

POINT of VIEW



A publication of the Alameda County District Attorney's Office

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In this issue

- **Suppression Exceptions**
- **Prolonged traffic stops**
- **Miranda warnings before booking**
- **Questioning minors**
- **Barricading multiple motorists**
- **Google Earth images as evidence**

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Point of View

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This edition of Point of View
is dedicated to the memory of
Sergeant Scott Lunger
Hayward Police Department
who was killed in the line of duty
on July 22, 2015

Contents

ARTICLES

1 Suppression Exceptions

The exclusionary rule has evolved. Now, evidence obtained during an illegal search or seizure should rarely be suppressed unless officers intentionally violated the law or were oblivious.

RECENT CASES

18 *Rodriguez v. United States*

Does a traffic stop become unlawful if prolonged for a K9 sniff?

21 *People v. Elizalde*

When an arrestee is booked into jail, must deputies obtain a *Miranda* waiver before asking about his gang affiliation?

23 *In re Elias V.*

A California court writes a contentious opinion about how officers interrogate suspects.

26 *U.S. v. Paetsch*

Did officers have grounds to barricade 20 cars on a roadway because a fleeing bank robber was probably in one of them? If so, was the subsequent detention of the robber unduly prolonged?

28 *U.S. v. Lizzarraga-Tirado*

Does a Google Earth satellite image constitute inadmissible hearsay? If not, does it become hearsay if it includes computer-generated markers?

FEATURES

29 *The Changing Times*

31 *War Stories*

Moving or retiring?

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Suppression Exceptions

*Exclusion exacts a heavy toll on both the judicial system and society at large.*¹

Starting in 1961, whenever a judge determined that an officer had obtained evidence by means of an illegal search or seizure, he or she would automatically suppress it—all of it.² This hard-line approach was the result of the Supreme Court's landmark decision in *Mapp v. Ohio* in which it said, “[A]ll evidence obtained by searches and seizures in violation of the Constitution is inadmissible.”³

Like many things from the '60s, however, the Court's all-or-nothing rule was later viewed by many as nutty. While its purpose was commendable—to provide officers with an incentive to learn and apply the rules pertaining to searches and seizures—its mechanical suppression requirement was having three adverse consequences.

First, the courts were being forced to free an untold number of criminal predators and recidivist felons whose guilt was indisputable.⁴ Second, many other people were being murdered, raped, robbed, or otherwise victimized by the beneficiaries of *Mapp*'s get-out-of-jail-free card.⁵ Third, *Mapp* was causing all of this devastation even when the officer's search or seizure was only minimally blameworthy and, worst of all, sometimes when it was commendable. Looking back on the shortcomings of its ruling, the Supreme Court acknowledged that it had unwittingly converted the exclusionary rule into a “bitter pill”⁶ that was generating “substantial social costs,”⁷ including “disrespect for the law and administration of justice.”⁸

So the Court began to develop a series of limited exceptions to the exclusionary rule which were later given catchy names, such as Good Faith, Standing, and Fruit of the Poisonous Tree. Although all of these exceptions are helpful,* as we will discuss in this article, they can be invoked only in very particular circumstances. For example, the exception known as “standing” applies only if the defendant happens to lack a reasonable expectation of privacy in the place or thing that was searched.

There is, however, one suppression exception that is unique because it can be invoked *in every case* in which court rules that evidence was obtained in violation of the Fourth Amendment. It is therefore the most useful exception, but is also the least understood. It doesn't even have a catchy name. We call it the general suppression exception.

General Suppression Exception

The general suppression exception is fairly simple: A court may not suppress evidence on grounds that it was obtained by means of a Fourth Amendment violation unless it also finds that, in this particular case, the benefits of suppression outweigh its costs. As the Supreme Court explained, a Fourth Amendment violation does not always lead to suppression:

Whether the exclusionary sanction is appropriately imposed in a particular case, our decisions make clear is an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.⁹

* **NOTE:** The suppression exceptions discussed in this article do not signal a return to the days of the Wild West. Even if evidence is not suppressed, officers might still be subject to civil and departmental consequences if their conduct violated the Fourth Amendment.

¹ *Davis v. United States* (2011) __ U.S. __ [131 S.Ct. 2419, 2427].

² See *Davis v. United States* (2011) __ U.S. __ [131 S.Ct. 2419, 2427] [“[T]here was a time when our exclusionary-rule cases were not nearly so discriminating.”]; *Arizona v. Evans* (1995) 514 U.S. 1, 13 [in the past the Supreme Court “treated identification of a Fourth Amendment violation as synonymous with application of the exclusionary rule”].

⁴ See *Herring v. United States* (2009) 555 U.S. 135, 141; *Davis v. United States* (2011) __ U.S. __ [131 S.Ct. 2419, 2427] [in many cases, the “bottom-line effect” of evidence suppression is to “suppress the truth and set the criminal loose in the community”].

⁵ *Hudson v. Michigan* (2006) 547 U.S. 586, 595.

⁶ *Davis v. United States* (2011) __ U.S. __ [131 S.Ct. 2419, 2427].

⁷ *Hudson v. Michigan* (2006) 547 U.S. 585, 591.

⁸ *United States v. Leon* (1984) 468 U.S. 897, 908.

⁹ *United States v. Leon* (1984) 468 U.S. 897, 906. Also see *Herring v. United States* (2009) 555 U.S. 135, 140 [“The fact that a Fourth Amendment violation occurred does not necessarily mean that the exclusionary rule applies.” Edited.].

Although the Court made this statement in 1984, it has frequently reaffirmed it, and always in clear and unambiguous language. For example:

1987: “[T]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against the substantial social costs exacted by the exclusionary rule.”¹⁰

2006: “[T]he exclusionary rule has never been applied except where its deterrence benefits outweigh its substantial social costs.”¹¹

2009: “[T]he deterrent effect of suppression must be substantial and outweigh any harm to the justice system.”¹²

2011: “[S]uppression would do nothing to deter police misconduct in these circumstances and it would come at a high cost to both the truth and the public safety.”¹³

Costs and benefits

To apply the general suppression exception it is necessary to understand the costs and benefits of suppression. Actually, this is easy because, although they differ in their importance, the costs and benefits are the same in every case. As for the benefits of suppressing evidence, there is only one: it may deter officers from violating the Fourth Amendment.¹⁴

While deterrence is an important benefit, there are two significant costs. First, suppression causes great harm to people throughout the country because criminals—often violent ones—escape punishment for their acts and continue to harm others. As the Supreme Court observed, “The principal cost of applying the [exclusionary] rule is, of course, letting guilty and possibly dangerous defendants go

free—something that offends basic concepts of the criminal justice system.”¹⁵ Second, suppression requires that the courts intentionally hide the truth from the jury, and this tends to generate disrespect for a criminal justice system which is supposed to be seeking the truth and only the truth.¹⁶

As we will discuss in the next section, the most important factor in determining whether the costs of suppression outweigh its benefits is the magnitude of the officer’s misconduct. But there are two other circumstances that may also be important. First, the defendant’s criminal history may carry some weight, especially if it indicates the defendant is a violent felon or career criminal.

Second, the seriousness of the crime with which he has been charged might be noteworthy because the more serious the crime, the more the public is harmed if the perpetrator is not brought to justice. (Although the defendant would not yet have been *convicted* of the crime whose evidence he is trying to suppress, this may nevertheless be relevant if he had been held to answer.) Conversely, a court might be more apt to suppress evidence if the crime was not as serious. Thus, in the tax evasion case of *U.S. v. Ganius* the court said “the costs of suppression are minimal here. This is not a case where a dangerous defendant is being set free.”¹⁷

Magnitude of the officer’s misconduct

As noted earlier, the most important circumstance in determining whether the costs of suppression outweigh its benefits is the magnitude of the officer’s misconduct. This is because the more egregious the officer’s conduct, the greater the need to deter it. In addition, the greater the misconduct, the

¹⁰ *Illinois v. Krull* (1987) 480 U.S. 340, 352-53. Also see *U.S. v. Katzin* (3rd Cir. 2014) 769 F.3d 163, 171 [“Deterrence must outweigh the substantial social costs of exclusion. These costs often include omitting reliable, trustworthy evidence of a defendant’s guilt, thereby suppressing the truth and setting a criminal loose in the community without punishment.”].

¹¹ *Hudson v. Michigan* (2006) 547 U.S. 586, 595.

¹² *Herring v. United States* (2009) 555 U.S. 135, 147.

¹³ *Davis v. United States* (2011) __ U.S. __ [131 S.Ct. 2419, 2423]. Edited.

¹⁴ See *Davis v. United States* (2011) __ U.S. __ [131 S.Ct. 2419, 2426] [“The [exclusionary] rule’s sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations.”].

¹⁵ *Herring v. United States* (2009) 555 U.S. 135, 141.

¹⁶ See *United States v. Leon* (1984) 468 U.S. 897, 908 [“Indiscriminate application of the exclusionary rule may well generate disrespect for the law and administration of justice.”]; *U.S. v. Katzin* (3rd Cir. 2014) 769 F.3d 163, 171 [“These costs often include omitting reliable, trustworthy evidence of a defendant’s guilt, thereby suppressing the truth and setting a criminal loose in the community without punishment.”].

¹⁷ (2nd Cir. 2014) 755 F.3d 125, 141. **NOTE:** On June 29, 2015, the Second Circuit granted en banc review of *Ganius*

more the general public would likely be willing to tolerate the harm that results from suppression. Thus, the Supreme Court has repeatedly emphasized the importance of this circumstance:

- The extent to which the exclusionary rule is justified “varies with the culpability of the law enforcement conduct.”¹⁸
- “[T]he deterrence benefits of exclusion vary with the culpability of the law enforcement conduct at issue.”¹⁹
- “[We have not seriously questioned] the continued application of the rule to suppress evidence from the prosecution’s case where a Fourth Amendment violation has been substantial and deliberate.”²⁰

As we will now discuss, an officer’s misconduct will ordinarily fall into one of three categories: (1) intentional, (2) grossly negligent, or (3) negligent.

Intentional violations: It is virtually certain that evidence will be suppressed if it was obtained as the result of an officer’s intentional violation of the Fourth Amendment.²¹ As the U.S. Supreme Court observed, when an officer deliberately violates the law, “the deterrent value of exclusion is strong and tends to outweigh the resulting costs.”²² For example, evidence obtained during a detention would surely be suppressed if it was apparent that the officer knew he had no legitimate reason for stopping the defendant.

Gross negligence, reckless disregard: Suppression is also likely if a court concludes that the officer’s misconduct constituted gross negligence or that he acted in reckless disregard of whether his

conduct was lawful.²³ For example, even if a judge signed a search warrant, the affiant’s act of applying for a warrant might constitute gross negligence if the suppression court judge rules that the officer should have known the affidavit was deficient.²⁴

Inadvertence, ordinary negligence: In most cases, an isolated incident of inadvertence or ordinary negligence is not sufficiently blameworthy to warrant suppression.²⁵ This is because “the deterrence rationale loses much of its force” when an officer’s conduct “involved only simple, isolated negligence.”²⁶ Or as the Supreme Court observed in *Herring v. United States*, “[W]hen police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not pay its way.”²⁷

It should be noted that some critics of the general suppression exception claim that it gives officers an incentive to stay uninformed about the Fourth Amendment.²⁸ Their ostensible concern is that an officer who is genuinely clueless can testify truthfully at a suppression hearing that he could not have intentionally or recklessly violated the Fourth Amendment because he doesn’t know anything about it. This is a red herring because the Supreme Court has ruled that, in determining the magnitude of an officer’s misconduct, the test is not what *that* officer knew or didn’t know, but what a reasonably well-trained officer would have known. Said the Court, “The pertinent analysis of deterrence and culpability is objective, not an inquiry into the subjective awareness of the arresting officers.”²⁹

¹⁸ *Herring v. United States* (2009) 555 U.S. 135, 143.

¹⁹ *Davis v. United States* (2011) __ U.S. __ [131 S.Ct. 2419, 2427].

²⁰ *United States v. Leon* (1984) 468 U.S. 897, 909.

²¹ See *Herring v. United States* (2009) 555 U.S. 135, 145 [“To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that deterrence is worth the price paid by the justice system.”]; *U.S. v. Cha* (9th Cir. 2010) 597 F.3d 995, 1004 [“the police conduct was deliberate, culpable, and systemic”]; *U.S. v. Shaw* (6th Cir. 2013) 707 F.3d 666, 670 [officers gained entry by lying that they had a search warrant].

²² *Davis v. United States* (2011) __ U.S. __ [131 S.Ct. 2419, 2427].

²³ *Davis v. United States* (2011) __ U.S. __ [131 S.Ct. 2419, 2427].

²⁴ *United States v. Leon* (1984) 468 U.S. 897, 923 [suppression remains an appropriate remedy if “no reasonably well trained officer should rely on the warrant”].

²⁵ See *Illinois v. Krull* (1987) 480 U.S. 340, 348 [suppression is warranted if the officer “had knowledge, or may properly be charged with knowledge that the search was unconstitutional under the Fourth Amendment”].

²⁶ *Davis v. United States* (2011) __ U.S. __ [131 S.Ct. 2419, 2427-28].

²⁷ (2009) 555 U.S. 135, 147.

²⁸ See, for example, *Heien v. North Carolina* (2014) __ U.S. __ [135 S.Ct. 530, 540].

²⁹ *Herring v. United States* (2009) 555 U.S. 135, 145.

The general suppression exception applied

To better understand how the general suppression exception works, it will be helpful to see how it has been applied by the courts in various published cases and how the courts determine the degree of the officer's misconduct.

Search warrant irregularities: One of the most common applications of the general suppression exception is found in cases where a judge issued search warrant, but an appellate court ruled that the officer's affidavit failed to establish probable cause. In most cases, the evidence will not be suppressed because it is usually reasonable for officers to rely on a judge's finding that an affidavit was sufficient. The evidence may, however, be suppressed if the affiant knew or should have known he lacked probable cause.³⁰ As the Supreme Court observed, an incompetent affiant cannot avoid suppression by "pointing to the greater incompetence of the magistrate."³¹ Suppression is also likely if a reasonably well-trained officer would have known that the descriptions of the evidence to be seized or the place to be searched were not sufficiently specific.³²

On the other hand, suppression would be unwarranted if the existence of probable cause was a "close or debatable question."³³ This is especially so if a prosecutor reviewed the affidavit and approved it;³⁴ or if the affiant notified the judge of the potential problem, but the judge concluded it was nevertheless valid.³⁵

Mistakes of law: In the most recent application of the general suppression exception, the Supreme Court ruled that evidence may not be suppressed if it was obtained as the result of an officer's mistaken—but not unreasonable—interpretation of a statute. Under such circumstances, said the Court, suppression is unwarranted because it "would serve none of the purposes of the exclusionary rule."³⁶ This exception will not, however, cover an officer's mistaken understanding of a constitutional restriction on searches and seizures; e.g., the officer thought that every detainee could be patsearched.

Database errors: Officers will frequently make an arrest or conduct a search based on information they received from governmental databases, such as registries of people who are wanted on outstanding warrants, or probationers who are subject to warrantless searches. If this information was incorrect, the general suppression exception will prohibit the suppression of evidence resulting from the arrest or search unless the officers knew or should have known that the database was unreliable or if "the police have been shown to be reckless in maintaining" the database.³⁷

Search invalidated after the fact: Officers will sometimes conduct a search when the law at the time expressly permitted it but—before the defendant was convicted—an appellate court issued a binding opinion that such searches were illegal. Even though the officer's conduct was lawful under

³⁰ See *United States v. Leon* (1984) 468 U.S. 897, 922 ["[T]he officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable."]. Compare *People v. Spears* (1991) 228 Cal.App.3d 1, 19 ["Where the affidavit is sufficient to create disagreement among thoughtful and competent judges, the officer's reliance on the magistrate's determination of probable cause should be deemed objectively reasonable."].

³¹ *Malley v. Briggs* (1986) 475 U.S. 335, 346, fn.9.

³² See *Groh v. Ramirez* (2004) 540 U.S. 551, 558 ["the warrant did not describe the items to be seized at all"]; *U.S. v. Berschansky* (2nd Cir. 2015) 788 F.3d 102. Compare: *Bay v. Superior Court* (1992) 7 Cal.App.4th 1022, 1031.

³³ *People v. Camarella* (1991) 54 Cal.3d 592, 606.

³⁴ See *People v. Camarella* (1991) 54 Cal.3d 592, 605, fn.5 ["It is, of course, proper to consider ... whether the affidavit was previously reviewed by a deputy district attorney."]; *Dixon v. Wallowa County* (9th Cir. 2003) 336 F.3d 1013, 1019 ["Though not conclusive, reliance on [the District Attorney's] advice is some evidence of good faith."]; *U.S. v. Otero* (10th Cir. 2009) 563 F.3d 1127, 1135.

³⁵ See *Massachusetts v. Sheppard* (1984) 468 U.S. 981, 990 ["[T]here is little reason why [the affiant] should be expected to disregard assurances that everything is all right, especially when he has alerted the judge to the potential problems."]; *U.S. v. Freitas* (9th Cir. 1988) 856 F.2d 1425, 1432 ["[T]he agents in this case not only noticed the potential defect in the warrant, they brought it to the attention of an Assistant U.S. Attorney and the magistrate, who both approved it."].

³⁶ See *Heien v. North Carolina* (2014) ___ U.S. __ [135 S.Ct. 530]. **NOTE:** *Heien* was based mainly on the fact that an officer's reasonable mistake of law could not constitute a violation of the Fourth Amendment. But the Court also said it could have been based on the general suppression exception because suppression would serve no purpose if an officer's error was objectively reasonable.

³⁷ *Herring v. United States* (2009) 555 U.S. 135, 145, 146. Also see *Arizona v. Evans* (1995) 514 U.S. 1, 15-16 ["There is no indication that the arresting officer was not acting objectively reasonably when he relied upon the police computer record"].

existing precedent, the Supreme Court ruled in 1987 that if a court with jurisdiction changes the law and renders the conduct unlawful, the evidence must be suppressed if the defendant's conviction was not yet final.³⁸ This was a wonderful rule for criminals, but entirely unfair to the officer and the public. It was especially unfair to officers because, unlike psychics, they are seldom able to predict the future. For this reason and others, the Supreme Court ruled in 2011 that the evidence in such cases can no longer be suppressed if the officer's conduct was lawful *when the search occurred*. As the Court explained, "Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule."³⁹

But what if the lawfulness of the officer's search had been fuzzy or unsettled; i.e., not expressly prohibited? Currently, the leading case on this subject is *U.S. v. Katzin*⁴⁰ in which the Third Circuit ruled that suppression is unwarranted if existing precedent could be *reasonably interpreted* as permitting the search; i.e., if the search "falls well within the rationale espoused in binding appellate precedent, which authorizes nearly identical conduct." The court also ruled that if the search was lawful under *non-binding* precedent, the evidence should not be suppressed if the search "conformed to practices authorized by a uniform treating of continuous judicial approval."

The question remains: What if the search was neither expressly nor impliedly permitted by current law? This issue is unsettled, but the First Circuit ruled that the evidence should be suppressed if the officer had no reason to believe the search was lawful. This is because "suppression has deterrent value" when "it creates an incentive to err on the side of constitutional behavior."⁴¹

Academia vs. general suppression exception

Before moving on, it is noteworthy that, despite the Supreme Court's repeated and unambiguous affirmation of its general suppression exception, some academics contend that, by cleverly parsing the Court's opinions, it is possible that the Court did not mean what it said. For example, in *Herring v. United States* the Court said an officer's "negligent bookkeeping" did not warrant suppression because it did not rise to the level of "deliberate, reckless, or grossly negligent conduct." But one law professor wrote that some commentators have "questioned how seriously this statement should be taken."⁴² At the risk of stating the obvious, any ruling by a majority of the Supreme Court should be taken "seriously"—even by commentators.

The Good Faith Rule

As the result of the general suppression exception, the good faith rule has probably become redundant because (1) the general exception will produce the same result as good faith even if the facts of the case were different from those of seminal good faith case, *United States v. Leon*; and (2) the general exception applies even if the officer was somewhat negligent.

The so-called "good faith rule" became the law in 1984 when the Supreme Court announced its decision in *United States v. Leon*.⁴³ But, over the years, the rule has been commonly interpreted—or misinterpreted—as applying only if two circumstances existed: (1) the evidence was obtained during the execution of a search warrant, and (2) the judge at the suppression hearing ruled that the judge who issued the warrant was mistaken when he concluded that the affiant had established probable cause. But the Supreme Court has made it clear that the good faith rule was never intended to be re-

³⁸ *Griffith v. Kentucky* (1987) 479 U.S. 314, 328.

³⁹ *Davis v. United States* (2011) __ U.S. __ [131 S.Ct. 2419, 2429]. Also see *Illinois v. Krull* (1987) 480 U.S. 340, 349 ["The application of the exclusionary rule to suppress evidence obtained by an officer acting in objective reasonable reliance on a statute would have [little deterrent effect]."]; *U.S. v. Stephens* (4th Cir. 2014) 764 F.3d 327, 337 [exclusionary rule not applicable because the officer's use of GPS "was objectively reasonable because of the binding appellate precedent of *Knotts*"]; *U.S. v. Sparks* (1st Cir. 2013) 711 F.3d 58, 67 [the existence of "settled" and "binding" precedent "precludes suppression of the resulting evidence"].

⁴⁰ (3rd Cir. 2014) 769 F.3d 164. Also see *United States v. Peltier* (1975) 422 U.S. 531, 541 ["It was in reliance upon a validly enacted statute, supported by longstanding administrative regulations and continuous judicial approval."].

⁴¹ *U.S. v. Sparks* (1st Cir. 2013) 711 F.3d 58, 64.

⁴² Alschuler, "Herring v. United States: A Minnow or a Shark Term Paper," 7 *Ohio State Journal of Criminal Law* 463 (2009). Emphasis added.

⁴³ (1984) 468 U.S. 897.

stricted to these specific circumstances. On the contrary, the Court said the rule was based on the flexible “balancing approach [i.e., the general suppression exception] that has evolved in various contexts.”⁴⁴ And it reaffirmed this principle years later in *Davis v. United States* when it said, “The basic insight of the *Leon* line of cases is that the deterrence benefits of exclusion vary with the culpability of the law enforcement conduct at issue.”⁴⁵

In addition to the widespread belief that the good faith exception must be narrowly interpreted, the rule has generated much confusion. This is because, in applying the rule, the officer’s “good faith” is, ironically, *irrelevant*. So are his honesty, forthrightness, and any other esteemed moral attribute. Instead, “good faith” has always simply meant that the officer’s conduct was objectively reasonable. As the California Supreme Court observed in 2002, “[T]he term ‘good faith exception’ may be somewhat of a misnomer because the exception focuses on the objective reasonableness of an officer’s conduct.”⁴⁶ This conclusion was confirmed in 2009 when the U.S. Supreme Court admitted that it had “perhaps confusingly” used the term “good faith” instead of the more accurate term, objective reasonableness.⁴⁷

Standing

Even if a court rules that the benefits of suppression outweigh its costs, the evidence will not be suppressed if the defendant lacked “standing” to challenge the search. But, like “good faith” the term

“standing” has caused much confusion because a defendant is said to have standing only if he had a *reasonable expectation of privacy* in the place or thing that officers searched.⁴⁸ As the Supreme Court explained, “The applicability of the Fourth Amendment turns on whether the person invoking its protection can claim a justifiable, a reasonable, or a legitimate expectation of privacy that has been invaded by government action.”⁴⁹

Because standing depends entirely on the defendant’s reasonable privacy expectations in the specific place or thing that was searched, the courts have consistently refused to grant “automatic” standing based on any other circumstance. Importantly, a defendant will not have standing merely because he owns the property.⁵⁰ “A claim of ownership,” said the California Supreme Court, “does not necessarily signify a legitimate expectation of privacy, although it is one factor to be considered in the analysis.”⁵¹ Similarly, a defendant will not have standing merely because he had a right to be present in the place that was searched,⁵² or because prosecutors intended to use the evidence against him.⁵³

How do the courts determine whether a defendant had a reasonable expectation of privacy in a place or thing? As we will now discuss, it will depend mainly on three things: (1) the privacy expectations that are inherent in such places and things and the defendant’s association or connection with the place or thing that was searched,⁵⁴ and (2) whether the defendant had effectively abandoned the evidence

⁴⁴ *United States v. Leon* (1984) 468 U.S. 897, 909.

⁴⁵ (2011) __ U.S. __ [131 S.Ct. 2419, 2427].

⁴⁶ *People v. Willis* (2002) 28 Cal.4th 22, 29, fn.3. Also see *People v. Machupa* (1994) 7 Cal.4th 614, 618, fn.1 [“Although many courts and commentators routinely describe the *Leon* decision as establishing a ‘good faith’ rule, the *Leon* exception itself focuses expressly and exclusively on the *objective reasonableness* of an officer’s conduct, not on his or her subjective ‘good faith’ (or ‘bad faith’).”].

⁴⁷ See *Herring v. United States* (2009) 555 U.S. 135, 142.

⁴⁸ See *United States v. Payner* (1980) 447 U.S. 727, 731; *Rakas v. Illinois* (1978) 439 U.S. 128, 132 [“The concept of standing ... focuses on whether the person seeking to challenge the legality of a search as a basis for suppressing evidence was himself the ‘victim’ of the search or seizure.”].

⁴⁹ *Hudson v. Palmer* (1984) 468 U.S. 517, 525.

⁵⁰ See *Rawlings v. Kentucky* (1980) 448 U.S. 98, 105; *United States v. Salvucci* (1980) 448 U.S. 83, 91 [“legal possession of a seized good is not a proxy for determining whether the owner had a Fourth Amendment interest”]; *U.S. v. Rahme* (2nd Cir. 1987) 813 F.2d 31, 34 [“Ownership is neither in itself sufficient to establish a legitimate expectation of privacy nor a substitute if the requisite legitimate expectation of privacy is lacking.”].

⁵¹ *People v. McPeters* (1992) 2 Cal.4th 1148, 1172.

⁵² *Rakas v. Illinois* (1978) 439 U.S. 128, 141-48; *Minnesota v. Carter* (1998) 525 U.S. 83, 90.

⁵³ See *Rakas v. Illinois* (1978) 439 U.S. 128, 134, 134; *United States v. Salvucci* (1980) 448 U.S. 83, 90.

⁵⁴ See *Minnesota v. Carter* (1998) 525 U.S. 83, 89; *Oliver v. United States* (1984) 466 U.S. 170, 178.

or otherwise forfeited any privacy expectations he might have had. (Standing might also depend on whether the evidence was observed or heard via electronic surveillance. See Chapter 42 ELECTRONIC SURVEILLANCE.)

The place or thing searched

Evidence may be found virtually anywhere, but it is usually found in homes, vehicles, pockets, and purses. Before we discuss these particular places and things, it should be noted that a defendant cannot have a reasonable expectation of privacy in a public place, especially if the evidence was in plain view. As the Supreme Court noted, “What a person knowingly exposes to the public is not a subject of Fourth Amendment protection.”⁵⁵ On the other hand, a defendant will almost always have standing to challenge a search of his person and whatever clothing he is wearing.⁵⁶

Everyone who lives in a house, condominium, apartment or any other single family residence will ordinarily have standing to challenge any police entry or search of the premises.⁵⁷ “At the risk of belaboring the obvious,” said the Supreme Court, “private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable.”⁵⁸ Furthermore, this privacy expectation covers all rooms on the premises because “[i]t would be intrusive, unwise, and impractical to make expectation of privacy against government intrusion turn on the various family uses of different areas in the home.”⁵⁹

As for visitors, their standing will depend on the nature and duration of their visit. For example, overnight houseguests will have standing to challenge a search of their own property and places in the house over which they had been given temporary possession, such as the bedroom they were using.⁶⁰ But people who have been invited inside for only social visit will ordinarily have standing to challenge only a search of their personal property.⁶¹

A more interesting question is whether a resident or houseguest can reasonably expect privacy as to evidence on the premises that officers saw from a public sidewalk or other place they had a legal right to occupy? This issue typically arises when an officer, having observed such evidence, later obtains a search warrant based on the observation.

As a general rule, residents and visitors cannot reasonably expect that officers will not observe things inside the residence if (1) the observation was made from a place in which the defendant lacked a reasonable expectation of privacy, and (2) it was made through a door, window, or fence that was uncovered or only partially covered.⁶² In the words of the Tenth Circuit, “Although privacy in the interior of a home and its curtilage are at the core of what the Fourth Amendment protects, there is no reasonable expectation that a home and its curtilage will be free from *ordinary* visual surveillance.”⁶³

A resident (and maybe an overnight visitor) might, however, have a reasonable privacy expectation if the evidence could only have been observed by means of considerable effort; i.e., the type of effort that people should not be required to anticipate. For example, the courts have ruled that residents had

⁵⁵ *Katz v. United States* (1967) 389 U.S. 347, 351. Edited.

⁵⁶ See *Gardner v. U.S.* (7th Cir. 2012) 680 F.3d 1006, 1010; *U.S. v. Gray* (4th Cir. 2007) 491 F.3d 138, 146.

⁵⁷ See *Kyllo v. United States* (2001) 533 U.S. 27, 40 “[T]he Fourth Amendment draws a firm line at the entrance to the house.”; *Payton v. New York* (1980) 445 U.S. 573, 585 “[T]he physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.”].

⁵⁸ *United States v. Karo* (1984) 468 U.S. 705, 714.

⁵⁹ *In re Rudy F.* (2004) 117 Cal.App.4th 1124, 1134.

⁶⁰ See *Minnesota v. Olson* (1990) 495 U.S. 91, 99 “[The houseguest is there with the permission of his host, who is willing to share his house and his privacy with his guest.”]; *People v. Henderson* (1990) 220 Cal.App.3d 1632, 1641-42; *People v. Hamilton* (1985) 168 Cal.App.3d 1058, 1066 “[While defendant could not reasonably expect to exclude [his host] from the room, he could reasonably expect the room to remain free from governmental intrusion.”].

⁶¹ See *Minnesota v. Carter* (1998) 525 U.S. 83, 86; *Rakas v. Illinois* (1978) 439 U.S. 128, 134, 134; *People v. Rios* (2011) 193 Cal.App.4th 584, 592; *People v. Ayala* (2000) 24 Cal.4th 243, 279.

⁶² See *People v. Camacho* (2000) 23 Cal.4th 824, 834; *People v. Superior Court (Reilly)* (1975) 53 Cal.App.3d 40, 45; *Cooper v. Superior Court* (1981) 118 Cal.App.3d 499 [the agent “could clearly see into the [defendant’s] household from a neighbor’s apartment”].

⁶³ *U.S. v. Hatfield* (10th Cir. 2003) 333 F.3d 1189, 1196. Emphasis added.

standing when the officers were able to see the evidence only by means of the following:

- stepping onto “a small planter area between the building and the parking lot”⁶⁴
- traversing bushes that constituted a “significant hindrance”⁶⁵
- climbing over a fence, onto a trellis, then walking along the trellis for a considerable distance⁶⁶

Motor vehicles: If officers discovered the evidence in the course of a car stop, all occupants will have standing to challenge the legality of the stop because they are all automatically detained as the result.⁶⁷ As for searches, the owner (or someone who had borrowed the car from him) will ordinarily have standing to challenge a search of the vehicle,⁶⁸ except for possessions belonging to others.⁶⁹ But also see “Forfeiture of Standing” (Borrowed or rented vehicle not returned), below. Vehicle passengers will only have standing to challenge a search of their personal property, which means they would usually not have standing as to evidence found inside the glove box, console, or the trunk.⁷⁰

As for rental cars, the driver’s standing will depend on whether he was authorized by the rental company to drive the vehicle. If so, his privacy expectations are the same as the owner.⁷¹ If not, there is a split of opinion among the federal courts, while California has not yet resolved the issue. It appears that the majority view is that an unauthorized driver lacks standing to challenge a search of anything except his personal property.⁷² In contrast,

the minority view (which includes the Ninth Circuit) is that a driver who was not authorized by the rental car company to drive the car can reasonably expect privacy throughout the vehicle if an authorized driver had permitted him to do so.⁷³ Lastly, the occupants of a stolen car may challenge the validity of the car stop, but nothing else.⁷⁴

Cell phones: Standing to challenge a search of a cell phone owned by someone else is an unsettled area of the law. The Ninth Circuit has ruled a defendant had standing to challenge the search if he lawfully possessed and used the phone.⁷⁵ A defendant may also have standing to challenge a search of data stored in a cell phone or PDA furnished by his employer.⁷⁶

Businesses and other commercial property: The owner of a business will ordinarily have standing to challenge a search of any part of the structure that was not open to the public.⁷⁷ Thus, in *Maryland v. Macon* the U.S. Supreme Court ruled that the owner of a bookstore did not have standing to challenge an undercover officer’s observation of the pornographic books on display because they “were intentionally exposed to all who frequent the place of business.”⁷⁸

On the other hand, employees will have standing to challenge a search of their private offices and workspaces, especially if they had a right to exclusive use.⁷⁹ “It is well established,” said the Tenth Circuit, “that an employee has a reasonable expectation of privacy in his office.”⁸⁰ This is true even if

⁶⁴ *Jacobs v. Superior Court* (1973) 36 Cal.App.3d 489.

⁶⁵ *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 635.

⁶⁶ *Pate v. Municipal Court* (1970) 11 Cal.App.3d 721, 724.

⁶⁷ *Brendlin v. California* (2007) 551 U.S. 249. Also see *U.S. v. Diaz-Castaneda* (9th Cir. 2007) 494 F.3d 1146, 1150.

⁶⁸ See *Rakas v. Illinois* (1978) 439 U.S. 128, 148; *People v. Carvajal* (1988) 202 Cal.App.3d 487, 495.

⁶⁹ See *U.S. v. Noble* (6th Cir. 2014) 762 F.3d 509, 526; *U.S. v. Walton* (7th Cir. 2014) 763 F.3d 655, 662.

⁷⁰ *Rakas v. Illinois* (1978) 439 U.S. 128, 148; *People v. Valdez* (2004) 32 Cal.4th 73, 122; *U.S. v. Pulliam* (9th Cir. 2005) 405 F.3d 782, 786; *U.S. v. Barber* (11th Cir. 2015) 777 F.3d 1303; *U.S. v. Smith* (7th Cir. 2012) 697 F.3d 625, 639.

⁷¹ See *U.S. v. Walker* (7th Cir. 2001) 237 F.3d 845, 849; *U.S. v. Hunter* (10th Cir. 2011) 663 F.3d 1136, 1144.

⁷² See *U.S. v. Kennedy* (3rd Cir. 2011) 638 F.3d 159, 165. Also see *U.S. v. Haywood* (7th Cir. 2003) 324 F.3d 514, 516.

⁷³ *U.S. v. Thomas* (9th Cir. 2006) 447 F.3d 1191, 1196-97. Also see *U.S. v. Kennedy* (3rd Cir. 2011) 638 F.3d 159, 166-67 [excellent criticism of the Ninth Circuit’s decision in *Thomas*].

⁷⁴ See *People v. Melnyk* (1992) 4 Cal.App.4th 1532, 1533; *People v. Carter* (2005) 36 Cal.4th 1114, 1141.

⁷⁵ *U.S. v. Lopez-Cruz* (9th Cir. 2013) 730 F.3d 803, 807-809. Compare *U.S. v. Stringer* (8th Cir. 2014) 739 F.3d 391, 396.

⁷⁶ See *U.S. v. Finley* (5th Cir. 2007) 477 F.3d 250, 259. Also see *City of Ontario v. Quon* (2010) 560 U.S. 746, 759-60.

⁷⁷ See *Dow Chemical v. United States* (1986) 476 U.S. 227, 236; *U.S. v. SDI Future Health, Inc.* (9th Cir. 2009) 568 F.3d 684, 698.

⁷⁸ (1985) 472 U.S. 463, 469. Also see *U.S. v. Reed* (8th Cir. 1984) 733 F.2d 492, 501.

⁷⁹ See *U.S. v. SDI Future Health, Inc.* (9th Cir. 2009) 568 F.3d 684, 699.

⁸⁰ *U.S. v. Anderson* (10th Cir. 1998) 154 F.3d 1225, 1230.

other employees sometimes entered without permission.⁸¹ An employee may, however, be denied standing if others regularly entered his office or workspace and the “operational realities of the workplace” made his privacy expectations unreasonable.⁸² Similarly, employees cannot expect privacy in a place merely because they had access to it.⁸³

More and more, the question arises whether employees can reasonably expect privacy in the contents of their workplace computers if their employer consented to the search. It appears the answer is yes unless (1) the employee was aware of a company policy or practice by which computer searches by his employer could be conducted “from time to time for work-related purposes,” and (2) these searches took place periodically and were therefore not merely a remote possibility.⁸⁴

Abandonment

A defendant with standing may lose it if he did or said something before the evidence was discovered that eliminated his privacy expectations in the evidence or in the place or thing in which the evidence was found. Standing can be forfeited in the following ways.

Defendant disclaims ownership: For good reason, suspects often deny that they own or control drugs or other incriminating evidence that officers had found in their actual or constructive possession. Whether such a disclaimer will deprive them of standing depends on the words they used.

DENIAL OF OWNERSHIP: A defendant’s claim that he did not “own” the evidence is a “strong indication” he has forfeited whatever standing he might have had.⁸⁵ The reason it does not eliminate standing is that a non-owner might have a reasonable expectation of privacy of a place or thing by virtue of his *right* to temporarily possess or control it; e.g., a borrowed car.⁸⁶ As the Eleventh Circuit explained, “[A] disclaimer of ownership, while indeed strong indication that a defendant does not expect the article to be free from government intrusion, is not necessarily the hallmark for deciding the substance of a fourth amendment claim.”⁸⁷

DENIAL OF ANY INTEREST: A defendant forfeits standing if he effectively denied ownership and control of the evidence (e.g., “What’s that?”).⁸⁸ “It is settled,” said the Court of Appeal, “that a disclaimer of proprietary or possessory interest in the area searched or the evidence discovered terminates the legitimate expectation of privacy over such area or items.”⁸⁹ For example, the courts have ruled that a defendant had forfeited standing when:

- he “continued to pretend that the bag had nothing to do with him”⁹⁰
- he “stated he did not live in the house and had never seen the bag before”⁹¹
- when asked about a suspicious briefcase, he “claimed that it did not belong to him and that he did not know how to open it”⁹²
- he “testified he did not live in apartment 301, had no key to the apartment, had no clothes there,

⁸¹ See *U.S. v. Taketa* (9th Cir. 1991) 923 F.2d 665, 673.

⁸² *O'Connor v. Ortega* (1987) 480 U.S. 709, 717.

⁸³ See *Sacramento County Deputy Sheriffs' Assn. v. County of Sacramento* (1996) 51 Cal.App.4th 1468, 1482 [sheriff's deputy could not reasonably expect privacy in the jail's “release office” because the office “was not exclusively assigned to him” and it was “accessible to any number of people, including other jail employees”]; *U.S. v. SDI Future Health, Inc.* (9th Cir. 2009) 568 F.3d 684, 696.

⁸⁴ *Schowengerdt v. General Dynamics, Inc.* (9th Cir. 1987) 823 F.2d 1328, 1335. Also see *U.S. v. Taketa* (9th Cir. 1991) 923 F.2d 665, 672-3; *Veda-Rodriguez v. Puerto Rico Telephone Co.* (1st Cir. 1997) 110 F.3d 174, 180 [“PRTC notified its work force in advance that video cameras would be installed and disclosed the cameras’ field of vision.”]; *City of Ontario v. Quon* (2010) 560 U.S. 746, 761 [“Quon was told that his messages were subject to auditing.”].

⁸⁵ *People v. Allen* (1993) 17 Cal.App.4th 1214, 1220-23. Also see *People v. Dasilva* (1989) 207 Cal.App.3d 43, 48; *U.S. v. Peters* (6th Cir. 1999) 194 F.3d 692, 696 [“Defendant vigorously denied that the black attaché case was owned by him or put on the bus by him”]; *U.S. v. Alexander* (7th Cir. 2009) 573 F.3d 465, 473; *U.S. v. Powell* (5th Cir. 2013) 732 F.3d 361, 375.

⁸⁶ See *Rakas v. Illinois* (1978) 439 U.S. 128, 142; *People v. Allen* (1993) 17 Cal.App.4th 1214, 1223; *U.S. v. Lopez-Cruz* (9th Cir. 2013) 730 F.3d 803, 808-809.

⁸⁷ *U.S. v. Hawkins* (11th Cir. 1982) 681 F.2d 1343, 1346.

⁸⁸ See *People v. Dees* (1990) 221 Cal.App.3d 588, 594-95.

⁸⁹ *People v. Stanislawski* (1986) 180 Cal.App.3d 748, 757.

⁹⁰ *In re Baraka H.* (1992) 6 Cal.App.4th 1039, 1048. Also see *U.S. v. Amaral-Estrada* (7th Cir. 2007) 509 F.3d 820, 827.

⁹¹ *People v. Mendoza* (1986) 176 Cal.App.3d 1127, 1129, 1133.

⁹² *U.S. v. Decoud* (9th Cir. 2006) 456 F.3d 996, 1007-8.

had no possessions there, and 'had no expectation of privacy while [he was] in the apartment' because people were always 'coming and going'"⁹³

Defendant abandons or transfers evidence: A defendant will not have standing to challenge a search or seizure of evidence that he had abandoned. But, as used here, the term "abandonment" does not mean he simply left it somewhere. Instead, means that he said or did something that reasonably indicated he had given up possession of it under circumstances that made it unreasonable for him to expect that others would not see or take it.⁹⁴ "[A]bandonment," said the California Supreme Court, "is primarily a question of the defendant's intent, as determined by objective factors such as the defendant's words and actions."⁹⁵ Some examples:

ABANDONING A VEHICLE: In addition to vehicles that have been abandoned as defined by the Vehicle Code,⁹⁶ a vehicle is deemed abandoned if there was circumstantial evidence of abandonment; e.g., he bailed out following a pursuit,⁹⁷ he left his getaway car on a public street.⁹⁸

ABANDONING A HOME: The fact that a home was "poorly maintained" will not render it abandoned but it is a relevant circumstance. Abandonment of a home may also depend on an officer's observations of the home over a period of time.⁹⁹

ABANDONING A MOTEL ROOM: Abandonment of a motel room does not result automatically because check-out time had passed but the guest was still inside or had not checked out.¹⁰⁰ That's because the renter's tenancy continues until management decides to retake possession.¹⁰¹

PRE-ARREST ABANDONMENT: Evidence will be deemed abandoned if the defendant, having suddenly realized that he was about to be arrested, detained or searched, tossed the item away or left it unattended in a place he did not control.¹⁰²

DENIABILITY ABANDONMENT: Deniability abandonment occurs when a defendant hides the evidence (usually drugs) in a place he does not control in order to provide himself with deniability if officers happen to find it; e.g., street-level drug dealer kept his stash in a bag behind some bushes.¹⁰³

EVIDENCE LEFT IN A PUBLIC PLACE: Property is abandoned if the defendant left it in a public place or a place over which he had no control.¹⁰⁴

EVIDENCE LEFT IN GARBAGE: Garbage left at the curb for pickup is abandoned,¹⁰⁵ even if officers had asked the garbage collector to segregate the defendant's garbage for a subsequent search.¹⁰⁶

EVIDENCE LEFT AT CRIME SCENE: A defendant who flees the scene of his crime will be deemed to have abandoned any evidence he left behind because it is highly unlikely that he will return to claim it.¹⁰⁷

⁹³ *People v. Dimitrov* (1995) 33 Cal.App.4th 18, 27-28.

⁹⁴ See *People v. Daggs* (2005) 133 Cal.App.4th 361, 365; *People v. Parson* (2008) 44 Cal.4th 332, 345.

⁹⁵ *People v. Parson* (2008) 44 Cal.4th 332, 347.

⁹⁶ See Veh. Code § 22651.

⁹⁷ See *U.S. v. Vasquez* (7th Cir. 2011) 635 F.3d 889, 894; *U.S. v. Smith* (8th Cir. 2011) 648 F.3d 654, 660.

⁹⁸ See *U.S. v. Burnett* (3rd Cir. 2015) 773 F.3d 122.

⁹⁹ See *U.S. v. Harrison* (3rd Cir. 2012) 689 F.3d 301, 311.

¹⁰⁰ See *U.S. v. Dorais* (9th Cir. 2001) 241 F.3d 1124, 1128; *U.S. v. Kitchens* (4th Cir. 1997) 114 F.3d 29, 32, fn.3.

¹⁰¹ *Eisentrager v. Hocker* (9th Cir. 1971) 450 F.2d 490, 491-92. Also see *People v. Bennett* (1998) 17 Cal.4th 373, 391, fn.6 ["Ordinarily, a suspect has no expectation of privacy with regard to items left in a motel room after a tenancy has expired, and the police may search such items with the consent of the owner of the motel."]; *People v. Satz* (1998) 61 Cal.App.4th 322 [motel manager asked police "to assist in appellant's eviction"]; *People v. Superior Court (Walker)* (2006) 143 Cal.App.4th 1183, 1200.

¹⁰² See *People v. Daggs* (2005) 133 Cal.App.4th 361, 365; *People v. Brown* (1990) 216 Cal.App.3d 1442, 1451; *People v. Thompson* (1988) 205 Cal.App.3d 1503, 1508 [defendant kicked bindles of cocaine underneath a counter in a liquor store]; *People v. Taylor* (1986) 178 Cal.App.3d 217, 230 [defendant tossed jewelry to the ground just before he was apprehended].

¹⁰³ See *In re Baraka H.* (1992) 6 Cal.App.4th 1039, 1045-46; *People v. Roybal* (1998) 19 Cal.4th 481, 507; *People v. Shaw* (2002) 97 Cal.App.4th 833, 839 [defendant put drugs in a hole in the ground in the common area of an apartment complex].

¹⁰⁴ See *People v. Juan* (1985) 175 Cal.App.3d 1064, 1069; *U.S. v. Alewelt* (7th Cir. 1976) 532 F.2d 1165, 1167.

¹⁰⁵ See *California v. Greenwood* (1988) 486 U.S. 35, 40-41.

¹⁰⁶ See *U.S. v. Bruce* (6th Cir. 2005) 396 F.3d 697, 706.

¹⁰⁷ See *People v. Ayala* (2000) 24 Cal.4th 243, 279 [at the murder scene, defendant left his fingerprints on some containers]; *People v. Daggs* (2005) 133 Cal.App.4th 361 [defendant accidentally dropped his cell phone at the scene of a robbery he had committed].

ABANDONING DNA: A defendant has no reasonable expectation of privacy as to a DNA sample he left in a place or thing he did not control.¹⁰⁸

Defendant transfers property: A defendant may forfeit standing to challenge a search of property if he conveyed it to a third person. The following are examples of abandonment by transfer:

- Defendant “dumped” drugs into the purse of a woman he had known for only a few days.¹⁰⁹
- Defendant left an unsealed bag containing drugs in a drug buyer’s car.¹¹⁰
- Defendant put drugs in a friend’s package of cigarettes.¹¹¹
- Defendant put an incriminating letter in the pocket of a fellow jail inmate.¹¹²
- Defendant gave a murder weapon to his cousin to hold for him “knowing it would be kept by [his cousin] in a place both unknown to him and over which he had no control.”¹¹³

A defendant may, however, retain a privacy interest in property he temporarily entrusted to a third person for safekeeping if he reasonably believed the person would not divulge its whereabouts.¹¹⁴

Internet communications: This is currently a hot topic. As things stand now, a person who communicates with someone via email or the Internet lacks standing to seek the suppression of the communication if the service provider released it to law enforcement without a warrant. This is essentially because a copy of the communication is automatically stored by the provider, who is viewed by the Fourth Amendment as a disinterested third party who has no duty to protect its privacy.¹¹⁵ In addition, although the U.S. Stored Communications Act (SCA) requires that officers obtain a warrant for such information, it does not authorize judges to suppress communications that were obtained without one.¹¹⁶

But this rule is under attack because many people now routinely send information to other people via email and the internet, and many of them (maybe most) think this information is “private.” Thus, in one of the most discussed and influential appellate opinions on this subject today, *U.S. v. Warshak*, the Sixth Circuit observed:

Since the advent of email, the telephone call and the letter have waned in importance, and an explosion of Internet-based communication has taken place. People are now able to send sensitive and intimate information, instantaneously, to friends, family, and colleagues half a world away. Lovers exchange sweet nothings, and businessmen swap ambitious plans, all with the click of a mouse button. Commerce has also taken hold in email. Online purchases are often documented in email accounts, and email is frequently used to remind patients and clients of imminent appointments.¹¹⁷

Consequently, the court in *Warshak* ruled that people who send email messages retain a reasonable expectation of privacy under the Fourth Amendment even if the SCA says otherwise. Similarly, the Ninth Circuit has ruled that the privacy interests in physical mail and email are “identical.”¹¹⁸

Although the Supreme Court has not yet addressed this issue, *Warshak* and the Ninth Circuit’s rulings are based on compelling logic and, moreover, seem to be in accord with public opinion. For that reason, it may be difficult for prosecutors to successfully argue that the suppression exception known as “standing” does not apply to internet communications, which means that a warrant will be required. In reality, a warrant is already required because providers who want to avoid privacy lawsuits (i.e., all of them) will usually refuse to release these communications without one.

¹⁰⁸ See *People v. Gallego* (2010) 190 Cal.App.4th 388, 395; *People v. Thomas* (2011) 132 Cal.App.4th 338, 342.

¹⁰⁹ *Rawlings v. Kentucky* (1980) 448 U.S. 98, 105.

¹¹⁰ *People v. Root* (1985) 172 Cal.App.3d 774, 778. Also see *People v. Clark* (1993) 5 Cal.4th 950, 979.

¹¹¹ *People v. Guajardo* (1994) 23 Cal.App.4th 1738.

¹¹² *People v. Burns* (1987) 196 Cal.App.3d 1440, 1453.

¹¹³ *People v. McPeters* (1992) 2 Cal.4th 1148, 1172.

¹¹⁴ See *People v. Ybarra* (1991) 233 Cal.App.3d 1353, 1362; *U.S. v. Basinski* (7th Cir. 2000) 226 F.3d 829, 837.

¹¹⁵ See *Smith v. Maryland* (1979) 442 U.S. 735, 743-44 [“a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties”]; *California v. Greenwood* (1988) 486 U.S. 35, 41.

¹¹⁶ See 18 USC § 2708; *City of Ontario v. Quon* (2010) 560 U.S. 746, 764; *U.S. v. Perrine* (10th Cir. 2008) 518 F.3d 1196, 1202.

¹¹⁷ (6th Cir. 2010) 631 F.3d 266, 284.

¹¹⁸ *U.S. v. Forrester* (9th Cir. 2008) 512 F.3d 500, 511.

Attenuation

Evidence that would otherwise be suppressed may be admissible if prosecutors can prove that the link between it and the officer's misconduct was sufficiently weakened or attenuated.¹¹⁹ This rule, more commonly known as the "fruit of the poisonous tree" doctrine, is based on the principle that "the chain of causation proceeding from the unlawful [police] conduct" may become sufficiently weakened so as "to remove the 'taint' imposed upon that evidence by the original illegality."¹²⁰ Or, as the Court of Appeal aptly explained:

The "fruit of the poisonous tree" theory contemplates evidence being discovered along a causal "time line" or "road," beginning at the "poison" of a Fourth Amendment violation, and ending at the "fruit" of newly discovered information, witnesses, or physical evidence. When the time line becomes too attenuated, or the causal "road" is blocked by an intervening, independent act, the "poison" is declared purged and its evidentiary "fruit," is admissible.¹²¹

Although the existence of attenuation is highly fact-intensive,¹²² the following circumstances, which we will now discuss, are almost always pivotal:

- (1) **Primary or derivative evidence:** Whether the evidence was "primary" or "derivative."
- (2) **Degree to misconduct:** The purpose and flagrancy of the officer's misconduct.

- (3) **Time lapse:** The time lapse between the misconduct and the discovery of the evidence.
- (4) **Independent intervening act:** Whether an "independent intervening act" occurred after the misconduct but before the evidence was discovered.

Derivative and primary evidence

The attenuation exception to the exclusionary rule will not apply if a court finds that the evidence was the "primary" result of the illegal search or seizure, as opposed to merely "derivative." As a general rule, evidence is "primary" if there was a swift and predictable progression of events from the illegal search or seizure to the discovery of the evidence.¹²³ The following are examples:

- The evidence was discovered during a search incident to an unlawful arrest.¹²⁴
- The evidence was discovered during an unlawful search of a house, car, or person.¹²⁵
- The evidence was observed during an illegal detention.¹²⁶
- The evidence was obtained during a consensual search but the consent was not voluntary.¹²⁷
- The evidence was obtained during a booking search following an illegal arrest.¹²⁸

In contrast, derivative evidence consists of evidence that was obtained as an *indirect* result of a Fourth Amendment violation, meaning the illegal

¹¹⁹ See *Wong Sun v. United States* (1963) 371 U.S. 471, 487-88 ["[The issue] is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."]; *United States v. Leon* (1984) 468 U.S. 897, 911 ["[T]he connection between police misconduct and evidence of crime may be sufficiently attenuated to permit the use of that evidence at trial"]; *Murray v. United States* (1988) 487 U.S. 533, 537 [evidence will not be suppressed if the connection between it and the unlawful conduct "becomes so attenuated as to dissipate the taint."]; *People v. Rodriguez* (2006) 143 Cal.App.4th 1137, 1142 ["The concept of purging the taint attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated the deterrent effect of the exclusionary rule no longer justifies its cost."].

¹²⁰ *United States v. Crews* (1980) 445 U.S. 463, 471.

¹²¹ *In re Richard G.* (2009) 173 Cal.App.4th 1252, 1262.

¹²² See *U.S. v. Conrad* (7th Cir. 2012) 673 F.3d 728, 734.

¹²³ See *Segura v. United States* (1984) 468 U.S. 796, 804; *Dunaway v. New York* (1979) 442 U.S. 200, 217-18; *People v. Williams* (1988) 45 Cal.3d 1268, 1299 ["primary evidence is automatically subject to exclusion."].

¹²⁴ See *Wong Sun v. United States* (1963) 371 U.S. 471; *People v. Teresinski* (1982) 30 Cal.3d 822, 832 ["Having found defendant's detention illegal, it necessarily follows that the physical evidence found in the automobile as a result of this detention is inadmissible."].

¹²⁵ See *Segura v. United States* (1984) 468 U.S. 796, 806; *People v. Roberts* (1956) 47 Cal.2d 374, 377 ["[I]f the conduct of officers in entering or searching was unlawful, the search warrant subsequently obtained based on their observation in the apartment was invalid."]; *People v. Dowdy* (1975) 50 Cal.App.3d 180; *People v. Brown* (1989) 210 Cal.App.3d 849, 857.

¹²⁶ See *People v. Harris* (1975) 15 Cal.3d 384; *People v. Teresinski* (1982) 30 Cal.3d 822, 832.

¹²⁷ See *People v. Haydel* (1974) 12 Cal.3d 190, 201.

¹²⁸ See *People v. Taylor* (1986) 178 Cal.App.3d 217, 230.

search generated an act, condition, situation, or information that had the potential to—but did not inevitably—result in the subsequent discovery of the evidence.¹²⁹ The following are examples of derivative evidence:

- While being illegally detained, the defendant abandoned the evidence.¹³⁰
- As the result of an illegal pat search, officers found car keys which led them to evidence in the defendant's car.¹³¹
- As the result of an illegal pat search, officers found car keys and, by using the remote control, they located the defendant's car.¹³²
- An illegal arrest of the defendant resulted in a booking photo that was subsequently used in a photo lineup that led to the defendant's arrest which, in turn, led to the discovery of evidence during a search incident to the arrest.
- The defendant confessed after being confronted with evidence that was obtained illegally.¹³³

Note that in all of the above cases—and in almost every “fruit of the poisonous tree” case—the evidence would not have been discovered if the officer had not previously conducted an illegal search or seizure. But this does not matter because evidence will not be deemed “primary” merely because there was a causal connection between it and the police misconduct. A rule that would require suppression under such circumstances—a so-called “but for” rule—has been consistently rejected by the Supreme Court.¹³⁴

Purpose and flagrancy of misconduct

Evidence will almost always be deemed tainted if the officers intentionally or recklessly disregarded the law for the purpose of obtaining it.¹³⁵ As the Court of Appeal observed, “[F]lagrancy and purposefulness of police misconduct, is considered the most important [factor] because it is tied directly to the rationale underlying the exclusionary rule, deterrence of police misconduct.”¹³⁶

For example, in *Brown v. Illinois*¹³⁷ detectives arrested Brown for murder knowing that they lacked probable cause. But they figured he might confess if they interrogated him, and he did. But the Supreme Court ruled the confession should be suppressed because the detectives' misconduct “had the quality of purposefulness. The impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives.” Similarly, in *People v. Gonzalez* the court ruled that the “most damning factor is the utter lack of probable cause for defendant's arrest and the very clear indication its purpose was to take defendant into custody and see what might turn up.”¹³⁸

Independent intervening acts

If a search or seizure was not flagrantly illegal, the resulting evidence will likely be deemed attenuated if the chain of causation was broken by an event that occurred between the time of the misconduct and the discovery of the evidence.¹³⁹ As the Court of Appeal explained:

¹²⁹ See *Murray v. United States* (1988) 487 U.S. 533, 536-37; *New York v. Harris* (1990) 495 U.S. 14, 19.

¹³⁰ See *People v. Verin* (1990) 220 Cal.App.3d 551; *People v. Lee* (1986) 186 Cal.App.3d 743, 751; *U.S. v. McClendon* (9th Cir. 2013) 713 F.3d 1211, 1218.

¹³¹ See *U.S. v. Holmes* (D.C.Cir. 2007) 505 F.3d 1288.

¹³² See *U.S. v. Holmes* (D.C.Cir. 2007) 505 F.3d 1288.

¹³³ See *U.S. v. Shetler* (9th Cir. 2011) 665 F.3d 1150, 1158.

¹³⁴ See *Hudson v. Michigan* (2006) 547 U.S. 586, 591; *People v. Mayfield* (1997) 14 Cal.4th 668, 760.

¹³⁵ See *Kaupp v. Texas* (2003) 538 U.S. 626, 633 [“Relevant considerations include . . . particularly, the purpose and flagrancy of the official misconduct.”]; *United States v. Leon* (1984) 468 U.S. 897, 911 [“[A]n assessment of the flagrancy of the police misconduct constitutes an important step in the calculus.”]; *People v. Cox* (2008) 168 Cal.App.4th 702, 712.

¹³⁶ *People v. Bates* (2013) 222 Cal.App.4th 60, 70.

¹³⁷ (1975) 422 U.S. 590.

¹³⁸ (1998) 64 Cal.App.4th 432, 447. Also see *Wong Sun v. United States* (1963) 371 U.S. 471, 486; *People v. Johnson* (1969) 70 Cal.2d 541, 549; *People v. Rodriguez* (2006) 143 Cal.App.4th 1137, 1143.

¹³⁹ See *People v. Sims* (1993) 5 Cal.4th 405, 445 [“The degree of attenuation that suffices to dissipate the taint requires at least an intervening independent act by the defendant or a third party to break the causal chain in such a way that the [evidence] is not in fact obtained by exploitation of the illegality.”]; *In re Richard G.* (2009) 173 Cal.App.4th 1252, 1262 [if “the causal ‘road’ is blocked by an intervening, independent act, the ‘poison’ is declared purged and its evidentiary ‘fruit’ is admissible”]; *People v. Gonzalez* (1998) 64 Cal.App.4th 432, 444 [“Intervening circumstances can be anything the court deems sufficient to break the causal chain”].

Where an event occurs between the proscribed law enforcement conduct and the proffered evidence which breaks the causal chain linking the illegality and evidence in such a way that the evidence is not in fact obtained by exploitation of that illegality the taint from the evidence is removed.¹⁴⁰

These events are known as “independent intervening acts,” and they typically consist of one or more of the following.

Commission of a new crime: If officers obtained evidence pertaining to one crime by means of an illegal search or seizure, the evidence may be admissible to prove that the defendant committed a second crime that occurred during or after the misconduct.¹⁴¹ This is because the commission of the new crime is ordinarily deemed an independent intervening act. As the Court of Appeal observed, “An individual’s decision to commit a new and distinct crime, even if made during or immediately after an unlawful detention, is an intervening act.”¹⁴²

A good example is found in *People v. Coe*¹⁴³ which began when LAPD officers executed a warrant to search Coe’s home. They found tools that had been used in some recent burglaries, but a court ruled the warrant was invalid and it ordered the officers to return the tools to Coe. But before doing so, they marked and photographed them. About two years later, detectives who were investigating a series of commercial burglaries started finding Coe’s marked tools at the crime scenes. Based on this discovery,

they obtained a warrant to search Coe’s home for evidence pertaining to the new burglaries, and the search was successful. Although the evidence would not have been discovered if the officers had not conducted the unlawful search two years earlier, the court ruled it was admissible because Coe’s commission of the new burglaries constituted independent intervening acts.

Similarly, in *People v. Cox*¹⁴⁴ Sacramento police officers detained Cox for walking in the middle of a street. In the course of the detention, Cox assaulted one of the officers and was arrested. He later filed a motion to suppress the officers’ testimony about the assault on grounds that it was the fruit of an unlawful detention. For reasons that are unimportant here, the court agreed that the detention was unlawful, but it denied the motion to suppress because Cox’s violent reaction constituted an independent intervening act that had “dissipated the taint created by the illegal detention.”

Confessing, or consenting to a search: Generally speaking, a suspect’s decision to consent to a search, confess, or make an incriminating statement while being illegally detained or arrested is not an independent intervening act because it is “inextricably bound up with the illegal conduct and cannot be segregated therefrom.”¹⁴⁵ There are, however, some exceptions to this rule. First, consent or a confession is apt to constitute an intervening independent act if it was made spontaneously or impulsively.¹⁴⁶ As the Supreme Court observed in

¹⁴⁰ *People v. Reagan* (1982) 128 Cal.App.3d 92, 96.

¹⁴¹ See *People v. Prendez* (1971) 15 Cal.App.3d 486, 489 [“Appellant’s act in fleeing is analogous to the commission of an offense subsequent to the police conduct said to be illegal—which subsequent offense then dissipates the taint caused by the police’s original misconduct.”]; *In re Robert D.* (1979) 95 Cal.App.3d 767, 772 [“The subsequent illegal acts dissipated any taint caused by the unauthorized police action in activating the red light and siren.”]; *People v. Caratti* (1980) 103 Cal.App.3d 847, 852.

¹⁴² *In re Richard G* (2009) 173 Cal.App.4th 1252, 1262.

¹⁴³ (1991) 228 Cal.App.3d 526.

¹⁴⁴ (2008) 168 Cal.App.4th 702.

¹⁴⁵ *People v. Haven* (1963) 59 Cal.2d 713, 718. Also see *Florida v. Royer* (1983) 460 U.S. 491, 501; *People v. \$48, 715* (1997) 58 Cal.App.4th 1507, 1514; *People v. Campa* (1984) 36 Cal.3d 870, 885. But also see *People v. Beardslee* (1991) 53 Cal.3d 68, 108 [“Incriminating statements by a defendant are admissible despite previous unlawful governmental conduct if they are sufficiently an act of free will to purge the primary taint”].

¹⁴⁶ See *People v. Terrell* (2006) 141 Cal.App.4th 1371, 1385; *People v. Rich* (1988) 45 Cal.3d 1036, 1081 [“defendant, soon after consulting his attorney, told [the officer] he still wished to talk to him”]; *People v. Sims* (1993) 5 Cal.4th 405, 446 [“Defendant thereafter unilaterally initiated further communication the following day, specifically requesting to speak with the officers.”]; *People v. Hernandez* (2009) 178 Cal.App.4th 1510, 1537-38 [“And even if the second interview was a product of the earlier pressure, the effect did not carry over to the contact with [the deputy] the next day, which she initiated”]; *U.S. v. Montgomery* (5th Cir. 2015) 777 F.3d 269, 274 [“the consent he gave to search his cell phone was unsolicited”]. Compare *People v. Boyer* (1989) 48 Cal.3d 247, 269 [defendant’s statement “was a direct and obvious response to the interrogational techniques used . . . during the earlier illegal interview.”].

Rawlings v. Kentucky, “Here, where petitioner’s admissions were apparently spontaneous reactions to the discovery of his drugs in Cox’s purse, we have little doubt that this factor weighs heavily in favor of a finding that petitioner acted of free will unaffected by the initial illegality.”¹⁴⁷

Second, a defendant’s admission will be deemed an independent intervening act if it occurred after the effects of the illegal search or seizure had terminated.¹⁴⁸ For example, if officers violated the *Ramey-Payton* rule by entering the defendant’s house to arrest him without a warrant, any evidence or statements they obtained while *inside* the house would be suppressed. That is because (1) the purpose of the rule is to protect the privacy interests of a home’s interior, and (2) the evidence would have been obtained in the interior. But if officers searched the defendant or obtained a statement from him *after* he had been escorted out the door (e.g., he was searched on the front porch) the evidence would not be suppressed because, at that moment, the illegal entry into the house would have terminated and the defendant’s privacy interest in its interior would have been restored—thereby terminating the *Ramey-Payton* violation.¹⁴⁹

Third, a defendant’s decision to confess or consent to a search may be deemed an intervening act if the officers who sought the confession or consent were sufficiently disassociated from the officers who conducted the illegal search or seizure. For example, in *People v. Gonzalez*¹⁵⁰ a West Covina police officer arrested Gonzalez without probable cause for robbing a liquor store. The magnitude of

the officer’s Fourth Amendment violation was not flagrant and it was arguably a close question. While Gonzales was confessing to West Covina detectives, detectives in nearby Monterey Park learned that he was in custody in West Covina and they went there to question him about a robbery-shooting that had occurred in their city three days before the West Covina holdup. Again, Gonzales confessed. Although his initial arrest was unlawful (because West Covina officers lacked probable cause to arrest him), the court ruled the subsequent confession to the Monterey Park robbery was not the fruit of the illegal arrest in West Covina because the Monterey Park officers had absolutely no role in making the arrest in West Covina. As the court explained:

This is not a case in which one police department attempts to make an end run around the Fourth Amendment by creating a “don’t ask-don’t tell” strategy in which one unit illegally arrests suspects and another unit interrogates them deliberately unaware of the circumstances of the arrest.

Discovery of search authorization: If an officer detained a suspect without reasonable suspicion and, in the course of the detention, recognized the suspect as a searchable probationer, a subsequent probation search may be deemed independent of the illegal detention if his knowledge of the search condition was obtained, not by running a routine records check, but because he suddenly recognized the detainee as a searchable probationer.¹⁵¹

Discovery of arrest warrant: If officers illegally detained a suspect and, in the course of the deten-

¹⁴⁷ (1980) 448 U.S. 98, 108.

¹⁴⁸ See *Wong Sun v. United States* (1963) 371 U.S. 471, 491; *People v. Jenkins* (2004) 122 Cal.App.4th 1160, 1179 [three days after being released from custody following an illegal detention, the suspect agreed to come to the police station for additional questioning]; *People v. Fitzgerald* (1972) 29 Cal.App.3d 296, 315 [after illegal arrest, fingerprints were legally obtained when defendant was arraigned on new charges]; *People v. Storm* (2002) 28 Cal.4th 1007; *U.S. v. Clariot* (6th Cir. 2011) 655 F.3d 550 [a suspect who was unlawfully detained made an incriminating statement after the detention had been converted into a contact].

¹⁴⁹ See *New York v. Harris* (1990) 495 U.S. 14, 21 [“where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State’s use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of *Payton*”]; *People v. Marquez* (1992) 1 Cal.4th 553, 569 [“[T]he lack of an arrest warrant does not invalidate defendant’s arrest or require suppression of statements he made at the police station.”]; *People v. Watkins* (1994) 26 Cal.App.4th 19, 29 [“Where there is probable cause to arrest, the fact that police illegally enter a home to make a warrantless arrest neither invalidates the arrest itself nor requires suppression of any postarrest statements the defendant makes at the police station.”]; *U.S. v. Crawford* (9th Cir. 2004) 372 F.3d 1048, 1056 [“[T]he presence of probable cause to arrest has proved dispositive when deciding whether the exclusionary rule applies to evidence or statements obtained after the defendant is placed in custody.”].

¹⁵⁰ (1998) 64 Cal.App.4th 432.

¹⁵¹ See *People v. Durant* (2012) 205 Cal.App.4th 57, 66 [the search “did not occur until after Officer Taylor had recognized appellant as a person subject to a search condition”].

tion, learned that he was wanted on an arrest warrant, evidence resulting from the arrest or search should be admissible so long as the detention was not flagrantly illegal.¹⁵² As the Seventh Circuit observed, “It would be startling to suggest that because the police illegally stopped an automobile, they cannot arrest an occupant who is found to be wanted on a warrant—in a sense requiring an official call of ‘Olly, Olly, Oxen Free.’”¹⁵³

Abandoning evidence during flight: A suspect’s act of abandoning evidence while fleeing from officers ordinarily qualifies as an independent intervening act. Possible exception: If the officers lacked grounds to detain or arrest him, a court might find that the abandonment was too closely linked to the threatened illegal seizure to constitute attenuation. (Still, the evidence will not be suppressed because a suspect who runs from officers is neither arrested nor detained until he is captured or gives up.¹⁵⁴)

Discovery of evidence in unrelated case: If, as a result of an illegal search or seizure, officers obtained information that led to an investigation into a unrelated crime, evidence obtained in the course of that investigation will be deemed independent of the misconduct if it merely provided officers with the motivation to conduct the investigation.¹⁵⁵ On the other hand, the evidence might be deemed tainted if the illegal search or seizure provided them with knowledge of its existence and location.¹⁵⁶

Identity evidence from illegal booking: When a suspect is arrested, it is standard procedure to obtain a booking photo and fingerprints. The question arises: If the arrest was later deemed unlawful, can the photo and prints be used to identify the suspect in subsequent cases? The Ninth Circuit ruled the answer was yes if the arresting officers did not make the illegal arrest for the “sole or primary purpose” of obtaining ID evidence for use in “ongoing or future investigations.”¹⁵⁷ Said the court, “[T]here is no sanction to be applied when an illegal arrest only leads to discovery of the man’s identity and that merely leads to the official file or other independent evidence.”¹⁵⁸

For example, one month after robbing a liquor store in El Segundo, a defendant in *People v. Griffin*¹⁵⁹ was arrested by officers in Los Angeles on a weapons charge. Because the defendant had become a suspect in the robbery, El Segundo detectives obtained the booking photo from LAPD and used it in a photo lineup which produced a positive ID. Although the California Supreme Court ruled the initial arrest was unlawful, it also ruled that the connection between the arrest and the photo identification was sufficiently attenuated because it resulted from “pure happenstance.”

In contrast, in *People v. Rodriguez*¹⁶⁰ officers in the city of Orange detained Rodriguez pursuant to a departmental policy of detaining suspected gang

¹⁵² See *People v. Brendlin* (2008) 45 Cal.4th 262, 269-70. Also see *People v. Durant* (2012) 205 Cal.App.4th 57, 66.

¹⁵³ *U.S. v. Green* (7th Cir. 1997) 111 F.3d 515, 521. **NOTE:** In *People v. Bates* (2013) 222 Cal.App.4th 60 the Court of Appeal ruled that attenuation will not result if officers discovered that the driver or passenger was subject to a search condition, as opposed to discovering he was wanted on an outstanding arrest warrant. Especially in light of the logical analysis in *Green*, we question the ruling in *Bates* because we cannot perceive a distinction of constitutional magnitude between the two.

¹⁵⁴ See *California v. Hodari D.* (1991) 499 U.S. 621, 626; *Brendlin v. California* (2007) 551 U.S. 249, 254.

¹⁵⁵ See *People v. Thomas* (1980) 112 Cal.App.3d 980, 986; *U.S. v. Smith* (9th Cir. 1998) 155 F.3d 1051, 1061 [“[U]nder Ninth Circuit precedent, the baseline inquiry in evaluating taint is not whether an unlawful search was the ‘impetus’ for the investigation or whether there exists an unbroken ‘causal chain’ between the search and the incriminating evidence; rather, courts must determine whether anything seized illegally, or any leads gained from illegal activity, tended significantly to direct the investigation toward the specific evidence sought to be suppressed.”]; *U.S. v. Carter* (7th Cir. 2009) 573 F.3d 418, 423.

¹⁵⁶ See *People v. Ramsey* (1969) 272 Cal.App.2d 302, 313; *U.S. v. Davis* (9th Cir. 2003) 332 F.3d 1163, 1171.

¹⁵⁷ *People v. Thierry* (1998) 64 Cal.App.4th 176, 184. Also see *People v. Griffin* (1976) 59 Cal.App.3d 532, 538; *Lockridge v. Superior Court* (1970) 3 Cal.3d 166, 170 [“[I]t was pure happenstance that during an investigation of other crimes, the police came across the gun taken in the Peace robbery.”]; *People v. McInnis* (1972) 6 Cal.3d 821, 826 [booking photo taken as a result of an illegal arrest and used in a photo lineup to identify the defendant in a previous crime was admissible; officers could have used any one of several lawfully-obtained booking photos on file but it was reasonable to show the victim the most recent photograph which was the one obtained unlawfully]; *U.S. v. Farias-Gonzalez* (11th Cir. 2009) 556 F.3d 1181, 1185 [“[T]he exclusionary rule does not apply to evidence to establish the defendant’s identity in a criminal prosecution”].

¹⁵⁸ *U.S. v. Orozco-Rico* (9th Cir. 1978) 589 F.2d 433, 435.

¹⁵⁹ (1972) 6 Cal.3d 821.

¹⁶⁰ (1993) 21 Cal.App.4th 232, 241.

members for the purpose of taking their photos for inclusion in the department's gang book. Three days later, Rodriguez committed a gang-related murder, and a witness to the murder who was viewing the gang book identified Rodriguez as the shooter.

Ordinarily, the subsequent murder would have been deemed an independent intervening act, but not here. That is because the department's policy of illegally detaining suspected gang members to include their photos in gang books as plainly unlawful, and also because of the short time lapse between the illegal detention and the positive ID. As the court pointed out, the gang-book photo "was obtained deliberately for use in future criminal investigations, and the connection between it and the identification of Rodriguez was not happenstance."

Misconduct leads to witness: If an illegal search or seizure of a suspect led to the discovery of a prosecution witness, the witness's testimony at the suspect's trial will not be deemed the "fruit" of the misconduct unless the link between the testimony and the Fourth Amendment violation was "closer, more direct" than the link required to suppress physical evidence.¹⁶¹ Circumstances that are relevant in determining whether such a close link existed includes the following: the extent to which the witness freely agreed to testify, the time lapse between the illegal conduct and the discovery of the witness, whether the witness's identity was known to officers before the illegal conduct, and whether

officers engaged in the illegal conduct for the purpose of obtaining names of potential witnesses.¹⁶²

Inevitable Discovery

Under the inevitable discovery exception to the exclusionary rule, evidence and statements obtained unlawfully will be admissible if they would have been acquired inevitably by lawful means.¹⁶³ As the Supreme Court put it:

[I]f the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury.¹⁶⁴

The term "inevitable discovery" is, however, misleading because prosecutors are not required to prove that the evidence would have been discovered "unquestionably," "certainly" or even "inevitably." Instead, they are only required to prove there was a reasonably strong probability¹⁶⁵ that it would have been discovered "in the normal course of a lawfully conducted investigation,"¹⁶⁶ or that it "would have been ultimately revealed by usual and commonplace police investigative procedures."¹⁶⁷ As the Court of Appeal explained, "The phrase 'inevitable discovery' is somewhat of a misnomer. The doctrine does not require certainty. Rather, the People must show a reasonable probability that the challenged evidence would have been procured in any event by lawful means."¹⁶⁸

¹⁶¹ *U.S. v. Ceccolini* (1978) 435 U.S. 268, 278. Also see *Michigan v. Tucker* (1974) 417 U.S. 433, 450.

¹⁶² See *U.S. v. Ceccolini* (1978) 435 U.S. 268, 276-80; *People v. Teresinski* (1992) 30 Cal.3d 822, 835, 838; *People v. Superior Court (Negoescu)* (1982) 131 Cal.App.3d 429, 433; *People v. Schweitzer* (1982) 138 Cal.App.3d 204, 207.

¹⁶³ See *Murray v. United States* (1988) 487 U.S. 533, 539 ["The inevitable discovery doctrine is in reality an extrapolation from the independent source doctrine: Since the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered."]; *In re Javier A.* (1984) 159 Cal.App.3d 913, 926 ["The inevitable discovery rule is a variation upon the independent source theory, but it differs in that the question is not whether the police did in fact acquire certain evidence by reliance upon an untainted source but instead whether evidence found because of a Fourth Amendment violation would inevitably have been discovered lawfully."]; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1040; *People v. Robles* (2000) 23 Cal.4th 789, 800; *U.S. v. Christy* (10th Cir. 2014) 739 F.3d 534, 541 ["inevitable discovery requires only that the lawful means of discovery be independent of the constitutional violation"]; *U.S. v. Marrocco* (7th Cir. 2009) 578 F.3d 627, 637-38.

¹⁶⁴ *Nix v. Williams* (1984) 467 U.S. 431, 444, 447.

¹⁶⁵ *In re Rudy F.* (2004) 117 Cal.App.4th 1124, 1136].

¹⁶⁶ *Lockridge v. Superior Court* (1970) 3 Cal.3d 166, 170.

¹⁶⁷ *People v. Ramsey* (1969) 272 CA2 302, 313. Also see *People v. Boyer* (1989) 48 Cal.3d 247, 279, fn.21; *Green v. Superior Court* (1985) 40 Cal.3d 126; *U.S. v. Lazar* (6th Cir. 2010) 604 F.3d 230, 240.

¹⁶⁸ *People v. Superior Court (Walker)* (2006) 143 Cal.App.4th 1183, 1215. Also see *People v. Superior Court (Tunch)* (1978) 80 Cal.App.3d 665, 680-81.

For example, in *People v. Kraft*,¹⁶⁹ CHP officers stopped a car and arrested the defendant for DUI. There was a passenger reclining on the front seat, and Kraft told the officers that he was just a hitchhiker. One of the officers then entered the car and saw drugs and a weapon in plain view. He also noticed that the passenger was dead. On appeal from his murder conviction, Kraft did not suggest that his victim's body should be suppressed, but he did argue that the drugs, weapon, and other evidence in the car was inadmissible because they were the fruit of an illegal warrantless entry into the car. Although the entry was probably legal, the court did not have to decide the issue because it ruled that the evidence would have been discovered inevitably because the officers would certainly have attempted to "awaken" the dead passenger. And while doing so, there was a strong possibility that they would have seen the other evidence.

Two other things should be noted about the inevitable discovery rule. First, the seriousness of the crime under investigation and the public interest in solving it are relevant in determining the probability that the evidence would have been discovered. This is because investigations into such crimes are more apt to be intensive, meaning there would be a greater likelihood that officers would have pursued every plausible lead.¹⁷⁰ Second, the inevitable discovery rule will not be applied if officers without probable cause to search a home, searched it illegally without a warrant on the theory that a warrant would have inevitably been issued.¹⁷¹

Independent Source

The independent source and inevitable discovery rules are very similar and are frequently mixed up. As noted earlier the inevitable discovery rule is applied when there is a reasonably strong probability that officers would have discovered the evidence by lawful means. In contrast, the independent source rule is applied when the evidence was discovered through a combination of legal and illegal police misconduct, but the information obtained unlawfully was superfluous.¹⁷² In other words, if prosecutors can prove that the officers' misconduct contributed nothing that affected the ultimate discovery or seizure of the evidence, it will be deemed independent of the illegal search.

The independent source rule is commonly invoked by prosecutors when a judge issued a search warrant based on an affidavit that contained *some* information that was obtained illegally. In these cases the evidence found during the execution of the warrant will be admissible under the independent source rule if prosecutors can prove two things: (1) the illegally-seized information was unnecessary to establish probable cause for the warrant,¹⁷³ and (2) the officers' decision to seek the warrant was not influenced by anything they saw or heard during the illegal search or seizure.¹⁷⁴ As the Ninth Circuit summed up the procedure, "A reviewing court should excise the tainted evidence and determine whether the remaining, untainted evidence would provide a neutral magistrate with probable cause to issue a warrant."¹⁷⁵

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¹⁶⁹ (2000) 23 Cal.4th 978.

¹⁷⁰ See *People v. Boyer* (1989) 48 Cal.3d 247, 278; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1040; *People v. Superior Court (Walker)* (2006) 143 Cal.App.4th 1183, 1216; *U.S. v. Swift* (7th Cir. 2000) 220 F.3d 502, 510.

¹⁷¹ See *People v. Superior Court (Chapman)* (2012) 204 Cal.App.4th 1004, 1022; *People v. Robles* (2000) 23 Cal.4th 789, 801; *People v. Superior Court (Walker)* (2006) 143 Cal.App.4th 1183, 1208, fn.18.

¹⁷² See *Murray v. United States* (1988) 487 U.S. 533, 542; *People v. Neely* (1999) 70 Cal.App.4th 767, 785; *U.S. v. Gonzalez* (7th Cir. 2009) 555 F.3d 579, 581 ["The key to determining whether the independent source doctrine applies is to ask whether the evidence at issue was obtained by independent legal means."].

¹⁷³ See *Segura v. United States* (1984) 468 U.S. 796, 814 ["None of the information on which the warrant was secured was derived from or related in any way to the initial entry into petitioners' apartment"]; *People v. Maestas* (1988) 204 Cal.App.3d 1208, 1215 ["the question that must be addressed 'is whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant'"]; *People v. Robinson* (2012) 208 Cal.App.4th 232, 241; *U.S. v. Stabile* (3rd Cir. 2011) 633 F.3d 219, 243 [we ask "whether a neutral justice would have issued the search warrant even if not presented with information that had been obtained during an unlawful search"].

¹⁷⁴ See *Murray v. United States* (1988) 487 U.S. 533, 543 [the issue was whether "the agents would have sought a warrant if they had not earlier entered the warehouse"]; *People v. Weiss* (1999) 20 Cal.4th 1073; *U.S. v. Stabile* (3rd Cir. 2011) 633 F.3d 219, 243; *U.S. v. Budd* (7th Cir. 2008) 549 F.3d 1140, 1147; *U.S. v. Swope* (8th Cir. 2008) 542 F.3d 609, 615.

¹⁷⁵ *U.S. v. Vasey* (9th Cir. 1987) 834 F.2d 782, 788.

Recent Cases

Rodriguez v. United States

(2015) __ U.S. __ [135 S.Ct. 1609]

Issue

Does a traffic stop become unlawful if it was prolonged so that the officer could walk his K9 around the vehicle to check for drugs?

Facts

Just after midnight, a K9 officer in Nebraska stopped a car for a minor traffic violation. The driver, Rodriguez, handed the officer his license, registration, and proof of insurance. The officer returned to his car, ran a records check and, after determining that everything was in order, he asked Rodriguez and his passenger where they were coming from and where they were going. The passenger said they had been looking at a car for sale. For several reasons, the officer suspected the men were drug traffickers but, for purposes of its opinion, the Court assumed he lacked reasonable suspicion to detain them.

The officer then requested backup to watch the suspects so that he could safely walk his K9 around the car. While waiting, he wrote a warning ticket, obtained Rodriguez's signature, and promptly returned his license and other documents. At that point, the stop had lasted about 30 minutes and, as the officer later acknowledged, he had no further reason to detain Rodriguez and that "I got all the reasons for the stop out of the way . . . took care of all the business."

Still waiting for backup, the officer asked Rodriguez if he would consent to a search of his car and Rodriguez said no. The officer responded by telling him to turn off the ignition, exit the car, and stand in front of his patrol car. Rodriguez complied and they waited there for about seven minutes until backup arrived. At that point, the officer walked his K9 around the car and the dog alerted to the presence of drugs. Inside the car, the officers found a "large bag" of methamphetamine. Rodriguez was indicted on federal drug charges and

later filed a motion to suppress the methamphetamine. The motion was denied and he appealed to the Supreme Court.

Discussion

The main issue on appeal was whether the traffic stop had become an illegal detention by the time the officer walked his dog around the car. If so, the methamphetamine should have been suppressed as the fruit of an illegal seizure.

It is established that a traffic stop becomes unlawful if the officers did not carry out their duties in a reasonable manner.¹ These duties are ordinarily limited to (1) maintaining officer safety; (2) inspecting the driver's license, vehicle registration, and proof of insurance; (3) running a warrant check; (4) determining whether to cite the driver; and, if so, (5) obtaining his signature on the promise to appear. The officer who stopped Rodriguez did all of these things and therefore the stop had been lawful, at least until Rodriguez signed the warning. But, as noted, the officer continued to detain Rodriguez for seven minutes in order to have his K9 check for drugs. Did this render the stop illegal? The Supreme Court said yes.

The general rule on the duration of traffic stops is that they become unlawful if they were unnecessarily prolonged. As the Court in *Rodriguez* explained, a traffic stop must be terminated "when tasks tied to the traffic infraction are—or reasonably should have been—completed." Plainly, those routine tasks do not include checking for drugs.

Although the Court ruled that the stop had become unlawful, it did not rule on whether it became unlawful within moments after Rodriguez signed the warning, or whether it happened seven minutes later as the search began, or whether it had occurred at some point in-between. The Court did not need to decide this because it was apparent that a delay lasting seven minutes was too long under the circumstances, and therefore the drugs should have been suppressed.²

¹ See *Illinois v. Caballes* (2005) 543 U.S. 405; *Arizona v. Johnson* (2009) 555 U.S. 323; *People v. Gorrostieta* (1993) 19 Cal.App.4th 71, 83 ["When the detention exceeds the boundaries of a permissible investigative stop, the detention becomes a de facto arrest requiring probable cause."].

² **NOTE:** The Court remanded the case back to Nebraska to determine whether the extension of the stop was lawful on grounds that the officer had reason to believe that Rodriguez possessed drugs.

Comment

It is doubtful that the Court's ruling will affect, or even call into question, the following well-established principles pertaining to traffic stops and detentions:

No time limit: There is no absolute time limit,³ nor are officers required to "move at top speed."⁴ Instead, they must simply carry out their duties diligently in light of the actions of the detainee and other circumstances over which they had little control.⁵ As the Court observed in *United States v. De Hernandez*, "[C]ommon sense and ordinary human experience must govern over rigid [time] criteria."⁶

No "least intrusive means" test: In the past, some courts would rule that a detention became unlawful if the officers failed to employ the least intrusive means of pursuing their objectives. The "least intrusive means" test has been abrogated.⁷ Instead, as the Court explained in *United States v. Sharpe*, "The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it."⁸

No unrealistic second-guessing: In determining whether a detention was conducted in a reasonable manner, the courts must apply common sense and ~~avoiding unrealistic second-guessing.~~ This is be-

cause a "creative" judge "can almost always imagine some alternative means by which the objectives of the police might have been accomplished."⁹

We would also like discuss some things about this opinion that don't make sense. The Court said it decided to rule on this issue because there existed "a division among lower courts on the question whether police routinely may extend an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff." The Court tried to prove that such a division existed by citing an irrelevant federal case from 2001 and a case from Utah. That's it.

In reality, no such division has existed since at least 2009. That was when the Court ruled in *Arizona v. Johnson*¹⁰ that an officer's investigation into matters unrelated to a traffic violation would not convert the encounter into an illegal seizure so long as the officer's inquiries did not "measurably extend" the duration of the stop." In other words, the Court effectively ruled that an extended traffic stop does not become an illegal seizure unless it had been *measurably* extended.

Although the Court in *Johnson* did not define the word "measurably," it means "to some extent" or "moderately."¹¹ Thus, the Court in *Rodriguez* could have simply applied *Johnson* and ruled the stop was unlawful because it was prolonged for over seven minutes which was an "immoderate" amount of time

³ See *People v. Gorak* (1987) 196 Cal.App.3d. 1032, 1037 ["The U.S. Supreme Court has refused to adopt any outside time limitation on a lawful detention."]; *People v. Gallardo* (2005) 130 Cal.App.4th 234, 238 ["[t]here is no hard and fast limit as to the amount of time that is reasonable"]; *U.S. v. Torres-Sanchez* (9th Cir. 1996) 83 F.3d 1123, 1129 ["'Brevity' can only be defined in the context of each particular case."].

⁴ *U.S. v. Hernandez* (11th Cir. 2005) 418 F.3d 1206, 1212, fn.7. Also see *U.S. v. Harrison* (2nd Cir. 2010) 606 F.3d 42, 45 [no requirement to terminate "at the earliest possible moment"].

⁵ See *United States v. Montoya De Hernandez* (1985) 473 U.S. 531, 543 ["Our prior cases have refused to charge police with delays in investigatory detention attributable to the suspect's evasive actions."]; *United States v. Place* (1983) 462 U.S. 696, 709, fn.10 [officers must be permitted "to graduate their responses to the demands of any particular situation"]; *United States v. De Hernandez* (1985) 473 U.S. 531, 543 ["common sense and ordinary human experience must govern over rigid [time] criteria"]; *People v. Gomez* (2004) 117 Cal.App.4th 531, 537 ["a detention will be deemed unconstitutional when extended beyond what is reasonably necessary under the circumstances that made its initiation permissible"]; *People v. Soun* (1995) 34 Cal.App.4th 1499, 1520 [30 minute detention was lawful because the investigating officer "fully accounted for this period of time"]; *People v. Johnson* (1991) 231 Cal.App.3d 1, 13 ["Levels of force and intrusion in an investigatory stop may be legitimately escalated to meet supervening events"].

⁶ (1985) 473 U.S. 531, 543.

⁷ See *City of Ontario v. Quon* (2010) 560 U.S. 746, 763 ["This Court has repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment."]; *Atwater v. City of Lago Vista* (2001) 532 U.S. 318, 350 [the "least-restrictive-alternative limitation" is "generally thought inappropriate in working out Fourth Amendment protection"].

⁸ (1985) 470 U.S. 675, 686.

⁹ *United States v. Sharpe* (1985) 470 U.S. 675, 686-67. Also see *In re Joseph F.* (2000) 85 Cal.App.4th 975, 989 ["The reasonableness of a particular use of force is judged from the perspective of a reasonable officer on the scene, not by the 20/20 vision of hindsight."]; *U.S. v. Winters* (6th Cir. 2015) 782 F.3d 289 ["it is not the role of this court to dictate the precise methods of investigation to be pursued by police officers"].

¹⁰ (2009) 555 U.S. 323, 333.

under the circumstances. Instead it ruled that a traffic stop becomes unlawful if it was prolonged beyond the time “reasonably required” to complete it. Does this mean that the “measurably extended” test has been superseded by something called the “time reasonably required” test? And if so, what’s the difference between the two? Ironically, these are questions that will result in actual divisions among the lower courts.

Another question: How can the courts determine the amount of time that was reasonably required to conduct a particular traffic stop? (As we were recently reminded here in Alameda County, there is no such thing as a “routine” traffic stop.) The answer is that, unless the delay was obviously excessive (as in *Rodriguez*), the courts will be forced to engage in the type of second-guessing that the Supreme Court has consistently urged judges to avoid.

Although these are legitimate questions, we doubt the Court in *Rodriguez* intended to announce a new test, especially such an ambiguous one. Thus, we are fairly certain that the test is still whether the duration of the stop was “measurably” extended.

Finally, the Court suggested that officer-safety precautions (such as waiting for backup or handcuffing a suspect) would become illegal if they were “negligibly burdensome.”¹² What does “negligibly burdensome” mean? According to *Merriam-Webster*, the adverb “negligibly” means “so tiny or unimportant or otherwise of so little consequence as to require or deserve little or no attention.”¹³ Accordingly, the Court’s language could easily be interpreted to mean that officer safety precautions—no matter how necessary—will render a detention unlawful unless they were “negligible” or “unimportant?” This is not—and never has been—the test for determining whether officer-safety precautions were reasonable in the scope. Not a thoughtful decision.

People v. Elizalde

(2015) __ Cal.4th __ [2015 WL 3893445]

Issue

When an arrestee is booked into jail, must deputies obtain a *Miranda* waiver before asking about his gang affiliation?

Facts

The Sureños street gang in Contra Costa County was in trouble. Its leader had fled the county to avoid arrest for murder, and its membership was starting to “deteriorate.” The solution, according to the gang’s new leader, was for its members to go out and start murdering members of their rival gang, the Norteños. So, over a three-month period, they murdered three people who may or may not have been Norteños. In the course of the investigation, detectives determined that Jose Mota was involved in two of the murders, so they arrested him for conspiracy to commit murder.

During booking at the county jail, a sheriff’s deputy asked Mota certain “standard booking questions,” including whether he was a member of a street gang. The purpose of this question was to make sure that Mota, if he was a member, would not be housed with a member of a rival gang who would probably try to kill him; e.g., a Norteño. Mota replied that he was an active member of the Sureños and, at trial, prosecutors used this admission to help prove the gang-conspiracy charge. Mota was convicted and sentenced to life in prison.

The Court of Appeal ruled, however, that Mota’s answer to the question should have been suppressed because the deputy had not obtained a *Miranda* waiver beforehand. The prosecution appealed to the California Supreme Court.

Discussion

Officers must, of course, obtain a *Miranda* waiver before “interrogating” a suspect “in custody.”¹⁴ Also, a question constitutes “interrogation” if it was reasonably likely to elicit an incriminating response.¹⁵ Thus, at first glance it would appear that the deputy had violated *Miranda* because Mota was under arrest for gang-related crimes and therefore his admission to gang membership would be incriminating.

There are, however, several exceptions to this requirement, and two of them were pertinent here. The first is the so-called “routine booking question” exception which applies when a deputy is merely seeking the type of basic biographical information that is necessary for purposes of booking. Such questions typically include name, address, date of birth, and occupation.¹⁶

¹¹ “Measurably.” *Merriam Webster’s Unabridged Dictionary*. Web. 22 July 2015. <http://unabridged.merriam-webster.com/>

¹² **NOTE:** Court: “[A]n officer may need to take certain negligibly burdensome precautions in order to complete his mission safely.”

¹³ “Negligibly.” *Merriam Webster’s Unabridged Dictionary*. Web. 22 July 2015. <http://unabridged.merriam-webster.com/>. Also see *The New Shorter Oxford English Dictionary* (4th ed. 1993) p. 1900 [“small or insignificant”].

¹⁴ See *Illinois v. Perkins* (1990) 496 U.S. 292, 297; *People v. Mayfield* (1997) 14 Cal.4th 668, 732.

¹⁵ *Rhode Island v. Innis* (1980) 446 U.S. 291, 301.

Although it is arguable that gang affiliation constitutes basic biographical information (in many cases it constitutes the arrestee's "occupation"), the court in *Elizalde* ruled that such questions do not qualify as "routine."

The second exception is known as the "public safety exception, and it applies if the answer to the question was reasonably necessary to avert a significant threat. As the court observed in 2005, "[C]ompliance with *Miranda* is excused where the purpose of police questioning is to protect life or avoid serious injury and the statement is otherwise voluntary."¹⁷ Moreover, this exception applies even when the person in danger was a suspect, a prisoner, or member of the jail staff.¹⁸

Accordingly, the prosecution argued that the question about Mota's gang affiliation fell within the public safety exception because Mota's life would have been in jeopardy if he was housed in a unit with a member of a rival gang, such as a Norteño. It also pointed out that the question was not asked as part of a criminal investigation" and it was asked "under circumstances lacking the inherently coercive features of custodial interrogation." The court disagreed, ruling that the question about Mota's gang affiliation did not qualify as a "public safety" question because the threat to Mota was not "imminent."

The court did acknowledge that deputies might need to know about an arrestee's gang affiliation in order to minimize "the potential for violence . . . particularly among rival gangs, which spawn a climate of tension, violence and coercion." Accordingly, it said that, even though such a question does not fall within the public safety exception, deputies may continue to ask it. But because asking the question constitutes a violation of *Miranda*, the answer will be suppressed unless they had obtained a *Miranda* waiver or unless the threat was more "imminent" than the threat to Mota.¹⁹

Comment

Like the Court of Appeal, the California Supreme Court devoted most of its opinion to the issue of whether the deputy's question fell within *Miranda*'s routine booking exception. But we think the more pertinent issue was whether the question was warranted under the public safety exception. (That's why we devoted so much time to this exception in the "Discussion" section.) In fact, Mota's safety was the basis of the trial court's ruling that his response was admissible. As the judge observed:

If the jail were to house rival gang members together at random it would pose a grave risk to both the inmates and staff. So I find that it is a fundamental and essential obligation of the sheriff's department to determine whether it is dangerous to house any inmate with any other inmate or any gang member with any rival gang member.

As noted, the California Supreme Court ruled the threat to Mota was not sufficiently "imminent" to qualify as a safety question. For what it's worth, we disagree.

In the seminal public safety case, *New York v. Quarles*²⁰ the threat seemed *less* imminent than the threat in *Elizalde*. In *Quarles*, NYPD officers had just arrested a rape suspect in a supermarket, and they reasonably believed he had hidden a gun somewhere in the store. So, without obtaining a *Miranda* waiver, an officer asked him where he had put the gun, and Quarles told him. The U.S. Supreme Court ruled that, although the question constituted custodial interrogation which triggered *Miranda*, the answer was admissible because the officer "needed an answer to his question not simply to make his case against Quarles but to insure that further danger to the public did not result from the concealment of the gun in a public area."

¹⁶ See *Pennsylvania v. Muniz* (1990) 496 U.S. 582, 601. Also see *New York v. Quarles* (1984) 467 U.S. 649, 656 ["[W]e do not believe that the doctrinal underpinnings of *Miranda* require that it be applied in all its rigor to a situation in which police officers asked questions reasonably prompted by a concern for the public safety."].

¹⁷ *People v. Panah* (2005) 35 Cal.4th 395, 471.

¹⁸ See *People v. Williams* (2013) 56 Cal.4th 165, 188 ["The officers were appropriately responding to defendant's own security concern, and would not reasonably have expected him to produce a confession. . . . the questioning was part of a routine, noninvestigative prison process, well within the scope of the booking exception."]; *People v. Stevenson* (1996) 51 Cal.App.4th 1234, 1239 ["when it is the arrestee's life which is in jeopardy, the police are equally justified in asking questions directed toward providing lifesaving medical treatment to the arrestee"]; *People v. Cressy* (1996) 47 Cal.App.4th 981, 989 ["[The officer's inquiry] must be narrowly tailored to prevent potential harm."]; *U.S. v. Lackey* (10th Cir. 2003) 334 F.3d 1224, 1227-28 ["It is irrelevant that the principal danger in this case was the risk of injury to the officers or Defendant himself, rather than ordinary members of the 'public'"].

¹⁹ **NOTE:** Although the court ruled that Mota's statement was obtained in violation of *Miranda*, it affirmed his conviction because, in light of the overwhelming evidence of his gang affiliation, the error was harmless.

²⁰ (1984) 467 U.S. 649.

The court in *Elizalde* sought to distinguish *Quarles* by saying that “the legitimate need to ascertain gang affiliation is not akin to the imminent danger posed by a unsecured weapon.” And yet, when Quarles was asked the question (Where’s the gun?) he had already been arrested, handcuffed and pat searched; and there were very few, if any, shoppers in the store because it was 12:30 A.M.²¹ Furthermore, there were four officers on the scene and they had no reason to believe that Quarles had an accomplice.²² Finally, the officers knew approximately where Quarles had hidden the gun because one of them was either watching or chasing him from the time he entered the store. Despite this, the Court ruled the danger was sufficiently imminent.

In contrast, the deputy in *Elizalde* needed to know if Mota was a member of a gang because he knew that Mota might be killed or severely injured if he was placed in a unit or pod occupied by an inmate who belonged to a rival gang. And this threat would have existed the moment Mota was housed with the other inmates—maybe minutes or even seconds later!

As noted, the court said that booking deputies may continue to ask arrestees about their gang affiliation, it’s just that their answers to these questions will be suppressed. Interestingly, the dissent in *Quarles* made this same suggestion: Why not just suppress Quarles’ answer to the question about the gun, but then praise the officer for doing such a good job of averting the serious threat that the gun presented? But the majority rejected this approach, saying that the judges should not ordinarily suppress evidence that an officer had obtained in an objectively reasonable manner. Said the Court, “But absent actual coercion by the officer, there is no constitutional imperative requiring the exclusion of the evidence.”

In re Elias V.

(2015) 237 Cal.App.4th 568

Issue

While questioning a teenager about a sex crime, did a detective use coercive interrogation tactics?

Facts

A 13-year old boy named Elias was playing a video game with his friend Hector in Hector’s bedroom in Santa Rosa. At some point, Hector’s 3-year old sister, identified as A.T., entered the room and sat near Elias on the bed. Hector could not see Elias or A.T. because he was playing the game from the floor. A short time later, the mother of Hector and A.T., identified here as Aurora, walked into the room and saw that A.T.’s pants were pulled down. When she asked “what happened,” Elias said that A.T. had asked him to help take her pants off because she needed to go to the bathroom. That was the end of the incident. But over the next few days, A.T. repeatedly told Aurora that Elias had “touched” her, which Aurora was told or interpreted as meaning that Elias had touched A.T.’s vagina. At first, Aurora did not report the incident because she “did not know what to do.” But when a friend told her to report it, she did.

A Sonoma County sheriff’s detective went to Elias’s school and met with him in a “small office used by a school counselor.” He was *Mirandized* and responded to questioning. At first, Elias “adamantly” denied the allegation but later admitted it, saying his motive was “curiosity,” not sexual gratification. In juvenile court, Elias argued that his statement should have been suppressed because it was involuntary. The juvenile court disagreed, sustained the petition, and placed Elias on probation. He appealed.

Discussion

In addition to satisfying the *Miranda* requirements, officers who are questioning a suspect must not say or do anything that would have generated such pressure that the suspect felt coerced. “[T]he ultimate test,” said the Supreme Court, is whether the confession was “the product of an essentially free and unconstrained choice by its maker.”²³ An interview is not, however, coercive merely because it was stressful. As the Eighth Circuit observed, “[A]n interrogation of a suspect will always involve some pressure because its purpose is to elicit a confession.”²⁴

²¹ See *People v. Gilliard* (1987) 189 Cal.App.3d 285, 291 [“there was no imminent urgency; the supermarket was almost deserted”].

²² NOTE: In his dissenting opinion, Justice Marshall said, “Contrary to the majority’s speculations, Quarles was not believed to have, nor did he in fact have, an accomplice to come to his rescue.”

²³ *Culombe v. Connecticut* (1961) 367 U.S. 568, 601-2. Also see *People v. Cunningham* (2015) 61 Cal.4th 609.

²⁴ *U.S. v. Dehghani* (8th Cir. 2008) 550 F.3d 716, 720. Also see *Oregon v. Elstad* (1985) 470 U.S. 298, 305 [officers may apply “moral and psychological pressures to confess”]; *People v. Andersen* (1980) 101 Cal.App.3d 563, 575.

Because the court did not append a transcript of the interview to its opinion, we do not know everything that was said. We know that it was short (it lasted only about 20 minutes), that it was recorded and that the recording was reviewed by Juvenile Court Judge Raima Ballinger. We also know that, after listening to the recording, the judge ruled the interview was not coercive, that the detective's manner was "gentle" and "calm," her questions were "short" and not "convoluted," and her "language usage for someone of Elias's age was appropriate." The judge concluded, "Just the totality of where the interview took place was, in the court's view, not intimidating. It was very short. It was only a 20-minute interview. And it complied with the current case law. I don't have a problem with the way the interview was conducted."

But in one of the most slanted and undignified opinions we have seen, a panel of the Court of Appeal (First District, Division 2) said the ruling by the juvenile court was baseless because, in its view, the detective had used interviewing techniques that were coercive, harsh, and contemptible. It also alleged that this was not an isolated incident—that law enforcement officers throughout the country are taught and encouraged to do the same thing. It also attacked the character of the detective and Aurora.

Attacking the detective

The thrust of the panel's opinion was that the detective's questioning of Elias was "aggressive," "persistent," and "relentless." It sought to prove this by condensing all of the detective's probing questions into one paragraph, then stringing them together. This left the reader with the impression that the detective had bombarded Elias with a series of hostile and accusatory questions. That didn't happen, but here is an example of how the panel presented it:

DETECTIVE: [W]hen [A.T.'s] mom walked in, how come [A.T.'s] pants were down?"; how come you ended up on the bed with her?; But her mom walked in and you were on the bed with her; how many fingers did you put inside her?; you touched the outside of her but you did not put fingers inside her? . . . So the question again is how many fingers did you put inside of her?

The panel also disregarded Judge Ballinger's observation that Elias "was able to indicate in the flow of conversation if he needed clarification of anything, and he did that a couple of times, and there was give and take in the conversation. In other words, sometimes he asked questions too, and that's what really made me feel that this interview was appropriate."

In addition, the panel suggested that the detective was unprofessional or incompetent because she had focused her investigation on Elias too quickly. Said the court, "Neither [the detective], nor, so far as she knew, any other officer, asked residents of the apartment complex about Elias's behavior or whether other children had been disturbed by Elias or anyone else." But it would have been foolish for the deputies to begin their investigation by questioning the other tenants since no one even suggested that Elias had molested any other children in the building or that any neighbors had witnessed the incident with A.T.

So why did the panel stoop to such a tawdry and obviously senseless line of attack? We cannot know all the reasons, but it apparently wanted to portray the sheriff's detective and other investigators as people whose goal was to railroad this youngster. It also conformed to the panel's main storyline (as discussed below) that such railroading is not an uncommon practice in the United States.

Next, the panel accused the detective of being "deceptive" and "overbearing." To help justify this characterization, it said that many academics who study the subject believe that "the purpose of interrogation is to induce confessions" and that was probably why the detective repeatedly referred to Elias's guilt "as an established fact." (The panel relies heavily on the opinions of academics, as discussed below.) Continuing on, the panel castigated the detective for providing Elias with two plausible motives for his behavior: he touched A.T.'s vagina because it was "exciting" or because he was "curious." The panel said this was a trick question because both answers constituted an admission. But even if it was a "trick question" there was nothing coercive about it.²⁵

It was especially revealing that, in its discussion of this issue, the panel insinuated that it was aware of

²⁵ See *Illinois v. Perkins* (1990) 496 U.S. 292, 297 ["mere strategic deception" is not coercive]; *People v. McCurdy* (2014) 59 Cal.4th 1063, 1088 ["The use of deceptive statements during an investigation does not invalidate a confession as involuntary unless the deception is the type likely to procure an untrue statement."]; *People v. Hensley* (2014) 59 Cal.4th 788, 813.

Elias's thought processes just before he answered the question about his motivation. Said the panel, Elias was "offended" by the suggestion that he was "excited" by the touching, and that is why he agreed to "the more acceptable alternative" that he was merely "curious." How did the panel become aware of Elias's thought processes? Nobody knows because there is nothing in the opinion to suggest that he discussed the subject with the detective, the juvenile court judge, or anyone else.

Attacking Aurora

In addition to attacking the detective, the court portrayed Aurora as a notorious troublemaker who had lied about the "touching" incident because of her hostility toward Elias's family. For example, the court thought it was significant that the landlord of her apartment building "frequently spoke with Aurora and her husband Carlos about complaints from tenants on both floors of the building and from neighbors that people living in or visiting Aurora's apartment (including Aurora's husband and children, her brothers, and others) were playing loud music, playing volleyball, and 'drinking alcohol a lot' in the backyard" and "peeing in the yard," and that the landlord had learned from Elias's father that Aurora's brother "wanted to take a swing" at him, that Elias's father "was scared and you could hear it in his voice," and that the landlord eventually evicted Aurora's family because she was "sick and tired of the problems."

Why was this sordid melodrama relevant to whether the detective utilized coercive interrogation techniques in the school counselor's office? The panel didn't say.

Attacking law enforcement

Although the court was contemptuous of the detective and Aurora, its most virulent attack was leveled at the nation's law enforcement agencies who, according to the panel, are routinely instructing officers to utilize nefarious interviewing tactics to obtain confessions from suspects. For example it explained that "all contemporary police manuals" instruct officers to "dis-

play an air of confidence in the suspect's guilt and from outward appearance to maintain only an interest in confirming certain details." It also quoted a psychologist as saying that officers are taught to "isolate the suspect in a small private room" in order to increase his "anxiety and incentive to escape," and then confront him "with accusations of guilt, assertions that may be bolstered by evidence, real or manufactured."

As for the anxiety-producing "small private room" in which Elias was supposedly questioned, we can only point out that it was his school counselor's office which most students would undoubtedly view as a "safe" and "friendly" place.

As for displaying an air of confidence in the suspect's guilt, this isn't surprising because detectives seldom begin their interviews by informing suspects that they have absolutely no evidence of their guilt and that they desperately need a confession because, otherwise, the suspect will walk out the door. Instead, most courts understand that "almost all interrogation involves some degree of pressure,"²⁶ which is why they have consistently rejected arguments that coercion necessarily resulted from persistent questioning, or because the suspect was subjected to "intellectual persuasion," "searching questions," or "confrontation with contradictory facts."²⁷ As the Fourth Circuit observed in *U.S. v. Holmes*, "Numerous cases reiterate that statements by law enforcement officers that are merely 'uncomfortable' or create a 'predicament' for a defendant are not ipso facto coercive."²⁸

Of course, in utilizing such tactics, officers must take into account the manner in which they are employed and the suspect's age and mental state.²⁹ And here, the juvenile court judge ruled that the detective who interviewed Elias had done just that. Yet the panel thought the detective had taken unfair advantage of his age because "[r]ecent research has shown that more than one-third (35 percent) of proven false confessions were obtained from suspects under the age of 18." (These statistics have been frequently questioned on grounds that they were based on dubious methodol-

²⁶ (1980) 101 Cal.App.3d 563, 575.

²⁷ See *Haynes v. Washington* (1963) 373 U.S. 503, 515; *People v. Carrington* (2009) 47 Cal.4th 145, 175; *People v. Ditson* (1962) 57 Cal.2d 415, 433; *People v. Boyde* (1988) 46 Cal.3d 212, 242; *People v. Anderson* (1980) 101 Cal.App.3d 563, 576; *In re Shawn D.* (1993) 20 Cal.App.4th 200, 213; *In re Joe R.* (1980) 27 Cal.3d 496, 515 ["loud, aggressive accusations of lying"].

²⁸ (4th Cir. 2012) 670 F.3d 586, 592-93.

²⁹ See *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226; *In re Joseph H.* (2015) 237 Cal.App.4th 517; *People v. Johnson* (1969) 70 Cal.2d 469, 479 ["[minority] alone would not invalidate a confession ... but it is relevant"].

ogy; e.g., in some studies, if a criminal charge against a teenager was dismissed *for any reason* after he confessed, the confession was listed as “false” even if it was unquestionably true.)

Finally, the panel suggested that an epidemic of false confessions (especially by minors) was sweeping the country and that it was caused by widespread police misconduct. It attempted to accomplish this by citing over 25 articles written by psychologists, sociologists, and behavioral scientists. We mention this because, by skimming the titles of just a few, it may be possible to detect a certain predisposition:

- *Convicting the Innocent*
- *The Problem of False Confessions in the Post-DNA World*
- *The Social Psychology of False Confessions*
- *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*
- *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*
- *Contaminated Confessions Revisited*
- *Police Practices and Perceptions Regarding Juvenile Interrogation and Interrogative Suggestibility*
- *Suggestibility of The Child Witness: A Historical Review and Synthesis*
- *Questioning the Reliability of Children's Testimony*
- *Testimony and Interrogation of Minors: Assumptions About Maturity and Morality*
- *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas*
- *No Match for the Police: An analysis of Miranda's Problematic Application to Juvenile Defendants*
- *Police-Induced Confessions: Risk Factors and Recommendations*
- *Police Interrogation and False Confession*
- *Tales From the Juvenile Confession Front: A Guide to How Standard Police Interrogation Tactics Can Produce Coerced and False Confessions*

Rewriting the law

Perhaps the most egregious of the many defects in the panel's opinion was its suggestion that, even if a statement was given freely, it may be deemed involuntary unless there was some corroboration of the suspect's guilt, or at least some “internal indicia” of the statement's reliability. The U.S. Supreme Court would

disagree with this. As noted earlier, it said that “the ultimate test” is whether the confession was “the product of an essentially free and unconstrained choice by its maker.” Thus, a statement that was given freely is, by definition, voluntary—no additional indicia of reliability is required. Instead, if a defendant contends that his statement was unreliable even though it was voluntary, he can either ask the trial court to suppress it on grounds that its probative value is outweighed by its unreliability.³⁰ or let the jury decide whether the statement was unreliable. But there is absolutely no precedent that permits a court to suppress an uncoerced statement on grounds that its lack of reliability demonstrated that it was involuntary.

To be clear, we do not contend that false confessions don't happen. On the contrary, it is a subject (like false identifications) that has become an integral part of police training. Nor do we think the court's dismissal of the charge against Elias resulted in a miscarriage of justice. We do believe, however, it is harmful to the administration of justice when an appellate court publishes an opinion that fails to demonstrate objectivity, restraint, and professionalism.

Update: For reasons that are incomprehensible, the California Attorney General's Office decided not to seek depublication of this case.

U.S. v. Paetsch

(10th Cir. 2015) 782 F.3d 1162

Issues

(1) Did officers have grounds to barricade 20 cars on a roadway because one of them was probably occupied by a fleeing bank robber? (2) If so, was the subsequent detention of the suspected robber unduly prolonged?

Facts

On a Saturday afternoon, a man brandishing a handgun and wearing a bee-keeper's mask robbed a bank in Aurora, Colorado and got away with about \$23,000. Almost immediately a GPS tracker hidden in the loot began sending location signals to the police department. Because the tracker was moving at driving speeds, officers knew that the robber had gotten into a car and that the car had just stopped at a particular intersection. Just then, an officer arrived at that intersection and saw that 20 vehicles that were headed in

³⁰ See Ev. Code Section 352.

the same direction as the robber were stopped at a traffic light. So he blocked the intersection and signaled the drivers of the cars to remain stopped. As other officers started arriving, an officer using a public address system ordered the 29 occupants of the cars to “raise their hands” and “hold them outside the windows.” Some of them were then handcuffed and some had firearms pointed at them.

At this point, as the court observed, the officers were facing a “difficult situation.” First, they had no description of the robber’s car or the robber himself, other than he was probably a white male in his 20s or 30s. Second, the GPS tracker was not able to pinpoint which of the 20 cars he was in. So the officer in charge requested that an officer drive to the FBI office in Denver (about 25 miles away) and retrieve a device that could home in on the GPS signals.

About 30 minutes later while still waiting for the device, officers noticed that a man in one of the cars was “behaving suspiciously” by “shifting in his seat, repeatedly looking around, and failing to keep his hands outside his car as ordered.” So four officers “with weapons drawn” approached the car, ordered the driver to step outside, and then handcuffed him. The man was Paetsch. An officer then looked into Paetsch’s car and saw an empty “money band” wrapper, apparently the type used by banks. Paetsch was isolated from the others, but they were not allowed to leave.

The officer with the homing device arrived about an hour later and officers determined that the GPS device was inside Paetsch’s car. He was arrested and, during a probable-cause search of his car, officers found two handguns, ammunition, a mask, a wig, gloves, two fake license plates, and a GPS tracker inside a stack of the bank’s money. When Paetsch’s motion to suppress the evidence was denied, he pled guilty.

Discussion

The central issues on appeal were whether the officers had sufficient grounds to detain Paetsch and, if so, whether the detention had been conducted in a reasonable manner before the officers developed probable cause to arrest him.

If the court had analyzed the legality of the road-block by the standards applicable to investigative detentions, it might have ruled it was illegal because there was only a one in 20 chance that the robber’s getaway car was one of the stopped cars. And, even by the loose standards for investigative detentions, that might not be enough.

It was, however, unnecessary for the court to decide this issue because it viewed the situation under the standards applicable to so-called “special needs detentions.” Unlike an investigative detention, a “special needs” detention is a temporary seizure of a person (or persons) that serves an overriding public interest. As the Supreme Court observed, “When faced with special law enforcement needs . . . the Court has found that certain general, or individual circumstances may render warrantless search or seizure reasonable.”³¹ Specifically, a detention based on special needs is permissible if the public interest in stopping the person outweighed the intrusiveness of the stop.

Plainly, the public interest in apprehending a fleeing armed robber is high. In addition, because he was inside a vehicle, there was a possibility of a high-speed chase or a shootout. Accordingly, the court ruled that “the gravity of the public concern in apprehending the armed bank robber and the likelihood of advancing the public interest justified the intrusion on individual liberty—at least until police developed individualized reasonable suspicion of Paetsch.”

The more difficult issue for the court was whether the detention was reasonable in its scope and intensity. Plainly, the detention was highly intrusive because the officers detained 29 people and all of them (except Paetsch) were guilty of nothing more than driving in their cars on a Saturday afternoon. Furthermore, many of them were detained in handcuffs or at gunpoint for over two hours. Maybe this was necessary, but it seems excessive. Fortunately, the court did not have to decide that issue because the only question before it was whether the detention of Paetsch was reasonable. And it ruled it was because the officers had developed grounds to detain him within 30 minutes after he was stopped which, under the unusual circum-

³¹ *Illinois v. McArthur* (2001) 531 U.S. 326, 330. Also see *Ashcroft v. al-Kidd* (2011) __ US __ [131 S.Ct. 2074, 2081] [“A judicial warrant and probable cause are not needed where the search or seizure is justified by ‘special needs, beyond the normal need for law enforcement’”]; *Illinois v. Lidster* (2004) 540 US 419, 424 [“special law enforcement concerns will sometimes justify [detentions] without individualized suspicion”]; *Indianapolis v. Edmond* (2000) 531 US 32, 37 [“[We have] upheld certain regimes of suspicionless searches where the program was designed to serve ‘special needs,’ beyond the normal need for law enforcement.”]

stances of this case, was not excessive. For these reasons, the court ruled that the detention was lawful and that the evidence discovered inside Paetsch's car was admissible.

U.S. v. Lizarraga-Tirado

(9th Cir. 2015) __ F.3d __ [2015 WL 3772772]

Issue

Does a Google Earth satellite image constitute inadmissible hearsay? If not, does it become hearsay if it includes computer-generated markers?

Facts

Late one night, Customs and Border Protection (CBP) agents arrested Lizarraga-Tirado in the Arizona desert near the border with Mexico. He was charged with illegal reentry and, at trial, contended that he was actually in Mexico when he was arrested, and that the agents must have accidentally crossed into Mexico before arresting him. The agents testified they were very familiar with the area and were certain they had arrested him north of the border.

In addition, one of the agents testified that, at the scene of the arrest, she used a handheld Global Positioning System (GPS) device to determine their precise longitude and latitude. Later, she inputted these coordinates into the Google Earth internet application which provided her with a high-resolution image of the location. In addition, Google Earth had automatically superimposed the following markers on the image: a "digital tack" that was "pinned" to the spot at which the defendant was arrested, a nearby highway, a small town and, most importantly, an outline of the U.S.-Mexico border which showed that he was, in fact, arrested in the U.S.

Lizarraga-Tirado urged the trial court to suppress the image, claiming it was inadmissible hearsay. But the court disagreed and, based on the image and the agents' testimony, Lizarraga-Tirado was found guilty.

Discussion

On appeal to the Ninth Circuit, the issue was whether the image with markers constituted inadmissible hearsay. As the court explained, hearsay is defined as an out-of-court statement by a person—whether verbal, nonverbal, or written—that purports to establish, or helps establish, the truth of a disputed matter before the court. Consequently, the defendant argued that the

marked image constituted hearsay because it was essentially an out-of-court statement by Google Earth saying that he had been arrested in the United States.

The image without markers: At the outset, the court ruled that the Google Earth image *without* the markers did not constitute hearsay because it was the functional equivalent of a photograph. As the court explained, a photo is not hearsay because it makes no assertion of anything—it merely depicts "a scene as it existed at a particular time." The same was true of the Google Earth image without markers because, said the court, it only depicted the area in which the defendant was arrested.

The image with markers: The more difficult question was whether adding the markers to the image converted it into hearsay because the markers purported to show the spot at which the defendant was arrested, and that it was within the United States.

The court began by explaining that there are two ways in which a marker can be superimposed on a Google Earth image. The first is manually. Thus, the image would have constituted hearsay if the CBP agent had inserted the words "Here is where I arrested the suspect." This is because these words would have constituted an out-of-court statement *by the agent* as to the truth of a disputed matter.

Markers can also be inserted automatically by Google. This happens, for example, when Google inserts the name of a street on a map. The question, then, was whether the insertion of such markers converted an image into hearsay. The answer was no because these markers are inserted by an algorithm—not a person. As the court pointed out, although "a person types in the GPS coordinates," no person decides what or where the information will be shown on the image—it's all done by software. In other words, said the court, there is no "human intervention" before the information is added and therefore the resulting image does not constitute hearsay.

Although the prosecution did not present any evidence of who or how the markers were added, the Ninth Circuit was able to figure it was done by Google. It accomplished this by inserting the GPS coordinates into the Google Earth app and comparing the resulting image with the image obtained by the CBP agent. They were identical. Consequently, the court ruled that the image with markers was not hearsay and it affirmed Lizarraga-Tirado's conviction.

POV

The Changing Times

Sergeant Scott Lunger

Hayward police sergeant Scott Lunger was shot and killed during a traffic stop on July 22, 2015. He was 48-years old and had been a Hayward police officer for 15 years. On July 30, 2015, a funeral service was held inside Oracle Arena in Oakland. In addition to family and friends, thousands of law enforcement officers from throughout California were in attendance. Among the speakers was Hayward Police Chief Diane Urban who said that Scott Lunger "personified the warrior spirit in everything he did. He was an example of how we should live our lives every day." Another speaker was Scott's friend and fellow sergeant Brian Maloney who said, "I can't put into words his level of tenacity and passion for working the street." Sgt. Lunger leaves behind two daughters. The suspected killer is in custody.

ALAMEDA COUNTY DISTRICT ATTORNEY'S OFFICE

Lt. **Kristy Milani** has retired after 21 years of service with the office. Prior to joining the District Attorney's Office, Kristy spent seven years with the University of California, Berkeley, Police Department. We all wish Kristy a happy retirement!

Alameda County also welcomes two new Inspectors to the office. **Jason Riechers** joins the office after serving 15 years with the Fremont PD is assigned to Court Operations at the Wiley Manuel Courthouse. **Tom Cleary** joins the office after serving 32 years with the San Francisco PD where he held the rank of captain. Tom is assigned to the Felony Trial Teams at the Rene C. Davidson Courthouse. Former inspector **Hansen Pang** was appointed Chief Investigator for the Office of Criminal Investigation for the Department of Toxic Substances Control.

ALAMEDA COUNTY SHERIFF'S OFFICE

The following deputies have retired: **Michael Brooks** (18 years), **Jeffrey Briggs** (11 years), and **Marc Nelson** (7 years). The following retired deputies have passed away: **William Godfrey** (Division Commander), **Morris Hickerson** (Capt.), **James Lucas** (Lt.), **William**

Robert Gonzalez (Sgt.), **Larry Brown**, and **David Johnson**. Reserve Deputy **Jasmin Martinez** died as the result of a brain aneurysm she suffered while on duty in 2013. Since then, she had been in a coma.

ALAMEDA POLICE DEPARTMENT

Lt. **Robert Frankland** retired after 20 years of service. **Jerad Kissack** was promoted to acting sergeant. Former Contra Costa County sheriff's deputy **Brandon Hansen** has joined APD.

BART POLICE DEPARTMENT

Sgt. **Keith Smith** retired after 28 years of service (25 years with BART PD and 3 years with Emeryville PD). Community Service Officer **Harish Lal** retired after 19 years of service. Community Service Officer **Larry Reed** retired after 14 years with the BART PD. Lateral Appointment: **Kenneth Rosenbaum** (Contra Costa SO). New recruit officer: **David Han**. **Andre Charles** was appointed to acting detective. Sgt. **Joel Enriquez** was appointed Range Master Community Service Officer. **Aliyyah Shah** was appointed to Video Recovery Unit. Police Administrative Specialist. **Cheryl Rinker** was appointed to Acting Police Administrative Analyst. **Frances Cheung** was promoted to Civilian Supervisor. Dispatcher Supervisor **Jason Devera** promoted to Civilian Supervisor Dispatcher. **Renee Livesey** promoted to Dispatcher Supervisor.

BERKELEY POLICE DEPARTMENT

Capt. **Erik Upson** resigned to accept the position of Chief of Police with the City of Benicia. Lt. **Dave Frankel** was promoted to captain. Sgt. **Dan Montgomery** was promoted to lieutenant. Officers **Mel Turner** and **Melanie Turner** were promoted to sergeant. Community Service Officer **Sandra Phillips** was promoted to Community Service Officer Supervisor. **Ross Kassebaum** retired after 21 years of service. **John Lenny** retired after ten years of service. Community Service Officer Supervisor **Henryanne Brown** retired after 41 years of service. Lateral appointment: **Kevin Peters**. New officers: **Heather Haney**, **Jonathan Loeliger**, **Daniel Breaux**, **Ashley Nahale**, and **Zack Nash**. New dispatchers: **Davina Kelly** and **Myriam Salem**. New police aide: **Manny Gonzalez**. Officer **Glenn Pon** resigned from his

position to accept a position with the San Francisco DA's Office. Parking Enforcement Manager **Noel Pinto** resigned from his position to accept a position as the Director of the Parking Division for the City of Santa Fe in New Mexico.

Former officer **Alan Fisch** passed away on April 25, 2014. Officer Fisch served with BPD from 1969-1973 followed by 27 years with the Las Vegas Metro Police Department. Former officer **Carol Berry** passed away on March 7, 2015. Officer Berry joined BPD in 1973, and she was the first female police officer to wear the uniform and work patrol in Berkeley.

CALIFORNIA HIGHWAY PATROL

DUBLIN OFFICE: **Rod Rocha** retired after 20 years of service. New officer: **Andrew House**.

EAST BAY REGIONAL PARKS POLICE DEPT.

Terrence "Joe" Cotcher was promoted to sergeant and assigned to the Personnel and Training Unit. **Patty Gershaneck** was promoted to Communications and Records Manager. **Jaime Price** was promoted to Dispatch Supervisor. New Officers: **Michael Truong** and **Alex Gehlert** (lateral from CHP Dublin). Sgt. **Giorgio Chevez** and **Erin O'Neill** rotated into Detectives for a four year assignment. Sgt. **Tracy Desiderio** and **David Bermudez** rotated from Detectives to Patrol. Officer/Pilot **Michael Hall** resigned with two years of service. **Patrick Brookens** and **James Michalosky** joined the SRU Unit. **Josh Harrington** was selected for the ACNTF assignment and **Gary Silva** will rotate from ACNTF back to patrol.

FREMONT POLICE DEPARTMENT

Lt. **Sean Washington** was promoted to captain. Sgts. **Mark Dang** and **Matt Snelson** were promoted to lieutenant. Officers **Heather Huiskens**, **Armando Magana**, and **Newton Dodson** were promoted to sergeant. The following officers have retired: **Brian Ancona** (31 years), **Gregory Pipp** (27 years), **Jill Martinez** (28 years), **Mark Peters** (27 years). Chief Forensics Specialist **Kourosh Nikoui** retired after 28 years of service. Lateral appointment: **Richard Rodarte** (Modesto PD). New officers: **Trustin Stiers**, **Jeffrey Carter**, **Jacob Crow**, **Sean Cavaz**, **Christopher Dubowy**, **Andrew Dennis**, **Houtan Pezeshkan**, and **Matthew Kerner**. **Robyn Sinick** has been appointed Chief Forensics Specialist.

NEWARK POLICE DEPARTMENT

Jennifer Bloom was selected as Officer of the Year. **Aaron Slater** was presented with a 25th Assembly District Community Heroes Award.

OAKLAND HOUSING AUTHORITY POLICE DEPT.

Todd Farris retired after 26 years of service. **Michael Morris** resigned and accepted a lateral position with Livermore PD. Lateral appointment: **Kristi Baughman** (Elk Grove PD). Newly appointed officer: **Scott Ho**. Newly appointed reserve officer: **Marvin Aguilar**. Newly appointed police service aide: **Chanri Kim**.

SAN LEANDRO POLICE DEPARTMENT

Lts. **Luis Torres** and **Jeff Tudor** were promoted to captain. Sgts. **Joseph Molettieri**, **Isaac Benabou**, and **Ted Henderson** were promoted to lieutenant. **Ryan Gill** and **Daniel Sellers** were promoted to sergeant. **John Brum** was promoted to acting sergeant. The following officers retired: **Robert Cronin** (18 years), **Michael Fischer** (28 years), **James Moss** (27 years), and **Mike Sobek** (24 years). Capt. **Ed Tracey** died at the age of 45. Ed was formerly a captain with Oakland PD. Retired captain **Chuck Kane** died. Chuck joined SLPD in 1952 and retired in 1980. New police business manager: **Scott Koll**. On Saturday, July 25, 2015 SLPD hosted a Day of Remembrance for Officer **Dan Niemi**. Dan was killed in the line of duty on July 25, 2005. The City of San Leandro has memorialized his service by re-naming a section of Hays Street to "Dan Niemi Way."

UNION CITY POLICE DEPARTMENT

Fred Camacho was promoted to sergeant. Sgt. **Raul Galindo** retired after 28 years of combined service. Lateral appointments: Lt. **Jeff Snell** (Hayward PD) and **Andrew Gannam** (Redwood City PD). Transfers: Lt. **Travis Souza** from Patrol to Professional Standards. **Josh Clubb** from Investigations to the Southern Alameda County Major Crimes Task Force (SACMCTF). **Andrew Holt** returns from SACMCTF to Investigations. **Josh Vasicek** from Patrol to Traffic.

UNIVERSITY OF CALIFORNIA, BERKELEY POLICE DEPARTMENT

Jack Kelly was appointed to detective. Retired officer **John Ziehe, Jr.** passed away on Saturday, June 20, 2015. John joined UCPD in 1957 and retired in 1989 after 32 years of service.

POV

War Stories

Lots of guts, low on brain cells

After working out at the gym one Saturday evening, a Union City burglar felt so invigorated he decided to break into a house. He quickly found an unlighted one, so he broke in and took lots of stuff. He returned home in good spirits, just in time to watch his favorite TV show, “Cops.” But then he remembered that he’d left his gym bag inside the house, so he raced back to retrieve it. Unfortunately, as he arrived, he saw that the lights were on and there was a car in the driveway. The owner had returned!

Meanwhile, having discovered the burglary, the home owner called Union City PD. Minutes later, the doorbell chimed and the man at the door was the burglar who said to the homeowner, “Hey, man, I was here earlier and forgot my gym bag. I think it’s in the hallway. Can you get it for me?” The homeowner slammed the door and updated 911 of the situation. Although the burglar had fled, officers quickly found him because his gym bag contained, among other things, his gym membership card (with photograph) and home address.

No sale on stolen earrings

A loss prevent agent at the Macy’s store in Pleasanton detained a woman who had shoplifted several pairs of earrings. As he pulled the earrings from her handbag, she said, “They’re not mine. I’ve never seen them before.” When the agent told her that the earrings cost \$200, she responded, “I ain’t payin’ \$200 for them things. They were on sale—half off. I only gotta pay ya \$100.” “That’s right,” said the agent, “but the only people who get the reduced price are customers who actually buy things.” “Well,” she said, “that doesn’t seem fair.”

Another unlikely story

While conducting a search of a parolee’s car, an Alameda County sheriff’s deputy found an expandable police baton—commonly known as an ASP—in the back seat. ASPs are illegal to possess unless you’re a cop, so the deputy arrested him. Of course, the man denied that it belonged to him, and repeated the old familiar line “That’s not mine. I’ve never seen it

before.” (See “No sale on stolen earrings,” above.) A few hours later, the deputy was going off-duty and was removing his gunbelt when he noticed that a piece of his equipment was missing. It was his ASP! He’d dropped it in the car! The parolee was immediately released, and the deputy apologized.

A painful sore throat

One night in Oakland, two men on an AC Transit bus got into an argument that ended when one of them shot the other. The victim was taken to Highland Hospital in critical condition. Although the shooting was recorded on the bus’s surveillance camera, investigators were unable to identify the shooter. Two weeks later outside the Emergency Department, the victim was being loaded into an ambulance (he was being transferred to a long-term care facility) when he looked around and saw the shooter walking into the ER. He immediately notified paramedics, who notified OPD, who arrested the shooter a few minutes later in the ER. Why did he come to the ER? His throat was sore.

It’s true: An attorney who represents himself has a fool for a client

An attorney and ex-judge in Rhode Island was the defendant in a civil lawsuit and was representing himself at trial. While being cross-examined by the plaintiff’s attorney, he decided to have some fun:

Q: Where do you live?

A: In a house.

Q: Can you tell me the address of your house?

A: No. I don’t have a house.

Q: Well, you just said you did.

A: I did not. I said I live in a house. It didn’t say it was *my* house.

Q: What’s the address of the house you live in?

A: I doesn’t have an address. It has a P.O. box.

It went on like this for a while and it eventually resulted in an ethics complaint against the attorney. The case went to the state supreme court which suspended him for one year for being a jerk. (That would never happen in California.) He later told a reporter, “They took it out of context.”

A tale of two cities

Oakland, California (From the police radio)

Officer: One of our tires is nearly flat. Our siren chirps when we make a left turn. Our brakes are grabbing. And there's a lot of heavy black smoke coming from our exhaust. We're heading to the garage.

Dispatcher: Unit on frequency one. I couldn't understand a word you said. I think you've got a problem with your radio.

P.S. The Oakland story was several years old. OPD's fleet has been upgraded.

Dubai, United Arab Emirates

Meanwhile in Dubai, that city's patrol cars consist mostly of new or almost new Bentleys, Ferraris, some \$450,000 Lamborghinis, and a couple of \$1.4 million Aston Martins. Of course, new officers must drive cheaper cars, such as Corvettes. When asked if the department ever used Crown Vics, an officer replied, "Never heard of it." While proudly standing in front of his Lamborghini (shown below), a sergeant explained, "Most of our cars max out at well over 320 km/h [200 m.p.h.]. And when we pull up behind somebody and signal them to pull over, they do it. Even if we take them to jail, they usually enjoy the ride."



More police car news

In order to induce police departments to buy Volvo patrol cars, the company loaned of its new patrol vehicles to the Canberra Police Department in Australia. It was a beauty: a turbo-charged V70R, capable of 170 m.p.h. A few days later, a lucky officer got an opportunity to let it run while pursuing a drag racer. The car performed exceptionally well, and the officer quickly caught up with the dragster. Except that, for some unknown reason, he suddenly crashed into a wall, totaling the Volvo. The officer was OK (the front and side air bags deployed), but the manager of Volvo's police division announced from Sweden that he is now "re-evaluating" the decision to let police officers test-drive his police cars.

Political correctness gone amok

Somebody in the U.S. Department of Justice reportedly sent out a memo to all federal law enforcement agents saying that, from now on, they should stop using the terms "confidential informant," "stooly," and "snitch" in their courtroom testimony and in search warrant affidavits. Instead, they were instructed to call them "Confidential Human Sources." The DOJ felt the change was necessary to "humanize" its snitches.

A fickle bride

Police in India sped to a large 415 (or whatever it's called in India) involving several guests at a wedding. The fighting started when the groom, Jugal, was about to put the wedding ring on the finger of his bride, Indira. Suddenly, Jugal had a seizure and fell to the ground. This upset Indira because the groom neglected to inform her that he had health problems, and she didn't want to marry a potential invalid. So, as Jugal regained consciousness, she announced that she had decided to marry Gopaal, who was one of the guests. This was news Gopall, but he accepted the offer anyway. And this triggered a wild brawl between the families of the bride and the initial groom.

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