POINT of VIEW

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Contents

ARTICLES

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Entrapment

I ate the apple because the serpent beguiled me.
Eve [1]

While most modern-day serpents have curtailed their beguilement activities, there is another form of enticement that continues to cause problems in the field of law enforcement. It is called entrapment and it typically becomes an issue when an undercover officer or police agent poses as a criminal associate of a suspect and then promotes, incites, or otherwise induces him to commit the crime with which he was later charged.[2] Entrapment is a complete defense to a charge, meaning that if the jurors at the defendant's trial decide that it happened, they will acquit and the defendant will walk.

Why is the penalty so severe? One reason is that entrapment is considered a poor substitute for "skillful and scientific investigation."[4] Another reason is that "[t]he function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime."[5]

In this article, we will explain what constitutes entrapment, how prosecutors and juries determine whether officers entrapped a defendant, and what types of inducements are likely to result in entrapment. We will also discuss the situations in which entrapment may occur based solely on the words or actions of an informant or anyone else who is not an officer.

What is Entrapment?

A defendant in California will be deemed "entrapped" if two things happen: (1) an undercover officer or police agent induced him to commit the crime with which he had been charged, and (2) the inducement was such that a "normally law-abiding person" would have given it consideration and would have agreed go along if it was sufficiently enticing.[6] In other words, the test in California is whether the words and actions of an undercover officer or police agent would have overcome the natural tendency of most people to reject the overture. As the California Supreme Court explained:

> [T]he rule is clear that ruses, stings, and decoys are permissible stratagems in the enforcement of criminal law, and they become invalid only when badgering or importuning takes place to an extent and degree that is likely to induce an otherwise law-abiding person to commit a crime.[7]

To understand the significance of the "normally law-abiding person" test, it may be helpful to think of people as falling into one of three categories: (1) those who can never be persuaded to commit a crime; (2) those who can be easily persuaded; and (3) those who, despite their usual inclination to avoid committing crimes, will give serious consideration to whatever criminal schemes are presented to them by total strangers. Because it is impossible to motivate the first type of suspect to

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[1] Genesis 3:13.
[2] See *Sorrells v. United States* (1932) 287 U.S. 435, 444.
[3] **NOTE**: A court may not dismiss charges on grounds of entrapment. See *People v. Harris* (1985) 165 Cal.App.3d 324, 332; *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1097. An entrapment instruction must be given if "there is substantial evidence supportive of a defense that is not inconsistent with the defendant's theory of the case."]; *People v. Barraza* (1979) 23 Cal.3d 675, 691. A defendant may plead "not guilty" and still raise an entrapment defense.
[4] *People v. Barraza* (1979) 23 Cal.3d 675, 689.
[5] *Sherman v. United States* (1958) 356 U.S. 369, 372. Also see *Patty v. Board of Medical Examiners* (1973) 9 Cal.3d 356, 364 [an officer's job is "to investigate, not instigate crime"].
[6] See *People v. Barraza* (1979) 23 Cal.3d 675, 690; *ABC v. ABC Appeals Board* (2002) 100 Cal.App.4th 1094, 1099 [the test "is whether the acts of the law enforcement agent are likely to induce a normally law-abiding person to commit the offense."].
[7] *Provigo Corp. v. ABC Appeals Board* (1994) 7 Cal.4th 561, 569.

commit a crime, and because it is too easy to motivate the second type, the rule in California is that entrapment results if a "normally law-abiding person" would have been induced to commit the crime.

It should be noted that the California test for entrapment differs from the federal test in that a defendant in federal court may not assert an entrapment defense if prosecutors prove to the court, or if the jury finds, that he was predisposed to commit the crime. The theory here is that "a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal."[8] Thus, in *United States v. Russell* the Supreme Court said that the defendant's predisposition to traffic in methamphetamine was "fatal to his claim of entrapment."[9] Similarly, a defendant in federal court cannot ordinarily be entrapped if he "had engaged in similar criminal activity in the past,"[10] or had otherwise demonstrated a propensity to commit any types of crimes.

Why is the defendant's criminal propensity irrelevant in California? It is mainly because the sole purpose of the entrapment law in California is to deter officers from pressuring or enticing suspects to commit crimes, regardless of their predisposition to do so.[11] As the California Supreme Court explained:

> No matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society.[12]

Prosecutors in California are, however, permitted to disprove entrapment by presenting evidence of the defendant's willingness to commit the crime *with which he was charged*. It should be noted that the defendant's inclination is technically irrelevant because the test in California is whether a "normally law-abiding person"—not the defendant—would have been induced to commit the crime. But the rule makes sense because, without it, California's entrapment law would turn a deaf ear to a circumstance that is so obviously significant. Thus, the California Supreme Court explained, "The court's assessment of an officer's objective conduct will inevitably be colored by, for example, whether the defendant was from the start an enthusiastic proponent of the proposed crime or initially declined and was only gradually worn down."[13] Consequently, prosecutors may present evidence of the defendant's "response to the inducements of the officer."[14]

Having discussed the legal principles upon which the law of entrapment is based in California, we

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[8] *Sherman v. United States* (1958) 356 U.S. 369, 372.

[9] (1973) 411 U.S. 423, 436. Also see *U.S. v. Ortiz* (10th Cir.) 804 F.2d 1161, 1165 ["the obvious question [is] whether the defendant was eager or reluctant to engage in the charged criminal conduct"].

[10] *U.S. v. Black* (9C 2013) 733 F.3d 294, 307.

[11] See *People v. Smith* (2003) 31 Cal.4th 1207, 1212 ["the character of the suspect, his predisposition to commit the crime, and his subjective intent are irrelevant"]; *People v. Peppars* (1983) 140 Cal.App.3d 677, 685-86 ["California has explicitly rejected the federal standard for entrapment; the stated purposes of the entrapment defenses in this state is to assure lawfulness of law enforcement activity."]; *People v. Holloway* (1996) 47 Cal.App.4th 1757, 1764-65 ["The California entrapment doctrine … ignores the suspect's subjective intent or any predisposition to commit the crime."]; *People v. Lee* (1990) 219 Cal.App.3d 829, 835 ["matters such as the character of the suspect, his predisposition to commit the offense, and his subjective intent are irrelevant"].

[12] *People v. Barraza* (1979) 23 Cal.3d 675, 687.

[13] *People v. Smith* (2003) 31 Cal.4th 1207, 1218. Also see *People v. Harris* (1985) 165 Cal.App.3d 324, 332-33 ["[W]e cannot ignore the evidence of past sales by defendant to the informant nor the evident sophistication of defendant as indicated by his various statements."]; *People v. Peppars* 1983) 140 Cal.App.3d 677, 686-87 ["it was appellant who had suggested the idea in the first place [and] there was no reluctance on appellant's part to commit the crime; he was willing from the beginning."]. **NOTE**: The court in *Smith* went on to say that other relevant circumstances include the gravity of the crime or the difficulty of detecting instances of its commission. However, we could not find any cases in which these two circumstances were discussed or even mentioned as relevant in determining whether the defendant was entrapped.

[14] *People v. Barraza* (1979) 23 Cal.3d 675, 690.

will now look at the types of police actions that are almost always impermissible and those that are not. As we will show, the courts have been consistent in their rulings.

Prohibited Inducements

The types of inducements that result in entrapment generally fall within one or more of the following categories: (1) importuning, (2) exploiting vulnerabilities, and (3) appeals to sympathy or friendship.[15]

IMPORTUNING: The most common type of entrapment results when officers urged the suspect to commit the charged crime or pressed him when he showed reluctance. In the words of the California Supreme Court, "[I]t is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime."[16]

An extreme example is found in *Jacobson v. United States*[17] where federal agents in Nebraska found the defendant's name on a list of people who had purchased a magazine containing nude photographs of young boys. Suspecting that the man might also be ordering child pornography through the mails, a postal inspector sent him a letter and questionnaire from a fictitious business asking if he would be interested in purchasing photos of "lusty and youthful lads" and "pre-teen sex."

Although Jacobson responded to the questionnaire, he did not place any orders. Nevertheless, over the next two and a half years, he was encouraged by "two Government agencies, through five fictitious organizations and a bogus pen pal" to order sexually explicit photographs of children through the mail. Eventually, he ordered a catalogue containing child pornography and he was charged and convicted. But the Supreme Court ruled that the agents' importuning amounted to impermissible inducement because, "By the time petitioner finally placed his order, he had already been the target of 26 months of repeated mailings and communications from Government agents and fictitious organizations."

Similarly, in *People v. McIntire*[18] an LAPD narcotics officer who was working undercover at a high school learned that the sister of a student named Todd was selling marijuana. There was testimony that, during a seven week period, the officer "constantly" asked Todd for marijuana (it "was all he ever talked about") and that the officer "urged him to keep asking his sister to supply marijuana after she indicated she didn't have any." Eventually, Todd's sister, Gale McIntire, sold marijuana to the officer because, according to her testimony, Todd "had called every day asking her to find marijuana" and that she finally sold it to him because "she wanted to help him because of family difficulties." At trial, the judge refused her request that the jury be given an entrapment instruction, and she was convicted. But the California Supreme Court reversed, ruling that an entrapment instruction was required because of the "strong and persistent pressure" on her brother.

EXPLOITING SUSPECT'S VULNERABILITIES: The courts are especially apt to find entrapment if officers induced a defendant who was physically or emotionally vulnerable to their enticement. For example, in *People v. Barraza*[19] the California Supreme Court ruled that the defendant was entitled to an entrapment instruction because there was evidence that he was a recovering heroin addict who sold heroin to an informant only because the informant repeatedly telephoned him at work and also because the defendant eventually agreed to

[15] See *U.S. Ortiz* (10th Cir. 1986) 804 F.2d 1161, 1165) [inducement "may take the form of persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy or friendship."].
[16] *People v. Barraza* (1979) 23 Cal.3d 675, 690.
[17] (1992) 503 U.S. 540.
[18] (1979) 23 Cal.3d 742.
[19] (1979) 23 Cal.3d 675.

meet with the informant because he was afraid that he would lose his job if the agent kept calling. Said the court, the agent's conduct "was consistent with the defense that the defendant "was a past offender trying desperately to reform himself but was prevented from doing so by an overzealous law enforcement agent who importuned him relentlessly until his resistance was worn down and overcome."

In another such case, *U.S. v. Poehlman*,[20] an undercover agent who was investigating child pornography began corresponding with Poehlman, apparently after finding his name on the membership list of an "alternative lifestyle" chat group. While Poehlman told her he was looking for companionship, the agent suggested that she would be interested only if he agreed to become the "special teacher" to her two young daughters, eventually making it clear that this meant having sexual relations with them. As the court noted, the agent "repeatedly held her own relationship with Poehlman hostage to his fulfilling the role of special man teacher." Eventually, following lengthy correspondence along these lines, Poehlman arranged to meet with the agent and her children at a motel. When he arrived he was arrested and was subsequently convicted of crossing state lines for the purpose of engaging in sex with a minor.

On appeal, the Ninth Circuit ruled that the agent's conduct clearly constituted entrapment. Among other things, the court noted that Poehlman "continued to long for an adult relationship with [the agent]," he offered marriage," talked about "quitting his job and moving to California," and "even offered his military health insurance benefits." Meanwhile, the agent was making it clear that none of these things would happen unless Poehlman agreed to her terms. Said the court, "There is surely enough real crime in our society that it is unnecessary for our law enforcement officials to spend months luring an obviously lonely and confused individual to cross the line between fantasy and criminality."

APPEALS TO SYMPATHY OR FRIENDSHIP: In cases where officers use an informant to approach the suspect, entrapment may result if the informant induced the suspect to commit the crime by appealing to their friendship and especially sympathy. For example, in *Bradley v. Duncan*[21] an undercover narcotics officer contacted an addict on the street and told him that he was looking to buy some cocaine. The addict, a man named Flores, was going through withdrawal and was in bad shape. As the officer testified, Flores was "pale and shaking," his head "kept moving back and forth," and he said he desperately needed cocaine. Although Flores said he didn't have any, he agreed to take the officer to a seller up the street. The seller, Bradley, testified that Flores smelled of vomit; he was "tweaking," "twitching," and shaking "like a junky." Although Bradley subsequently sold cocaine to Flores, the Ninth Circuit ruled he was entitled to an entrapment instruction because, among other things, "Flores appeal, 'Please, please, big man, would you help me out?' would certainly be found by a jury to constitute badgering or cajoling." Said the court, "This was a case in which the police used a decoy whose physical suffering would appeal to the sympathies of most people."

Similarly, in *Sherman v. United States*[22] the defendant and an "active" informant happened to meet at the office of a physician who was treating them for drug addiction. The informant told Sherman that he was "not responding to treatment" and asked if he knew a good source for narcotics. Sherman said no and, for some time thereafter, he "tried to avoid the issue." But the informant persisted, making a "number of repetitions of the request" and claiming he needed the

[20] (9th Cir. 2000) 217 F.3d 692.
[21] (9th Cir. 2002) 315 F.3d 1091. Also see *People v. McIntire* (1979) 23 Cal.3d 742, 747 [police agent utilized "sympathy aroused by family problems."
[22] (1958) 356 U.S. 369.

drugs because he was "suffering." Eventually, Sherman sold drugs to the informant and, as a result Sherman was convicted. But the Supreme Court overturned the conviction, ruling that entrapment results when "the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted." Also see "Entrapment by an Intermediary," below.

Entrapment has been found when undercover officers or police agents engaged in "forceful" solicitation and "dogged insistence until [the suspect] capitulated,"[23] when they played upon sentiments of "one former war buddy" for another,[24] and when they used "repeated suggestions" which succeeded only when the defendant lost his job and needed money for his family's food and rent.[25] In contrast, in *People v. Lee*[26] the defendant argued that she was entrapped because her decision to sell drugs to a police agent was motivated by feelings of friendship. But the court pointed out that, while the defendant and agent were friends, they were hardly close friends and, besides, "there was substantial evidence that [the defendant] sold drugs to earn money, not out of friendship."

What is Not Entrapment

POLICE MADE THE INITIAL APPROACH: In determining whether a defendant was entrapped, it does not matter whether it was the officers or the defendant who initiated the contact or proposed the criminal scheme. In the words of the California Supreme Court, "[W]e are not concerned with who first conceived or who willingly, or reluctantly, acquiesced in a criminal project."[27]

For example, in *People v. Smith*[28] the court ruled that the defendant was not entrapped when a police agent approached him with a plan for a home invasion robbery. This was because the defendant had "expressed nothing but enthusiasm at the prospect of robbing a home where she was told 200 kilograms of cocaine would be found." In another case, *People v. McClellan,*[29] the defendant claimed that he had been entrapped when an undercover officer knocked on the door of his apartment and asked if he knew where he could get a "Sherm" (i.e., a cigarette dipped in PCP). In rejecting McClellan's request for an entrapment instruction, the trial judge told the defendant, "[N]ow here is a situation where the officer simply walks in. You don't know him from the man in the moon. He walks in and says he wants to buy a Sherm, and you just go and get him one."

Finally, in *Alcoholic Beverage Control v. ABC Appeals Board*[30] the Court of Appeal ruled that an undercover ABC agent did not entrap a stripper at a club in San Diego merely because, in the course of a "couch dance," he asked if there would be "more skin involved," after which she showed him so much skin that her boss lost his liquor license. The agent's conduct, said the court, "was not of such a nature that it was likely to induce a normally law-abiding person to commit the offense."

GAINING THE SUSPECT'S CONFIDENCE: Many criminals believe that entrapment automatically results whenever an undercover officer denies that he is a cop, or when the officer took other steps to convince him that he was a trustworthy criminal. But, as the California Supreme Court explained, this is a misconception: "There will be no entrapment

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[23] *U.S. v. Rodriguez* (1st Cir. 1988) 858 F.2d 809, 812-15.
[24] (1932) 287 U.S. 435, 440.
[25] *U.S. v. Kessee* (9th Cir. 1993) 992 F.2d 1001, 1003.
[26] (1990) 219 Cal.App.3d 829.
[27] *People v. Barraza* (1979) 23 Cal.3d 675, 688. Also see *ABC v. ABC Appeals Board* (2002) 100 Cal.App.4th 1094,1100 [it has been "uniformly held to be permissible" for an undercover officer to approach a possible drug source on the street and offer to buy drugs."].
[28] (2003) 31 Cal.4th 1207, 1218.
[29] (1980) 107 Cal.App.3d 297.
[30] (2002) 100 Cal.App.4th 1094.

when the official conduct is found to have gone no further than necessary to assure the suspect that he is not being 'set up.' The police remain free to take reasonable, though restrained, steps to gain the confidence of suspects."[31]

PROVIDING AN OPPORTUNITY: Entrapment does not result if officers merely provided the defendant with an opportunity to commit the crime, such as offering to purchase drugs.[32] As the Supreme Court explained, "[T]he fact that government agents merely afford opportunities or facilities for the commission of the offense does not constitute entrapment. Entrapment occurs only when the criminal conduct was the product of the creative activity of law-enforcement officials."[33]

In other words, the courts presume that a person who is usually law-abiding "would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. Official conduct that does no more than offer that opportunity to the suspect for example, a decoy program is therefore permissible."[34] Thus, entrapment does not result if officers engage in nothing more than the "proper setting of traps,"[35] and that "[a]rtifice and stratagem may be employed to catch those engaged in criminal enterprises."[36] Similarly, the Ninth Circuit explained, "Where government agents merely make themselves available to participate in a criminal transaction, such as standing ready to buy or sell illegal drugs, they do not induce commission of the crime."[37]

For example, in *Provigo Corp. v. ABC Appeals Board*[38] the court ruled that the use of underage decoys to attempt to buy alcoholic beverages did not constitute entrapment "so long as no pressure or overbearing conduct is employed by the decoy." Similarly, in *Douglass v. Board of Medical Quality Assurance*[39] undercover agents posing as patients started visiting a physician, Douglass, because he was suspected of prescribing controlled drugs that were not medically indicated. Over time, Douglass prescribed controlled substances to three "patients" who had merely complained of such maladies as backache, virus, and the need to "get going" in the morning. Once, he even prescribed Quaaludes to an agent because the agent "liked the way they made her feel." In rejecting an argument that the patients had entrapped Douglass, the court said, "Here, the agents' conduct simply provided Douglass the opportunity to engage in unprofessional conduct for the ordinary criminal motive of pecuniary gain. Douglass does not argue that agents badgered or cajoled him into providing the drugs and there is no evidence they did."

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[31] *People v. Barraza* (1979) 23 Cal.3d 675, 690, fn.4. Also see CALCRIM 3408 ["If an officer ... merely tried to gain the defendant's confidence through reasonable and restrained steps, that conduct is not entrapment."]; *U.S. v. Sandoval-Mendoza* (9th Cir. 2006) 472 F.3d 645, 649 ["Offering to buy drugs from a drug dealer is not entrapment"]; *People v. West* (1990) 224 Cal.App.3d 1337 [reverse sting, drugs]; *People v. Wesley* (1990) 224 Cal.App.3d 1130 [reverse sting, drugs]. Also see *U.S. v. Russell* (1973) 411 U.S. 423 [undercover officer did not entrap a meth manufacturer merely because he provided him with a precursor; an undercover officer who is trying to infiltrate a criminal enterprise "will not be taken into the confidence of the illegal entrepreneurs unless he has something of value to offer them"].

[32] See *People v. Holloway* (1996) 47 Cal.App.4th 1757, 1764 ["The police merely posed as drug buyers and sellers in a notorious drug trafficking area."].

[33] *She rman v. United States* (1958) 356 U.S. 369, 372.

[34] *People v. Barraza* (1979) 23 Cal.3d 675, 690.

[35] *People v. Benford* (1959) 53 Cal.2d 1, 8.

[36] *Jacobson v. United States* (1992) 503 U.S. 548. Also see *Sherman v. United States* (1958) 356 U.S. 369, 372 ["However, the fact that government agents merely afford opportunities or facilities for the commission of the offense does not constitute entrapment."]; *People v. Watson* (2000) 22 Cal.4th 220, 223 [entrapment does not result merely by giving the suspect an "opportunity" to commit a crime]; *People v. Barraza* (1979) 23 Cal.3d 675, 690 ["we presume that [the normally law-abiding person] would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully"].

[37] *U.S. v. Poehlman* (9th Cir. 2000) 217 F.3d 692, 701.

[38] (1994) 7 Cal.4th 561, 568.

[39] (1983) 141 Cal.App.3d 645.

The same principle has been applied to "bait car" stings. For example, in *People v. Watson*[40] the defendant argued that a bait car operation constituted entrapment because the officers made a big production of stopping the car and "arresting" the driver while a group of spectators watched, then leaving the car unattended with the keys in the ignition. But the court ruled this was not entrapment because "normally law-abiding persons do not take a car not belonging to them merely because it is unlocked with the keys in the ignition and it appears they will not get caught."

MAKING THE CRIME APPEAR ATTRACTIVE: In some cases, undercover officers will suggest that the proposed crime is worth the chance of getting caught. This will not necessarily result in entrapment because, as the First Circuit observed, undercover operations are often "designed to tempt the criminally inclined, and a well-constructed sting is often sculpted to test the limits of the target's criminal inclinations."[41]

Entrapment will, however, result if an undercover officer convinced the defendant that the proposed criminal scheme was so attractive that the normally law-abiding person would have been unable to pass it up.[42] Thus, the Court of Appeal observed that entrapment may be based on "affirmative police conduct that would make commission of the crime unusually attractive to a normally law-abiding person, such as a guarantee that the act is not illegal or will go undetected, an offer of exorbitant consideration, or any similar enticement."[43]

For example, although the Court of Appeal in *People v. Peppars*[44] ultimately ruled that the defendant was not entrapped, it was a close case and may therefore be helpful. In *Peppars* an undercover Sonoma County sheriff's deputy contacted Peppars for the purpose of selling a stolen wedding ring and, in the course of the conversation, Peppars asked the officer if he "knew of a warehouse to rip off." The officer dodged the question but, about a week later, told Peppars that he could obtain the keys to a certain warehouse from a former employee who had made a set of duplicates. He added that the warehouse was "full of stereo equipment, TVs and video recorders," and that the burglary will "just be a matter of walkin' in, loadin' up and walkin' out. No break in, no alarms, or nothin'." Peppars took the bait, committed the burglary, and was arrested two days later. Although the court could have gone either way, it ruled that Peppars was not entrapped because he "had suggested the idea in the first place [and] there was no reluctance on [his] part to commit the crime; he was willing from the beginning."

Entrapment by Informant

As we have seen, officers will sometimes arrange for an informant or other intermediary to discuss the commission of the crime. This is often necessary because, as the Ninth Circuit observed, "It is unrealistic to expect law enforcement officers to ferret out criminals without the help of unsavory characters."[45]

The question arises: If the intermediary—without any directions or encouragement from officers—employed an improper inducement to convince the suspect to commit the crime, can the officers be held accountable and therefore provide the defendant with a potential entrapment defense? As we will discuss, in determining whether

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[40] (2000) 22 Cal.4th 220.
[41] *U.S. v. Connell* (1st Cir. 1992) 960 F.2d 191, 196.
[42] See *People v. Barraza* (1979) 23 Cal.3d 675, 690. **Note**: The court added that entrapment would likely result if officers assured the defendant that the proposed activity was not illegal, that it would go undetected, or that it would result in a huge payoff. At p. 690.
[43] *ABC v. ABC Appeals Board* (2002) 100 Cal.App.4th 1094, 1100. Also see *U.S. v. Poehlman* (9th Cir. 2000) 217 F.3d 692, 698.
[44] (1983) 140 Cal.App.3d 677.
[45] *U.S. v. Simpson* (9th Cir. 1987) 813 F.3d 1462, 1464.

the actions of the intermediary may be attributed to the officers, the courts focus on what the officers instructed—or, in some cases, failed to instruct—the intermediary to do. In addition, the courts have sometimes ruled that an intermediary's actions could be attributed to the officer if the officer created a situation in which it was likely that the informant would disregard any such instructions.

Plainly, entrapment would result if the officers instructed or even suggested that the intermediary pressure the suspect. On the other hand, in *People v. Thoi*[46] the court pointed out that while some police operatives "may have played upon the sympathies of some doctors" to prescribe controlled drugs, there is no evidence the government fostered, encouraged, or condoned this ploy."

But even in the absence of such overt encouragement, an intermediary may be deemed a police agent if the officers knew, or should have known, that he would resort to pressure or excessive inducement. For example, in *Sherman v. United States*,[47] a case we discussed earlier, an informant who had been convicted of drug trafficking, but had not yet been sentenced, befriended a drug addict and essentially provided him with drugs. Although the officers did not instruct or even suggest that the informant engage in such a tactic, the Supreme Court essentially ruled they were responsible for his actions for two reasons.

First, they were aware that the informant had a strong motive to entrap someone; i.e., by pleasing the agents, he might stay out of jail. Second, the informant testified that, based on his ongoing relationship with the federal agents, he "inferred" that they wanted him to "go out and try and induce somebody to sell you narcotics." Third, they failed to monitor and restrict his undercover activities to make sure he did not resort to entrapment. As the Court pointed out, the federal agent in charge of the case "admitted that he never bothered to question [the informant] about the way he had made contact with petitioner. The government cannot make such use of an informer and then claim disassociation through ignorance." Consequently, the court ruled that Sherman had been entrapped.

Similarly, in another case we discussed earlier, *Bradley v. Duncan*, two narcotics officers used a sickly and pathetic cocaine addict to convince the defendant to sell him drugs.[48] Although the officers did not ask the addict to pressure the suspect, the Ninth Circuit ruled that they had knowingly created a situation in which the addict's physical appearance and distraught mental state constituted impermissible pressure. Said the court, although neither of the officers "badgered, cajoled, or importuned [the defendant] personally," the decoy did, and "[i]n light of the urgency of Flores' requests, his conduct also constituted 'importuning' in the ordinary meaning of the term."

"Sentence Entrapment"

There is another form of pressure that might conceivably result in entrapment. It is called "sentence entrapment," and it occurs if the defendant was amenable to committing a certain crime, but was persuaded by an officer or police agent to commit a crime with greater punishment. As the California Supreme Court explained, "Under the theory of sentence entrapment, a defendant's sentence should be reduced if he was predisposed to commit a lesser offense, but was entrapped by the police into committing an offense subject to greater punishment."[49] Although sentence entrapment is recognized in the federal courts as grounds to reduce a defendant's sentence,[50] it has not been recognized in California. [51] POV

[46] (1989) 213 Cal.App.3d 689.
[47] (1958) 356 U.S. 369.
[48] (9th Cir. 2002) 315 F.3d 1091.
[49] *People v. Smith* (2003) 31 Cal.4th 1207, 1211-12.
[50] See *U.S. v. Black* (9th Cir. 2013) 733 F.3d 294, 310; *U.S. v. Huang* (9th Cir. 2012) 687 F.3d 1197, 1202.
[51] See *People v. Smith* (2003) 31 Cal.4th 1207, 1213 ["unlike in the federal courts, the test for entrapment focuses on the police conduct."].

"Official Channels" Communications

It is well settled that an officer may reasonably rely on information received through official channels to support an arrest.[1]

Officers may arrest and detain suspects, conduct parole and probation searches, and take other intrusive actions based solely or mainly on certain communications received from others. "The accepted practice of modern law enforcement," said the Ninth Circuit, "is that an officer often makes arrests at the direction of another law enforcement officer even though the arresting officer himself lacks actual, personal knowledge of the facts supporting probable cause."[2] The reason this is the "accepted practice" is that "effective law enforcement cannot be conducted unless police officers can act on directions and information transmitted by one officer to another and that officers, who must often act swiftly, cannot be expected to cross-examine their fellow officers about the foundation for the transmitted information."[3] As the Seventh Circuit observed, "[L]aw enforcement officers in diverse jurisdictions must be allowed to rely on information relayed from officers and/or law enforcement agencies in different localities in order that they might coordinate their investigations, pool information, and apprehend fleeing suspects in today's mobile society."[4]

Similarly, the Court of Appeal explained in *People v. Soun* that "a police officer who receives a request or direction, through police channels, to detain named or described individuals may make a constitutionally valid detention, even without personal knowledge of facts sufficient to justify the detention, so long as the facts known to the police officer or agency that originated the request would be sufficient."[5]

This does not, however, mean that officers may blindly follow any directions and believe everything they learn from other officers or agencies. Instead, reliance is permitted only as to information that is transmitted to them through so-called "official channels." Furthermore, as we will discuss in the accompanying article on the *Harvey-Madden* Rule, prosecutors may be required to prove the information was, in fact, transmitted to the officer who acted on it.

What's an "official channel?" It is essentially any conduit through which information pertaining to the existence of probable cause or reasonable suspicion is transmitted from one officer to another, or from a governmental agency or database to an officer. While this includes dedicated communication systems such as NCIC, CLETS, DMV, AWS, wanted flyers, and daily roll-call announcements, it also covers extemporaneous exchanges such as police radio traffic and ordinary face-to-face communications between officers about suspicious activity, a particular crime, or about a particular suspect. Here are the most common situations in which "official channels" communications are apt to result in a search or seizure:

Source	**Disseminator**	**Action by**
Officer A →	Officer B →	Recipient
Officer A →	Dispatch →	Recipient
911 call →	Dispatch →	Recipient
Civilian →	Officer A →	Recipient
Warrant →	Database →	Recipient

As we will now discuss, there are two types of information that are transmitted through official channels: (1) summary notifications and requests, and (2) factual information.

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[1] *People v. Gomez* (2004) 117 Cal.App.4th 531, 540; *People v. Alcorn* (1993) 15 Cal.App.4th 652, 655.

[2] *U.S. v. Jensen* (9th Cir. 2005) 425 F.3d 698, 704. Also see *People v. Orozco* (1981) 114 Cal.App.3d 436, 444 [officers "obviously have to act on the basis of what they are told by the dispatcher or their superiors"].

[3] *United States v. Hensley* (1985) 469 U.S. 221, 231. Also see *U.S. v. Valez* (2nd Cir. 1986) 796 F.2d 24, 28 ["in light of the complexity of modern police work, the arresting officer cannot always be aware of every aspect of an investigation; sometimes his authoriity to arrest a suspect is based on facts known only to his superiors or associates"].

[4] *U.S. v. Natzger* (7th Cir. 1992) 974 F.2d 906, 910.

[5] (1995) 34 Cal.App.4th 1499, 1521, 1523-24. Also see *U.S. v. Lyons* (6th Cir. 2012) 687 F.3d 754, 769.

Summary Notifications

Officers may detain, arrest, or search a suspect based on a notification through an official channel that a warrant for the suspect's arrest is outstanding, that there is probable cause to arrest him, or that the suspect is on parole or searchable probation. Such notifications contain little, if any, explanation of their factual basis, other than the implied fact that there is reason to believe they are accurate.[6] "It is well established," said the Third Circuit, "that the arresting officer need not possess an encyclopedic knowledge of the facts supporting probable cause, but can instead rely on an instruction to arrest delivered by other officers possessing probable cause."[7] Similarly, the Court of Appeal said that "a police officer who receives a request or direction, through official channels, to detain named or described individuals may make a constitutionally valid detention, even without personal knowledge or facts sufficient to justify the detention."[8]

The most common notifications are from national, state, regional, and local law enforcement databases that store and transmit such information to officers; e.g., NCIC, CLETS, AWS. As the Ninth Circuit observed, "There is a long line of cases from this and other circuits that an 'NCIC hit,' although not definitive in terms of conviction, has been routinely accepted in establishing probable cause for a valid arrest."[9]

Summary notification may also be made on the fly via impromptu exchanges between officers about criminal activity, a particular crime, or about a particular suspect; e.g., "Stop him!" These communications are usually transmitted between officers via police radios, cell phones, text messages, and face-to-face conversations. For example, in *People v. Lara*[10] LAPD detectives developed probable cause to arrest Lara for murder, and they also learned he was now staying at his sister's home in South Gate. So one of the detectives phoned South Gate PD and requested that officers go to the residence and arrest him. And so they did. On appeal, Lara argued that the arrest was unlawful because the South Gate officers knew nothing about the case, which was true. But the court ruled it did not matter because they were "entitled to make an arrest on the basis of this information, as it was received through official channels."

Similarly, *U.S. v. Nafzger*[11] federal and state officers were conducting a joint investigation into an interstate car theft ring run by Roy and Ralph Nafzger. The officers were generally communicating via a command post and briefings. One of the officers, Terry Argue, was told at a meeting that "stolen vehicles might be stored at the Nafzgers' respective farms, and that a search warrant had been issued for Ralph's farm." Because Argue's role was only to provide security during the search, he was did not know anything else about the case.

While other officers were searching Ralph's farm pursuant to the warrant, Argue spotted Roy driving by and detained him. During the stop, Roy consented to a search of his farm on which officers found three stolen vehicles. On appeal, Roy claimed that his consent was ineffective because Argue knew nothing about the case and therefore his consent was given during an illegal detention. The court disagreed, saying, "If the officer issuing the flyer or bulletin concludes that the facts he is aware of authorize a stop or arrest and relays that conclusion to another officer, that officer may rely on the conclusion, regardless of whether he knows the supporting facts."

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[6] See *People v. Ramirez* (1997) 59 Cal.App.4th 1548 ["officers and investigators need not inform the final arresting officer of the precise nature of the probable cause they possess"]; *U.S. v. Zuniga* (5th Cir. 2017) 860 F.3d 276.
[7] *U.S. v. Burton* (3rd Cir. 2002) 288 F.3d 91, 99.
[8] (1995) 34 Cal.App.4th 1499, 1523-24.
[9] *Case v. Kitsap County Sheriff's Department* (9th Cir. 2000) 249 F.3d 921, 928.
[10] (1967) 67 Cal.2d 365.
[11] (7th Cir. 1992) 974 F.2d 906. Also see *U.S. v. Shareef* (10th Cir. 1996) 100 F.3d 1491, 1503, fn.4 ["when an order to stop or arrest a suspect is communicated to officers in the field, the underlying facts constituting probable cause or reasonable suspicion need not be communicated"].

Transmission of Information

In addition to bare-bones notifications, official channels may be used to disseminate factual information that may enable officers to determine whether there are grounds to arrest, detain, or search a person. These transmissions are different from summary notifications in that the officer who receives them must exercise judgment in determining whether the quality and quantity of the information will justify a search or seizure. Although they must also exercise judgment in determining whether the information was sufficiently reliable, they are permitted to make certain inferences.

OFFICER IS THE SOURCE: If the original source of the information was an officer, other officers may rely on it without considering the reliability of the information. This is because an officer who disseminates information based on his personal knowledge is presumed to be a reliable source. For example, in *People v. Taylor*[12] LAPD officers stopped a yellow van at about 4:45 A.M., approximately four minutes after receiving a report that a cat burglary had just occurred in the area. The officers' decision to stop the van was based largely on information that had been disseminated over the police radio and during roll call. Among other things, they had been informed that a cat burglar "was working" in the area, usually between 11 P.M. and 3 A.M; that the burglar might be driving a yellow van; that he was "hitting approximately two or three houses each time he would hit"; that he was taking "large items" such as TVs, and that investigators "suspected existence of a dolly or multiple suspects because of the large items taken."

As the officers approached the van they saw, among other things, a dolly, a stereo, a knife, screwdriver, flashlight and a pair of brown gloves. They also noticed that the driver's race and sex matched that of the perpetrator that was given during roll call. So they arrested the driver, searched the van, and found several items that had been taken in a burglary. In rejecting the defendant's argument that the car stop and search were unlawful, the court cited the "appearance of defendant in the yellow van in such close proximity in time and space to the 'cat burglary'" coupled with the information "already possessed" by the officers. Said the court, "We are satisfied that there was probable cause to arrest the defendant for burglary."

VICTIM OR WITNESS WAS THE SOURCE: An officer may also rely on information from the victim of a crime or a witness so long as there was no specific reason to believe the person was unreliable. Such reliance is permitted even if the information was received from another officer or even it had been passed along from a series of officers.[13]

For example, in *Mueller v. DMV*[14] an officer met with his lieutenant at the scene of a traffic accident and was informed that witnesses were saying that Mueller was driving one of the cars, that he was at fault, and he appeared to be intoxicated. Based on this information, the officer conducted a field sobriety test which Mueller "indisputably flunked." After Mueller refused to submit to a blood or breath test, he was arrested and the DMV suspended his driver's license. On appeal, Mueller argued that the arrest was unlawful because the arresting officer did not see him driving the car. Mueller was right about that, but the court pointed out that "one police officer who has received a report from a citizen-informant of a crime's commission, and who has passed the information on to a brother officer in the crime's investigation, will be deemed to have reliably done so."

Post-Arrest Pooling and the Collective Knowledge Rule

Until now we have been discussing situations in which information was transmitted via official channels to the officer who detained, arrested, or searched the suspect. The question arises: Are there any circumstances in which a search or seizure may be based on information that was possessed by other officers in the department but had

[12] (1975) 46 Cal.App.3d 513.
[13] See *People v. Senkir* (1972) 26 Cal.App.3d 411, 418.
[14] (1985) 163 Cal.App.3d 681.

not been transmitted? In other words, if the arresting officer lacks probable cause, can the search or seizure be upheld on grounds that probable cause would have existed if he had talked with all the other officers who had pertinent information? The answer is no. As the Court of Appeal explained, "The People must prove not only that the collective knowledge of the investigating authorities justified the arrest, but that such knowledge was funneled to the arresting officer by imparting it to him or, more simply, by the giving of an order or request to make the arrest by someone who, in turn, was possessed of such collective knowledge."[15]

There is, however, an exception to this rule. If two or more investigators from the same or different agencies are conducting a joint investigation and were generally communicating amongst themselves, a court may infer that all of the officers were aware of the information possessed by the others. The theory here is that a "presumption of communication often will reflect what has actually taken place and communication among officers during the exigencies of a stop or arrest may often be subtle or nonverbal."[16]

For example, in *People v. Rogers*[17] the members of an LAPD narcotics task force were conducting intensive surveillance of the members of an organization that included "probably one of the largest heroin and cocaine suppliers in this nation." While following the suspects from Los Angeles to San Diego and back, the officers kept in constant communications. Eventually, one of the officers instructed another officer to stop and arrest the man he was following, Rogers. The officer did so and, while pat searching Rogers, found two ounces of heroin. Rogers contended that his arrest was unlawful because there had been no testimony that the officer who ordered the arrest was aware of the information that had been developed during the operation and, therefore, any attempt to attribute such knowledge to the arresting officer would constitute illegal post-arrest pooling. In rejecting the argument, the court said, "The record adequately supports an inference that the officers who were conducting the investigation both in Los Angeles and San Diego kept in touch with each other" so it was reasonable to infer that the knowledge of the officer who ordered the arrest "included the information gathered by the others," and therefore this was "not a case of post-arrest pooling of information relevant to probable cause."

Similarly, in *U.S. v. Sawyer*[18] two U.S. Marshals, who were taking part in a federal-state fugitive task force operation in East St. Louis, noticed a man standing in front of a vacant building in a high crime area. The time was 10:30 P.M. and the man was dressed in all-black clothing. One of the marshals, Woods, identified himself and told Sawyer that he wanted to speak with him. Sawyer ran, Woods gave chase and, while doing so, saw Sawyer drop a handgun.

Woods testified he "was in verbal contact with the other task force officers" and that he had told them what had happened. He also testified that, about a minute later, he saw that another marshal, Nelson, had apprehended Sawyer and, while pat searching him, found a bag containing .45 caliber cartridges. Woods also testified that he recovered the gun that Sawyer has tossed and determined that they matched the cartridges that had been found in Sawyer's pockets. Although Nelson did not testify at the suppression motion, the court inferred that he had heard Woods' broadcast "because Woods was in communication with the other task force officers at the scene, including Nelson. It does not matter that we do not know what Nelson knew when he initiated Sawyer's arrest, because we do know what Woods knew." POV

[15] *People v. Rice* (1967) 253 Cal.App.2d 789, 792. Also see *U.S. v. Shareef* (10th Cir. 1996) 100 F.3d 1491, 1503.
[16] *U.S. v. Shareef* (10th Cir. 1996) 100 F.3d 1491, 1504.
[17] (1976) 54 Cal.App.3d 508.
[18] (7th Cir. 2000) 224 F.3d 675. Also see *U.S. v. Ledford* (7th Cir. 2000) 218 F.3d 684, 689 ["because the search was a joint endeavor, the court may properly consider what Page and the other officers knew"].

Harvey-Madden Motions

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

Obviously, when one officer relies on information provided by someone else to justify a stop or search, a hearsay problem arises.[1]

In the preceding article, we explained that officers may detain, arrest, and search suspects based on information that was disseminated through "official channels." As discussed, this usually occurs when an officer is notified by another officer, dispatcher, law enforcement database, or other intermediary that a suspect can be searched or seized without a warrant. Also as noted, the following are the situations in which this issue will arise:

Source	Disseminator	Action by
Officer A →	Officer B →	Recipient
Officer A →	Dispatch →	Recipient
911 call →	Dispatch →	Recipient
Civilian →	Officer A →	Recipient
Warrant →	Database →	Recipient

If the search resulted in the discovery of incriminating evidence and the suspect was charged, the defense may require that prosecutors prove that the information upon which probable cause or reasonable suspicion were based had, in fact, been transmitted to the officer who made the arrest or conducted the search. One objective of this requirement, which is commonly known as *Harvey-Madden*, is to prevent situations in which an officer could justify a search or seizure by merely testifying that he had obtained authorization to do so through official channels.[2] Another objective is to make sure that an officer who does not have probable cause or reasonable suspicion could authorize other officers to search or seize a suspect by falsely stating that there was probable cause. As the Court of Appeal observed:

> The *[Harvey-Madden]* requirement was not established to prove the information furnished the arresting officer was true; rather, it was established to prove that the officers furnishing the information to the arresting officers which triggered the arrest had actually received it; i.e., that the information was not falsely manufactured by those reporting it to the arresting officers to furnish ostensible grounds of probable cause for arrest.[3]

Before we discuss the ways in which this can be accomplished, it should be noted that compliance with *Harvey-Madden* will be required only if the defendant's attorney notified prosecutors—before the suppression hearing—that he was invoking

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[1] *People v. Romeo* (2015) 240 Cal.App.4th 931, 944.

[2] See *People v. Orozco* (1981) 114 Cal.App.3d 435, 444 ["The whole point of the [*Harvey-Madden*] rule is to negate the possibility that the facts which validate the conduct of the officers in the field are made up inside of the police department by somebody who is trying to frame a person whom he wants investigated."]; *People v. Pease* (1966) 242 Cal.App.2d 442 [if officers did not have to account for the information they receive "every utterance of a police officer would instantly and automatically acquire the dignity of official information"]; *People v. Madden* (1970) 2 Cal.3d 1017, 1021 [if some proof of the source was not required, it "would permit the manufacture of reasonable grounds to arrest within a police department by one officer transmitting information purportedly known by him to another officer who did not know such information, without establishing under oath how the information had in fact been obtained by the former officer"].

[3] *People v. Armstrong* (1991) 232 Cal.App.3d 228, 234. Also see *People v. Lazanis* (1989) 209 Cal.App.3d 49, 59 ["The important consideration here is not whether a burglary was in fact being committed, but whether a radio call went out which justified the stop of appellant."]; *Remers v. Superior Court* (1970) 2 Cal.3d 659, 667 ["The absence of such a requirement would allow a police officer to manufacture reasonable grounds to arrest while circumventing the necessity of pointing to specific and articulable facts."].

Harvey-Madden.[4] This is because, without prior notification, prosecutors would not know which officers must be subpoenaed. Consequently, if the attorney fails to give notice, prosecutors will not be required to prove that the facts constituting probable cause or reasonable suspicion were transmitted to the receiving officer. As the California Supreme Court explained, "[A] defendant must state the grounds for the motion with sufficient particularity to give notice to the prosecution of the sort of evidence it will need to present in response."[5]

It should also be noted that some courts have said that the purpose of the *Harvey-Madden* requirement is to make sure that the information transmitted through official channels constituted probable cause.[6] This is incorrect. It is the Fourth Amendment—not *Harvey-Madden*—that requires proof of probable cause. Instead, as noted, the purpose of *Harvey-Madden* is to make sure that the information upon which probable cause was based had, in fact, been transmitted to the officer who made the arrest or conduced the search.

Direct Evidence

Although prosecutors may comply with *Harvey-Madden* by presenting circumstantial evidence (a subject we will discuss later), in most cases they will comply by means of direct evidence, as follows:

Testimony of disseminating officer

In situations where an one officer notified another that there were grounds to detain, arrest, or search a particular suspect, prosecutors may satisfy *Harvey-Madden* by presenting testimony from the officer who disseminated the information which was the basis of the search or seizure. As the Court of Appeal observed in *People v. Orozco*, "The best way of negating 'do it yourself probable cause' is to have the officer who received the information from outside the police department testify."[7] Thus, in *People v. Senkir* the Court of Appeal said:

> [I]nformation given to the arresting officer by another officer who himself received the information from a third party may furnish probable cause for an arrest. That is so where the officer who gave the information to the arresting officer himself testifies concerning his receipt of it and as to the circumstances that made it reasonable to accept the information as true.[8]

Testimony of source

Direct evidence may also consist of testimony from an informant, victim, witness, or other person who had transmitted the information to the officer, dispatcher, or database that disseminated it. For example, in his concurring opinion in *People v. Harvey*, Justice Dooling said, "If the informer should be produced by the prosecution and should testify that he had in fact given the information [to the disseminating officer] which [that officer] transmitted to [the arresting officer] the trial court would be justified, if this was believed, in holding that [the arresting officer] had reasonable grounds for appellant's arrest."[9]

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[4] See *People v. Williams* (1999) 20 Cal.4th 119, 123 [such notice "must state the grounds for the motion [to suppress] with sufficient particularity to give notice to the prosecution of the sort of evidence it will need to present in response"].
[5] *People v. Williams* (1999) 20 Cal.4th 119, 123. Also see *People v. Collin* (1973) 35 Cal.App.3d 416, 421 [because the defense did not file a *Harvey-Madden* motion, "the prosecution was not required to present as a witness the officer who initiated the original broadcast"].
[6] See, for example, *In re Eskiel S.* (1993) 15 Cal.App.4th 1638, 1643 ["Justifying an arrest or detention based on information received by an officer through 'official channels' requires the prosecution to trace the information received by the arresting officer back to its source and prove that the [source] had the requisite probable cause or reasonable suspicion to justify the arrest or detention."]; *People v. Gomez* (2004) 117 Cal.App.4th 531, 540 ["[*Harvey-Madden*] governs the manner in which the prosecution may *prove the underlying grounds for arrest* when the authority to arrest has been transmitted to the arresting officer through police channels." Emphasis added].
[7] (1981) 114 Cal.App.3d 435, 444.
[8] (1972) 26 Cal.App.3d 411, 418.
[9] *People v. Harvey* (1958) 156 Cal.App.2d 516, 524 (conc. opn. of Dooling, J.).

Testimony of dispatcher, 911 recording

In cases where the person who transmitted the information which led to the search was a 911 operator or police dispatcher, the testimony from either will ordinarily suffice to prove that such a transmission had been made.[10] Said the California Supreme Court, compliance with *Harvey-Madden* "can be met by calling the police dispatcher as a witness at the suppression hearing."[11] The court added that prosecutors may also comply "by introducing a recording of the 911 call."

Produce police communications records

Another way to comply is to produce the official police communication records that documented the source's call to the police or the dispatcher's transmission to the officer who acted on the information. In the former situation, it is presumed that the source's information was transmitted by a dispatcher to the searching officer. Thus, in ruling that prosecutors in *People v. Lazanis* had complied with *Harvey-Madden*, the Court of Appeal noted, among other things, "The prosecution has relied upon the exhibit which was offered as a record of the Santa Monica Police Department. This document was time stamped and headed 'Call for Service Record.' It is certified as a true and correct copy of an original document by Sergeant Keane of that department. It shows on its face that 'second hand info poss 459 to business.'"[12]

Produce arrest warrant, abstract

If the defendant was arrested on an outstanding warrant , prosecutors can satisfy *Harvey-Madden* by producing the original warrant,[13] or a departmental computer printout that describes the warrant by number and offense. Thus, the Court of Appeal explained that the "most direct way of proving police do not manufacture probable cause for a [warrant] arrest," is the "production of that warrant."[14] *Harvey-Madden* may also be satisfied if prosecutors produce a certified copy or abstract of the warrant.[15] As the Court of Appeal observed, "In today's age of electronic communications and computerized record- keeping, the use and reliance on abstracts are a necessary part of the administration of justice."[16]

Circumstantial Evidence

The prosecution's use of circumstantial evidence to satisfy the *Harvey-Madden* requirement is frequently overlooked, but in many cases it is sufficient and efficient. As the Court of Appeal observed in such a case, *In re Richard G.,* "Where, as here, the evidence and the reasonable inferences flowing from it show that the police dispatcher actually received a telephone report creating a reasonable suspicion of criminal wrongdoing, it is not necessary to require strict compliance with the *Harvey-Madden rule*."[17]

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[10] See *In re Richard G.* (2009) 173 Cal.App.4th 1252, 1260 ["[The *Harvey-Madden* requirements] can plainly and easily be met by simply calling the police dispatcher as a witness at the suppression hearing."]; *People v. Jourdain* (1980) 111 Cal.App.3d 396, 406 [prosecutors met their burden under *Harvey-Madden* when they had the intermediary officers present at the hearing and available for questioning].

[11] *People v. Brown* (2015) 61 Cal.4th 968, 983.

[12] (1989) 209 Cal.App.3d, 49, 56.

[13] See *People v. Alcorn* (1993) 15 Cal.App.4th 652, 660 ["[W]hen the prosecution produces an abstract showing the existence of a facially valid warrant, identifying the warrant with sufficient particularity to allow the defendant to obtain a copy of the warrant and its supporting documents, the prosecution has met its burden of producing evidence."]; *Hewitt v. Superior Court* (1970) 5 Cal.App.3d 923, 929-30.

[14] *People v. Armstrong* (1991) 232 Cal.App.3d 228, 246. Also see *People v. Collins* (1997) 59 Cal.App.4th 988, 994 ["[W]here the prosecution has introduced some credible independent evidence of the existence of a facially valid warrant supporting the arrest, the prosecution has met its burden of producing evidence."].

[15] See *People v. Alcorn* (1993) 15 Cal.App.4th 652, 660 ["The abstract is some proof that a warrant exists, although not absolute proof of its validity. An abstract provides sufficient information for a defendant who suspects foul play to trace the source of the probable cause and mount any challenge he or she deems appropriate."].

[16] *People v. Johnson* (1987) 189 Cal.App.3d 1315, 1320.

[17] (2009) 173 Cal.App.4th 1252, 1259. Also see *People v. Romeo* (2015) 240 Cal.App.4th 931, 945.

What usually happens is that prosecutors simply present testimony from the arresting officer who will usually be present anyway to establish probable cause. Then that officer will explain to the court that when he arrived at the scene he saw or heard something that was consistent with the information he had received from another officer or over the police radio. It should be noted that such testimony does not prejudice the defendant because his attorney will be able to cross-examine the officer about what he saw or heard. The following are examples of how circumstantial evidence has been effectively used.

SUSPECTS LOCATED AT SCENE: In *Richard G.*, an officer who was dispatched to a report of a 415 with a gun testified that, upon arrival, he located two suspects who matched the description that had been broadcast over the radio. In ruling that this testimony satisfied *Harvey-Madden*, the court observed that, if the descriptions of the perpetrators had not been transmitted to the officer, he would not have been able to identify the people who were involved in the 415.

SUSPECTS FLED: In *People v. Johnson*[18] an officer who had responded to an anonymous report of a burglary in progress testified that, upon arrival, he saw two men who matched the descriptions of the perpetrators that were broadcast, and that the men fled when they saw him. Although the prosecutor did not provide direct evidence of the dispatch, the court ruled that the officer's testimony that the suspects fled was sufficient to prove that their descriptions had been transmitted because, otherwise, the officer would not have known what the suspects looked like. Said the Court, "[T]he information transmitted by the police dispatcher was corroborated by what the officers observed at the scene, making it virtually impossible for the information to have been made up in the police department. The officers at the scene were thoroughly cross-examined and the court obviously believed that they, in fact, had received the dispatch."

CORROBORATING PHYSICAL EVIDENCE: Testimony from the arresting or searching officer may also satisfy *Harvey-Madden* if he testified that he found something at the scene that was consistent with having received the transmission.

For example, in *People v. Orozco*,[19] an anonymous caller phoned Pomona police at about 11:50 A.M. and reported "shots being fired" from a vehicle which the caller described. When officers arrived at the scene and spotted the car, they detained the occupants. Shortly after that, one of the officers saw "two expended cartridges on the ground" near the car. Although the prosecutor did not present testimony from the caller or the dispatcher, the court ruled the officer's testimony that he found the expended cartridges at the scene constituted sufficient circumstantial evidence that the call had been received. Said the court, "The presence of the cartridges certainly supports a very strong inference that the police did not make up the information from the informant. Thus, the veracity of the dispatcher's statement that he received a call was circumstantially proved."

Finally, in *People v. Sutton*[20] an LAPD officer responded to an anonymous call that small children had been left alone in an apartment. Again, the prosecutor did not present testimony from the dispatcher, but the court ruled that the officer's testimony was sufficient because he testified that, upon arrival, he saw certain things that were consistent the report that small children were inside; i.e., the lights in the apartment were on, a TV was sounding, and no one answered the door. Said the court, the officer verified the fact that there were occupants in appellant's apartment, and "they were not capable of responding to his repeated knocks on the door. This was consistent with there being 'small children' too young to respond." POV

[18] (1987) 189 Cal.App.3d 1315, 1320.
[19] (1981) 114 Cal.App.3d 435, 444-45.
[20] (1976) 65 Cal.App.3d 341.

Searches by Civilians and Police Agents

[T]he protections of the Fourth Amendment do not extend to searches conducted by private persons.[1]

People will sometimes discover evidence of a crime and turn it over to an officer. In most cases, the evidence is some type of contraband, such as drugs or stolen property, or sometimes a weapon. But whatever it is, and regardless of how the person obtained it, the evidence cannot be suppressed because suppression is a remedy only if the evidence was obtained by an officer or police agent.[2] As the Supreme Court explained, the Fourth Amendment's suppression remedy "is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official."[3] The question we will address in this article is how the courts determine whether a person is a police agent.

Indications of Police Agency

Virtually anyone can be a police agent, including victims, witnesses, neighbors, security officers employed by malls and amusement parks, private investigators, motel managers, employees of package delivery services, informants, and sometimes even off-duty officers. But in determining whether a person was acting as a police agent, it doesn't matter where he worked. What matters is whether, and to what extent, an officer had a role in the intrusion that resulted in the discovery and seizure; i.e., whether the officer "had a hand in it."[4] In other words, it all depends "on the degree of the Government's participation in the private party's activities."[5] The following circumstances are strong indications that a person was acting as a police agent:

Requesting, inducing, instigating: Plainly, a private party who conducts a search will become a police agent if an officer requested, induced, or instigated the intrusion. For example, people have been deemed police agents if they were acting at an officer's request,[6] or if an officer participated in the "planning and implementation" of the search,[7] or if the search was conducted at an officer's "behest or instigation,"[8] or if an officer "coerced, promoted, or encouraged" the search,[9] or if an officer acted as a "lookout" while the person searched.[10]

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[1] *People v. William G.* (1985) 40 Cal.3d 550, 558. Edited.
[2] See *People v. Wachter* (1976) 58 Cal.App.3d 911, 920 [the exclusionary rule "does not extend to cases where evidence has been seized or obtained by a private citizen unless that citizen was then acting as an agent for the government"]. Also see *Skinner v. Railway Labor Exec. Assn.* (1989) 489 U.S. 602, 614 [evidence will be suppressed if it was obtained as the result of an unlawful search by civilian who was an "instrument or agent of the Government"].
[3] *United States v. Jacobsen* (1984) 466 U.S. 109, 113.
[4] *Lustig v. United States* (1949) 338 U.S. 74, 78.
[5] *Skinner v. Railway Labor Exec. Assn.* (1989) 489 U.S. 602, 614.
[6] See *People v. Bennett* (1998) 17 Cal.4th 373, 383.
[7] See *Raymond v. Superior Court* (1971) 19 Cal.App.3d 321, 325 ["police participation in planning and implementation subjected the expedition and its product to [suppression]"]; *People v. Wilkinson* (2008) 163 Cal.App.4th 1554, 1567.
[8] See *People v. De Juan* (1985) 171 Cal.App.3d 1110, 1120 [search at officers' "behest or instigation"]; *U.S. v. Silva* (1st Cir. 2009) 554 F.3d 13, 18 [consider "the extent of the government's role in instigating or participating in the search, its intent and the degree of control it exercises over the search and the private party"].
[9] See *George v. Edholm* (9th Cir. 2014) 752 F.3d 1206, 1215] ["Police officers may not avoid the requirements of the Fourth Amendment by inducing, coercing, promoting, or encouraging private parties to perform searches they would not otherwise perform."].
[10] See *U.S. v. Reed* (9th Cir. 1994) 15 F.3d 928, 932.

JOINT OPERATIONS: A person may also be deemed a police agent if officers allowed him to participate in a police action. For example, in *Stapleton v. Superior Court*[11] LAPD officers and agents from three credit card companies went to Stapleton's home to arrest him on an outstanding warrant for credit card fraud. Some of the agents covered the back yard while the officers entered through the front door. After Stapleton was arrested, one of the agents searched the trunk of his car and found several illegal tear gas canisters. Although the actual search was conducted by a civilian, the California Supreme Court ruled it was a police search because the officers, "by allowing [the agent] to join in the search and arrest operation, put [him] in a position which gave him access to the car keys and thus to the trunk of [Stapleton's] car."

FAILING TO INTERVENE: An officer's failure to prevent a person from conducting an illegal search may also be attributable to the officer if (1) the officer knew that the search was impending or underway; and (2) he knew, or should have known, that it was unlawful.[12] As the court explained in *People v. De Juan*, "Suppression will be ordered when with the knowledge that a private citizen is violating or is about to unlawfully violate the privacy rights of another, the police sit idly by and do nothing."[13] For example, in *U.S. v. Reed*[14] the manager of a Best Western motel notified officers that he suspected that a guest named Reed was using his room for "drug activities." He also asked the officers to stand by while he "checked the room"; i.e., illegally searched it. According to the court, the officers "stood guard" in the doorway as the manager went through Reed's dresser drawers and examined the contents of his briefcase. As it turned out, the search netted a gun and drugs, but the court suppressed everything because the officers had failed to stop him. Said the court, the officers "definitely knew and acquiesced in [the manager's] search. They were personally present during the search, knew exactly what [the manager] was doing as he was doing it, and made no attempt to discourage him from examining Reed's personal belongings beyond what was required to protect hotel property."

On the other hand, an officer's failure to intervene will not result in a police search if the officer reasonably believed that the intrusion was lawful.[15] For example, in *People v. Minervini*[16] a motel clerk in Santa Barbara suspected that two men who had rented two rooms were part of a gang that had been stealing television sets from motels in the area. When he saw one of the men removing a

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[11] (1968) 70 Cal.2d 97, 100.

[12] See *People v. Yackee* (1984) 161 Cal.App.3d 843, 847 ["the investigating officer knowingly allowed the airline to reopen the suitcase in his presence, for his benefit, without intervening to stop the search"]; *Dyas v. Superior Court* (1974) 11 Cal.3d 628, 633, fn.2 [exclusionary rule will be applied if officers "knowingly allowed [an illegal search] to take place without protecting the third party's rights"]; *Stapleton v. Superior Court* (1968) 70 Cal.2d 97, 103 ["[T]he police need not have requested or directed the search in order to be guilty of 'standing idly by'; knowledge of the illegal search coupled with a failure to protect the petitioner's rights against such a search suffices."]; *U.S. v. Walther* (9th Cir. 1981) 652 F.2d 788, 793 ["The DEA thus had knowledge of a particular pattern of search activity dealing with a specific category of cargo, and had acquiesced in such activity."]; *U.S v. Shahid* (7th Cir. 1997) 117 F.3d 322, 325 ["a "critical factor" is "whether the government knew of and acquiesced in the intrusive conduct"].

[13] (1985) 171 Cal.App.3d 1110, 1120.

[14] (9th Cir. 1994) 15 F.3d 928.

[15] See *People v. Thompson* (1972) 25 Cal.App.3d 132, 142 ["The police officer who was present at the [search] believed reasonably and in good faith that the conduct of the airline official was lawful."]; *People v. Minervini* (1971) 20 Cal.App.3d 832, 839 [because the motel manager had a right to enter the rooms, "that right would not be diminished if he sought police assistance in exercising that right or even if he was encouraged by the police to so exercise it."]; *U.S. v. Walther* (9th Cir. 1981) 652 F.2d 788, 792 ["The presence of law enforcement officers who do not take an active role in encouraging or assisting an otherwise private search has been held insufficient to implicate fourth amendment interests, especially where the private party has had a legitimate independent motivation for conducting the search."].

[16] (1971) 20 Cal.App.3d 832.

"large box" from his room he notified the police and the motel's manager. When officers arrived, they accompanied the manager as he opened the door to one of the rooms and found that the television was gone. The manager and the officers then went to the other room which the manager opened with a key. As he looked around, he saw that the television set had been placed in a cardboard box. The men were later arrested and argued in court that the officers' observations inside the rooms should be suppressed because the motel manager was functioning as a police agent when he inspected the rooms. But the court pointed out that the manager "went to the rooms and opened them on his own initiative" and, more important, he had a right to do so and "that right would not be diminished if he sought police assistance in exercising [it] or even if he was encouraged by the police to so exercise it."

Similarly, in *U.S v. Cleaveland*[17] an investigator for the Portland General Electric Company (PGE) received a tip that someone was diverting electricity to a certain residence. He then asked a police detective to accompany him while he checked out the meter. The detective waited in his car while the PGE investigator searched the meter housing and discovered evidence of illegal diversion. The suspect was arrested and argued that the investigator's observations should have been suppressed because he was functioning as a police agent. The court disagreed, noting, "It was PGE, not the police, who initiated the plan to inspect the meter. There was no reason why the detective should have restrained [the investigator] or discouraged him in his search because [the investigator] never exceeded his authority under the Customer Service Agreement to go on the property and inspect the meter."

Not Indications of Police Agency

The following circumstances will not ordinarily render a person a police agent:

REQUEST TO FOLLOW "ROUTINE" PROCEDURES: A search by a civilian will not be converted into a police search merely because an officer requested that the civilian (such as a motel desk clerk, house cleaner, or delivery person) follow "routine" procedures in carrying out his duties while the officer merely stood by.[18] For example, in *U.S. v. Andrini*[19] ATF agents were conducting surveillance on a motel room rented by Andrini, who was suspected of setting fire to an office building. As the result of a mix-up in room assignments, Andrini's suitcase was sent to the wrong room, then returned to the front desk. Although an ID tag was not attached to the bag, both the desk clerk and the ATF agent (who happened to be present) suspected that it belonged to Andrini. When the clerk asked the agent what he wanted him to do with the bag, he said that he should follow "routine" procedures for such a situation. So the clerk opened the bag to try to determine the identity of its owner. Inside, he saw a gun. Continuing to follow routine procedures, he notified local police who arrested Andrini for being a felon in possession of a firearm. During a search incident to arrest, the officers found a pyrotechnic fuse similar to the one that had been used in the arson. On appeal from his arson conviction, Andrini contended that the search of his suitcase should be deemed a police search but the court disagreed because the ATF agent "did not instruct the motel clerk to open the bag. To the contrary, he advised the clerk to follow routine motel procedure."

In another such case, *U.S. v. Bruce*,[20] the manager of an Extended Stay America hotel in Ohio notified police that employees had detected the odor of burning marijuana coming from one of two rooms that had been rented by Bruce. At the request of an officer, the motel manger instructed the housekeepers to segregate the trash "during their regular cleaning." While searching the segregated trash,

[17] (9th Cir. 1994) 38 F.3d 1092.
[18] See *People v. Minervini* (1971) 20 Cal.App.3d 832, 839.
[19] (9th Cir. 1982) 685 F.2d 1094.
[20] (6th Cir. 2005) 396 F.3d 697.

officers found marijuana, and Bruce argued that it should be suppressed because the housekeepers were police agents. Not so, said the court, because the "cleaning staff was not asked to *search* for evidence, but merely to *preserve* any possible evidence they might otherwise have been removed from the room and discarded in the course of their ordinary cleaning duties. There is no evidence that the staff were asked to look around the rooms, report any suspicious items, or otherwise deviate from their typical cleaning routine."

POLICE REQUEST FOR PUBLIC ASSISTANCE: A search conducted by a civilian will not become a police search merely because the civilian was responding to a public request for assistance in obtaining information about a case. As the California Supreme Court explained in *People v. McKinnon*,[21] "When the authorities respond to [public interest in apprehending criminals] with drug education programs and generalized appeals for the assistance of the citizenry, they do not automatically 'deputize' all those who may have occasion to act on the information thus provided."

PRIOR CONTACTS, COOPERATION: Although it is relevant that officers had spoken with the civilian in the past about crime problems or investigations, or that the civilian had previously cooperated with officers, these circumstances will not establish an agency relationship.[22] As the Ninth Circuit put it, "While a certain degree of governmental participation is necessary before a private citizen is transformed into an agent of the state, *de minimis* or incidental contacts between the citizen and law enforcement agents prior to or during the course of a search or seizure will not subject the search to fourth amendment scrutiny."[23] For example, in *U.S. v. Koenig*[24] the court ruled that Federal Express did not become a police agency merely because DEA officials had "aided Federal Express in the development of a drug shipper profile."

LICENSING: A person does not become a police agent simply because he was licensed by a state or local government agency; e.g. security officers, private investigators, taxi drivers.[24]

CIVILIAN DISREGARDS OFFICER'S INSTRUCTIONS: A person will not be deemed a police agent if he acted in disregard of the officers' explicit instructions not to seek incriminating evidence.[25]

Applying the Principles

Having explained the principles of police agency, we will now look at how the courts have applied them in specific situations.

PRIVATE SECURITY: While store security officers and other security guards make citizens arrests and engage in other activities that are related to law enforcement, and although they may be licensed by the state,[26] they seldom qualify as police agents because they are not supervised or otherwise controlled by officers, and their primary objective is to protect their employer's property.[27] For example, in

[21] (1972) 7 Cal.3d 899. 914.

[22] See *People v. Lanthier* (1971) 5 Cal.3d 751, 757; *People v. Mangiefico* (1972) 25 Cal.App.3d 1041, 1046-47 [private investigator did not become a police agent merely because he notified the police chief and fire marshal that he was working on an arson case that he and they were investigating]; *People v. North* (1981) 29 Cal.3d 509, 629, 516 ["Citizen cooperation with the police in a criminal investigation, standing alone, does not invoke the exclusionary rule."].

[23] *U.S. v. Walther* (9th Cir. 1981) 652 F.2d 788, 79.

[24] See *People v. Taylor* (1990) 222 Cal.App.3dA3 612, 625 ["[T]he mere fact that California licenses security guards and regulates their conduct does not transform them into state agents."]; *U.S. v. Day* (4th Cir. 2010) 591 F.3d 679, 685 [court rejects argument that security guards were police agents because they are licensed].

[25] See *People* v. *Dement* (2011) 53 Cal.4th 1, 35 [officer "specifically told him that he was not to elicit information from defendant on our behalf"].

[26] See Bus. & Prof. Code §§ 7580 *et seq.*

[27] See *In re Christopher H.* (1991) 227 Cal.App.3d 1567, 1574 [the mall security guards "obtained no aid from state officials in stopping and searching defendants"]; *People v. Taylor* (1990) 222 Cal.App.3d 612, 625 ["[T]he mere fact that California licenses security guards and regulates their conduct does not transform them into state agents."]; *U.S. v. Shahid* (7th Cir. 1997) 117 F.3d 322, 326 ["[T]he security officers' primary role is to provide safety and security for all persons on mall property."].

People v. Leighton[28] security agents at the Nordstrom store in Costa Mesa learned that a store employee, Karen Leighton, had stolen some refund slips which she had taken to her apartment. So the agents went to the apartment and spoke with Leighton's roommate who, apparently at their request, retrieved the slips from a desk drawer in Leighton's bedroom. The agents later turned the slips over to an officer who then arrested Leighton. On appeal, Leighton claimed that the Nordstrom agents and her roommate were functioning as police agents because they acted "with the specific objective of assisting law enforcement officials." But even if that was their objective, said the court, they would not have been police agents because "there is no evidence of prior consultation [with police officers] before seizure of the incriminating documents nor is there any evidence the police had any part in the direction of this investigation."

It has been argued that security agents employed by the large malls and amusement parks should be deemed police agents because these places are virtually small cities. But so far these arguments have not succeeded. For example, in *People v. Taylor*[29] it was contended that security officers at the Santa Cruz Beach Boardwalk were police agents because they worked closely with Santa Cruz police; they wore uniforms, duty belts and badges; they carried handcuffs, batons, and two-way radios, including a police radio. In rejecting the argument, the court said there was "no evidence from which this court can infer a prearranged plan, customary procedure, or policy that substituted the judgment of a private party for that of the police," and there was no indication that police officers encouraged the security guards to make arrests.

PRIVATE INVESTIGATORS: Although private investigators are licensed by the state, they are not police agents when they obtain evidence in the course of an investigation if, as is usually the case, their primary objective was to obtain information or evidence for use by their client.[30] For example, in *People v. De Juan*[31] private investigators (some of whom were retired police officers) were hired to find two brothers who were missing under suspicious circumstances. In the course of their work, some of them illegally detained the defendant and obtained his consent to search his car which, as it turned out, contained evidence linking him to the murder of the brothers. Although the search was unlawful, the court refused to suppress the evidence because the investigators "were not acting as agents of the police or in concert with the police," and the police "had no knowledge of the investigators' plan to intercept and interrogate defendant." The court also ruled, however, that the private investigators *were* acting as police agents when, after discovering the evidence, they received authorization from police officers to transport the defendant to the police station. Consequently, statements made by the defendant during the trip were suppressed.

OFF-DUTY POLICE OFFICERS: The courts have consistently rejected the argument that officers are always on duty for Fourth Amendment purposes. As the court observed in *People v. Wachter*,[32] the defendant "urges that since a police officer is required in many situations to take police action, even during off-duty hours, he never really loses his status as such police officer during any 24-hour period. Such a rule, however, finds no support in California case law." Instead, the rule seems to be

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[28] (1981) 124 Cal.App.3d 497.

[29] (1990) 222 Cal.App.3d 612. Also see *Ecker v. Raging Waters Group, Inc.* (2001) 87 Cal.App.4th 1320, 1329, fn.3 ["Even in a criminal prosecution, the action of a private security guard in searching an individual is not subject to the proscriptions of the Fourth Amendment unless the private security guard may fairly be said to be a state actor."].

[30] See *People v. Mangiefico* (1972) 25 Cal.App.3d 1041, 1048 [private investigator "was not engaged in a joint operation with local authorities, but was conducting an independent investigation"]; *People v. Sahagun* (1979) 89 Cal.App.3d 1 [security consultant hired to investigate thefts at a laundry was not a police agent when he searched a shed owned by the suspect].

[31] (1985) 171 Cal.App.3d 1110.

[32] (1976) 58 Cal.App.3d 911.

that the existence of an agency relationship depends on the officer's primary motivation for taking the action.[33]

For example, in *People v. Wolder*[34] an off-duty LAPD officer was talking with the owner of a Long Beach apartment complex in which the officer's daughter lived. After the officer mentioned that he was concerned that his daughter was hanging out with "bad companions," the owner informed him that his daughter's "Uncle Bob" had stored "a bunch of cases of something" in the garage. The officer was suspicious because his daughter did not have an "Uncle Bob." So he obtained the owner's permission to look inside the boxes in which he found typewriters and burglar tools.

Looking further into the matter, he determined that "Uncle Bob" was Bob Wolder, a well-known "office machine burglar." He also learned that the typewriters had been taken in a commercial burglary in Long Beach. On appeal, Wolder contended that the typewriters and tools should have been suppressed because the officer was functioning as a police agent when he opened the boxes. But the court disagreed, pointing out that he "was concerned about his daughter's association with 'bad companions.'"

In contrast, in *People v. Millard*[35] two off-duty LAPD officers were working as store security at a department store when they noticed that a man in the store, Millard, appeared to be drunk. As they approached him, one of them identified himself as a police officer, displayed his badge, and placed him under arrest. During a pat search, the officer found marijuana. But the court suppressed it, pointing out that "[t]he search was incident to the arrest which had just preceded it and [the officer] had made this arrest ostensibly and expressly as a police officer and not as a private person."

OTHERS: Bail bondsmen are not police agents when they make arrests pursuant to their statutory authority.[36] Vehicle repossessors are not police agents when they search repossessed vehicles.[37] Employees of motels, apartments, and condominiums who are acting on their own initiative and without police supervision are deemed civilians when taking action to protect people and property on the premises, or to prevent the premises from being used for illegal activities.[38] Packages shipped by UPS, FedEx, the airlines, and other carriers will sometimes be intentionally opened by employees for inspection or as the result of a mishap. These are private searches.[39] A search of files by an internet service provider is not a police search in the absence of police involvement.[40] A computer technician is not a police agent if he finds evidence stored in a computer he was repairing.[41] POV

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[33] See *People v. Peterson* (1972) 23 Cal.App.3d 883, 884 ["It fairly appears [that the off-duty officer] entered the garage out of concern for his own safety as a tenant of the apartment complex"]; *People v. Topp* (1974) 40 Cal.App.3d 372, 378 ["He was off-duty . . . . He simply acceded to the request of his friend to accompany him to the house."].

[34] (1970) 4 Cal.App.3d 984.

[35] (1971) 15 Cal.App.3d 759. Also see *U.S. v. Schleis* (8th Cir. 1976) 543 F.2d 59, 61.

[36] See *People v. Houle* (1970) 13 Cal.App.3d 892, 895; Pen. Code §§ 1299 *et seq.*, 1300 *et seq.*

[37] See *People v. Shegog* (1986) 184 Cal.App.3d 899, 902.

[38] See *People v. Ingram* (1981) 122 Cal.App.3d 673, 677 [hotel manager found drugs in a guest's suitcase and showed the open suitcase to officers]; *People v. Robinson* (1974) 41 Cal.App.3d 658 [landlady discovered a murder weapon in her tenant's coat pocket and gave the coat to an officer]; *People v. Johnson* (1971) 21 Cal.App.3d 235, 242 [apartment maintenance entered an apartment in the course of his duties and saw a machine gun].

[39] See *United States v. Jacobsen* (1984) 466 U.S. 109, 115; *People v. Sapper* (1980) 102 Cal.App.3d 301, 305 [shipper did not become a police agent merely because government regulations encouraged, but did not mandate, searches of suspicious packages]; *People v. Howard* (1971) 21 Cal.App.3d 997, 999 [package opened because employees reasonably believed it contained drugs]; *U.S. v. Parker* (8th Cir. 1994) 32 F.3d 395, 399 ["the government did not direct UPS to open the package . . . . UPS opened the package pursuant to its policy to inspect the packaging of packages insured for more than $1,000"].

[40] See *U.S.* v. *Richardson* (4th Cir. 2010) 607 F.3d 357, 364.

[41] *U.S. v. Tosti* (9th Cir. 2013) 733 F.3d 816.

Recent Cases

In re I.F.

(2018) 20 Cal.App.5th 735

Issue

Did officers violate the *Miranda* rights of a 12-year old murder suspect?

Facts

The minor in this case, 12-year old I.F., was charged in Calaveras County with murdering his 8-year old sister by stabbing her 22 times. The murder occurred in his sister's bedroom while the other members of the family were attending a Little League game. After killing his sister, I.F. phoned his mother and 911 and reported that an unknown man had stabbed his sister "a bunch of times, she's like dead." I.F.'s father was the first to arrive and, as he approached the body, the only injury he could see was a cut over the forehead. It was only when he lifted her shirt that he could see the stab wounds. I.F. was interviewed four times. He was not *Mirandized*.

The first interview: A sheriff's detective spoke with I.F. outside the hospital where the body was taken. I.F. said that when he saw the man running away, he grabbed a kitchen knife "just in case there's anyone there," and that he later put the knife on the kitchen counter. (It was determined that the knife blade was "damaged" and there were traces of I.F.'s sister's blood on it and on I.F.'s sneakers.) After making it clear to I.F. that he was not "in trouble" and that he did not have to speak with him, the detective asked, "Did you do anything to harm your sister?" I.F. said no. The interview lasted 16 minutes.

The second interview: Later that day, I.F.'s father drove him to the district attorney's office where the same detective questioned him in an interview room located in a portable trailer. Both doors to the interview room were open. At the beginning of the interview (all of the interviews were recorded) the detective informed I.F. that he wanted to talk to him "as a witness," that I.F. did not have to say anything, and that he could "walk out" any time he wanted. During the subsequent interview, which lasted 77 minutes, I.F. made it clear that he never entered his sister's bedroom and that he only observed her body from the doorway.

The Third interview: The third interview was conducted two days later in the DA's interview room by two other sheriff's detectives. The doors were closed. The first 40 minutes of the 84-minute interview were described as "non-confrontational," but they were also unproductive. The following passages were especially significant:

- Detective 1 told I.F., "There's a couple things that we know and that we, I think maybe you, you've forgotten and I can understand that cuz this is a really big thing right?"
- Detective 2 told I.F that he could leave with his family when the interview had concluded.
- Detective 1 said, "There is no man that ran out of that house is there?" I.F. responded, "Yeah there is. I saw him."
- Both detectives said, "in empathetic tones, that they had both made mistakes as young people."
- Detective 2 told I.F. that he felt that I.F. was holding back, that there was "something on your mind."
- Because I.F. told 911 that his sister had been "stabbed," and because the only injury he could have seen from outside her bedroom was a cut on her forehead, Detective 1 asked how he knew she'd been stabbed. I.F. said, "I don't know. I could have seen it I guess."
- Both detectives "intimated" that investigators had obtained DNA evidence that proved I.F. was the killer.

The Fourth interview: The fourth interview was conducted two weeks later by a sheriff's detective and an FBI agent.

- The detective "outlined the evidence against I.F." and said that investigators had obtained "a lot of evidence" that he did not tell the truth about seeing a man flee the house.

- I.F. was shown a photograph of a bloody T-shirt that had been found inside his clothes hamper. He admitted that he had worn the shirt on the day his sister was killed, adding "I could have changed I guess I don't remember," and "I probably changed after I see her or something."
- When asked if he was willing to continue the interview, I.F. said no, but his father insisted that he answer additional questions because "we need to find out what happened."
- I.F.'s father told him that investigators "have evidence that it points back to you" so "just tell him yes you did it and what the deal is."
- When the FBI agent told I.F. that his parents "want to know what happened" to his sister, I.F. replied, "I don't remember doing it. But I guess I did, I don't know."

After I.F. was charged with murder in juvenile court, his attorney filed a motion to suppress all of his statements on grounds that they were obtained in violation of *Miranda*. The judge denied the motion and affirmed the murder petition. I.F. was sentenced to 16-years to life.

Discussion

Because I.F. was not *Mirandized*, the main issue on appeal was whether he had been "in custody" for *Miranda* purposes at any point and, if so, when. The law is settled that a minor, like an adult, is "in custody" for *Miranda* purposes if a reasonable person in his position would have believed that his freedom of action had been curtailed to the degree associated with a formal arrest.[1] Although the circumstances that are relevant in making this determination are the same for minors and adults, in juvenile court proceedings the minor's age, maturity, and experience with the criminal justice system are especially important.[2] In this regard, the court noted that I.F. was only 12-years old when he was interviewed, that he had no criminal record, and was not a "seasoned juvenile delinquent." Other circumstances that are almost always relevant (as they were here) include the following:

LOCATION OF THE INTERVIEW: The location of the interview is important because some places such as government buildings (and especially police stations) are heavily secured and are seldom viewed as "friendly" places.

TONE OF THE INTERVIEW: An interview is more apt to be deemed custodial if it was *accusatory* (i.e., the officer's apparent objective was to obtain an incriminating statement) as opposed to *investigative* (i.e. the apparent objective was simply to learn what happened).[3]

"YOU'RE FREE TO LEAVE": Telling a suspect he was not under arrest and was free to leave has been described as "[t]he most obvious and effective means of demonstrating that the suspect had not been taken into custody,"[4] and "powerful evidence" of this.[5]

UNIFORMS, WEAPONS: Especially if the suspect was a minor, the courts often note whether the officers were in uniform and whether their weapons were in plain view. In *I.F.,* the investigators wore plain clothes or departmental polo shirts, except the detectives who conducted the third interview who were in uniform.

DURATION OF INTERVIEW: The duration of the interview is almost always noted.[6] While it is seldom an important circumstance when the suspect was an adult, it becomes significant if the suspect was a minor, especially a younger one.

With these circumstances in mind, the court examined the circumstances surrounding the interviews with I.F.

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[1] See *Berkemer v. McCarty* (1984) 468 U.S. 420, 440; *People v. Stansbury* (1995) 9 Cal.4th 824, 830.
[2] See *J.D.B. v. North Carolina* (2011) 564 U.S. 261, 272.
[3] See *Yarborough v. Alvarado* (2004) 541 U.S. 652, 664.
[4] *U.S. v. Boslau* (8th Cir. 2011) 632 F.3d 422, 428. Also see *U.S. v. Crawford* (9th Cir. en banc 2004) 372 F.3d 1048, 1060.
[5] *U.S. v. Czichray* (8th Cir. 2004) 378 F.3d 822, 826.
[6] See *Yarborough v. Alvarado* (2004) 541 U.S. 652, 665; *Green v. Superior Court* (1985) 40 Cal.3d 126, 135.

The first interview

It was apparent that I.F. was not in custody when he was briefly questioned outside the hospital. As the court said, "where the interview was conducted in the relatively public setting of the entrance to the emergency room, with people coming and going, a reasonable 12 year old subject to non-confrontational questioning by a single officer would feel free to terminate the interview and leave."

The second interview

Although the location of the second interview was the DA's interview room, and although it lasted 77 minutes, the court ruled it was not custodial because (1) I.F. was repeatedly informed that he was not under arrest and that he could leave whenever he wanted; (2) the detective's tone was "professional and appropriate," and (3) the detective's questions were investigatory, not accusatory. Said the court, "Although some of the questions may have caused a reasonable child to experience momentary embarrassment, they would not have caused such a child to experience a restraint on freedom tantamount to an arrest." The court also noted that the DA had attempted to make the interview room less intimidating by putting posters of motion pictures on the walls.

The third and fourth interviews

The third and fourth interviews can be discussed together because they were so similar. They were both rather lengthy, the third interview lasted 84 minutes and the fourth interview lasted about two hours. Moreover, an obvious change in the atmosphere occurred in the course of the third interview and carried over throughout the fourth. Specifically, while the first and second interviews were investigatory in nature, the third and fourth interviews were often accusatory. For example, during the third interview I.F. was asked, "There is no man that ran out of that house is there?" And in the fourth interview he was informed that investigators had obtained "a lot of evidence" indicating he did not tell the truth about seeing a man running from the house.

Even more important, in both interviews I.F. was confronted with evidence of his guilt. In the third interview, he was reminded that he had told the 911 operator that his sister had been "stabbed" but he could not have known that if, as he claimed, he had never entered his sister's bedroom. When asked to explain how he determined that his sister had been stabbed, I.F. responded, "I don't know. I could have seen it I guess." This same point was made during the fourth interview when I.F. was shown a photograph of the bloody T-shirt he had admitted wearing on the day of the murder. Finally, although the investigators were "polite and friendly" and although they told I.F. that he was free to leave, at one point he was told that he could leave "when the interview was over." This was problematic, said the court, because it would have indicated to him that, until then, he was *not* free to leave.

For these reasons, the court ruled that "the third and fourth interviews were custodial, and that I.F.'s statements during these interviews should have been suppressed. Consequently, it remanded the case to the juvenile court with instructions to conduct a new adjudication hearing.

Comments

As we discussed in the Winter 2018 edition and on Point of View Online, officers in California are now effectively prohibited from questioning minors who are 15-years old or younger if they were "in custody" for *Miranda* purposes. Although the new law was not in effect when I.F.'s sister was murdered, the case is nevertheless timely and useful because it addresses the things that officers must do (and avoid doing) in order to prevent interviews with minors from becoming custodial.

Four other things should be noted. First, the court's analysis was accurate and, we believe, fair.[7] Second, the investigators were hampered by I.F.'s parents who demanded control over when and how their son would be interviewed. For example, at one point I.F.'s father said he would permit the investigators to interview his son "only on the condition that he be the one to confront I.F." And,

[7] Compare *In re Elias J.* (2015) 237 Cal.App.4th 568.

during the fourth interview, he told I.F. to cooperate "no less than seventeen times." Said the court, "[T]here is no reason the presence of a parent could not contribute to the creation of a coercive atmosphere, as [the father's] presence did here."

Third, it was apparent that the investigators who questioned I.F. understood that they were on shaky ground during the third and fourth interviews, as demonstrated by their repeated (and prudent) statements to I.F. that he was free to leave at any time, and also by the restrained and sympathetic manner in which they questioned him. But as sometimes happens—especially in extremely serious and troubling cases—they were eventually forced to choose between terminating the interview (and never knowing exactly what happened) and going forward in hopes that they might be able to prevent the interview from becoming custodial. As *I.F.* demonstrates, this is sometimes impossible. Fourth, if I.F. is retried, there is a good chance that prosecutors will be able prove his guilt based on the bloody T-shirt and sneakers, along with some of the things I.F. said during the first and second interviews.

Finally, in another recent case, *People v. Saldana*,[8] the court suppressed the confession of a 58-year old suspect in three sexual assaults, citing some of the reasons cited in *I.F.* For example, the court ruled that *Miranda* is "triggered" when officers "create an atmosphere equivalent to that of formal arrest," which can happen if the suspect was subjected to accusatory questioning "behind closed doors in a police station interrogation room" and, although he was told that he was free to leave, "all the objective circumstances later are to the contrary."

People v. Almeda

(2018) 19 Cal.App.5th 346

Issue

Was a jailhouse informant functioning as a police agent when he elicited incriminating statements from a murder suspect?

Facts

While driving around in Sacramento County, Almeda and Villa saw Alex Chavez in the car in front of them. Because they thought that Chavez had been planning to conduct a drive-by shooting of Almeda's house, they decided to conduct a preemptive drive-by. So they pulled up alongside his car and opened fire, killing him. Riding with Chavez was his girlfriend Jacqueline Jones who was not injured and who immediately identified Almeda and Villa as the perpetrators. Both were arrested, charged with murder, and held in the Sacramento County Jail.

Over the next few weeks, Villa and his cellmate Jerry Rhodes had many conversations in which Villa talked freely about the murder and even drew a diagram of the crime scene. Seeing this as an opportunity to get a reduced sentence for his pending armed robbery charge, Rhodes notified sheriff's deputies that he had "some information" about Villa's case. This resulted in a meeting between Rhodes and a prosecutor, and this resulted in a plea agreement with Rhodes's attorney whereby Rhodes would testify against Villa and would receive a reduced sentence in return if he testified "truthfully and cooperated fully." At one point in the discussions, Rhodes asked the prosecutor if there was anything she wanted him to ask Villa, and she made it clear to him that, apart from engaging in small talk, he was simply to listen and try to remember everything he said about the murder. Rhodes thereafter obtained additional incriminating statements from Villa.

Before trial, Villa argued that his statements to Rhodes should be suppressed because Rhodes had been functioning as a police agent and, therefore, he had violated Villa's Sixth Amendment rights by deliberately eliciting incriminating information from him about the murder for which he had been charged. The motion was denied. Villa and Almeda were found guilty and sentenced to life without parole.

[8] 19 Cal.App.5th 432.

Discussion

In the landmark case of *Massiah v. United States*,[9] the Supreme Court ruled that it is a violation of a defendant's Sixth Amendment right to counsel if officers or prosecutors requested or even encouraged any of the defendant's friends, relatives, or anyone else to surreptitiously elicit incriminating information from him about the crime with which he was charged. Thus, in *In re Neely* the California Supreme Court explained that a *Massiah* violation results "where a fellow inmate, acting pursuant to a prearrangement with the government, stimulates conversation with a defendant relating to the charged offense or actively engages the defendant in such conversation."[10]

In *Almeda*, the parties disputed whether Rhodes had deliberately elicited information from Villa. But because a *Massiah* violation cannot occur unless the defendant was questioned by a "police agent," the court resolved the Sixth Amendment issue when it determined that Rhodes was not a police agent.

In most cases a person will be deemed a police agent if any of the following circumstances existed:

EXPRESS REQUESTS OR ENCOURAGEMENT: Officers instructed or encouraged the informant to seek incriminating information from the defendant.[11]

EXPRESS AND IMPLIED PROMISES: Officers promised the informant that he would receive something of value if he obtained incriminating information from the defendant; e.g., a reduced sentence.[12] Such a promise may be express or implied.[13] However, the Second Circuit recently observed that a court "will not readily imply an improper promise or misrepresentation from vague or ambiguous statements by law enforcement officers."[14]

PROVIDING AN INCENTIVE: An informant may be deemed a police agent if officers provided him with a strong incentive to obtain incriminating statements from the defendant, even if he was instructed not to.[15] In other words, "the critical inquiry is whether the [officer has created a situation likely to provide it with incriminating statements from an accused."[16]

In *Almeda*, it was apparent that neither the prosecutor nor the sheriff's deputy made any express or implied promises did any of these things. In fact, the prosecutor gave Rhodes only one instruction: "Don't try and pry. If he tells you something that's fine but I don't want to get you in a situation where you have any issues with him." Although it was true that Rhodes had entered into a plea agreement with the prosecutor in return for his assistance, the court ruled that this did not render him a police agent because the prosecutor did not imply that the sentence reduction was contingent on Rhodes obtaining incriminating information. As the court pointed out, "The plea agreement did not direct Rhodes to do anything regarding his contacts with Villa."

Consequently, the court ruled that, even if Rhodes had deliberately elicited incriminating statements from Villa, there was no *Massiah* violation because neither the prosecutor nor the sheriff's deputy said anything that would have rendered Rhodes a police agent.

Comment

The question arises: What instructions should officers give to an informant to help make sure that he does not deliberately elicit incriminating statements from the defendant? The most important thing is to be very specific about what the informant can and cannot do and say. For example, it is

[9] (1964) 377 U.S. 201.
[10] (1993) 6 Cal.4th 901, 915.
[11] See *United States v. Henry* (1980) 447 U.S. 264, 271-72; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1247.
[12] See *In re Neely* (1993) 6 Cal.4th 901, 915; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1241.
[13] See *In re Neely* (1993) 6 Cal.4th 901, 917-18.
[14] *U.S. v. Haak* (2nd Cir. 2018) 884 F.3d 400.
[15] See *People v. Memro* (1995) 11 Cal.4th 786, 828.
[16] *People v. Whitt* (1984) 36 Cal.3d 724, 742. Also see *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1241.

not sufficient to merely tell him not to "interrogate" or "question" the defendant; or not to initiate any conversations about the charged crime; or to "be yourself" or "act naturally."[17] Instead, officers and prosecutors should explain that his role is that of a listening post—an "ear"—and that he may do nothing to stimulate a conversation about the charged crime.[18] It would, of course, be unrealistic to expect an informant to say absolutely nothing while the suspect is talking. (It would also be highly suspicious.) Still, the informant should be instructed to keep his comments to a minimum, and to limit them to meaningless conversation fillers and acknowledgments of understanding or agreement; e.g., Yeah, OK, Sure, I hear you, Say that again.[19]

District of Columbia v. Wesby

(2018) __ U.S. __ [138 S.Ct. 577]

Issue

Did officers have probable cause to arrest 21 people for having a party inside a vacant house?

Facts

At about 1 A.M., the District of Columbia's Metropolitan Police Department received a complaint about loud music and "illegal activities" inside a vacant house. When officers arrived, several of the neighbors confirmed that the house should have been empty. As the officers approached the house, they heard loud music coming from inside, and as one of the occupants opened the door for the officers, they immediately observed that the inside of the house was in disarray and, for various reasons, it appeared to have been vacant. It also looked like there was some "debauchery" going on, as several women were giving lap dances, some were walking around in only bras and thongs ("with cash tucked into their garter belts"), and there were "multiple open condom wrappers." As the officers entered, many of the occupants "scattered" and hid. After rounding them up, the officers interviewed them and "did not get a clear or consistent story." For example, many of them said the gathering was a bachelor party, but nobody knew the name of the bachelor.

As things progressed, the officers learned that someone named "Peaches" was supposedly renting the house and had orchestrated the party. Peaches was not in attendance so an officer phoned her and, during a conversation—in which she was "nervous, agitated, and evasive"—she claimed she had rented the house from the owner. But when the officer asked her the owner's name, she "became evasive and hung up." The officers then phoned the owner who said that he had not given Peaches (or anyone else) permission to use his house for a party. At this point, the officers arrested all of the occupants for "unlawful entry."

After the DA dropped the charges, 16 of the partygoers sued the department, claiming they were arrested without probable cause. The District Court agreed and also ruled that the officers were not entitled to qualified immunity. The case then went to trial and the jury awarded the partygoers a total of $680,000 in compensatory damages, and awarded their attorneys about $320,000. The D.C. Circuit upheld the award, and the District of Columbia appealed to the Supreme Court.

Discussion

In a unanimous opinion, the Supreme Court reversed the District Court and the D.C. Circuit, ruling that the officers did, in fact, have probable cause to arrest the partygoers. The Court's ruling was so obviously correct that it would serve no purpose to explain its reasoning. But we are reporting on this case because it gives us an opportunity to review two fundamental principles of probable cause that had somehow eluded the District Court judge and two of the three judges on the D.C. Circuit's panel. (The third judge, the one who got

[17] See *Maine v. Moulton* (1985) 474 U.S. 159, 177, fn.14; *People v. Whitt* (1984) 36 Cal.3d 724, 742.
[18] See *U.S. v. Lentz* (4th Cir. 2008) 524 F.3d 501, 517-18.
[19] See *Kuhlmann v. Wilson* (1986) 477 U.S. 436, 460; *U.S. v. York* (7th Cir. 1991) 933 F.3d 1343; *U.S. v. Lentz* (4th Cir. 2008) 524 F.3d 501, 517-18.

it right, was Janice Brown, formerly with the California Supreme Court.)

The first principle of probable cause is that, in determining whether it exists, the courts must consider the totality of circumstances, which essentially means that they must not isolate each fact, belittle its importance or explain it away, and then conclude that probable cause did not exist because none of the individual facts were very incriminating. As the Supreme Court previously observed, "[W]e have said repeatedly that [the lower courts] must look at the totality of the circumstances of each case."[20] And yet, the two judges on the *Wesby* panel did just the opposite when, for example, they concluded that partygoers' reaction to seeing the officers (they scattered and hid) was "not sufficient standing alone" to create probable cause. But under the totality of circumstances rule, it doesn't matter whether any circumstance "standing alone" would not constitute probable cause. What counts is whether the totality of circumstances do. The two judges were also mistaken, said the Court, when they concluded there was no evidence "suggesting that the condition of the house, on its own, should have alerted the partygoers that they were unwelcome." This was because its conclusion ignored the fact that the house "was in disarray and looked like a vacant property."

Second, the Supreme Court ruled that the judges "mistakenly believed" that they could "dismiss outright any circumstances that were 'susceptible of innocent explanation.'" For example, they "brushed aside" the drinking and lap dances because they thought it was consistent with the partygoers' explanation that they were having a bachelor party. This ruling not only violated the "totality" rule, it was wrong because, as the Supreme Court observed, the partygoers acknowledged that there was "no bachelor" at their bachelor party.

Consequently, the Court ruled that the officers had probable cause to arrest the occupants

Comment

The D.C. Circuit's ruling in *Wesby* was disconcerting because it was the second search case in a row in which its ruling was so obviously wrong. In the other case, *In re Ezra Griffith,*[21] the court ruled that a warrant to search the defendant's cell phone was not supported by probable cause because "the affidavit supporting the warrant application provided virtually no reason to suspect that Griffith in fact owned a cell phone." And yet, as the Supreme Court pointed out (and as almost everyone in the real world knows) cell phones are now "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy."[22]

U.S. v. Sanjar

(5th Cir. 2017) 876 F.3d 725

Issues

(1) Did a search warrant describe the evidence to be seized with sufficient particularity? (2) Did the affidavit establish probable cause to believe that all of the documents to be seized were evidence?

Facts

A company named Spectrum Psychiatric Services was a community mental health center and Medicare provider in Texas. For six years, Spectrum billed Medicare over $90 million for providing its patients with an intensive level of mental health care known as "partial hospitalization" or PHP. Medicare patients can qualify for PHP treatment only if, among other things, they suffer from an acute mental illness, they meet with a physician daily, and receive twenty hours of treatment weekly. Because PHP treatment is so comprehensive, Medicare reimburses providers at a higher rate than alternative treatments.

For six years, Spectrum billed Medicare over $90 million for PHP services. And most of these bills were fraudulent because federal investigators found

[20] *United States v. Arvizu* (2002) 534 U.S. 266, 273.
[21] (D.C.Cir. 2017) 867 F.3d 1265.
[22] *Riley v. California* (2014) __ U.S.__[134 S.Ct. 2473, 2484].

that (1) not all Spectrum's PHP patients were suffering from an acute mental illness, and (2) Spectrum was not providing patients with the level of care required for PHP. For example, patients testified that they spent their time watching movies, listening to music, and playing bingo. In addition, agents determined that Spectrum employees received cash kickbacks from group-home operators who funneled patients to them.

In the course of their investigation, agents obtained a warrant to search Spectrum's offices for, among other things, "documents constituting patient files." These files contained incriminating evidence that was used against Spectrum's physicians and staff. They were convicted.

Discussion

The defendants claimed that the patient files should have been suppressed because the warrant lacked particularity and was overbroad. It is settled that a search warrant may be deemed invalid if the description of the evidence to be seized was not "particular," or if the warrant was "overbroad."[23] A warrant is deemed "unparticular" if it contained no meaningful restriction on where officers could search or what things they were authorized to search for; e.g., a warrant to search for "all evidence," "all stolen" property.[24] In contrast, a warrant is "overbroad" if the supporting affidavit failed to demonstrate probable cause to search for one or more items of listed evidence.[25] Both are usually fatal defects.

The defendants argued that the language "all patient files" was insufficiently particular. Without much discussion, the court disagreed, ruling that the description satisfied the particularity requirement because it "provided sufficient notice of what items the agents could take."

The more difficult issue was overbreadth; i.e., whether the affidavit had established probable cause to believe that *all* of the patient files on the premises contained incriminating documents. Plainly, it did not. That was because the agents could not possibly have known what information each file contained or that all files contained incriminating information.

This is, however, a common problem in complex fraud cases, and the courts have addressed it by adopting the so-called "permeated with fraud" rule. Under this rule, a warrant may authorize the seizure of an entire category of documents (such as "all patient files") if the affidavit established probable cause to believe that all or substantially all of the documents in that category constituted evidence. As the Ninth Circuit observed, a "warrant authorizing the seizure of essentially all business records may be justified when there is probable cause to believe that fraud permeated the entire business operation."[26] Applying this rule to the facts in *Sanjar*, the Fifth Circuit ruled that the warrant was not overbroad since the affidavit established probable cause that "fraud and kickbacks infected the entire PHP program."

Comment

The "permeated with fraud" rule will not ordinarily be applied if, despite proof of widespread fraud, the affiant had the ability to—but didn't—provide a more restrictive description of the evidence to be seized. Thus, the warrant in *Sanjar* was arguably defective because it authorized a search of all patient files instead of all files of patients *enrolled in the PHP program*. Although the court did not discuss this problem, it would not have changed the result since the only files used at trial were those pertaining to patients in the PHP program.

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[23] **Note**: The terms "overbroad" and "unparticular" are often confused. See *Millender v. County of Los Angeles* (9th Cir. 2010) 620 F.3d 1016, 1024 ["We read the Fourth Amendment as requiring 'specificity,' which has two aspects, 'particularity and breadth.'"]; *U.S. v. SDI Future Health, Inc.* (9th Cir. 2009) 568 F.3d 684, 702 ["The district court only made one inquiry, which explicitly conflated particularly and overbreadth."].

[24] See *U.S. v. Kimbrough* (5th Cir. 1995) 69 F.3d 723, 727.

[25] See *People v. Hepner* (1994) 21 Cal.App.4th 761, 773-74; *U.S. v. SDI Future Health, Inc.* (9th Cir. 2009) 568 F.3d 684, 702.

[26] *U.S. v. Smith* (9th Cir. 2005) 424 F.3d 992, 1006.

Smith v. City of Santa Clara

(9th Cir. 2017) 876 F.3d 987

Issue

Are officers prohibited from conducting a probation search of a residence if an occupant who is not on probation objects to the search?

Facts

Officers in Santa Clara developed probable cause to believe that Justine Smith had taken part in an armed carjacking. While trying to find her, they learned she was on probation with a search condition that encompassed her home. They also learned from the probation department that she was currently living in a duplex with her mother, Josephine. So the officers decided to conduct a probation search of the home in order to determine if Justine was hiding inside. But when they arrived, Josephine informed them that she would not admit them without a warrant. The officers entered nevertheless but Justine was not there.

Josephine then filed a civil rights lawsuit in federal court against the officers and their department, claiming that their warrantless entry violated the Fourth Amendment. The case went to trial and the jury determined that the officers' entry was lawful. Josephine appealed to the Ninth Circuit.

Discussion

It is settled that a probation search of a home is lawful if (1) the officers were aware that the terms of probation included authorization to search the home without a warrant, and (2) they had probable cause to believe the probationer lived in the home. It is also settled that officers may conduct probation searches of homes even though the probationer was not present at the time.[23] Thus, it appeared that the search of Josephine's house was legal.

Josephine argued, however, that the search was illegal because the Supreme Court has ruled that officers may not conduct consent searches of homes if one of the occupants expressly objected to the search.[24] And although the search of Josephine's home was a probation search—not a consent search—she contended that *Randolph* should also be applied to probation searches because they are technically based on consent.

The Ninth Circuit disagreed, ruling that the restrictions imposed by *Randolph* apply only to actual consent searches and, because probation searches in the federal system are not based on consent, *Randolph* did not apply and therefore Josephine's objection to the search did not render it illegal.

Comment

Although the California Supreme Court has ruled that probation searches are consensual in nature,[25] we think it is likely that it would have upheld the search in *Smith* because the difference between the federal standard of overall "reasonableness" and "consent" is more theoretical than substantive. Moreover, when the U.S. Supreme Court had an opportunity to choose between the two tests in 2001, it declined but then resolved the case by applying the reasonableness standard.[26]

People v. Gutierrez

(2018) __ Cal.App.5th __ [2018 WL 1531154]

Issue

When conducting a probation search of a residence, under what circumstances may officers detain visitors?

Facts

At about 7 P.M., Kern County sheriff's deputies arrived at the home of Timothy Beltran to conduct a probation search. It was a routine search; i.e.,

[23] See *People v. Mason* (1971) 5 Cal.3d 759, 763.
[24] *Georgia v. Randolph* (2006) 547 U.S. 103.
[25] See *People v. Schmitz* (2012) 55 Cal.4th 909, 920 ["a probationer who is subject to a search clause has explicitly consented to that condition"]; *People v. Ramos* (2004) 34 Cal.4th 494, 506.
[26] *United States v. Knights* (2001) 534 U.S. 112, 118.

there was no reason to believe that Beltran had violated the terms of his probation. While speaking with Beltran at the front door, the deputies determined that the defendant, Reynaldo Gutierrez, was also in the house. So they ordered both men to step outside where they were pat searched and directed to sit on the front porch.

About ten minutes later, while other deputies were searching the house, the deputy who was detaining Gutierrez obtained his ID and ran a warrant check. He was informed that Gutierrez was on Post-Release Community Supervision (PRCS), which includes search authorization.[27] The deputy then searched him and found a "wad" of cash in his front pocket. Other deputies searched Gutierrez's car and found a digital scale and almost an ounce of methamphetamine.

The court was unable to establish how much time elapsed between the start of the detention and the search of Gutierrez and his car. For purposes of this appeal, however, the court figured it was somewhere between 30 and 50 minutes.

Gutierrez was charged with, among other things, possession of methamphetamine for sale. When his motion to suppress the evidence was denied, he pled no contest.

Discussion

The central issue on appeal was whether Gutierrez was legally detained when he and his car were searched. If not, the evidence should have been suppressed as the fruit of an unlawful detention.

The Supreme Court has ruled that officers who arrive at a residence to execute a search warrant may detain all residents and visitors until the search is completed.[28] Does this rule also apply to probation searches? The court in *Gutierrez* ruled it did not, and the reason was that, unlike the execution of search warrants, the execution of routine probation searches are simply not as dangerous.

The court did not, however, rule that officers may never detain visitors at homes that are being searched pursuant to a search condition. Instead, it ruled there must be some specific reason for doing so. For example, it might suffice that officers had reason to believe that an occupant was armed or dangerous; or that the probationer had one or more accomplices who might also be on the premises; or that the terms of probation prohibited the probationer from associating with felons, and the purpose of the detention was to identify the occupants to make sure he wasn't.[29] In *Gutierrez*, however, there was little, if any, justification for detaining Gutierrez, at least after the deputies had determined that he was not armed and did not live in the residence.

The court also ruled that, in determining whether the detention of an occupant was justified, the courts should also consider the intrusiveness of the detention. It then noted that Gutierrez's detention was moderately intrusive, even if not greatly so. There is no evidence that the officers had their guns drawn." And, although it might have been permissible to detain Gutierrez at the outset, (e.g., officer safety), there were no facts that justified a detention lasting 30 minutes or more, especially after the deputy determined that he was unarmed and did not live in the house. Said the court:

> [W]e cannot say that the entire period of Gutierrez's detention—from the inception of Beltran's probation search until the deputies were notified by dispatch that Gutierrez was on PRCS—was justified by government interests made applicable to his detention by individualized and objective facts.

Consequently, the court ruled that Gutierrez was illegally detained by the time the deputy learned that he was searchable and, therefore, the evidence found in his possession should have been suppressed POV

[27] **Note**: It turned out the Gutierrez's PRCS status had terminated almost two years earlier. However, in light of the court's decision, it was unnecessary to determine whether the error affected the legality of the searches.
[28] See *Michigan v. Summers* (1981) 452 U.S. 692, 705; *Bailey v. United States* (2013) 568 U.S. 186, 195.
[29] See *People v. Rios* (2011) 193 Cal.App.4th 583.

If it's not listed here, it's not a problem.

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