do? (3) How can officers obtain a waiver of the right?

When the right attaches

Under the Sixth Amendment, a suspect acquires a right to have counsel present at a lineup or showup if all of the following circumstances exist: (1) the suspect was charged with a crime and had been arraigned on that charge, (2) the lineup or showup pertained to the charged crime, and (3) the suspect appeared in person at the lineup or showup.

ARRAIGNMENT: In 2008, the United States Supreme Court ruled that, for Sixth Amendment purposes, a suspect becomes "charged" with a crime at the point he makes his first court appearance pertaining to that crime. Said the Court, "[A] criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel."[149]

IN-PERSON IDENTIFICATION: Even if the suspect had been arraigned on the crime under investigation, he does not have a right to have counsel to observe the lineup procedure unless the witness will be viewing him in person or, in the case of a voice-only lineup, listening to him in person. Consequently, a suspect will not have a right to counsel when the witness views his photograph in a photo lineup, views a videotape of a live lineup, or listens to a tape recording of a voice-only lineup.[150]

The reason the right to counsel does not attach in these situations is that the defendant's trial attorney will be able to explore the possibility of suggestiveness by looking at the photos or videotape, or listening to the audio tape. Note, however, that a violation of the right to counsel might occur if officers are unable to provide the defense with copies of the photographs or recordings.[151]

SUPPRESSION OF EVIDENCE: If a court rules that officers conducted a lineup in violation of the defendant's right to counsel, the prosecution will be prohibited from introducing testimony that the witness had identified the defendant at the lineup.[152] The witness will also be prohibited from identifying the defendant at trial unless prosecutors can prove, by clear and convincing evidence, that the in-court identification was independent of the unlawful lineup identification.[153]

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[149] *Rothgery* v. *Gillespie County* (2008) 554 U.S. 191, 213. Also see *U.S.* v. *States* (7th Cir. 2011) __ F.3d __ [2011 WL 2857263] ["the initial appearance marks the point at which interrogations . . . begin to be governed by the Sixth Amendment"].

[150] See *United States* v. *Ash* (1973) 413 U.S. 300, 321 ["the Sixth Amendment does not grant the right to counsel at photographic displays"]; *United States* v. *Wade* (1967) 388 U.S. 218, 237; *Gilbert* v. *California* (1967) 388 U.S. 263; *People* v. *Virgil* (2011) 51 Cal.4th 1210, 1256 ["the Sixth Amendment does not guarantee a criminal defendant the right to counsel at a photographic lineup"]; *People* v. *Rist* (1976) 16 Cal.3d 211, 216 ["We have consistently rejected the contention that the constitutional right to counsel extends to photographic identification procedures."]; *People* v. *Dominick* (1986) 182 Cal.App.3d 1174, 1197, fn. 15 ["there is no right to counsel at a photographic identification procedure"]; *People* v. *Rhinehart* (1973) 9 Cal.3d 139, 153 ["There is no right to counsel at a photographic identification"]; *People* v. *Hawkins* (1970) 7 Cal.App.3d 117, 121 ["Any suggestive influences present at a photo-identification in large measure are preserved by the photographic evidence, or readily detectable by cross-examination of the participants."]; *U.S.* v. *Gallo-Moreno* (7th Cir. 2009) 584 F.3d 751, 762 ["When a witness makes an identification based on hearing a defendant's recorded voice on tape and that tape is preserved in the record, the defendant can adequately challenge the witness's voice identification at trial through effective cross-examination."]; *U.S.* v. *Gallo-Moreno* (6th Cir. 2009) 584 F.3d 751, 760 [no Sixth Amendment right to counsel unless the suspect was "present in a trial-like confrontation"].

[151] See *People* v. *Lawrence* (1971) 4 Cal.3d 273, 278 ["As long as the photographs from which the witness made his identification are preserved and available at trial, counsel for the accused . . . an easily reveal the possibility of prejudice"]; *People* v. *Dontanville* (1970) 10 Cal.App.3d 783, 791 ["the chief difference between a photographic line-up and [the live lineup] is the ability to reproduce much of what transpired by the production of the photographs themselves"].

[152] See *Gilbert* v. *California* (1967) 388 U.S. 263, 272-73; *Moore* v. *Illinois* (1977) 434 U.S. 220, 231; *United States* v. *Wade* (1967) 388 U.S. 218, 239-41.

[153] See *United States* v. *Wade* (1967) 388 U.S. 218, 242; *Gilbert* v. *California* (1967) 388 U.S. 263, 272; *People* v. *George* (1972) 23 Cal.App.3d 767, 774 [the prosecution "must show that there was a sufficient independent source for the in-court identification"]; *People* v. *Diggs* (1980) 112 Cal.App.3d 522, 528; *People* v. *Malich* (1971) 15 Cal.App.3d 253, 261; *People* v. *LeBlanc* (1972) 23 Cal.App.3d 902, 906.

What the attorney is permitted to do

The attorney's role at a lineup is limited to that of a silent observer, taking note of any suggestiveness in the procedure so that he can later assist trial counsel in challenging the lineup.[154] A good explanation of the attorney's function was provided by Justice Mosk in *People* v. *Williams*:

> [D]efense counsel has no affirmative right to be active during the course of the lineup. He cannot rearrange the personnel, cross-examine, ask those in the lineup to say anything or to don any particular clothing or to make any specific gestures. Counsel may not insist law enforcement officials hear his objection to procedures employed, nor may he compel them to adjust their lineup to his views of what is appropriate. ¶ At most, defense counsel is merely present at the lineup to silently observe and to later recall his observations for purposes of cross-examination . . . [155]

RIGHT TO BE PRESENT WHEN ID IS MADE: Because the attorney serves as an observer of the identification process, he has a right to be present when the witness is asked if anyone in the lineup was the perpetrator.[156] This is because any suggestiveness at that point is just as likely to result in misidentification as suggestivess that occurs during the viewing.

For example, in *People* v. *Williams,* discussed above, the defendant's attorney was present when a witness viewed the lineup, but then the officers took the witness into another room "for the purpose of making his identification." The attorney asked to observe but his request was denied on grounds that it was against departmental policy. On appeal, the California Supreme Court ruled that such a departmental policy violated Williams' right to counsel because, said the court, "It is not the moment of viewing alone, but rather the whole procedure by which a suspect is identified that counsel must be able to effectively reconstruct at trial."

PRE- AND POST-LINEUP INTERVIEWS: The suspect's attorney does not have a right to be present when officers interview a witness before the lineup begins or after it was completed.[157] For example, in *People* v. *Perkins*[158] the defendant's attorney left the lineup after the witness failed to identify Perkins as the man who robbed her. A few minutes later, an officer asked the witness if there was anyone in the lineup who resembled the robber. She replied that one of the men was, in fact, the robber—it was Perkins. On appeal, Perkins, contended that the post-ID interview violated his right to counsel, but the court disagreed, saying, "[S]ince the identification process had been completed, Perkins' counsel had no more right to be present at the interview than he would at any nonconfrontational identification by a victim. No defendant has the right to demand representation by counsel at every interview between the prosecution and its witnesses."

Similarly, in *People* v. *Mitcham*[159] a robbery victim who was viewing a live lineup at Oakland police headquarters placed a question mark on the lineup card next to Mitcham's number. The robbery investigator did not immediately ask her to explain the question mark because it was "standard practice in his office not to discuss lineup details in the presence of defense counsel." One week later, he met with the victim and asked her about the question mark, and she said she was "95% sure" that Mitcham was the robber. On appeal, Mitcham contended that the

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[154] See *People* v. *Carpenter* (1999) 21 Cal.4th 1016, 1046 ["defense counsel must not be allowed to interfere with a police investigation"]; *People* v. *Bustamante* (1981) 30 Cal.3d 88, 99 ["At most, defense counsel is merely present at the lineup to silently observe and to later recall his observations for purposes of cross-examination or to act in the capacity of a witness"]; *People* v. *Williams* (1971) 3 Cal.3d 853, 856 [the right to counsel was adopted "to enable an accused to detect any unfairness in his confrontation with the witness, and to insure that he will be aware of any suggestion by law enforcement officers, intentional or unintentional, at the time the witness makes his identification."].

[155] (1971) 3 Cal.3d 853, 860 (dis. opn. of Mosk, J.).

[156] See *People* v. *Malich* (1971) 15 Cal.App.3d 253, 261 ["[T]he attorney's exclusion from the actual identification after the lineup emasculates the lineup and vitiates an in-court identification based upon it."].

[157] See *People* v. *Carpenter* (1997) 15 Cal.4th 312, 369 ["The right to counsel extends only to the actual identification, not to postidentification interviews."]; *People* v. *Carpenter* (1999) 21 Cal.4th 1016, 1046 ["defense counsel must not be allowed to interfere with a police investigation"].

[158] (1986) 184 Cal.App.3d 583.

[159] (1992) 1 Cal.4th 1027, 1067.

victim's identification of him should have been suppressed, urging the California Supreme Court to rule that a lineup is not "over" until the post-lineup interview is completed. But the court refused, ruling instead that the lineup was complete when the victim "filled out and signed the identification card, indicating her identification of defendant, qualified by a question mark."

Waiver of right to counsel

A suspect may waive the right to counsel, even if he has an attorney.[160] To obtain a waiver, officers must begin by advising him of the following rights:

(1) You have a right to have counsel present at the lineup.

(2) You are not required to participate in the lineup without counsel.

(3) If you want an attorney but cannot afford one, the court will appoint one for you at no charge.[161]

Officers must then ask the suspect if, having these rights in mind, he is willing to waive the right to counsel. Furthermore, like any other waiver, the waiver of the right to counsel must be made freely, meaning that officers must not pressure the suspect to waive. Note that because there are significant differences between the right to counsel at a lineup and the *Miranda* right to counsel during interrogation, a *Miranda* waiver does not constitute a waiver of counsel's presence at a lineup.[162]

Attorney not available or won't participate

If the suspect requests a certain attorney who cannot attend the lineup or refuses to do so, officers may proceed with the lineup if they obtain "substitute counsel."[163] If the suspect's attorney appears at the lineup but, for whatever reason, refuses to observe the procedure, officers may proceed with the lineup without him. For example, in *People* v. *Hart* the public defender, "[u]pon seeing the composition of the lineup," objected that it was unfair and immediately "departed." On appeal, the California Supreme Court rejected the defendant's argument that the lineup violated his Sixth Amendment right to counsel because, said the court, "the public defender's *refusal* to attend the lineup cannot be equated with a *denial* of defendant's right to counsel."[164] In such a situation, however, officers should photograph or videotape the lineup so that prosecutors can prove the lineup was not suggestive.

There is one other option when counsel cannot or will not participate in a lineup: Photograph or record the lineup without the witness being present, then show the witness the photos or the recording of the lineup. As noted earlier, such a procedure does not violate the suspect's right to counsel because a suspect does not have a right to counsel unless the witness is viewing a live lineup.

Other Lineup Issues

REFUSAL TO STAND IN A LINEUP: A suspect does not have a right to refuse to participate in a lineup, refuse to speak during a voice lineup, or refuse to wear clothing for identification purposes.[165] And if he refuses, prosecutors may be permitted to disclose it to the jury at trial as evidence of his consciousness of guilt.[166]

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[160] See *Montejo* v. *Louisiana* (2009) __ U.S. __ [129 S.Ct. 2079].

[161] See *People* v. *Wells* (1971) 14 Cal.App.3d 348, 354 [an "effective waiver" resulted when the suspect "was advised also of his right to counsel at the lineup and waived, in writing, his right to such counsel"]; *People* v. *Banks* (1970) 2 Cal.3d 127, 134 [waiver invalid because officer neglected to tell the defendant that an attorney would be appointed if he wished]; *People* v. *Thomas* (1970) 5 Cal.App.3d 889, 897 [defendant was informed "that he did not have to go through the lineup without counsel unless he wanted to; that an attorney would be provided him if he so desired"].

[162] See *People* v. *Banks* (1970) 2 Cal.3d 127, 134-36; *People* v. *Schafer* (1970) 4 Cal.App.3d 554, 560.

[163] See *People* v. *Wimberly* (1992) 5 Cal.App.4th 773, 784-86 [court rejects argument that a suspect has a right to counsel "of his choice"]; *People* v. *Nichols* (1969) 272 Cal.App.2d 59, 64 [appointment of substitute counsel].

[164] (1999) 20 Cal.4th 546, 625.

[165] See *Goodwin* v. *Superior Court* (2001) 90 Cal.App.4th 215, 221; *People* v. *Huston* (1989) 210 Cal.App.3d 192, 216; *People* v. *Ellis* (1966) 65 Cal.2d 529, 533.

[166] See *People* v. *Alexander* (2010) 49 Cal.4th 846, 905 ["The jury reasonably might question why, if he were not involved in the shooting, defendant would not want to appear in the lineup to clear his name despite his attorney's advice."]; *People* v. *Smith* (1970) 13 Cal.App.3d 897, 910; *People* v. *Ellis* (1966) 65 Cal.2d 529, 537 [refusal constituted "circumstantial evidence of consciousness of guilt"]. **NOTE**: Disclosure to jury of refusal to participate was admissible even if the defendant refused to appear on the advice of counsel. See *People* v. *Alexander* (2010) 49 Cal.4th 846, 905-906.

To help ensure the admissibility of this evidence at trial, officers should notify the suspect that his refusal to participate may be used against him in court as evidence that he knew he would be identified as the perpetrator.[167] The following is an example of such an admonition:

> You do not have a right to refuse to participate in a lineup. But if you refuse, your decision to do so may be used in court as proof that you are, in fact, guilty of the crime for which you have been arrested, and that you knew the witness[es] at the lineup would positively identify you as the perpetrator. Having these consequences in mind, do you still refuse to participate in the lineup?

Note that if the suspect refuses to speak at a lineup, and if he was previously *Mirandized*, officers must notify him that the *Miranda* right to remain silent does not give him a right to refuse to participate in a voice test.[168]

COMPELLING A SUSPECT TO STAND IN LINEUP: If a suspect refuses to participate in a live lineup, officers may seek a court order that would compel him to do so. Such an order may also authorize officers to use reasonable force if, after being served with a copy of the order, he still refuses to comply.[169] As the Seventh Circuit observed in *In re Maguire*, "While it may not enhance the image of justice to force a [suspect] kicking and screaming into a lineup, the choice has been made by the [suspect], not the court."[170]

In terms of form and procedure, it appears that such an order would be virtually the same as a search warrant. First, an officer would submit to the judge an affidavit containing the following: (1) the name of arrestee and any identifying number, (2) the name of the jail in which the arrestee is currently being held, (3) the crime for which the arrestee was arrested, and (4) the names of the affiant and his agency. The affidavit must then demonstrate probable cause to believe (1) that the arrestee committed the crime under investigation, (2) that the results of the lineup would be relevant to the issue of his guilt,[171] and (3) that the arrestee notified officers that he would not voluntarily appear in a lineup.

A sample court order is shown on the next page. To obtain a copy via email in Microsoft Word format, send a request from a departmental email address to POV@acgov.org.

APPEARANCE ORDERS: If the suspect is in custody in another county in California, officers may seek an "Appearance Order" authorizing them to transport the suspect to the county in which the lineup will be held. Such an order may be issued upon an *ex parte* declaration that establishes "sufficient cause" to believe that the suspect committed the crime under investigation, and that a live lineup was reasonably necessary.[172] If the suspect is out of custody, there is currently no procedure for compelling him to appear in a live lineup.[173]

DEFENDANT'S MOTION FOR LINEUP: A defendant may file a motion for a court order requiring that officers place him in a live lineup. But such a motion may be granted only if it establishes the following: (1) the perpetrator's identity will be a material issue in the case, (2) there is a reasonable likelihood of a mistaken identification which a lineup would tend to alleviate, and (3) the motion was made in a timely manner.[174] POV

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[167] See *People* v. *Huston* (1989) 210 Cal.App.3d 192, 217.
[168] See *People* v. *Johnson* (1992) 3 Cal.4th 1183, 1223, fn.9; *People* v. *Ellis* (1966) 65 Cal.2d 529, 539.
[169] See *Schmerber* v. *California* (1966) 384 U.S. 757, 770-71 [Court notes that a search warrant may authorize the use of force to obtain a blood sample]; *U.S.* v. *Pipito* (7th Cir. 1987) 861 F.2d 1006, 1010 [court may authorize the use of force to obtain palm prints]. Also see *United States* v. *Wade* (1967) 388 U.S. 218, 222 ["We have no doubt that compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance."].
[170] *In re Maguire* (1st Cir. 1978) 571 F.2d 675, 677.
[171] See Pen. Code § 1524(a)(4).
[172] See *People* v. *Sequeira* (1981) 126 Cal.App.3d 1, 13-15; Pen. Code § 4004.
[173] See *Goodwin* v. *Superior Court* (2001) 90 Cal.App.4th 215, 226 ["There is wisdom in a procedure authorizing an ex parte order compelling a suspect who is out of custody to attend a lineup. [But] that procedure does not currently exist in California law." Edited].
[174] See *Evans* v. *Superior Court* (1974) 11 Cal.3d 617, 625. COMPARE *People* v. *Redd* (2010) 48 Cal.4th 691, 725 [no reasonable likelihood of misidentification]; *People* v. *Sullivan* (2007) 151 Cal.App.4th 524, 560 ["[Defendant] failed to make the prima facie showing required by *Evans*."]; *People* v. *Farnam* (2002) 28 Cal.4th 107, 183-84. ALSO SEE *People* v. *Vallez* (1978) 80 Cal.App.3d 46, 56 ["Motions made shortly before trial will generally be denied unless good cause is shown for the delay."].

SUPERIOR COURT OF CALIFORNIA
County of ________________

The Great Seal

LINEUP ORDER

THE PEOPLE OF THE STATE OF CALIFORNIA

- **To any peace officer in ________________________ County**
- **To the arrestee identified below:**

Name of arrestee: *[Insert name]*

Identifying number of arrestee: *[Insert local or state criminal offender number]*

Place of incarceration: *[Insert name and location of detention facility]*

Felony under investigation: *[Insert name and code section]*

Affiant's name and agency: *[Insert affiant's name and agency]*

Date of lineup: *[Insert date of requested lineup]*

Location of lineup: *[Insert location of requested lineup]*

FINDINGS: The affidavit filed herewith, sworn to and subscribed before me on this date, has established probable cause to believe the following:

Commission of felony: The felony listed above was committed in this county and is currently under investigation by officers of the law enforcement agency listed above.
Arrestee in custody: The arrestee is currently being held in the detention facility listed above.
Probable cause: There is probable cause to believe that the arrestee committed the felony listed above.
Relevance of lineup: The results of a physical lineup would constitute evidence that the arrestee committed or did not commit the felony listed above. Pen. Code § 1524(a)(4).
Notification to arrestee: The arrestee was notified that a lineup pertaining to the felony listed above would be held, and he notified officers that he would not voluntarily participate in the lineup.

ORDER: Based on the above, this court orders the following:

(1) The arrestee shall stand and participate in a lineup on the date and at the location listed above; furthermore, the arrestee shall comply with all orders and instructions given to him by officers as to what he must do and say before and during this lineup.

(2) If the arrestee notifies officers that he will refuse to comply with section (1) of this order, or if he thereafter refuses to comply, officers are authorized to employ such force as is reasonably necessary to compel him to do so. Such force may, if reasonably necessary, include the use of restraints such as handcuffs.

(3) Before utilizing force, officers shall do the following:

(a) Serve the arrestee with a copy of this order and, if necessary, read it to him.

(b) Confirm that the arrestee understands the order.

(c) Confirm that the arrestee will refuse to comply with section (1) of this order.

(d) Notify the arrestee that his refusal to comply with this order will constitute evidence in court that he knows that the witness(es) at the lineup would identify him as the perpetrator of the above felony.

(4) Officers shall record the lineup and any use of force, and shall retain the recording.

________________________________ Date and time order issued

________________________________ Judge of the Superior Court

Showups
Should probable cause make them illegal?

The California Legislature is now considering a bill that would prohibit field showups of detainees if officers had probable cause to arrest them.[1] Thus, officers who locate a suspect who resembled the perpetrator of a crime that had just occurred would be required to choose between (1) detaining the suspect and conducting a showup (in which case the showup would be unlawful if a court later concluded that they had probable cause), or (2) arresting the suspect and holding him for a lineup (in which case both the arrest and lineup would be unlawful if a court later concluded that the officers lacked probable cause). For the following reasons, we think such a drastic change in the law would be unwise.

Under traditional Fourth Amendment principles, officers who have probable cause to arrest a person are given greater—not lesser—leeway in determining how to resolve their suspicion. This has worked well because it establishes a type of fail-safe mechanism: *When in doubt, exercise restraint*. But the proposed law turns this upside down: *When in doubt, arrest*.

The proposed rule is also problematic because it is based on the assumption that officers who have located a person who resembles the perpetrator of a recent crime will usually be able to quickly and accurately determine whether they have probable cause to arrest or merely reasonable suspicion to detain. In reality, however, it is often extremely difficult. In fact, the two terms cannot even be satisfactorily defined. As the United States Supreme Court pointed out, "Articulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible."[2]

Moreover, the need for a showup will arise only when the determination must be made immediately, and when it must be based on criteria as highly subjective as estimates of height, weight, build, color of hair, and the style and color of clothing. To make matters worse, officers in these situations must almost always make the call under extreme pressure and confusion. As the D.C. Circuit pointed out, "[S]ome of the factors which they observe, will add up in support of probable cause; some, on the other hand, may undermine that support."[3]

It should also be noted that officers will sometimes have probable cause to arrest two or more people in the vicinity of a crime committed by only one person. Thus, under the proposed statute, officers would be encouraged to arrest everyone and hold them for a lineup instead of releasing them after they were cleared by the witness.

The Court of Appeal has observed that a "prompt on-the-scene confrontation between a suspect and a witness enables the police to exclude from consideration innocent persons so a search for the real perpetrator can continue while it is reasonably likely he is still in the immediate area."[4] Because the proposed law would subvert this effective investigative procedure, we urge the legislature to reject it.

[1] Assembly Bill 308 — 2011-2012 Regular Session.
[2] *Ornelas* v. *United States* (1996) 517 U.S. 690, 695. Also see *United States* v. *Sokolow* (1989) 490 U.S. 1, 7 ["The concept of reasonable suspicion, like probable cause, is not readily, or even usefully, reduced to a neat set of legal rules."].
[3] *Jackson* v. *U.S.* (D.C. Cir. 1962) 302 F.2d 194, 197.
[4] *People* v. *Cowger* (1988) 202 Cal.App.3d 1066, 1072.

"Open Carry" Detentions: A Rebuttal

In response to an article on "open carry" detentions that we published in the Spring 2010 *Point of View*, the law firm of Jones & Mayer recently distributed a "client alert" stating that it "strongly disagrees" with our conclusions. Jones & Mayer is involved in the matter because it gives advice to some law enforcement agencies on how to avoid civil liability.

The firm maintains that officers are required to implement less-intrusive procedures whenever the purpose of the detention is to investigate a person who is openly carrying a firearm in public. In fact, the firm asserts that officers must simply walk up to the person and, before doing anything else, inquire as to whether the gun is loaded. And if it was unloaded, they must immediately return it to the person, turn around and walk away. Said the firm, "If it is unloaded, it should be returned and the subject released to go about his/her lawful business."

This conclusion is based on the firm's misunderstanding of Penal Code section 12031(e) which states in relevant part, "In order to determine whether or not a firearm is loaded . . . peace officers are authorized to examine any firearm carried" by the detainee. From this passage, the firm jumps to the conclusion that the statute thereby rendered illegal any detention that was not conducted in precisely that manner.

The problem with this conclusion is that it ignores the distinction between "permissive" and "prohibitive" statutes. Section 12031(e) is a permissive statute because it *permits* officers to do something; i.e., to examine firearms. But it prohibits nothing, and it clearly does not purport to define the scope and intensity of these types of detentions.

It should be noted that the distinction between permissive and prohibitive statutes is well known in the law. For example, in *U.S.* v. *Ramirez*[1] officers who were about to enter a home to execute a search warrant broke a window to "discourage" the occupants from arming themselves. One of the occupants of the house, Ramirez, argued that the officers' actions were unlawful because there is a federal statute—18 U.S.C. § 3109—which says that such breaking is permitted "if, after notice of his authority and purpose, [the officer] is refused admittance . . . " Because this statute specifically authorizes officers to break in after giving notice, Ramirez concluded that it must necessarily prohibit a breaking without giving notice. On the contrary, said the United States Supreme Court, "by its terms § 3109 prohibits nothing. It merely authorizes officers to damage property in certain instances."

Similarly, in *U.S.* v. *Knights*[2] the Supreme Court used the term "dubious logic" to describe reasoning that was virtually identical to that employed by Jones & Mayer. In *Knights*, the defendant argued that a probation search of his home was unlawful because it was conducted in a manner that differed from a probation search that the Court had previously approved. Said the Court: "This dubious logic—that an opinion upholding the constitutionality of a particular search implicitly holds unconstitutional any search that is not like it—runs contrary [to our precedent]."

For these reasons, we disagree with the firm's conclusion. We also note that its position is contrary to settled Fourth Amendment law that officers who have detained someone are not required to utilize the "least intrusive means" of pursuing their objectives. As the U.S. Supreme Court observed, "This Court has repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment."[3]

The firm's opinion is also untenable as a matter of common sense because it is based on its assumption that officers who see someone openly carrying a firearm can readily determine whether he is exercising his right to bear arms, or whether he is planning to use it in the commission of a crime. Here, the firm employs the term "plain open carry situation," as if the intentions of armed individuals are always "plain."

The unsoundness of this conclusion was demonstrated in the case of *Schubert* v. *City of Springfield*[4] in which an officer in Springfield, Massachusetts saw Schubert walking toward the courthouse with a holstered handgun under his coat. It turned out that Schubert was not a criminal—he was a "prominent" criminal defense attorney. But it appears the officer was either unaware of it or he didn't care, because he detained Schubert at gunpoint and pat searched him after securing the weapon. Finding no other weapons, and confirming that Schubert was licensed to carry the weapon, the officer released him. Naturally, Schubert sued him.

On appeal, he contended that, under the Second Amendment, an officer who sees a person carrying a handgun in a public place cannot detain him unless he has reason to believe the person is carrying the weapon

[1] (1998) 523 U.S. 65.
[2] (2001) 534 U.S. 112. 117.
[3] *City of Ontario* v. *Quon* (2010) __ U.S. __ [2010 WL 2400087].
[4] (1st Cir. 2009) 589 F.3d 496.

for some criminal purpose. The First Circuit disagreed, ruling that mere possession of the handgun in a public place "provided a sufficient basis for [the officer's] concern that Schubert may have been about to commit a serious criminal act, or, at the very least, was openly carrying a firearm without a license to do so." The court then rejected the argument (virtually the same as that of Jones & Mayer) that officers should be able to determine a person's intentions based on his physical appearance. Said the court:

> Schubert contends that his clothing, his age, and the fact that he was carrying a briefcase are factors that should undercut the reasonableness of [the officer's] suspicion. We are not persuaded. A *Terry* stop is intended for just such a situation, where the officer has a reasonable concern about potential criminal activity based on his "on-the-spot observations," and where immediate action is required to ensure that any criminal activity is stopped or prevented.

It should be noted that, although we cited *Schubert* in our article, and although *Schubert* was a published opinion, and although the published opinions of all federal circuit courts are citable in California for their persuasive value,[5] Jones & Mayer neglected to refute—or even mention it—in its "client alert."

The firm also disagrees with our view that officers who detain a person for openly carrying a firearm may take reasonable officer-safety precautions. In this regard, we simply note that the United States Supreme Court has said it is "too plain for argument" that officer safety concerns during detentions are "both legitimate and weighty."[6] If anything, these concerns become even more "weighty" when the detainee is armed.

Jones & Mayer further contends that officers have no right to determine the identity of the detainee. Under California law, however, officers have a right to identify every person they have lawfully detained. For example, the court in *People* v. *Rios* said, "[W]here there is such a right to so detain, there is a companion right to request, and obtain, the detainee's identification."[7]

Similarly, the United States Supreme Court in *Hiibel* v. *Nevada*[8] observed that "[o]btaining a suspect's name in the course of a *Terry* stop serves important government interests. Knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder." But Jones & Mayer claimed *Hiibel* is irrelevant because it arose in Nevada which "has a statute which requires one to identify himself when detained." It seems rather obvious, however, that the fact the case arose in Nevada (or Idaho or even Kentucky) has absolutely no bearing on the Court's conclusion that identifying a detainee "serves important government interests."

Jones & Mayer also contends that, while officers may inspect the detainee's gun to see if it was loaded, they must not look at its serial number, as this would constitute an unlawful search. But if an officer can lawfully hold the weapon, and if he can lawfully manipulate it so as to make sure it is unloaded, it is hard to imagine what Fourth Amendment privacy interest would be invaded if he glances at the serial number.

Some concluding thoughts: It is true, of course, that virtually all of the people who openly carry firearms for the purpose of demonstrating their Second Amendment rights are law-abiding people. But officers have no way of knowing the personal histories of these people when they see them. And because the demonstrators have voluntarily chosen to expose themselves to temporary detention to prove a point, they should also be prepared to incur the inconvenience of having to submit to brief officer-safety and investigative measures.

The firm said the purpose of its "alert" was "helping officers avoid needlessly exposing themselves to civil liability." It seems to us that there is another issue with which officers (and their families) might be even more concerned: exposing themselves to gunfire.

It is understandable that lawyers whose only obligation is to minimize the civil liability of law enforcement agencies will consistently urge them to instruct their officers to do fewer things and to not get involved in matters that can be avoided. But that is not what the public needs and expects from its law enforcement officers. "Getting involved" is a big part of the job. Plus, we are fairly certain that timidity-as-departmental-policy would be abhorrent to every man and woman who carries a badge.

As we made clear in our article, the law in this area is unsettled. For that reason, we took the position that, unless a court expressly rules otherwise, officers who detain a person who is openly carrying a firearm in public should be permitted to use the same investigative and officer-safety procedures that are allowed when detaining any armed individual. Nothing contained in Jones & Mayer's memo has changed our position. POV

[5] See *People* v. *Bradford* (1997) 15 Cal.4th 1229, 1305.
[6] *Pennsylvania* v. *Mimms* (1977) 434 U.S. 106, 110.
[7] *People* v. *Rios* (1983) 140 Cal.App.3d 616, 621. ALSO SEE *People* v. *Loudermilk* (1987) 195 Cal.App.3d 996, 1002.
[8] (2004) 542 U.S. 177.

Recent Cases

J.D.B. v. North Carolina

(2011) __ U.S. __ [131 S.Ct. 2394]

Issue

In determining whether a minor was "in custody" for *Miranda* purposes, is the minor's age relevant?

Facts

Officers in Chapel Hill, North Carolina suspected that a 13-year old boy, identified by the Court as J.D.B., had been burglarizing homes in the city. Wanting to interview him, a uniformed school resource officer went to J.D.B.'s middle school, removed him from his classroom, and escorted him to a conference room. Waiting in the room were a police investigator, the school's assistant principal, and an administrative intern. During the next 30-45 minutes, J.D.B. was questioned about the burglaries but was not advised of his *Miranda* rights. He eventually confessed and was allowed to leave.

After being charged with the crimes in juvenile court, J.D.B. filed a motion to suppress his confession on grounds that it was obtained in violation of *Miranda*. Specifically, he argued that he was "in custody" when he was questioned in the conference room and, therefore, the officers violated *Miranda* by failing to obtain a waiver. His motion was denied, and so were his appeals in state court. The United States Supreme Court decided to review the case.

Discussion

It is settled that officers must obtain a *Miranda* waiver before interrogating a suspect who is "in custody."[1] Furthermore, a suspect will be deemed "in custody" if a reasonable person in his position would have believed he was under arrest, or that his freedom had been restricted to the degree associated with an arrest.[2]

In applying this test, the courts have consistently applied an objective test, which means the only circumstances that matter are those that appeared to have been seen or heard by the suspect. As the U.S. Supreme Court explained in *Stansbury* v. *California*, custody "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being interrogated."[3] Thus, for example, it is immaterial that, unbeknownst to the suspect, he had become the "focus" of the officers' investigation,[4] or that the officers had probable cause to arrest him and intended to do so.[5] Similarly, the Court has ruled that the suspect's experience with police and any other "contingent psychological factors" are irrelevant in determining how the circumstances would have appeared to a reasonable person.[6] As the Court explained in *J.D.B.*:

> Police must make in-the-moment judgments as to when to administer *Miranda* warnings. By limiting analysis to the objective circumstances of the interrogation, and asking how a reasonable person in the suspect's position would understand his freedom to terminate questioning and leave, the objective test avoids burdening police with the task of anticipating the idiosyncrasies of every individual suspect and divining how those particular traits affect each person's subjective state of mind.

The question, then, was whether the age of a minor is an objective circumstance that may be considered, or a subjective circumstance that may not. The Court ruled it becomes objective when, as is usually the case, officers were aware of the minor's young age. Why is this relevant to whether the minor was "in custody"? Because, said the Court, "childhood yields objective conclusions." And one of them is that "children are most susceptible to influence, and outside pressures." The Court went on to say:

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[1] See *Stansbury* v. *California* (1994) 511 U.S. 318, 322.
[2] See *Yarborough* v. *Alvarado* (2004) 541 U.S. 652, 662.
[3] (1994) 511 U.S. 318, 323. ALSO SEE *People* v. *Pilster* (2006) 138 Cal.App.4th 1395, 1403 ["Custody determinations are resolved by an objective standard: Would a reasonable person interpret the restraints used by the police as tantamount to a formal arrest?"].
[4] See *Stansbury* v. *California* (1994) 511 U.S. 318, 326 ["any inquiry into whether the interrogating officers have focused their suspicions upon the individual being questioned (assuming those suspicions remain undisclosed) is not relevant"].
[5] See *Berkemer* v. *McCarty* (1984) 468 U.S. 420, 442; *People* v. *Blouin* (1978) 80 Cal.App.3d 269, 283.
[6] *Yarborough* v. *Alvarado* (2004) 541 U.S. 652, 668.

> In some circumstances, a child's age would have affected how a reasonable person in the suspect's position would perceive his or her freedom to leave. That is, a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go.

Although a minor's age must now be considered by officers in determining whether the minor was in custody for *Miranda* purposes, the Court acknowledged that this circumstance will not "be a determinative, or even a significant factor in every case." It is, however, "a reality that courts cannot simply ignore."

Finally, the Court ruled that officers are not required to make assumptions as to the vulnerability of each minor they question, as this would require a consideration of subjective circumstances. "[C]onsidering age in the custody analysis," said the Court, "in no way involves a determination of how youth subjectively affects the mindset of any particular child."

As for whether J.D.B. was "in custody" in light of his age, the Court did not rule on the issue. Instead, it remanded the case to the North Carolina courts for a determination.

Comment

If officers are not sure whether they must obtain a *Miranda* waiver from a minor, they should consider telling him that he is not under arrest, that he is free to leave, and that he need not answer their questions. As the Eighth Circuit recently observed in *U.S.* v. *Boslau*, "The most obvious and effective means of demonstrating that a suspect has not been taken into custody is for police to inform the suspect that an arrest is not being made and that the suspect may terminate the interview at will."[7]

Davis v. United States

(2011) __ U.S. __ [131 S.Ct. 2419]

Issue

If officers conduct a search in accordance with existing law but, before the resulting criminal charge is resolved, the law is changed in a way that rendered the search unlawful, must evidence obtained during the search be suppressed?

Facts

In 2007, officers in Alabama made a traffic stop on a car in which Davis was the passenger. After arresting the driver for DUI and arresting Davis for falsely identifying himself, officers handcuffed them both and put them in the back of patrol cars. The officers then searched the car incident to the arrest and found a revolver inside Davis's jacket pocket. As a result, Davis was charged in federal court with being a felon in possession of a handgun and, after his motion to suppress the gun was denied, he was convicted.

Discussion

At the time of the search, it was the law in Alabama—as it was in California and in most states—that officers who have arrested an occupant of a vehicle may search the passenger compartment as an incident to the arrest. This rule was announced by the Supreme Court in 1981 in the case of *New York* v. *Belton*.[8] In 2009, however, the Court severely restricted *Belton*, ruling that officers would now be permitted to conduct these searches only if the search occurred at a time when the arrestee had immediate access to the passenger compartment. The case was *Arizona* v. *Gant*,[9] and it was apparent that the search of Davis's jacket would have been unlawful under *Gant* because it occurred after Davis had been handcuffed. But because the search occurred when *Belton* was still the law, the Eleventh Circuit rejected Davis's argument that his gun should have been suppressed.

Davis appealed to the United States Supreme Court and argued that *Gant* should be applied retroactively. But the Court ruled that the issue here was not the retroactivity of *Gant*, but whether the evidence should be admissible under the Court's Good Faith Rule.

In its usual formulation, the Good Faith Rule states that evidence obtained as the result of an unlawful search will not be suppressed if (1) the search was rendered unlawful by a mistake made by someone who was not associated with law enforcement, and (2) officers were not at fault in failing to detect the mistake.[10] While the facts in *Davis* do not fall squarely within the parameters of the Good Faith Rule, the Supreme Court concluded that the rule should also be applied where, as here, officers conduct a search that

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[7] (8th Cir. 2011) 632 F.3d 422, 428.
[8] (1981) 453 U.S. 454.
[9] (2009) 556 U.S. 332.
[10] See *United States* v. *Leon* (1984) 468 U.S. 897; *Arizona* v. *Evans* (1995) 514 U.S. 1.

was expressly permitted under a law that existed when the search occurred, but which was subsequently overturned or modified so as to render the search unlawful. The Court reasoned that the sole purpose of the exclusionary rule is to deter police misconduct; but when officers conduct a search or make a seizure that was authorized under existing law, there is simply no misconduct to deter. Said the Court, "An officer who conducts a search in reliance on binding appellate precedent does no more than act as a reasonable officer would and should act under the circumstances."

Accordingly, the Court ruled that Davis's motion to suppress his gun was properly denied.

People v. Downey

(2011) __ Cal.App.4th __ [2011 WL 3621856]

Issue

To conduct a probation search of a home, must officers have probable cause to believe that the probationer lives there? Or will reasonable suspicion suffice?

Facts

Having decided to conduct a probation search on the home of George Roussell, Riverside police detective Kevin Townsend started trying to determine where Roussell lived. As Det. Townsend later testified, it was a "very difficult" process because different agencies and sources reported different addresses. For example, the probation department showed that he lived in Moreno Valley, the court computer system showed he lived in Corona, and his listed address at DMV was on Gould Street in Riverside. But the sources of the most recent information were the records of the local utilities and phone company which showed that he lived at 8123 Magnolia Ave. Apt. 85 in Riverside. Det. Townsend testified it was most likely that the Magnolia apartment was Roussell's current address because, while many probationers and parolees "give false addresses" to avoid warrantless searches, many "do not know that police have access to utility bills; therefore, it is a very good source in finding out where someone lives."

After searching the apartment and finding a handgun, officers learned from the current resident, Kima Downey, that Roussell had moved out about three months earlier. But they also learned that Downey was a convicted felon, so they arrested him for possessing the gun. When his motion to suppress the weapon was denied, he pled guilty.

Discussion

In *Payton* v. *New York,*[11] the United States Supreme Court ruled that officers who have a warrant to arrest a person may enter a home for the purpose of arresting him if they have "reason to believe" he lives there. This same "reason to believe" standard has also been applied by the courts in determining whether officers may enter a home to conduct a parole or probation search; i.e. officers must have "reason to believe" that the parolee or probationer lives there.

Over the years, however, the federal courts have been split on the issue of whether "reason to believe" means probable cause or merely reasonable suspicion, and the California courts have not resolved the matter.[12] Until now.

In *Downey*, the Court of Appeal ruled that reasonable suspicion will suffice, reasoning that because the U.S. Supreme Court is quite familiar with the term "probable cause," its decision not to employ the term in *Payton* indicates it had decided to require a lesser level of proof; i.e., reasonable suspicion. Quoting from the District of Columbia Circuit, the *Downey* court said, "We think it more likely that the Supreme Court in *Payton* used a phrase other than 'probable cause' because it meant something other than probable cause.'"[13]

The court then ruled that the officers who searched Roussell's house had reasonable suspicion to believe that Roussell did, in fact, live there "[b]ased on the utility bills and telephone record." Accordingly, it concluded that Downey's motion to suppress was properly denied.

People v. Stillwell

(2011) 197 Cal.App.4th 996

Issues

(1) Did POST certification establish the reliability of a drug detecting dog (K9)? (2) Does an alert by a K9 establish probable cause to search? (3) Did a K9 conduct an unconstitutional "search" when he sniffed inside the bed of a pickup truck?

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[11] (1980) 445 U.S. 573, 602-3.
[12] See *People* v. *Jacobs* (1987) 43 Cal.3d 472, 479, fn.4.
[13] See *U.S.* v. *Thomas* (D.C. Cir. 2005) 429 F.3d 282, 286.

Facts

At about 11 P.M., a reserve police officer in Marysville, Matthew Minton, stopped a pickup truck because the truck's license plate was obscured and the license plate light was out. There were two people in the truck: the driver was Robin Briggs; the passenger was Darla Stillwell. Having observed signs that Briggs was under the influence of drugs, Minton radioed for assistance from Officer Christopher Miller who had more experience in such matters. Officer Miller and his K9 Tommy arrived about two minutes later. In response to questioning by Officer Minton, Briggs said he had taken methadone earlier that day, which prompted the officer to ask Briggs if he would consent to a search of his truck. He said no.

At that point, Officer Miller walked Tommy around the truck and, when they reached the truck's bed, Tommy "stood up on his hind legs with his front paws on the side of the truck and sniffed over the bed of the pickup" where a backpack was located. Tommy then sat and stared in the direction of the backpack, which was a signal to Officer Miller that Tommy had detected the odor of drugs inside. Officer Miller then opened the backpack and found several items that appeared to be parts of a methamphetamine lab.

After the defendants were arrested, officers with the Yuba-Sutter Narcotics Enforcement Team obtained a warrant to search their home and, in the course of the search, they found more evidence of methamphetamine production. When the defendants' motion to suppress the evidence was denied, they pled to several charges related to possession and trafficking in drugs.

Discussion

Briggs and Stillwell argued that their motion to suppress the evidence should have been granted for the following reasons.

TOMMY'S RELIABILITY: The defendants contended that prosecutors failed to prove that Tommy was competent in detecting illegal drugs. Specifically, they asserted that the competence of a drug detecting dog depends on his success rate, and that prosecutors presented insufficient evidence on this issue. The court pointed out, however, that a dog's reliability may be established through proof of his POST certification which "involves the hiding of different types of drugs in various weights in vehicles and buildings. To obtain certification, the dog must locate all of the required odors in both environments." The court then ruled that because prosecutors proved that "Tommy has been certified every time he has been tested" and that he "was up to date on his certifications" when the search occurred, his reliability was sufficiently established.

PROBABLE CAUSE BASED ON DOG'S ALERT: Next, the defendants argued that an alert by a certified K9 cannot, in and of itself, establish probable cause to believe there are drugs in the place or thing to which he alerted. But the court summarily rejected this argument, pointing out that it is settled that such an alert does, in fact, provide probable to search.[14]

The question, then, was whether Tommy had, in fact, alerted to the backpack. Here, the court pointed out that "Officer Miller is trained to read Tommy, watch his behavior, how he reacts. When Tommy is sniffing the air around a vehicle, Officer Miller watches for any change in Tommy's behavior, such as a deviation from his standard high/low search pattern or the use of a 'cone pattern' to work back to the source of the odor. . . . When Tommy locates the source of an odor, his 'passive alert' is to sit and stare at the location where he found the controlled substance."

The court then concluded that there was considerable proof that Tommy had signaled to Officer Miller that there were drugs in the backpack. Said the court:

> At the rear tire on the driver's side, Officer Miller noticed a change in Tommy's behavior. First, Tommy "snapped" back from circling around the truck and redirected his search by doubling back. Officer Miller kept walking around the truck, because he did not want to influence Tommy's decision to redirect the search. Tommy next used a "scent cone" search pattern, working right to left in an attempt to find the odor. Tommy then stood up on his hind legs with his front paws on the side of the truck and sniffed over the bed of the pickup. After sniffing the air in that area, Tommy immediately dropped down into his "sit/stare" alert.

Based on this testimony, the court ruled that Tommy's actions constituted an alert which established probable cause to search the backpack.

TOMMY'S ENTRY INTO THE TRUCK BED: The defendants also claimed that Tommy exceeded the permissible scope of a K9 search when he "stood up on his hind legs with his front paws on the side of the truck." But such

[14] See *Illinois* v. *Caballes* (2005) 543 U.S. 405, 410; *Indianapolis* v. *Edmond* (2000) 531 U.S. 32, 40.

a "minimal and incidental contact," said the court, "did not amount to a constitutionally cognizable infringement."[15] Finally, the defendants argued that Tommy conducted an unlawful search when he stuck his nose "over and inside the bed of the truck." But the court ruled that these "instinctive actions of following the odor from the ground up to the source (even though these actions may have caused him to sniff in the bed of the truck) did not violate the Fourth Amendment."[16]

Consequently, the court ruled that the trial court properly denied the defendants' motion to suppress.

U.S. v. Smith

(8th Cir. 2011) __ F.3d __ [2011 WL 3366393]

Issues

(1) Did the use of felony car stop procedures on a detainee render the detention a de facto arrest? (2) When the driver fled on foot, did he effectively abandon his vehicle so as to eliminate his privacy interest in its contents?

Facts

At about 5:30 P.M., a man wearing a mask and armed with a handgun robbed a bank in Missouri. He fled on foot and left a trail of money leading to a nearby apartment complex. Officers obtained a video from one of the complex's surveillance cameras, and it showed the following: shortly before the holdup, the robber arrived at the complex in a burgundy Buick which was followed by a white Cadillac.[17] The robber exited the Buick and got into the Cadillac; the driver of the Cadillac then drove in the direction of the bank. A few minutes after the holdup, the robber jumped a fence surrounding the complex, got into the Buick, changed his clothing, and walked off.

The registered owner of the Cadillac told officers that the actual owner was Mario Smith; officers confirmed that Smith had received several traffic tickets while driving the car. Investigators did not, however, believe they had probable cause to arrest him. In any event, he had disappeared, so investigators requested that all law enforcement agencies in the area instruct their officers to be on the lookout for the Cadillac, detain the driver for questioning if they located it, and hold the vehicle for prints.

At about 1 A.M. the next morning, an officer in a nearby city spotted Smith driving the car on a highway and, after requesting assistance, followed it as it left the highway and eventually pulled into the parking lot of a Taco Bell. By this time, several backup officers had arrived, so they made a felony car stop.

The officers ordered Smith to turn off the engine and throw the keys out the window, but he did not comply. Instead, he stuck his head out the window and asked, "What do you want?" He then put the car in gear and tried to escape out the drive-thru lane. But one of the officers had blocked the exit, so he jumped out and fled on foot. He was apprehended a few minutes later after fighting with several officers. Officers then searched the Cadillac and found $72,900 in cash and a handgun. As the result, Smith was charged in federal court with being a felon in possession of a firearm. When his motion to suppress the gun was denied, he pled guilty.

Discussion

Although it was apparent that the officers had grounds to detain Smith, he argued that (1) their use of felony car stop procedures transformed the detention into a de facto arrest, and (2) the arrest was unlawful because the officers lacked probable cause.

Before going further, it should be noted that it is likely that the officers did have probable cause to arrest Smith for being an accessory to bank robbery. But it didn't matter because it is settled that officers who have only reasonable suspicion to detain a suspect may utilize felony stop procedures if they reasonably believed the suspect was armed or otherwise presented a substantial threat.[18] As the Ninth Circuit explained, "The use of force during a stop does not convert the stop into an arrest if it occurs under circumstances justifying fears for personal safety."[19] And because it is apparent that the detention of a suspected armed robber is such a circumstance,[20] the court in *Smith* ruled that "[t]he reasonable safety measures officers took in effecting an inherently dangerous investigative stop in connection with an armed robbery did not transform the encounter with Smith into an arrest."

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[15] ALSO SEE *U.S.* v. *Olivera-Mendez* (8th Cir. 2007) 484 F.3d 505.

[16] ALSO SEE *People* v. *Amick* (1973) 36 Cal.App.3d 140.

[17] **NOTE**: Although the court does not refer to this man as the bank robber, it is apparent he was. In addition to the other circumstances, he matched the physical and clothing description of the robber.

[18] See *People* v. *Soun* (1995) 34 Cal.App.4th 1499 [robbery-murder]; *People* v. *Celis* (2004) 33 Cal.4th 667, 676 [drug trafficking].

[19] *U.S.* v. *Buffington* (9th Cir. 1987) 815 F.2d 1292, 1300.

[20] See *People* v. *Anthony* (1970) 7 Cal.App.3d 751, 761.

Smith also argued that the search of his Cadillac was unlawful because the officers lacked a warrant. Because Smith's flight from the officers would have eliminated any uncertainty as to whether they had probable cause to arrest him for the robbery, the search of the car could have been justified as a probable cause search for the fruits and instrumentalities of the crime. It was, however, unnecessary for the court to address this issue because it concluded that no justification for the search was necessary inasmuch as Smith abandoned the vehicle when he fled. To put it another way, his act of running off—especially considering that he left "the car open, with the keys in the ignition, the motor running"—extinguished whatever expectation of privacy he might have had in the contents of the vehicle, including the handgun and cash.

Dougherty v. City of Covina

(9th Cir. 2011) __ F.3d __ [2011 WL 3583404]

Issue

If officers have probable cause to believe that a person engaged in "inappropriate touching" of children, do they automatically have probable cause to believe he possesses child pornography?

Facts

Officers in Covina developed probable cause to believe that a sixth grade teacher, Bruce Dougherty, had engaged in "inappropriate touching" of several female students, and that he may have attempted to molest a student three years earlier. Based on this information, an officer sought a warrant to search Dougherty's home and computer for child pornography. In his affidavit, the officer established that he had substantial experience in investigating sex crimes against minors; and that, based on his training and experience, it was his opinion that "subjects involved in this type of criminal behavior have in their possession child pornography." A judge issued the warrant, but the search was unproductive.

Dougherty later sued the City of Covina, the affiant and another officer, claiming the warrant was invalid because their affidavit did not establish probable cause to believe that he possessed child pornography. The district court disagreed, however, and dismissed the suit. Dougherty appealed to the Ninth Circuit.

Discussion

One of the fundamental principles of search and seizure law is that probable cause to search a place or thing for evidence of a crime can exist only if there was reason to believe the evidence actually exists.[21] While such a belief is often based on direct proof (e.g., an undercover officer saw drugs or illegal firearms in the suspect's house) it may also be based on circumstantial evidence, especially if the conclusion is supported by the opinion of an officer who has significant training and experience in investigating such crimes. For example, proof that the suspect recently visited child pornography websites might support an expert opinion that he has child pornography on the premises.[22]

In *Dougherty*, however, the only circumstantial evidence that there was child pornography in the defendant's house was that he reportedly engaged in "inappropriate touching" of several female students, and that he allegedly attempted to molest a student three years earlier. And the court concluded that this was insufficient—ruling there must be some link between the circumstantial evidence and child pornography.[23] Among other things, the court pointed out:

> The affidavit contains no facts tying the acts of Dougherty as a possible child molester to his possession of child pornography. The affidavit provides no evidence of receipt of child pornography. No expert specifically concludes that Dougherty is a pedophile. . . . The affidavit provides no indication that Dougherty was interested in viewing images of naked children or of children performing sex acts. There is no evidence of conversations with students about sex acts, discussions with children about pictures or video, or other possible indications of interest in child pornography.

Accordingly, the court ruled that the search warrant was invalid. It also ruled, however, that because the issue had not been resolved when the officers applied for the warrant, they were entitled to qualified immunity; i.e., they were not liable.

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[21] See *Illinois* v. *Gates* (1983) 462 US 213, 238.

[22] See *U.S.* v. *Wagers* (6th Cir. 2006) 452 F.3d 534, 540.

[23] Also see *U.S.* v. *Weber* (9th Cir. 1990) 923 F.2d 1338, 1343; *U.S.* v. *Falso* (2nd Cir. 2008) 544 F.3d 110, 123; *U.S.* v. *Hodson* (6th Cir. 2008) 543 F.3d 286, 292. But also see *U.S.* v. *Colbert* (8th Cir. 2010) 605 F.3d 573, 578 ["There is an intuitive relationship between acts such as child molestation or enticement and possession of child pornography."].

People v. Bennett

(2011) 197 Cal.App.4th 907

Issue

Can officers detain the driver of a car for a parking violation?

Facts

At about 8 P.M., two LAPD officers were on patrol in an area known for drug trafficking when they saw a Lincoln Town Car parked in a red zone. The defendant, Bryant Bennett, was sitting in the driver's seat. As the officers walked up to the car, Bryant looked at them, put the car in drive and accelerated. The officers ordered him to stop, and he did after driving only about three feet. But then he leaned forward and dropped something on the floor. One of the officers ordered him to step out of the car and, as he did so, the officer looked in the area where the object fell and saw a baggie containing rock cocaine. The officers arrested Bennett and seized the baggie. They also searched the car for more drugs, and found evidence of drug sales.

When Bennett's motion to suppress the evidence was denied, he went to trial and was found guilty of possession for sale.

Discussion

On appeal, Bennett argued that officers should not be permitted to detain the driver of a car for a run-of-the-mill parking violation and, therefore, the evidence should have been suppressed because it was the fruit of an unlawful detention. This argument was based on Vehicle Code section 40200 which says that a person who parks illegally is subject only to a "civil penalty." Bennett reasoned that because a parking violation is "civil" in nature, officers cannot enforce it by means of a detention, which is "criminal" in nature.

The court acknowledged that, while California law "has enacted a civil administrative process to enforce parking penalties," parking regulations are still considered "traffic laws" which, under long-standing law, are enforceable by means of detention.[24]

In his backup argument, Bennett noted that Vehicle Code section 40202(d) states that if the driver of an illegally parked vehicle leaves before officers are able to attach a citation to the windshield, the correct procedure is to mail the citation to the registered owner. But the court pointed out that, even if state law were interpreted as mandating this procedure, it would not invalidate the detention because the legality of searches and seizures in California is determined by applying federal constitutional law, not state law.[25] And under federal constitutional law, officers may detain any person when, as here, they have reasonable suspicion to believe that he has violated or is violating a law.[26]

Accordingly, the court ruled that Bennett's motion to suppress the evidence in his car was properly denied.

U.S. v. Warren

(3rd Cir. 2011) 642 F.3d 182

Issue

Did an officer properly advise a suspect of his *Miranda* rights before questioning him?

Facts

After arresting Warren for possessing crack cocaine with intent to distribute, an officer drove him to the police station and sought a *Miranda* waiver. Although the officer did not read the *Miranda* rights from a card, he testified that he informed Warren of the following:

(1) He had a right to remain silent.
(2) Anything he said could be used against him in court.
(3) He had the right to an attorney.
(4) If he could not afford to hire an attorney, one would be appointed to represent him without charge before any questioning.

Warren waived his rights and made an incriminating statement. When his motion to suppress the statement was denied, he pled guilty.

Discussion

Warren argued that his statement should have been suppressed because the officer neglected to inform him that he had a right to the presence of an attorney during questioning. This argument was based on a passage in the Supreme Court's ruling in *Miranda* v. *Arizona* that one of the *Miranda* rights is "the right to consult with a lawyer and to have the lawyer with him during interrogation."[27] More recently, however, the Supreme

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[24] QUOTING FROM *U.S.* v. *Choudhry* (9th Cir. 2006) 461 F.3d 1097, 1100.
[25] See *People* v. *McKay* (2002) 27 Cal.4th 601, 610.
[26] See *Terry* v. *Ohio* (1968) 392 U.S. 1, 21; *Alabama* v. *White* (1990) 496 U.S. 325.
[27] (1966) 384 U.S. 436, 471.

Court ruled that officers need not recite the *Miranda* warnings exactly as they were enumerated in the *Miranda* decision. Instead, what is required is that officers "reasonably convey" the *Miranda* rights.[28]

The question, then, was whether informing Warren that he had a "right to have an attorney" reasonably communicated to him that he had a right to have an attorney during questioning. The court ruled it did, pointing out that the officer "warned Warren of his right to counsel without any reference to whether it commenced or ceased at any particular time," and that he also told Warren that if he "cannot afford to hire an attorney, one will be appointed to represent you without charge before any questioning if you wish." Taken as a whole, said the court, these words could reasonably be interpreted "as indicating merely that Warren's right to pro bono counsel became effective before he answered any questions."

Accordingly, the court ruled that Warren's motion to suppress his statement was properly denied.

Comment

As we have often said, officers should ordinarily read the *Miranda* warnings from a standard *Miranda* card or interview form so as to eliminate the legal problems that result when, as here, an officer reads the warnings from memory and forgets something or mixes things up. Even if the error does not result in the suppression of a statement, it will needlessly consume court and prosecution resources that must be utilized to resolve the matter; e.g., research, briefing, argument, appeal. This was also of concern to the court in *Warren* which said "the fact that this [interview] occurred in the police station—a setting where a card imprinted with the *Miranda* warning should be readily available—is disconcerting, considering the resources that have been expended to consider a claim that could have been preempted with minimal care and effort."

Glik v. Cunniffe

(1st Cir. 2011) __ F.3d __ [2011 WL 3769092]

ISSUE

Under what circumstances may officers arrest a person for videotaping them as they arrest another person?

Facts

As Glik was walking past the Boston Commons, he saw three Boston police officers arresting a man. Concerned that they were using excessive force, he stopped about ten feet away and recorded the incident on his cell phone's video camera. After the officers arrested the man, one of them told Glik, "I think you have taken enough pictures." Glik responded, "I am recording this. I saw you punch him." An officer then asked Glik if his cell phone also recorded sound. When Glik said yes, the officer arrested him for violating the state's wiretap statute. A court subsequently dismissed the charge on grounds that the statute does not apply when, as here, the recording was not done secretly.

After the police department refused to investigate his internal affairs complaint into the matter, Glik sued the officers and the department for violating his rights under the First and Fourth Amendments. In a pretrial proceeding, the court rejected the officers' contention that they were entitled to qualified immunity, and they appealed to the First Circuit.

Discussion

The main issue on appeal was whether the First Amendment prohibits officers from arresting a person for recording their actions in public places; and, if so, whether this prohibition was "clearly established" when Glik was arrested. To both questions, the court ruled yes—if the recording "does not interfere with the police officers' performance of their duties." Specifically, the court ruled that Glik was exercising "clearly-established First Amendment rights" in recording the arrest, and "his clearly-established Fourth Amendment rights were violated by his arrest without probable cause."[29]

The court also rejected the officers' argument that such First Amendment protections should be interpreted to cover news reporters, but not private citizens. Among other things, the court observed, "[C]hanges in technology and society have made the lines between private citizen and journalist exceedingly difficult to draw. The proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera."

Accordingly, the court ruled that the officers were not entitled to qualified immunity. POV

[28] *Duckworth* v. *Eagan* (1989) 492 U.S. 195, 203.
[29] Also see *Fordyce* v. *City of Seattle* (9th Cir. 1995) 55 F.3d 436, 439; *Smith* v. *City of Cumming* (11th Cir. 2000) 212 F.3d 1332, 1333.

The Changing Times

ALAMEDA COUNTY DISTRICT ATTORNEY'S OFFICE

Norbert Chu was appointed Intergovernmental Liaison and Head of the newly-formed DA's Office Stike Team targeting violent felons in Alameda County with focus on Oakland. **Paul Hora** was promoted to Assistant DA and appointed Assistant in Charge of the Wiley Manuel Courthouse. **Jon Thurston** was appointed Assistant Branch Head at Wiley Manuel. Property Room Manager **Jim "Scotty" Robertson** retired aftet 20 years of service. He is succeeded by his assistant, **Juan Cazessus**. OPD Homicide Sgt. **Gus Galindo** joined the Inspectors Division. DDA **Cherri Allison** was appointed Executive Director of the Family Justice Center. New prosecutors: **Glenn Kim** and **Samantha Kim**.

ALAMEDA COUNTY SHERIFF'S OFFICE

The following deputies retired: Capt. **James Ayala** (34 years), Lt. **David McKaig** (30 years), Lt. **Kevin Ary** (27 years), Sgt. **Chris Roemer** (24 years), Sgt. **John Beauchamp** (26 years), Sgt. **Joseph Bricker** (28 years), Sgt. **James Realph** (21 years), **Ayman Masri** (21 years), **Dan Adams** (21 years), **Rachel Lauricella** (26 years), **Peter Norton** (27 years), **Lynn Croan** (26 years), and **William Croghan** (28 years).

Dr. **Thomas Beaver** was appointed Chief Forensic Pathologist at the Coroner's Bureau. Dr. Beaver was formerly a pathologist with Kern County SO.

ACSO reports that former deputy **Vincent A. Perez** died on June 2, 2011. Vincent left ACSO in 1990 to fulfill his lifelong ambition of becoming a firefighter in San Francisco. He died in the line of duty while fighting a structure fire. He was 48 years old. The office also reports that retired sergeant **Jim Crowley** died at the age of 67. He had retired in 1998.

ALAMEDA POLICE DEPARTMENT

Acting Capt. **Paul Rolleri** and Lt. **Dave Boersma** were promoted to captain. Acting Lts. **Jill Ottaviano**, **Ted Horlbeck**, and **Joe McNiff** were promoted to lieutenant. Sgt. **Rob Frankland** was promoted to lieutenant. Acting Sgts. **Darin Tsujimoto**, **Rick Bradley**, and **Jeff Emmitt** were promoted to sergeant. **Mark Reynolds** was promoted to acting sergeant. New officers: **Kittrell Carter** and **Spencer Mountain**. **Glen Anderson** was seriously injured in a motorcycle accident on June 17th in Walnut Creek. The Alameda PD Retiree's Association is accepting donations to help Glen's family. Contributions may be sent to APDRA, 685 Sylvaner Dr., Pleasanton, CA 94566.

BART POLICE DEPARTMENT

Transfers: Deputy Chief **Ben Fairow** to Operations Bureau, Deputy Chief **Dan Hartwig** to Support Service Bureau, and Deputy Chief **Jan Glenn-Davis** to Professional Standards and Training. The following officers retired: **Linda Cortez** (28 years) and **Don Walker** (26 years). Sgt. **Tom Smith** was named detective sergeant. **Rodney Barrera** was named as a TSA Canine Handler. New officer: **Ernesto Estrada**.

BERKELEY POLICE DEPARTMENT

Cynthia Luttrell retired after 30 years of service. Reserve Officer **Thomas Woodhouse** retired after 25 years of service. Lateral appointments: **Josiah Nelson**, **Miguel Salazar**, and **Ryan Howard**. New officer: **Greg Michalczyk**. Other appointments: **Allyson Nakayama** (Community Services Officer), **Erin Netz** (Dispatcher), **Janet Diersen** (Parking Enforcement Officer), and **Grace Gatpandan** (Police Aide).

CALIFORNIA HIGHWAY PATROL

DUBLIN AREA: Capt. **Mitch Mueller** was appointed Commander of the CHP Academy in Sacramento. Mitch will be succeeded by Capt. **Zachary Johnson** who was formerly assigned to the Solano Area. Sgt. **Jim Libby** has been promoted to lieutenant. **Jeremy Dobler** was promoted to sergeant and transferred in from Amador CHP. **John Soto** was promoted to sergeant and transferred out to the San Jose CHP command. Sgt. **Micheal Allen** retired after 28 years of service. Transferring in: Sgt. **James Sheeran** (from Oakland CHP). Transferring out: Lt. **Chuck Jordan** (to the Coastal Division)

OAKLAND AREA: Sgts. **Steve Larson** and **David Tafel** were promoted to lieutenant. The following officers

were promoted to sergeant: **Steve Zills**, **Joy Montgomery**, **Frank Newman**, and **Mark Stevens**. Sgt. **Dave Hazelwood** retired after 32 years of service. **Steve Porter** retired after 30 years of service. Lt. **Chris Childs** transferred to the Fairfield Area.

EAST BAY REGIONAL PARKS POLICE DEPT.

Josh Harrington was hired as a police officer. **Michi Toy** was hired as a dispatcher. Sgt. **Al Love** rotated into the Personnel & Training Unit, and Sgt. **Dave Hall** returned to Patrol. **David Bermudez** rotated into the detective specialty assignment.

FREMONT POLICE DEPARTMENT

The following officers have retired: Sgt. **Antonio Delgado** (15 years at FPD, 10 years at Foster City PD), **John Rosette** (30 years), **John Laing** (30 years), and **J.C. Grant** (24 years).

NEWARK POLICE DEPARTMENT

Lateral appointments: **Vincent Kimbrough** (Stanislaus County SO) and **Michael Taylor** (Sanger PD). Det. **David Lee** transferred back to Patrol after his assignment at the Major Crimes Task Force. **Jolie Gentry** transferred to the Major Crimes Task Force. Det. **David Higbee** was named Officer of the Year, which is the third time he has received this honor.

OAKLAND HOUSING AUTHORITY POLICE DEPT.

Sgt. **Jerold Coats** was promoted to lieutenant and placed in charge of field operations. **Luther Dupree**, **Joshua Ruiz**, and **Paul Malech** were promoted to sergeant. **Oscar Vargas** and **Qiana Johnson** resigned and returned to OPD. The department recently received its fourth re-accreditation and second consecutive "Flagship" designation from CALEA.

OAKLAND POLICE DEPARTMENT

The department reports that 25 officers who had been laid off as the result of the budget crisis have been reinstated. The following sergeants were promoted to lieutenant: **Kirk Coleman**, **Oliver Cunningham**, **David Elzey**, **Carlos Gonzalez**, and **Clifford Wong**. The following officers were promoted to sergeant: **Lisa Ausmus**, **James Beere**, **Holly Joshi**, **Robert Supriano**, **Jeffrey Thomason**, **Ross Tisdell**, **Michael Valladon**, and **Alan Yu**. Capt. **David Downing** left Oakland PD after 23 years of service to accept a position with Concord PD, and has been appointed the captain in charge of the Patrol Division.

The following officers have retired: Lt. **Fausto Melara** (29 years of service), Sgt. **Gus Galindo** (25 years of service), Sgt. **Gary Foppiano** (28 years), Sgt. **James Kelly** (20 years of service), **Mark Chinen** (26 years of service), and **Norma Parker** (21 years of service). The following officers have taken disability retirement: **Tristan Bowen**, **Cornelius Callan**, and **Lindsey Lyons**.

PLEASANTON POLICE DEPARTMENT

Lt. **Craig Eicher** was promoted to captain and transferred to the Investigations Unit. Sgt. **Jim Knox** was promoted to lieutenant and transferred to the Patrol Operations Division.

SAN LEANDRO POLICE DEPARTMENT

Transfers: Sgt. **Robert McManus** from Criminal Investigation Division to Patrol, Sgt. **Ted Henderson** from Patrol Division to Criminal Investigations, Sgt. **Randy Hudson** from Traffic Division to Patrol, and Sgt. **Randy Brandt** from Patrol Division to Traffic. New officers: **Victor Pimentel**, **Joseph Kalsbeek**, **Brandon Kelsoe**, **John Robertson**, and **Jason Vincent**. **Adrienne Bradford** was hired as a Public Safety Dispatcher.

UNION CITY POLICE DEPARTMENT

Sgt. **Mark Quindoy** was promoted to lieutenant and assigned to Patrol. Det. **Paul Kanazeh** was promoted to corporal and transferred from Patrol to Investigations. Lateral appointments: **James Cordero** (Oakland PD), **Daniel Blum** (Stockton PD), and **Chris Figuiredo** (San Jose PD). Transfers: **Jim Bizieff** and **Humberto Rodriguez** from Patrol to the Community Policing Unit, **Heather Lockett** and **Sean Mace** from the Community Policing Unit to Patrol, **Czar Valdehueza** and **James Martin** from Patrol to Investigations. New officers: **Sergio Quintero**, **Michael Brunicardi**, and **Jeff Willson**. **Andrew Doyle** was hired as a dispatcher.

UNIVERSITY OF CALIFORNIA, BERKELEY POLICE DEPARTMENT

Sgt. **Kenneth Moody** retired after 33 years of service. New officer: **John "Jack" Kelly**. POV

War Stories

A cure for all ailments

At Alameda County's Glenn Dyer Jail, a sheriff's deputy was asking an arrestee some standard medical questions:

Deputy: Do you have a history of mental illness?
Arrestee: No.
Deputy: Have you ever been a patient in a mental hospital?
Arrestee: No.
Deputy: Have you had any surgical procedures?
Arrestee: Yeah, I had an autopsy once.

Slow times on the dog watch

The Court of Appeals in Iowa ruled that a Le Mars police officer lacked grounds to stop a car for speeding. The problem with the case was that the traffic stop occurred at about 2:30 A.M., and that the officer testified that he estimated the suspect's speed while parked at the side of the road playing Solitaire on his computer.

Sounds like a confession

A man walked into a liquor store in Alameda, bought some cigarettes and left. A few seconds later he returned, punched the clerk, and ran off with a can of "Steel Reserve 211" beer. Officers quickly arrested the man and, after *Mirandizing* him, asked if he wanted to make a statement. "OK," said the man, "I bought some smokes and I just walked out the door when I thought, 'Hey, I'm thirsty.' So I went back inside for a two-eleven." Indeed.

That'll do

An Oakland police officer had just arrested a 15-year old boy for robbery and was taking a statement:

Officer: The lady positively identified you, and she said you took her bike and you threatened her with a gun and punched her. Did you do that?
Suspect: No.
Officer: Why would she say that?
Suspect: She's lyin'! She couldn't even see my face. Well, maybe she could've seen my clothes, but not my face.

That's the best you can come up with?

After pleading guilty to burglarizing a vehicle in Oakland, a young man was interviewed by a probation officer. The PO's report read as follows:

> Subject denied he burglarized the pickup. He says he was walking home when the occupants of a brown Chevrolet shot at him with a gun. He claims he ducked under the pickup for cover, not realizing that "some other dudes" were burglarizing it. The next thing he knew, the burglars and shooters were gone, and the police were falsely arresting him.

Hold your nose on this one

A prison inmate was charged with assaulting a correctional officer with feces after throwing a smelly "brown substance" at the officer, then yelling "I got you with shit!" The issue at trial was whether prosecutors had proven that the substance was, in fact, feces. The defendant contended that prosecutors were required to provide scientific analysis and expert testimony. But the court disagreed:

> Paraphrase of an old adage seems apropos under the circumstances: If it looks like feces, if it smells like feces, if it has the color and texture of feces, then it must be feces. No witness with a degree in scatology was required.

A somewhat improper lineup

A robbery victim testified that after looking at a photo lineup he told the investigator, "It's either number one or number three. I can't be sure." The investigator responded, "Well, I'll put you down for number one 'cause number three's in prison."

Fun while it lasted

Late one night, a drunken passenger on the cruise ship M.S. Ryndam decided to liven things up, so he broke into the ship's control room and deployed the ship's anchor. Then he laughed as the ship came to a sudden stop and the panic-stricken passengers ran from their rooms. But he's not laughing now: he's looking at 20 years in prison.

That old excuse never works

A man in Madison Ohio, Ryan Stephens, was charged with the crime of "teasing a police dog," which is a misdemeanor. It seems that a K9 officer was at the scene of a traffic accident when he heard his dog Timber "barking uncontrollably" from inside his patrol car. When the officer went to investigate, he saw Stephens standing at the rear window, "making barking and hissing noises" at the dog who was naturally responding in kind. In court papers, Stephens contended he was entrapped, claiming that "the dog started it."

Golfing blues

A suspected drunk driver in Oakland told a CHP officer that he couldn't do any FSTs. In his arrest report, the officer explained what happened next:

Suspect: I want to tell you why I can't do these tests. I've got a sore back from golfing.
Officer: What's wrong with your back?
Suspect: It makes me slice.

Goombsie?

In a recent case from the Second Circuit, the caption included the name of the defendant and all of 43 of his aliases, including "Anthony Marshmallow, Louie Eggs, Franky the Beast, Goombsie, Big Joey, John Doe, Sal the Barber, Charlie the Hat . . ."

A love story

A prosecution witness in a murder case was testifying at a preliminary hearing, explaining how she met the defendant:

Witness: I was walking down the street and he pulled up in a blue four-door Cadillac and he said, "Hey, baby, you dating?" And I said, "No. You're a pimp." And he said, "No I ain't." So I got into the car with him and I was going to date him.
DA: What happened next?
Witness: He went around the corner and parked. I seen him coming up under the seat with a gun and he told me to shut up. I asked him if I was going to die, and he said not if I was to cooperate.
DA: So then what happened?
Witness: We made love.
DA: So, he forced you to have sex with him?
Witness: No. I really liked him.

And away we go

A San Leandro officer stopped a driver for running a red light. According to the officer's report:

> The driver and I exited our vehicles at the same time. As we walked toward each other, I noted that he staggered. I asked him for his driver's license but he ignored me. He walked directly past me over to my patrol vehicle, opened the rear door, and got in the back seat. I asked him what he was doing. He said, "I have a warrant out of Hayward on a drunk driving FTA, and I'm obviously drunk. You know and I know I'm going to jail. So let's get going."

Never mind

In Hayward, a frantic man phoned 911 and reported that his house had just been burglarized. He told the dispatcher that, shortly after leaving his home and locking the door, he checked his surveillance camera from his mobile phone and saw a suspicious stranger standing at the door—and the door was open! Several HPD officers arrived at the scene, but found no sign of a forced entry. So an officer phoned the man and explained the situation. The man didn't say anything for a few seconds, apparently while he took another look at the surveillance video. Then he said, "Oh wait! That's *me* as I was leaving the house this morning!"

Got a War Story?

The War Story Hotline

Email: POV@acgov.org
Mail: 1225 Fallon St., Room 900
Oakland, CA 94612

Coming in November

The 2012 Edition of California Criminal Investigation

We expect to start shipping the 2012 edition of *California Criminal Investigation*—the 16th annual edition—in late November 2011. Revised and completely updated, *CCI 2012* consists of over 700 pages, including more than 3,600 endnotes with comments, examples, insightful quotes from the courts, and nearly 14,000 case citations. The single-copy price is $70.00. For more information or to order online, visit our website: www.le.alcoda.org. Here is the Table of Contents:

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