

POINT of VIEW



A publication of the Alameda County District Attorney's Office

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Point of View

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This edition of Point of View
is dedicated to the memory of
Officer Michael Johnson
San Jose Police Department
who was killed in the line of duty
on March 24, 2015

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Consent Searches

*Let's go search my apartment. You can search the shit out of it. I'll even help you.*¹

That was a major league bluff. And soon after suspected murderer Eugene Wheeler made his bold offer in an LAPD interview room, he must have realized he had blundered. That's because the detectives gracefully accepted his offer, then diligently searched his apartment and found the murder weapon hidden behind a wall-mounted music speaker. So, thanks in part to his hubris, Wheeler was convicted of first degree murder.

Why did he take such a chance? Actually, there are several logical reasons.² As the Court of Appeal pointed out, a suspect "may wish to appear cooperative in order to throw the police off the scent or at least to lull them into conducting a superficial search; he may believe the evidence is of such a nature or in such a location that it is likely to be overlooked; he may be persuaded that if the evidence is nevertheless discovered he will be successful in explaining its presence or denying any knowledge of it; he may intend to lay the groundwork for ingratiating himself with the prosecuting authorities or the courts; or he may simply be convinced that the game is up and further dissembling is futile."³

But whatever a suspect's motivation, the thing to remember for officers is that, when it comes to consent searches, there's no harm in asking. In fact, the Supreme Court has described them as a "wholly legitimate aspect of effective police activity" which is often "the only means of obtaining important and reliable evidence."⁴ Of course, such evidence is worthless unless it is admissible in court, and that is why we are devoting this edition of *Point of View* to the rules that govern consent searches.

As we will explain, there are four basic requirements:

- (1) **Consent was given:** The suspect must have expressly or impliedly consented.
- (2) **Consent was voluntary:** The consent must have been given voluntarily.
- (3) **Scope of consent:** Officers must have searched only those places and things that the suspect expressly or impliedly authorized them to search.
- (4) **Intensity of search:** The search must not have been unduly intrusive.

In addition to these requirements, we will discuss two issues that frequently arise: mid-search withdrawal of consent and consent obtained by means of trickery. Then in the accompanying article, "Third Party Consent," we will explain the rules for obtaining consent to search a suspect's property from someone other than the suspect, such as his spouse, roommate, or accomplice.

Did he consent?

The most basic requirement is that the suspect must have consented—either expressly or impliedly.

EXPRESS CONSENT: Express consent results when the suspect responds in the affirmative to an officer's request for permission. There are, however, no "magic words" that the suspect must utter.⁵ Instead, express consent may be given by means of any words or gestures that reasonably indicate the suspect was consenting. Express consent will also result if, like Mr. Wheeler, the suspect suggested it.

IMPLIED CONSENT TO SEARCH: Consent will be implied if the suspect said or did something that officers reasonably interpreted as authorization to search.⁶ As the Court of Appeal explained, "Specific words of

¹ *People v. Wheeler* (1971) 23 Cal.App.3d 290, 302 [overturned on other grounds in *People v. Wheeler* (1978) 22 Cal.3d 258].

² *People v. Meredith* (1992) 11 Cal.App.4th 1548, 1562.

³ *People v. James* (1977) 19 Cal.3d 99, 144.

⁴ *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 227-28. Also see *United States v. Drayton* (2002) 536 U.S. 194, 207 ["Police officers act in full accord with the law when they ask citizens for consent."].

⁵ See *People v. James* (1977) 19 Cal.3d 99, 113 ["[T]here is no talismanic phrase which must be uttered by a suspect in order to authorize a search."]; *U.S. v. Carter* (6th Cir. 2004) 378 F.3d 584, 589 ["trumpets need not herald an invitation [to search]"].

⁶ See *Illinois v. Rodriguez* (1990) 497 U.S. 177, 185; *U.S. v. Guerrero* (10th Cir. 2007) 472 F.3d 784, 789-90.

consent are not necessary; actions alone may be sufficient.”⁷ For example, consent to search a home or vehicle has been implied when the suspect responded to the officer’s request to search by handing him the keys;⁸ and when an officer told the suspect what he was looking for and when the suspect responded by telling them where it was located.⁹ However, a failure to object to a search does not constitute consent.¹⁰

Voluntary Consent

In addition to proving that the suspect expressly or impliedly consented, officers must prove that his consent had been given voluntarily.¹¹ This simply means the consent must not have been the result of threats, promises, intimidation, demands, or any other method of pressuring the suspect to consent.¹² “Where there is coercion,” said the Supreme Court, “there cannot be consent.”¹³

It has been argued (usually out of desperation) that any consent search that results in the discovery of incriminating evidence must have been involuntary because no lucid criminal would voluntarily do something that would likely land him in jail. But, as the Court of Appeal observed, these arguments have “never been dispositive of the issue of consent.”¹⁴ For example, the Sixth Circuit observed in *U.S. v. Carter*¹⁵ that, while the defendant’s decision to consent “may have been rash and ill-considered, that does not make it invalid.”

Furthermore, if the suspect consented, it is immaterial that he was not joyful or enthusiastic about it.¹⁶ This is because “[n]o person, even the most innocent, will welcome with glee and enthusiasm the search of his home by law enforcement agents.”¹⁷ For example, consent to search has been found when, upon being asked for consent, the suspect responded “Yeah,” “I don’t care,” “No problem,” “Do what you gotta do,” and “Be my guest.”¹⁸

As we will now discuss, the circumstances that are relevant in determining whether consent was voluntary can be divided into four categories: (1) direct evidence of coercion, (2) circumstantial evidence of coercion, (3) circumstantial evidence of voluntariness, and (4) circumstantial evidence bearing on the suspect’s state of mind.

Direct evidence of coercion

Apart from physical violence, the most obvious forms of coercion are threats and demands—either of which will likely render consent involuntary.

THREATS: An officer’s threat to arrest or take punitive action against the suspect if he refused to consent will render the consent involuntary. For example, the courts have ruled that consent was involuntary when it resulted from an officer’s threat to arrest the suspect,¹⁹ terminate her welfare benefits,²⁰ or remove her children from the home.²¹

DEMANDING CONSENT: Consent is also involuntary if officers said or suggested that, although they were

⁷ *Nerell v. Superior Court* (1971) 20 Cal.App.3d 593, 599 [edited].

⁸ See *People v. Carvajal* (1988) 202 Cal.App.3d 487, 497; *U.S. v. Zapata* (1st Cir. 1994) 18 F.3d 971, 977. Also see *People v. Quinn* (1961) 194 Cal.App.2d 172, 175; *People v. Panah* (2005) 35 Cal.4th 395, 467.

⁹ See *People v. Superior Court (Henry)* (1974) 41 Cal.App.3d 636, 639; *U.S. v. Reynolds* (1st Cir. 2011) 646 F.3d 63, 73.

¹⁰ See *People v. Nelson* (1985) 166 Cal.App.3d 1209, 1215; *People v. Timms* (1986) 179 Cal.App.3d 86, 90.

¹¹ *Florida v. Royer* (1983) 460 U.S. 491, 497.

¹² See *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 228; *Florida v. Bostick* (1991) 501 U.S. 429, 438.

¹³ *Bumper v. North Carolina* (1968) 391 U.S. 543, 550.

¹⁴ *People v. Ibarra* (1980) 114 Cal.App.3d 60, 65.

¹⁵ (6th Cir. en banc 2004) 378 F.3d 584, 588-89.

¹⁶ See *Robbins v. MacKenzie* (1st Cir. 1966) 364 F.2d 45, 50 [“Bowling to events, even if one is not happy about them, is not the same thing as being coerced.”]; *U.S. v. Gorman* (1st Cir. 1967) 380 F.2d 158, 165.

¹⁷ *U.S. v. Faruolo* (2nd Cir. 1974) 506 F.2d 490, 495.

¹⁸ See *People v. Perillo* (1969) 275 Cal.App.2d 778, 782 [“I don’t care”]; *U.S. v. Canipe* (6th Cir. 2009) 569 F.3d 597, 604 [no problem]; *U.S. v. \$117,920* (8th Cir. 2005) 413 F.3d 826, 828 [“I guess if you want to”]; *U.S. v. Zubia-Melendez* (10th Cir. 2001) 263 F.3d 1155, 1163 [“Yeah, no matter”]; *U.S. v. Franklin* (1st Cir. 2011) 630 F.3d 53, 60 [“do what you got to do”].

¹⁹ See *Hayes v. Florida* (1985) 470 U.S. 811, 814-15.

²⁰ See *Parrish v. Civil Service Commission* (1967) 66 Cal.2d 260, 270-75.

²¹ See *U.S. v. Soriano* (9th Cir. 2003) 361 F.3d 494 502. **NOTE:** The Court of Appeal has ruled that a DUI arrestee’s consent to submit to a warrantless blood draw was not involuntary merely because the officer notified him of California’s Implied Consent law and the consequences of refusing to consent. *People v. Harris* (2015) __ Cal.App.4th __ [2015 WL 708606].

asking for the suspect's consent, he really had no choice. As the court observed in *People v. Fields*, "There is a world of difference between requesting one to open a trunk and asking one's permission to look in a trunk."²² Similarly, an officer's entry into a home would not be consensual if he was admitted after announcing, "Police! Open the door!"²³

Circumstantial evidence of coercion

Even if there were no explicit threats or demands, consent is involuntary if (1) a reasonable person in the suspect's position would have viewed the officers' words or conduct as coercive, and (2) there was no overriding circumstantial evidence of voluntariness (discussed in the next section).

INTIMIDATION: Consent is involuntary if it was obtained by the use of police tactics that were reasonably likely to elicit fear if it was denied.²⁴ For example, in *People v. Reyes*²⁵ a narcotics officer induced Reyes to leave his home by claiming that Reyes' parked car had been damaged in a traffic accident. As Reyes stepped outside, he was met by five officers, three of whom were "attired in full ninja-style raid gear, including black masks and bulletproof vests emblazoned with POLICE markings." Although Reyes consented to a search his pockets (there were drugs), the court ruled the consent was involuntary because the officers had "lured him into a highly intimidating situation." Said the court, "[W]e think the police went too far." Some other examples:

- The suspect was "standing in a police spotlight, surrounded by four officers all armed with shotguns or carbines."²⁶
- "Six or seven officers strode into Poole's apartment in order to 'talk' to him, without so much as a by-your-leave."²⁷
- "[A] half dozen uniformed police officers" asked for consent while "moving up the [suspect's] stairs with pistols drawn."²⁸

BADGERING: If the suspect initially refused to consent, an officer's badgering him into changing his mind is necessarily coercive. Officers may, however, ask the suspect to reconsider his decision so long as they are not overly persistent.²⁹ When does mere persistence become badgering? Although the line may be difficult to draw, it may depend a lot on the officers' attitude; e.g., hostile or accusatory versus "restrained and noncoercive."³⁰

NUMBER OF OFFICERS: The presence of several officers at the scene is somewhat coercive. But unless they surrounded the suspect or were otherwise in close proximity, this circumstance is not a strong indication of coercion.³¹

ARREST, HANDCUFFS: That the suspect had been arrested or was handcuffed is relevant, but not significant.³² As the Supreme Court observed, "[C]ustody alone has never been enough to demonstrate a coerced confession or consent to search."³³

DRAWN WEAPONS: Consent to search given at gunpoint will usually be involuntary³⁴ unless the follow-

²² (1979) 95 Cal.App.3d 972, 976. Also see *U.S. v. Winsor* (9th Cir. en banc 1988) 846 F.2d 1569, 1573, fn.3 ["compliance with a police command is not consent"].

²³ *People v. Poole* (1986) 182 Cal.App.3d 1004, 1012.

²⁴ See *People v. Challoner* (1982) 136 Cal.App.3d 779, 782; *U.S. v. Robertson* (4th Cir. 2013) 736 F.3d 677, 680 [a "police-dominated atmosphere"]. But also see *People v. Ibarra* (1980) 114 Cal.App.3d 60, 65 ["Defendant claims coercion from the fact that he was surrounded by police cars when originally stopped. But again, police domination does not necessarily vitiate consent."]; *U.S. v. Chaney* (1st Cir. 2011) 647 F.3d 401, 407 [consent was given after "the excitement of the initial entry had passed"].

²⁵ (2000) 83 Cal.App.4th 7, 13. Also see *Estes v. Rowland* (1993) 14 Cal.App.4th 508, 527.

²⁶ *People v. McKelvy* (1972) 23 Cal.App.3d 1027.

²⁷ *People v. Poole* (1986) 182 Cal.App.3d 1004, 1012.

²⁸ *People v. Dickson* (1983) 144 Cal.App.3d 1046, 1051-52.

²⁹ See *People v. Hamilton* (1985) 168 Cal.App.3d 1058, 1067 ["Neither does it appear, as a matter of law, that the persistence of the officers constituted coercion."]; *U.S. v. Cormier* (9th Cir. 2000) 220 F.3d 1103, 1109 ["not unreasonably persistent"].

³⁰ See *Fare v. Michael C.* (1979) 442 U.S. 707, 727; *People v. Perdomo* (2007) 147 Cal.App.4th 605, 618; *People v. Benson* (1990) 52 Cal.3d 754, 780 ["Everything totally aboveboard with the officers. No coercion, no harassment. No heavy-handedness."].

³¹ See *People v. Gurtenstein* (1977) 69 Cal.App.3d 441, 451; *People v. Weaver* (2001) 26 Cal.4th 876, 924; *Orhorhaghe v. I.N.S.* (9th Cir. 1994) 38 F.3d 488, 500; *U.S. v. Price* (3rd Cir. 2009) 558 F.3d 270, 279.

³² See *People v. Monterroso* (2004) 34 Cal.4th 743, 758; *People v. Ratliff* (1986) 41 Cal.3d 675, 686; *People v. James* (1977) 19 Cal.3d 99, 109 ["custody" is of "particular significance," but "not conclusive"].

³³ *United States v. Watson* (1976) 423 U.S. 411, 424.

³⁴ See *People v. Challoner* (1982) 136 Cal.App.3d 779, 782; *People v. Fields* (1979) 95 Cal.App.3d 972, 976.

ing circumstances existed: (1) the officer had good reason for drawing the weapon, (2) the weapon was reholstered before consent was sought, and (3) the circumstances were not otherwise coercive.³⁵

REFERENCES TO SEARCH WARRANTS: A remark by officers as to the existence, issuance, or necessity of a search warrant may constitute evidence of coercion depending on the context:

"WE HAVE A WARRANT": Consent is involuntary if officers falsely said or implied that they possessed a warrant or that one had been issued. As the Supreme Court observed in *Bumper v. North Carolina*, "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion."³⁶

"WE DON'T NEED A WARRANT": Consent is involuntary if officers said or implied that, although they were asking for consent, they did not need it.³⁷

"[T]here can be no effective consent," said the Ninth Circuit, "if that consent follows a law enforcement officer's assertion of an independent right to engage in such conduct."³⁸

"WE WILL SEEK A WARRANT": Consent is not involuntary if officers merely told the suspect they would "seek" or "apply for" a search warrant if consent

was refused.³⁹ As the court explained in *People v. Gurtenstein*,⁴⁰ an officer's statement that "he would go down and apply for a search warrant" could not be considered coercive because he "was merely telling the defendant what he had a legal right to do." Similarly, in *U.S. v. Faruolo*⁴¹ an FBI agent told the defendant that if he refused to consent to a search of his house the agents would secure the premises and apply for a warrant. In rejecting the argument that this comment constituted coercion, the court said that, on the contrary, it was "a fair and sensible appraisal of the realities facing the defendant Faruolo."

"WE WILL 'GET' A WARRANT": If officers told the suspect that they would "get" or "obtain" a warrant if he refused to consent (as if warrants were issued on request), his consent should not be deemed involuntary if officers did, in fact, have probable cause for a warrant.⁴² As the Ninth Circuit explained, "[C]onsent is not likely to be held invalid where an officer tells a defendant that he could obtain a search warrant if the officer had probable cause upon which a warrant could issue."⁴³ Similarly, the Seventh Circuit observed in *U.S. v. Duran*, "Although empty threats to obtain a warrant may at times render a subsequent consent involuntary, the threat in this case was firmly grounded."⁴⁴

³⁵ See *People v. Parker* (1975) 45 Cal.App.3d 24, 31; *People v. Ratliff* (1986) 41 Cal.3d 675, 686.

³⁶ (1968) 391 U.S. 543, 550. Also see *People v. Baker* (1986) 187 Cal.App.3d 562, 571 ["Baker's consent cannot be disentangled from the news that a search warrant was imminent."]; *Trulock v. Freeh* (4th Cir. 2001) 275 F.3d 391, 402 [police agent told the suspect that "the FBI had a search warrant"].

³⁷ See *Florida v. Royer* (1983) 460 U.S. 491, 497 [consent is involuntary when it is "a mere submission to a claim of lawful authority"]; *Lo-Ji Sales v. New York* (1979) 442 U.S. 319, 329 ["Any 'consent' given in the face of colorably lawful coercion cannot validate the illegal acts shown here."]; *People v. Valenzuela* (1994) 28 Cal.App.4th 817, 832 ["Where the circumstances indicate that a suspect consents because he believes resistance to be futile ... the search cannot stand."].

³⁸ *Orhorhaghe v. I.N.S.* (9th Cir. 1994) 38 F.3d 488, 500.

³⁹ See *People v. Goldberg* (1984) 161 Cal.App.3d 170, 188 ["[C]onsent to search is not necessarily rendered involuntary by the requesting officers' advisement that they would try to get a search warrant should consent be withheld."]; *U.S. v. Rodriguez* (9th Cir. 2006) 464 F.3d 1072, 1078 ["A statement indicating that a search warrant would likely be sought and the apartment secured could not have, by itself, rendered [the] consent involuntary as a matter of law."]; *U.S. v. Alexander* (7th Cir. 2009) 573 F.3d 465, 478 ["[A]n officer's factually accurate statement that the police will take lawful investigative action in the absence of cooperation is not coercive conduct."].

⁴⁰ (1977) 69 Cal.App.3d 441, 450.

⁴¹ (2nd Cir. 1974) 506 F.2d 490.

⁴² See *People v. Rodriguez* (2014) 231 Cal.App.4th 288, 303 ["the trial court was entitled to find this was only a declaration of the officer's legal remedies"]; *People v. McClure* (1974) 39 Cal.App.3d 64, 69 [officers had probable cause when they said "they would obtain a search warrant"]; *U.S. v. Hicks* (7th Cir. 2011) 630 F.3d 1058, 1066 ["[T]he ultimate question is the genuineness of the stated intent to get a warrant."]; *Edison v. Owens* (10th Cir. 2008) 515 F.3d 1139, 1146 ["An officer's threat to obtain a warrant may invalidate the suspect's eventual consent if the officer's lack the probable cause necessary for a search warrant."].

⁴³ *U.S. v. Kaplan* (9th Cir. 1990) 895 F.2d 618, 622.

⁴⁴ (7th Cir. 1992) 957 F.2d 499, 502.

A REFUSAL IS A CONFESSION: Coercion is likely to be found if officers said or implied that, under the law, a refusal to consent is the same as a confession of guilt. This occurred in *Crofoot v. Superior Court* in which an officer detained a suspected burglar named Stine. Stine was carrying a “bulging” backpack and, in the course of the detention, the officer told him that he “shouldn’t have any objections to my looking in the backpack if he wasn’t doing anything.” In ruling that Stine’s subsequent consent was involuntary and that stolen property in the backpack should have been suppressed, the Court of Appeal said this: “[I]mplicit in the officer’s statement is the threat that by exercising his right to refuse the search Stine would be incriminating himself or admitting participation in illegal activity.”⁴⁵

In a similar but somewhat less obvious scenario, an officer will ask a detainee if he is carrying drugs, weapons or other contraband. When the detainee says no, the officer will say or suggest that if he was telling the truth he would certainly have no objection to a search. Although this is not an unusual practice, we were unable to find any California case in which this precise subject was addressed. There are, however, at least two federal circuit cases in which the courts ruled that consent given under such circumstances may be voluntary if the officers made it clear to the detainee that he was free to reject their request.⁴⁶

In a third variation on this theme (and probably the most common), the officer will omit asking the suspect if he is carrying contraband, and simply ask if he has “any objection” to a search. Of all three approaches, this is plainly the least objectionable.

For example, in *Gorman v. United States*⁴⁷ an FBI agent asked a robbery suspect if he had “any objection” to a search of his motel room, and the suspect said “go ahead.” In ruling that the agent’s words did not constitute a threat, the First Circuit explained that consent is not involuntary merely because the suspect faced the following dilemma: If he consented, the evidence would likely be found. But if he refused, it “would harden the suspicion [of guilt] that he was trying to dispel.”

NO SANE CRIMINAL WOULD VOLUNTARILY CONSENT: Defendants sometimes attempt to prove they did not voluntarily consent by asserting that no lucid criminal would freely agree to a search that might uncover proof of their guilt. As noted earlier, however, these arguments are routinely rejected because there are several logical reasons why a criminal would freely do so.

Circumstantial evidence of voluntariness

Even if there was some circumstantial evidence of coercion, the suspect’s consent may be deemed voluntary if there was some overriding circumstantial evidence of voluntariness,⁴⁸ which often consists of one or more of the following:

“YOU CAN REFUSE”: Officers are not required to notify a suspect that he has a right to refuse to consent,⁴⁹ but it is a relevant circumstance.⁵⁰ Thus in *United States v. Mendenhall* the Supreme Court observed that “the fact that the officers themselves informed the respondent that she was free to withhold her consent substantially lessened the probability that their conduct could reasonably have appeared to her to be coercive.”⁵¹

⁴⁵ (1981) 121 Cal.App.3d 717, 725. Edited.

⁴⁶ See *U.S. v. Erwin* (6th Cir. 1998) 155 F.3d 818, 823 [“Although it was not a neutral question, it plainly sought Erwin’s permission to search the vehicle; the defendant still could have refused to consent to the search.”]; *U.S. v. Ledesma* (10th Cir. 2006) 447 F.3d 1307, 1315 [“Nothing about this line of questioning ... suggests coercion or intimidation.”].

⁴⁷ (1st Cir. 1967) 380 F.2d 158, 165.

⁴⁸ See *United States v. Drayton* (2002) 536 U.S. 194, 207 [“[T]he Court has repeated that the totality of the circumstances must control”]; *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 227, 233 [“[I]t is only by analyzing all the circumstances of an individual consent that it can be ascertained whether in fact it was voluntary or coerced.”]; *U.S. v. Morning* (9th Cir. 1995) 64 F.3d 531, 533 [“Every encounter has its own facts and its own dynamics. So does every consent.”].

⁴⁹ See *United States v. Drayton* (2002) 536 U.S. 194, 206 [“The Court has rejected in specific terms the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search.”]; *People v. Tully* (2012) 54 Cal.4th 952, 983, fn.10; *People v. Monterroso* (2004) 34 Cal.4th 743, 758.

⁵⁰ See *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 249 [“the suspect’s knowledge of a right to refuse is a factor to be taken into account”]; *People v. Profit* (1986) 183 Cal.App.3d 849 [“[T]he delivery of such a warning weighs heavily in favor of finding voluntariness and consent.”].

⁵¹ (1980) 446 U.S. 544, 559.

OFFICERS' MANNER: A courteous attitude toward the suspect is highly relevant because it would ordinarily communicate to him that the officers were seeking his assistance, not demanding it. Thus it would be relevant that the officers displayed a "pleasant manner and tone of voice that is not insisting,"⁵² as opposed to one that was "officious and authoritative."⁵³

"ASKING" IMPLIES A CHOICE: The fact that officers asked the suspect for consent to search is, itself, an indication that he should have known he could have refused the request. As the California Supreme Court observed, "[W]hen a person of normal intelligence is expressly asked to give his consent to a search of his premises, he will reasonably infer he has the option of withholding that consent if he chooses."⁵⁴

SUSPECT SIGNED CONSENT FORM: It is relevant that the suspect signed a form in which he acknowledged that his consent was given voluntarily.⁵⁵ But an acknowledgment will have little or no weight if he was coerced into signing it.⁵⁶

SUSPECT WAS COOPERATIVE: That the suspect was generally cooperating with the officers, or that he

suggested the officers conduct a search of his property is a strong indication that his consent was voluntary.⁵⁷

SUSPECT INITIALLY REFUSED: It is relevant that the suspect initially refused the officers' request or that he permitted them to search only some things, as this tends to demonstrate his awareness that he could not be compelled to consent.⁵⁸

EXPERIENCE WITH POLICE, COURTS: Another example of circumstantial evidence of voluntariness is that the suspect had previous experience with officers and the courts. Thus, in *People v. Coffman* the California Supreme Court observed that, "given Marlow's maturity and criminal experience (he was over 30 years old and a convicted felon at the time of the interrogation) it was unlikely Marlow's will was thereby overborne."⁵⁹

MIRANDA WAIVER: Giving the suspect a *Miranda* warning before seeking consent has a slight tendency to indicate the consent was voluntary. A *Miranda* warning, said the Court of Appeal, "was an additional factor tending to show the voluntariness of appellant's consent."⁶⁰

⁵² *U.S. v. Ledesma* (10th Cir. 2006) 447 F.3d 1307, 1314. Also see *People v. Williams* (2007) 156 Cal.App.4th 949, 961 [the officers "went out of their way to be courteous"]; *People v. Linke* (1968) 265 Cal.App.2d 297, 302 [the officers were "polite and courteous"].

⁵³ *Orhorhaghe v. INS* (9th Cir. 1994) 38 F.3d 488, 495. Also see *People v. Boyer* (1989) 48 Cal.3d 247, 268 ["The manner in which the police arrived at defendant's home, accosted him, and secured his 'consent' to accompany them suggested they did not intend to take 'no' for an answer."].

⁵⁴ *People v. James* (1977) 19 Cal.3d 99, 116. Also see *People v. Fields* (1979) 95 Cal.App.3d 972, 976; *People v. Bustamonte* (1969) 270 Cal.App.2d 648, 653 [seeking consent "carries the implication that the alternative of a refusal existed"].

⁵⁵ See *People v. Ramirez* (1997) 59 Cal.App.4th 1548, 1558; *People v. Weaver* (2001) 26 Cal.4th 876, 924; *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1578; *U.S. v. Rodrigues* (9th Cir. 2006) 464 F.3d 1072, 1078.

⁵⁶ See *Haley v. Ohio* (1947) 332 U.S. 596, 601 ["Formulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them."]; *Haynes v. Washington* (1963) 373 U.S. 503, 513 ["[I]f the authorities were successful in compelling the totally incriminating confession of guilt ... they would have little, if any, trouble securing the self-contained concession of voluntariness."].

⁵⁷ See *People v. Ruper* (1966) 244 Cal.App.2d 292, 298 [suspect "indicated a desire to fully cooperate"]; *People v. Ramos* (1972) 25 Cal.App.3d 529, 536; *People v. Wheeler* (1971) 23 Cal.App.3d 290, 304; *U.S. v. Morning* (9th Cir. 1995) 64 F.3d 531, 533; *U.S. v. Sandoval-Vasquez* (7th Cir. 2006) 435 F.3d 739, 744-45; *U.S. v. Brown* (9th Cir. 2009) 563 F.3d 410, 413.

⁵⁸ See *People v. Aguilar* (1996) 48 Cal.App.4th 632, 640 ["The fact that Daniel refused consent to search appellant's room shows that he was aware of his right to refuse consent and shows that his consent to search the rest of the home was not the product of police coercion."]; *U.S. v. Mesa-Corrales* (9th Cir. 1999) 183 F.3d 1116, 1125 ["[Defendant] had demonstrated by his prior refusal to consent that he knew that he had such a right—a knowledge that is highly relevant in our analysis of whether consent is voluntary."]; *U.S. v. Welch* (11th Cir. 2012) 683 F.3d 1304, 1309 ["But Welch must not have felt coerced into consenting when they first asked, because he declined to consent."].

⁵⁹ (2004) 34 Cal.4th 1, 58-59. Also see *Fare v. Michael C.* (1979) 442 U.S. 707, 726 ["He was a 16½-year-old juvenile with considerable experience with the police."]; *People v. Williams* (1997) 16 Cal.4th 635, 659 ["The [trial] court described defendant as a 'street kid, street man,' in his 'early 20's, big, strong, bright, not intimidated by anybody, in robust good health,' and displaying 'no emotionalism [or signs of] mental weakness'"]; *In re Aven S.* (1991) 1 Cal.App.4th 69, 77 ["The minor, while young, was experienced in the ways of the juvenile justice system."].

⁶⁰ (1974) 39 Cal.App.3d 64, 70. Also see *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 248 ["the lack of any effective warnings to a person of his rights" is relevant].

Suspect's mental state

So long as the suspect answered the officers' questions in a rational manner, consent is not apt to be involuntary merely because he was under the influence of drugs or alcohol, had a mental disability, was uneducated, or was emotionally upset or distraught. As the Eighth Circuit noted, "Although lack of education and lower-than-average intelligence are factors in the voluntariness analysis, they do not dictate a finding of involuntariness, particularly when the suspect is clearly intelligent enough to understand his constitutional rights."⁶¹ Nevertheless, a suspect's lack of mental clarity may invalidate consent if a court finds that officers obtained authorization by exploiting it.⁶²

Scope and Intensity of Search

Before beginning a consensual search, officers must understand what they may search and the permissible intensity of the search. This requirement will be easy to satisfy if the suspect authorized a search of a single and indivisible object, such as a pants pocket or cookie jar. But in most cases they will be searching something (especially a home or car) in which there are containers, compartments, or separate spaces. So, how can officers determine the permissible scope of such a search?

Actually, it is not difficult because the Supreme Court has ruled that, in the absence of an express agreement, the scope and intensity of a consent search is determined by asking: What would a reasonable person have believed the search would encompass?⁶³ As the Court put it, "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?"⁶⁴ In this section, we will discuss how the courts answer this question.

Scope of the search

The "scope" of a search refers to physical boundaries of the search and whether there were any restrictions as to what places and things within these boundaries may be searched.⁶⁵ As we will now discuss, scope is usually based on what the officers told the suspect before consent was given.

OFFICERS SPECIFIED THE OBJECT OF SEARCH: If officers obtained consent to search for a specific thing or class of things (e.g., drugs), they may ordinarily search any spaces and containers in which such things may reasonably be found.⁶⁶ As the Tenth Circuit put it, "Consent to search for specific items includes consent to search those areas or containers that might reasonably contain those items."⁶⁷ For

⁶¹ *U.S. v. Vinton* (8th Cir. 2011) 631 F.3d 476, 482. Also see *United States v. Mendenhall* (1980) 446 U.S. 544, 558 [consent not involuntary merely because the suspect was a high school dropout]; *U.S. v. Soriano* (9th Cir. 2003) 361 F.3d 494, 502 ["While a court must look at the possibly vulnerable subjective state of the person who consents, the court must also look at the reasonableness of that fear."].

⁶² See *Reck v. Pate* (1961) 367 U.S. 433 [officers exploited the mental condition of the defendant who was described as "mentally retarded and deficient"]; *Brewer v. Williams* (1977) 430 U.S. 387, 403 [exploitation of religious beliefs].

⁶³ See *People v. Tully* (2012) 54 Cal.4th 952, 984 ["The question is what a reasonable person would have understood from his or her exchange with the officer about the scope of the search."]; *People v. Jenkins* (2000) 22 Cal.4th 900, 974 [prosecutors must demonstrate that it was "objectively reasonable ... to believe that the scope of the consent given encompassed the item searched."]; *People v. Crenshaw* (1992) 9 Cal.App.4th 1403, 1409 ["But if his consent would reasonably be understood to extend to a particular container, the Fourth Amendment provides no grounds for requiring a more explicit authorization."].

⁶⁴ *Florida v. Jimeno* (1991) 500 U.S. 248, 251.

⁶⁵ See *People v. Jenkins* (2000) 22 Cal.4th 900, 974 [prosecution must prove "the scope of the consent given encompassed the item searched"]; *People v. Crenshaw* (1992) 9 Cal.App.4th 1403, 1409 ["A consensual search may not legally exceed the scope of the consent supporting it."]; *People v. Oldham* (2000) 81 Cal.4th 1, 11 ["[I]t is also the People's burden to show the warrantless search was within the scope of the consent given."]; *U.S. v. McWeeney* (9th Cir. 2006) 454 F.3d 1030, 1034 ["It is a violation of a suspect's Fourth Amendment rights for a consensual search to exceed the scope of the consent given."].

⁶⁶ See *Florida v. Jimeno* (1991) 500 U.S. 248, 251 ["The scope of a search is generally defined by its expressed object."]; *People v. Jenkins* (2000) 22 Cal.4th 900, 975 ["a general consent to search includes consent to pursue the stated object of the search"]; *U.S. v. Zapata* (11th Cir. 1999) 180 F.3d 1237, 1243 ["A general consent to search for specific items includes consent to search any compartment or container that might reasonably contain those items."].

⁶⁷ *U.S. v. Kimoana* (10th Cir. 2004) 383 F.3d 1215, 1223.

example, because drugs, weapons, and indicia can be found in small spaces and containers,⁶⁸ the permissible scope of a search for these things in a home would include boxes, briefcases, and the various compartments in household furniture.⁶⁹ Or, if officers were searching for such things in a car, the scope would include a paper bag and other containers,⁷⁰ the area behind driver's seat and door panels,⁷¹ a side panel compartment,⁷² behind the vents,⁷³ under loose carpeting,⁷⁴ the trunk,⁷⁵ under the vehicle,⁷⁶ the area between the bed liner and the side of the suspect's pickup.⁷⁷ Note that if the suspect authorized a search for "anything you're not supposed to have," officers may interpret this as consent to search for drugs.⁷⁸

OFFICERS SPECIFIED THE NATURE OF CRIME: Instead of specifying the type of evidence they wanted to search for, officers will sometimes seek consent to search for evidence pertaining to a certain crime. If the suspect consents, the scope of the search would be quite broad because the evidence pertaining to most crimes frequently includes small things such as documents, clothing, weapons, and ammunition. Thus in *People v. Jenkins* the court ruled that, having obtained consent to search for evidence in a shooting, officers could search a briefcase because it "is obviously a container that readily may contain incriminating evidence, including weapons."⁷⁹

SCOPE NOT SPECIFIED: If neither the officers nor the suspect placed any restrictions on the search, or if they did not discuss the matter, the search must simply be "reasonable" in its scope. As the Eleventh

Circuit explained, "When an individual gives a general statement of consent without express limitations, the scope of a permissible search is not limitless. Rather it is constrained by the bounds of reasonableness: what a police officer could reasonably interpret the consent to encompass."⁸⁰ Officers may, however, infer that a suspect who authorizes an unrestricted search had authorized them to look for evidence of a crime which, as noted, frequently consists of things that are very small.⁸¹

SEARCHING CONTAINERS IN SEARCHABLE AREAS: While conducting a search that is otherwise lawful in its scope and intensity, officers may ordinarily open and search any containers in which the sought-after evidence might reasonably be found.⁸² A container may not, however, be searched if it reasonably appeared to be owned, used, controlled, and accessed exclusively by someone other than the consenting person. This exception is discussed in the accompanying article, "Third Party Consent."

Intensity of the search

The term "intensity" of the search refers to how thorough or painstaking it may be. But if, as is usually the case, the officers and suspect did not discuss the subject, the search must simply be "reasonable" in its intensity, as follows:

A "THOROUGH" SEARCH: Officers may presume that the suspect was aware they would be looking for evidence of a crime and would therefore be conducting a "thorough" search.⁸³ As the court observed in

⁶⁸ See *People v. Miller* (1999) 69 Cal.App.4th 190, 203 ["The scope of a consensual search for narcotics is very broad and includes closets, drawers, and containers."]; *U.S. v. Anderson* (8th Cir. 2012) 674 F.3d 821, 827.

⁶⁹ See *People v. Jenkins* (2000) 22 Cal.4th 900, 976 [briefcase]; *U.S. v. Canipe* (6th Cir. 2009) 569 F.3d 597, 606 [box in a truck].

⁷⁰ See *Florida v. Jimeno* (1991) 500 U.S. 248, 251 [closed paper bag on the floor of the suspect's car].

⁷¹ See *People v. Crenshaw* (1992) 9 Cal.App.4th 1402, 1415; *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1579.

⁷² *U.S. v. Gutierrez-Mederos* (9th Cir. 1992) 965 F.2d 800, 803-804.

⁷³ See *U.S. v. Torres* (10th Cir. 1981) 664 F.3d 1019 [officers were permitted to remove "the air-vent cover in the side of the door"].

⁷⁴ See *U.S. v. McWeeney* (9th Cir. 2006) 454 F.3d 1030, 1035.

⁷⁵ See *U.S. v. McWeeney* (9th Cir. 2006) 454 F.3d 1030, 1035.

⁷⁶ See *U.S. v. Anderson* (10th Cir. 1997) 114 F.3d 1059, 1065; *U.S. v. Perez* (9th Cir. 1994) 37 F.3d 510, 516.

⁷⁷ See *People v. \$48,715* (1997) 58 Cal.App.4th 1507, 1516.

⁷⁸ See *U.S. v. McWeeney* (9th Cir. 2006) 454 F.3d 1030, 1035; *U.S. v. Canipe* (6th Cir. 2009) 569 F.3d 597, 606.

⁷⁹ (2000) 22 Cal.4th 900, 976.

⁸⁰ *U.S. v. Strickland* (11th Cir. 1990) 902 F.2d 937, 941.

⁸¹ See *People v. Williams* (1980) 114 Cal.App.3d 67, 74; *U.S. v. Coleman* (4th Cir. 2009) 588 F.3d 816 [unrestricted consent authorized a search under a mattress].

⁸² See *Frazier v. Cupp* (1969) 394 U.S. 731, 740; *People v. Schmeck* (2005) 37 Cal.4th 240, 281,

⁸³ See *U.S. v. Snow* (2nd Cir. 1995) 132 F.3d 133, 135. *U.S. v. Torres* (10th Cir. 1981) 663 F.2d 1019, 1027 ["permission to search contemplates a thorough search. If not thorough it is of little value"].

U.S. v. Snow, “[T]he term ‘search’ implies something more than a superficial, external examination. It entails looking through, rummaging, probing, scrutiny, and examining internally.”⁸⁴ But, as noted below in “Length of search,” officers may not be permitted to conduct a thorough search if they implied that they only wanted to conduct a quick or cursory one.

NOT DESTRUCTIVE: It would be unreasonable for officers to interpret consent to search something as authorization to destroy or damage it in the process. Thus, in discussing this issue in *Florida v. Jimeno*, the United States Supreme Court said, “It is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk, but it is otherwise with respect to a closed paper bag.”⁸⁵ Similarly, in *U.S. v. Strickland*⁸⁶ a suspect gave officers consent to search “the entire contents” of his car for drugs. During the search, an officer noticed some things about the spare tire that caused him to think it might contain drugs. So he cut it open. His suspicions were confirmed (the tire contained ten kilograms of cocaine), but the court ruled the search was unlawful because “a police officer could not reasonably interpret a general statement of consent to search an individual’s vehicle to include the intentional infliction of damage to the vehicle or the property contained within it.”

In contrast, in *People v. Crenshaw*⁸⁷ the Court of Appeal ruled that an officer did not exceed the permissible intensity of a search for drugs in a vehicle when he unscrewed a plastic vent cover to look inside. This was because the officer “did not rip the

vent from the door; he merely loosened a screw with a screwdriver and removed it.”

LENGTH OF SEARCH: The permissible length of a consent search depends mainly on how large an area must be searched, the difficulties in searching the area and its contents (e.g. heavily cluttered home), the extent to which the sought-after evidence can be concealed, and whether the officers claimed they would be conducting only a cursory search. For example, in *People v. \$48,715*⁸⁸ a Kern County sheriff’s deputy found almost \$80,000 in cash during a consent search of a pickup truck that had broken down near Bakersfield. In the subsequent appeal of a forfeiture order, the driver argued that the search was too lengthy, but the court pointed out that the contents of the pickup included large bags of pasture seed and several suitcases, and that a “typical reasonable person” in the driver’s position “would have expected that [the deputy] intended, in some manner, to inspect the contents of the seed bags and the suitcases. Thus, the seizure would be extended and the search would be extensive.”

In contrast, in *People v. Cantor*⁸⁹ the court ruled that a search of a car took too long because, in obtaining consent, the officer had asked the driver, “Nothing illegal in the car or anything like that? Mind if I check real quick and get you on your way?” The entire search lasted about 30 minutes but court ruled it was excessive because a 30-minute search cannot reasonably be classified as “real quick.”

CONDUCTING A PROTECTIVE SWEEP: Officers who have lawfully entered a home to conduct a consent search may conduct a protective sweep of the pre-

⁸⁴ (2nd Cir. 1995) 44 F.3d 133, 135.

⁸⁵ (1991) 500 U.S. 248, 251-52. Also see *U.S. v. Osage* (10th Cir. 2000) 235 F.3d 518, 522 [“[B]efore an officer may actually destroy or render completely useless a container which would otherwise be within the scope of a permissive search, the officer must obtain explicit authorization, or have some other lawful basis upon which to proceed.”]. Compare *U.S. v. Gutierrez-Mederos* (9th Cir. 1992) 965 F.2d 800, 804 [“The record indicates that [the officer] did not pry open or break into the side panel, but instead used the key. Nor did [the officer] force the loose cardboard divider apart, but rather pulled it back. Because a reasonable person would believe that appellant had authorized these actions, the search was permissible.”].

⁸⁶ (11th Cir. 1990) 902 F.2d 937, 941-42.

⁸⁷ (1992) 9 Cal.App.4th 1403, 1415.

⁸⁸ (1997) 58 Cal.App.4th 1507.

⁸⁹ (2007) 149 Cal.App.4th 961. Also see *People v. Cruz* (1964) 61 Cal.2d 861, 866 [The general consent given by Ann and Susan that the officers could ‘look around’ did not authorize [the officer] to open and search suitcases and boxes”]; *People v. Williams* (1979) 93 Cal.App.3d 40, 58 [“The officer’s journey to the back of the home and into a bedroom where they found defendant was a journey beyond the scope of the consent—to enter—extended by [the consenting person].”]; *U.S. v. Wald* (10th Cir. 2000) 216 F.3d 1222, 1228 [where officers asked to “take a quick look” inside the suspect’s car, they exceeded the permissible scope when they searched the trunk]; *U.S. v. Quintero* (8th Cir. 2011) 648 F.3d 660, 670 [a “full-scale” search].

mises if (1) they reasonably believed there was someone hiding on the premises who posed a threat to them or the evidence, and (2) this belief materialized *after* they entered; i.e., they must have not entered with the secret intention of conducting an immediate sweep.⁹⁰

CONSENT TO “ENTER” OR “TALK”: If officers obtained consent to enter a home (“Can we come inside?”), they have the “latitude of a guest”⁹¹ which generally means they may not wander into other rooms,⁹² immediately conduct a protective sweep;⁹³ or immediately arrest an occupant.⁹⁴

SEARCH BY K-9: Officers who have obtained consent to search a car for drugs or explosives may use a K9 to help with the search unless the suspect objects.⁹⁵ As the Ninth Circuit observed, “Using a narcotics dog to carry out a consensual search of an automobile is perhaps the least intrusive means of searching.”⁹⁶

CONDUCTING MULTIPLE SEARCHES: When officers have completed their search, they may not ordinarily conduct a second search because, as the Court of Appeal observed, consent to search “usually involves an understanding that the search will be conducted forthwith and that only a single search will be made.”⁹⁷

Consent withdrawn

The consenting person may modify the scope of consent or withdraw it altogether at any time before the evidence was discovered.⁹⁸ In such cases, the following legal issues may arise.

EXPRESS AND IMPLIED WITHDRAWAL: A withdrawal or restriction of consent may be express or implied. However, neither an express nor implied withdrawal will result unless the suspect’s words or actions unambiguously demonstrated an intent to do so. As the Court of Appeal explained, “Although actions inconsistent with consent may act as a withdrawal of it, these actions, if they are to be so construed, must be positive in nature.”⁹⁹ For example, the courts have ruled that the following words or actions sufficiently demonstrated an unambiguous intent to withdraw or restrict consent:

- After officers had searched the outer pockets of a backpack, and just before they were about to search the inside pockets, the suspect said, “Leave them alone.”¹⁰⁰
- After the suspect consented to a search of his home, an officer went outside to call for backup; while she was on the radio, the suspect shut and locked the front door.¹⁰¹

⁹⁰ See *U.S. v. Gandia* (2nd Cir. 2005) 424 F.3d 255, 262 “[T]here is concern that generously construing *Buie* will enable and encourage officers to obtain that consent as a pretext for conducting a warrantless search of the home.”; *U.S. v. Scroggins* (5th Cir. 2010) 599 F.3d 433, 443 [protective sweep OK because grounds for search developed upon entry]; *U.S. v. Crisolis-Gonzalez* (8th Cir. 2014) 742 F.3d 830, 836 [protective sweep OK because grounds for search developed upon entry].

⁹¹ *U.S. v. Carter* (6th Cir. en banc 2004) 378 F.3d 584, 589.

⁹² See *Lewis v. United States* (1966) 385 U.S. 206, 210 [officers did not “see, hear, or take anything that was not contemplated” by the suspect]; *People v. Williams* (1979) 93 Cal.App.3d 40, 58 [“The officer’s journey to the back of the home and into a bedroom where they found defendant was a journey beyond the scope of the consent—to enter—extended by [the consenting person].”].

⁹³ See *U.S. v. Gandia* (2nd Cir. 2005) 424 F.3d 255, 262 [“W]hen police have gained access to a suspect’s home through his or her consent, there is a concern that generously construing [the protective sweep rules] will enable and encourage officers to obtain that consent as a pretext for conducting a warrantless search of the home.”].

⁹⁴ See *In re Johnny V.* (1978) 85 Cal.App.3d 120, 130 [“A right to enter for the purpose of talking with a suspect is not consent to enter and effect an arrest.”]; *U.S. v. Johnson* (9th Cir. 1980) 626 F.2d 753 [arrest after obtaining consent to “talk” with suspect].

⁹⁵ See *People v. \$48,715* (1997) 58 Cal.App.4th 1507, 1516 [“U]se of the trained dog to sniff the truck, although not reasonably contemplated by the exchange between the officer and the suspect, did not expand the search to which the [suspect] had consented”]; *People v. Bell* (1996) 43 Cal.App.4th 754, 770-71, fn.5.

⁹⁶ *U.S. v. Perez* (9th Cir. 1994) 37 F.3d 510, 516.

⁹⁷ *People v. Valencia* (2011) 201 Cal.App.4th 922, 937.

⁹⁸ See *U.S. v. Jachimko* (7th Cir. 1994) 19 F.3d 296, 299 [“I]f Jachimko attempted to withdraw his consent after [the DEA informant] saw the marijuana plants, he could not withdraw his consent.”]; *U.S. v. Booker* (8th Cir. 1999) 186 F.3d 1004, 1006 [“T]he seizure was valid, because at the time the consent was revoked the officers had probable cause to believe that the truck was carrying drugs.”].

⁹⁹ *People v. Botos* (1972) 27 Cal.App.3d 774, 779. Also see *People v. Hamilton* (1985) 168 Cal.App.3d 1058, 1068 *U.S. v. Lopez-Mendoza* (8th Cir. 2010) 601 F.3d 861, 867 [withdrawal of consent “must be an act clearly inconsistent with the apparent consent to search, an unambiguous statement challenging the officer’s authority to conduct the search, or some combination of both”].

¹⁰⁰ *Crofoot v. Superior Court* (1981) 121 Cal.App.3d 717, 726.

¹⁰¹ *In re Christopher B.* (1978) 82 Cal.App.3d 608, 615.

- When asked for the keys to the trunk of his car, a suspect who had consented to a search of it threw the keys into some bushes.¹⁰²
- An officer who was conducting a consent search of a woman's apartment was about to enter her bedroom when the woman "raced in front of the officer and started to close the partially open door."¹⁰³

In contrast, the courts have ruled that the following words or conduct were too ambiguous to constitute a withdrawal of restriction of consent:

- A suspect in a hate crime who had consented to a search of his home initially tried to mislead officers as to the location of his home.¹⁰⁴
- A person who had consented to a search of his home said he was uncertain as to his address.¹⁰⁵
- A suspect verbally consented but refused to sign a consent form.¹⁰⁶
- After the occupants of a car consented to a search of the vehicle, they refused to tell the officers how to open a hidden compartment the officers had discovered.¹⁰⁷

SECURING THE PREMISES: Even if the suspect withdrew his consent, officers may secure the premises pending issuance of a search warrant if they reasonably believed there was probable cause for a warrant.¹⁰⁸

Consent By Trickery

Obtaining consent to enter a home by means of a ruse or other misrepresentation is legal—most of the time. That is because consent, unlike a waiver of constitutional rights, need not be "knowing and intelligent."¹⁰⁹ But, as we will discuss, there are limits that seem to be based mainly on whether the courts thought the officers' conduct was unseemly.

CONSENT FOR ILLEGAL PURPOSE: The most common type of consent by trickery occurs when a suspect invites an informant or undercover officer into his home to plan, commit or facilitate a crime; e.g. to buy or sell drugs. Although the suspect is unaware of the visitor's true identity and purpose, the consent is valid because a criminal who invites someone into his home or business for an illicit purpose knows he is taking a chance that the person is an officer or informant. As the Supreme Court explained, "A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purpose contemplated by the occupant."¹¹⁰

For example, in *Lopez v. United States*¹¹¹ a cabaret owner in Massachusetts, German Lopez, tried to bribe an IRS agent who had figured out that Lopez was cheating on his business taxes. One day, the agent came to the cabaret and suggested that he and Lopez meet privately in Lopez's office to discuss the bribe. Lopez agreed and their subsequent conversation was surreptitiously recorded and used against Lopez at his trial. He appealed his conviction to the Supreme Court, arguing that the recording of the conversation should have been suppressed because the agent had "gained access to [his] office by misrepresentation." The Court disagreed, saying that the IRS agent "was not guilty of an unlawful invasion of [Lopez's] office simply because his apparent willingness to accept a bribe was not real. He was in the office with [Lopez's] consent."

Perhaps the most famous of all the trickery cases is *Hoffa v. United States*¹¹² in which Teamsters boss Jimmy Hoffa was being tried in Nashville on charges of labor racketeering. One of Hoffa's associates was Edward Partin, a federal informant.

¹⁰² *People v. Escollias* (1968) 264 Cal.App.2d 16, 18.

¹⁰³ *People v. Hamilton* (1985) 168 Cal.App.3d 1058, 1066.

¹⁰⁴ *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1273-74.

¹⁰⁵ *People v. Garcia* (1964) 227 Cal.App.2d 345, 351.

¹⁰⁶ *People v. Gurtenstein* (1977) 69 Cal.App.3d 441, 451.

¹⁰⁷ See *U.S. v. Barragan* (8th Cir. 2004) 379 F.3d 524.

¹⁰⁸ See *Segura v. United States* (1984) 468 U.S. 796; *Illinois v. McArthur* (2001) 531 U.S. 326, 331-32.

¹⁰⁹ *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 243 ["[I]t would be next to impossible to apply to a consent search the standard of an intentional relinquishment or abandonment of a known right or privilege."].

¹¹⁰ *Lewis v. United States* (1966) 385 U.S. 206, 211.

¹¹¹ (1963) 373 U.S. 427.

¹¹² (1966) 385 U.S. 293.

While the trial was underway, Hoffa permitted Partin to hang out in a hotel room that Hoffa was using as a command post. Among other things, Partin overheard Hoffa saying that they were “going to get to one juror or try to get to a few scattered jurors and take their chances.” The racketeering trial ended with a hung jury, but Hoffa was later convicted of attempting to bribe one of the jurors.

On appeal to the United States Supreme Court, Hoffa argued that Partin’s testimony should have been suppressed because, even though Hoffa had consented to Partin’s entries into his room, his consent became invalid when Partin misrepresented his true mission. Of course he did, but the Court ruled it didn’t matter because “Partin did not enter the suite by force or by stealth. He was not a surreptitious eavesdropper. Partin was in the suite by invitation, and every conversation which he heard was either directed to him or knowingly carried on in his presence.”

Note that some untrusting criminals still think they can protect themselves from such trickery by simply refusing to admit a suspected undercover agent into their homes unless he first expressly denies that he is a cop (“You gotta say it else you ain’t comin’ in”). This is pure urban legend.¹¹³ As the Ninth Circuit observed, “If a lie in response to such a question made all evidence gathered thereafter the inadmissible fruit of an unlawful entry, all dealers in contraband could insulate themselves from investigation merely by asking every person they contacted in their business to deny that he or she was a law enforcement agent. This is not the law.”¹¹⁴

CONSENT FOR LEGAL PURPOSE: The rules on trickery are not so permissive if the undercover officer or

informant was neither a friend nor associate of the suspect but, instead, had gained admittance by falsely representing that he needed to come inside for some legitimate purpose. As the Ninth Circuit explained, “Not all deceit vitiates consent. The mistake must extend to the essential character of the act itself ... rather than to some collateral matter which merely operates as an inducement. . . . Unlike the phony meter reader, the restaurant critic who poses as an ordinary customer is not liable for trespass”¹¹⁵ For example, consent to enter a suspect’s home has been deemed ineffective when undercover officers claimed they were deliverymen, building inspectors, or property managers; or if the officers obtained consent by falsely stating they had received a report that there were bombs on the premises.¹¹⁶

There is also a case winding its way through the federal courts in which FBI agents disrupted the internet connection into a villa at Caesar’s Palace that had been rented by a suspect in an illegal gambling operation. An agent then gained admittance to the room by posing as a technician who needed to come in and restore the service. While inside, the agent videotaped various instrumentalities of this type of crime, and the video was later used to convict the suspect. In light of the cases discussed earlier, this could be trouble.

There is, however, an exception to this rule: If a house was for sale and the owner or his agent had an open house, an entry by an undercover officer is not invalid merely because the officer was not really interested in buying the house.¹¹⁷ This is because the whole purpose of an open house is to get people to come in, look around, and maybe become interested. And that’s just what the officer did.

POV

¹¹³ See *On Lee v. United States* (1951) 343 U.S. 747, 752; *Maryland v. Macon* (1985) 472 U.S. 463, 469; *Toubus v. Superior Court* (1981) 114 Cal.App.3d 378, 383 [entry to buy drugs; “There was no ruse.”]; *U.S. v. Lyons* (D.C. Cir. 1983) 706 F.2d 321, 329; *U.S. v. Bullock* (5th Cir. 1979) 590 F.2d 117 [undercover ATF agent obtained consent from Bullock, a Ku Klux Klan member, to enter Bullock’s house to discuss becoming a member of the Klan].

¹¹⁴ *U.S. v. Bramble* (9th Cir. 1996) 103 F.3d 1475.

¹¹⁵ *Theofel v. Farley-Jones* (9th Cir. 2004) 359 F.3d 1066, 1073.

¹¹⁶ See *Mann v. Superior Court* (1970) 3 Cal.3d 1, 9 [“Cases holding invalid consent to entry obtained by ruse or trick all involve some positive act of misrepresentation on the part of officers, such as claiming to be friends, delivery men, managers, or otherwise misrepresenting or concealing their identity.”]; *People v. Reyes* (2000) 83 Cal.App.4th 7, 10 [officer identified himself as the driver of a car that had just collided with the suspect’s car outside his home]; *People v. Mesaris* (1970) 14 Cal.App.3d [officer identified himself as a friend of the Sears repairman who was working inside the defendant’s home]; *In re Robert T.* (1970) 8 Cal.App.3d 990, 993-94 [apartment manager and undercover officer obtained consent to enter to “check the apartment”]; *U.S. v. Harrison* (10th Cir. 2011) 639 F.3d 1273, 1280 [officer said they needed to investigate a report of bombs on the premises].

¹¹⁷ See *People v. Lucatero* (2008) 166 Cal.App.4th 1110; *People v. Jaquez* (1985) 163 Cal.App.3d 918, 928.

Third Party Consent

*Valid consent may be given not only by the defendant but also a third party with common authority.*¹

For many officers who need to search a suspect's home, car, cell phone, or other property, it will be impractical or impossible to obtain consent from the suspect. This will surprise no one because many suspects are fugitives. But it is also because officers may not want the suspect to know he is under investigation, or because they might know from experience that he wouldn't consent to anything. When this happens, there may be another option: obtain consent from someone else. Such a person must, of course, have the legal authority to consent, which means that officers must know how to make this determination. But, as we explain in this article, they can usually make the right call if they are familiar with just a few rules and principles.

"Common Authority"

A suspect's spouse, roommate, parent, accomplice, homie, or other third party may consent to a search of the suspect's property if he had "common authority" over it. As the Supreme Court explained, "[T]he consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared."² As we will now discuss, a person will have common authority if there was a sufficiently close link or connection between the person and the place or thing that officers need to search.

Basis of common authority

There are actually four ways in which a third party can acquire common authority over a place or thing:

ownership (or co-ownership), general use of the property, joint access to it, or joint control over it.

JOINT OWNERSHIP: A third party will have common authority over any place or thing that he owns or co-owns with the suspect. "Each cotenant," said the United States Supreme Court, "has the right to use and enjoy the entire property as if he or she were the sole owner."³ (There is an exception to this rule that we will cover later: The owner of property who rents or leases it to the suspect may not ordinarily authorize a search of that property.)

JOINT USE: A third party's active use of a place or thing is a strong indication that he had common authority over it, even if he did not own, access, or exercise control over it.⁴ For example, in *People v. Schmeck*⁵ the defendant kept some of his clothes with a woman who would wash and store them in paper bags for him. After Schmeck killed a man in Hayward, police went to the house and asked the woman if they could look inside the bags. She consented, and officers found clothing that linked Schmeck to the murder. On appeal, the California Supreme Court ruled that, although the woman did not own the bags, she had common authority over them because she "used" them; i.e., she "routinely placed Schmeck's laundered clothing inside the bags, and he never instructed her not to do so."

JOINT ACCESS OR CONTROL: Finally, a third party will have common authority over something if he had a right to joint access or control.⁶ For example, in *People v. Jenkins*⁷ the California Supreme Court ruled that the defendant's sister had common authority over an unlocked briefcase she was storing for her brother even though it appeared she had never

¹ *U.S. v. Morgan* (6th Cir. 2006) 435 F.3d 660, 663. Edited.

² *United States v. Matlock* (1974) 415 U.S. 164, 170. Also see *Illinois v. Rodriguez* (1990) 497 U.S. 177, 179.

³ See *Georgia v. Randolph* (2006) 547 U.S. 103, 114 [quoting from R. Powell, Powell on Real Property].

⁴ See *United States v. Matlock* (1974) 415 U.S. 164, 171 ["joint use of the bag rendered the cousin's authority to consent to its search clear"]; *Frazier v. Cupp* (1969) 394 U.S. 731, 740; *People v. Catlin* (2001) 26 Cal.4th 81, 163 ["Although [the consenting person] stated that he predominantly used one side of the garage/shop, the evidence established that [he] and defendant had common authority over the entire garage, including the cabinet."]. **NOTE:** Technically, access and control are separate relationships but, for whatever reason, they are treated as one in the context of consent searches.

⁵ (2005) 37 Cal.4th 240 [overturned on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610].

⁶ See *United States v. Matlock* (1974) 415 U.S. 164, 171, fn.7; *Fernandez v. California* (2014) __ U.S. __ [134 S.Ct.1126, 1133].

⁷ (2000) 22 Cal.4th 900.

opened or used it. Said the court, “although the searching officer had little reason to suppose that Diane Jenkins herself was using defendant’s briefcase,” she had common authority because she had “exercised control” over it. Note that if the briefcase had been locked and only Mr. Jenkins could have opened it, it is likely that Ms. Jenkins would not have had common authority because she would have lacked ownership, use, access, and control. (Beginning on the next page, we will discuss the most common examples of common authority and the various circumstances that give rise to it.)

Apparent Common Authority

Because it is sometimes difficult for officers in the field to make a legal determination as to whether the consenting person had actual common authority over something, a consent search will be upheld if they reasonably believed he did.⁸ This is known as “apparent authority” and it is based on the principle that “[t]he officer’s conclusion that the consenting individual had authority to consent need not always be correct, but must always be reasonable.”⁹ Or as the Sixth Circuit explained:

The apparent-authority doctrine excuses otherwise impermissible searches where the officers conducting the search reasonably (though erroneously) believe that the person who has consented to the search had the authority to do so.¹⁰

For example, in *Illinois v. Rodriguez*¹¹ a woman named Gail Fischer phoned Chicago police from her parent’s house and said she had been beaten by a man she lived with in an apartment. When officers arrived at the house, she told them that the man, Rodriguez, was now asleep in the apartment and that she wanted them to go over there and arrest him. While speaking with the officers, Fischer referred to the apartment several times as “our” apartment and also said she “had clothes and furniture there.” When

Fischer and the officers arrived at the apartment, Fischer gave them the key, and they walked inside and arrested Rodriguez in a bedroom. They also seized his stash of cocaine in plain view.

It turned out that Fischer had moved out of the apartment weeks earlier, her name was not on the lease, and she did not contribute to the rent. Thus, she probably didn’t have actual common authority. But the Supreme Court ruled it didn’t matter because the officers reasonably believed she had it—and that was enough. As the Court observed:

Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability.

Asking questions

Officers cannot reasonably believe that a person had common authority unless they asked him questions about it. Sometimes just a few will suffice; other times they will need to probe.¹² As the Supreme Court explained, “[L]aw enforcement officers [must not] always accept a person’s invitation to enter premises. Even when the invitation is accompanied by an explicit assertion that the person lives there, the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry.”¹³

For example, in ruling that the defendant’s girlfriend had common authority over his apartment, the court in *U.S. v. Goins*¹⁴ pointed out that “this was not a case of officers blindly accepting a person’s claim of authority over a premises in order to create apparent authority to search. Several officers questioned [her] regarding her access to the apartment, and her answers remained consistent.” Specifically, she told the officers that she “had a key to the apartment,

⁸ See *Georgia v. Randolph* (2006) 547 U.S. 103, 122; *People v. Oldham* (2000) 81 Cal.App.4th 1, 10.

⁹ *U.S. v. Clark* (8th Cir. 2005) 409 F.3d 1039, 1044.

¹⁰ *U.S. v. Taylor* (6th Cir. 2010) 600 F.3d 678, 681. Also see *People v. Engel* (1980) 105 Cal.App.3d 489, 504 [common authority “may be determined equally from reasonable implications derived from a person’s express words”].

¹¹ (1990) 497 U.S. 177.

¹² See *U.S. v. Goins* (7th Cir. 2006) 437 F.3d 644, 649; *People v. Cruz* (1964) 61 Cal.2d 861, 867 [“[The officer] failed to make such simple inquiries”]; *U.S. v. Whitfield* (D.C. Cir. 1991) 939 F.2d 1071, 1075 [“superficial and cursory questioning”].

¹³ *Illinois v. Rodriguez* (1990) 497 U.S. 177, 188.

¹⁴ (7th Cir. 2006) 437 F.3d 644.

possessions within the apartment, and represented that she lived there on-and-off and frequently cleaned and did household chores in the home. She also said she was allowed into Goins' residence when he was not home." "These representations," said the court, "paint a believable and reasonably complete picture" of the woman's authority to search.

Similarly, in *U.S. v. Gillis*¹⁵ a woman named Shaneska Williams told Knoxville police that she was living with Gillis in an apartment, that she was listed as the lessee, and that Gillis was hiding drugs in the kitchen cabinets. She then consented to a search of the apartment and the officers found drugs. At trial, Gillis argued that the search of his apartment was unlawful because, when Williams consented to it she no longer lived in the apartment and could not access it because he had changed the locks on the doors. But the court ruled that Williams had apparent authority because, in addition to being listed as the tenant in the lease, she provided the officers with "detailed information about the premises, including the locations where Gillis had drugs hidden on the property. They also had statements from Williams that she continued to reside at [the apartment] and that she had been at the residence earlier that same morning." "Under these circumstances," said the court, "the officers had enough information at the time of the search to reasonably conclude that Williams had apparent authority to consent.

In the remainder of this article, we will examine the most common situations in which officers must make a determination of common authority.

Consent By Spouses

If the consenting person was the suspect's spouse, officers may ordinarily infer that he or she had common authority over, among other things, the entire family home, car and all containers within.¹⁶ As the California Supreme Court explained:

[S]ince a wife normally exercises as much control over the property in the home as the husband, police officers may reasonably assume that she can properly consent to a search thereof.¹⁷

ROOMS USED MAINLY BY SUSPECT: The inference that the consenting spouse has common authority over all rooms in the family home includes rooms that were used primarily or even exclusively by the suspect.¹⁸ This is because such an arrangement demonstrates only that the consenting spouse made it a practice not to enter or use the room—not that he or she was denied access and control.

For example, in *People v. Reynolds*¹⁹ officers who had arrested Reynolds for kidnapping and molesting a young girl obtained his wife's consent to search the family home for evidence of the crimes. One of the rooms in the house was a darkroom that was used exclusively by Reynolds. Although the room was locked, Ms. Reynolds provided the officers with a key and, during a search of the room the officers found pornographic photographs of Reynolds' stepdaughters. In ruling that Ms. Reynolds had common authority over the darkroom, the court noted that, although it was Reynolds' "work area," he did not have exclusive control over it. Said the court, "This type of arrangement is not uncommon in a family home, but does not lead to the conclusion, as between a husband and wife, that such areas are beyond either spouse's control."

SEARCH OF COMPUTERS: It is usually reasonable to infer that the consenting spouse had common authority over all computers on the premises, including files stored on hard drives or servers.²⁰ However, the consenting spouse might not have common authority if the suspect had exclusive control over the computer, and the consenting spouse could not access it because he or she did not know the password.²¹

SPOUSES HOSTILE: The fact that the marriage was acrimonious does not automatically eliminate the consenting spouse's common authority over any-

¹⁵ (6th Cir. 2004) 358 F.3d 386.

¹⁶ See *U.S. v. Whitfield* (D.C. Cir. 1991) 929 F.2d 1071, 1074-75 ["[Officers] may assume that a husband and wife mutually use the living areas in their residence and have joint access to them so that either may consent to a search."].

¹⁷ *People v. Duren* (1973) 9 Cal.3d 218, 241.

¹⁸ See *U.S. v. Sealey* (9th Cir. 1987) 830 F.2d 1028, 1031; *U.S. v. Clark* (8th Cir. 2005) 409 F.3d 1039, 1044.

¹⁹ (1976) 55 Cal.App.3d 357.

²⁰ See *U.S. v. Buckner* (4th Cir. 2007) 473 F.3d 551, 555; *U.S. v. Morgan* (6th Cir. 2006) 435 F.3d 660, 663-64.

²¹ See *U.S. v. Tosti* (9th Cir. 2013) 733 F.3d 816, 824. Also see *Trulock v. Freeh* (4th Cir. 2001) 275 F.3d 391, 403.

thing.²² Said the court in *People v. Bishop*, “While they are both living in the premises the equal authority does not lapse and revive with the lapse and revival of amicable relations between spouses.”²³ In fact, the consenting spouse may retain common authority over the family home even if he or she had moved out temporarily or even permanently. This is because the issue is whether the consenting person retained the right to access or control the property—not whether she was currently exercising the right.²⁴

This point was illustrated in *Bishop* where the defendant killed a woman while robbing the Los Angeles Parking Violations Bureau. After Bishop became a suspect, his wife, Heather, notified officers that he was the perpetrator, and because he had been physically abusing her, she had moved into a battered women’s shelter, taking as much furniture and clothing as she could carry. Officers arrested Bishop and later obtained Heather’s consent to search the family home for evidence pertaining to the crimes. By this time, however, Bishop had changed the locks on the doors, so Heather crawled in through a window, unlocked the front door and allowed the officers to enter. During the subsequent search, they found evidence linking Bishop to the crime.

Before trial, Bishop argued that the search was unlawful because the officers knew that Heather had moved out and therefore she lacked both common authority and apparent authority over the house. The court disagreed, pointing out that Bishop “did not have exclusive right of possession of the house. They were still married and, at least at that point, Bishop had “no legal right to exclude [Heather].” The court

added, “The fact appellant had changed the locks to the house is indicative of the level of antagonism between Heather and appellant but is not determinative of Heather’s continuing authority in her own right to consent to a search of the house.”

IF THE SUSPECT OBJECTS: Here things become a bit complicated. Although officers may usually presume that each spouse has common authority over the family home and its contents, the Supreme Court ruled in *Georgia v. Randolph*²⁵ that one spouse’s common authority over the home will not support a consensual entry or search if the other spouse objected and all of the following circumstances existed:

- (1) OBJECTIVE OF SEARCH: The purpose of the entry or search was to obtain evidence against the objecting spouse. For example, officers could enter a home over a spouse’s objection if the consenting spouse had asked them to come inside to discuss a domestic violence incident, keep the peace, or arrest the objecting spouse.²⁶
- (2) EXPRESS OBJECTION: The objecting spouse expressly informed the officers that he opposed the entry or search.²⁷ Thus, an objection will not be inferred, and officers are not required to ask him if he objects.²⁸
- (3) OBJECTION IN OFFICERS’ PRESENCE: The objecting spouse objected in the officers’ presence when they sought to enter or search.²⁹

But there is an exception to the third requirement—and it’s an important one: The United States Supreme Court ruled in *Fernandez v. California*³⁰ that, even if an objection was made by one spouse or (as in *Fernandez*) one half of an unmarried couple,

²² See *U.S. v. Tosti* (9th Cir. 2013) 733 F.3d 816, 824, fn.3; *U.S. v. Long* (9th Cir. 1975) 524 F.2d 660, 661; *U.S. v. Weston* (8th Cir. 2006) 443 F.3d 661, 668.

²³ (1996) 44 Cal.App.4th 220, 237.

²⁴ See *U.S. v. Long* (9th Cir. 1975) 524 F.2d 660, 661; *U.S. v. Weston* (8th Cir. 2006) 443 F.3d 661, 668.

²⁵ (2006) 547 U.S. 103, 106.

²⁶ See *Georgia v. Randolph* (2006) 547 U.S. 103, 108.

²⁷ See *Georgia v. Randolph* (2006) 547 U.S. 103, 120; *U.S. v. Caldwell* (6th Cir. 2008) 518 F.3d 426; *U.S. v. McKerrell* (10th Cir. 2007) 491 F.3d 1221, 1225-26 [*Randolph* requires express objection]; *U.S. v. Moore* (9th Cir. 2014) 770 F.3d 809, 813 [*“Randolph* requires an express, not implicit, refusal.”]; *U.S. v. Williams* (8th Cir. 2008) 521 F.3d 902.

²⁸ See *Georgia v. Randolph* (2006) 547 U.S. 103, 122; *U.S. v. Lopez* (2nd Cir. 2008) 547 F.3d 397, 400; *U.S. v. Parker* (7th Cir. 2006) 469 F.3d 1074, 1079 *U.S. v. Uscanga-Ramirez* (8th Cir. 2007) 475 F.3d 1024, 1028.

²⁹ See *Georgia v. Randolph* (2006) 547 U.S. 103, 106; *Fernandez v. California* (2014) __ U.S. __ [134 S.Ct. 1126, 1136]; *U.S. v. Shrader* (4th Cir. 2012) 675 F.3d 300, 306; *U.S. v. Henderson* (7th Cir. 2008) 536 F.3d 776, 777; *U.S. v. Hudspeth* (8th Cir. 2008) 518 F.3d 954, 959 [“Throughout the *Randolph* opinion, the majority consistently repeated it was *Randolph’s physical presence and immediate objection* to Mrs. *Randolph’s* consent that distinguished *Randolph* from prior case law.”].

³⁰ (2014) __ U.S. __ [134 S.Ct. 1126].

the consent given by the other half overrides the objection if the following circumstances existed: (1) the consent was given after the officers had removed the objecting spouse from the premises, and (2) they had good cause to remove him. The facts in *Fernandez* demonstrate how this issue is likely to arise.

LAPD officers who had responded to an ADW call saw a man run into Fernandez's apartment and then heard the "sounds of screaming and fighting coming from that building." Because they did not think they had grounds to make a warrantless entry, they knocked on the front door which was answered by a woman named Roxanne Rojas. When Rojas lied by denying that anyone had just entered, the officers told her they were going to conduct a protective sweep of the premises. Suddenly, Fernandez "stepped forward" and said, "You don't have any right to come in here. I know my rights." By then, however, the officers had seen injuries to Ms. Rojas' face that, coupled with the earlier screaming, indicated she had just been beaten. So they arrested Fernandez for domestic violence and confined him in a patrol car. They later returned to the house, obtained Ms. Rojas' consent to search it, and found evidence that was used against Fernandez.

On appeal, he argued that Ms. Rojas' consent was unlawful under *Randolph* because he had previously objected to the search. But the Court ruled that a *Randolph* violation does not result when, as here, the objecting spouse was no longer objecting because he had been lawfully removed from the premises. Said the Court, "[A]n occupant who is absent due to a lawful detention or arrest stands in the same shoes as an occupant who is absent for any other reason." The Court then ruled that the officers' decision to remove Fernandez from the premises was reasonable because they needed to speak with Rojas, "an apparent victim of domestic violence, outside of [Fernandez's] potentially intimidating presence."

Unmarried Couples

Although there was no blockbuster case in which the Supreme Court announced this rule, it appears to be settled that people who are living together in a relationship have equal common authority throughout the residence unless officers have reason to believe otherwise.³¹ Thus in *United States v. Matlock* the Supreme Court agreed with the idea that "the voluntary consent of any joint occupant of a residence to search the premises jointly occupied is valid against the co-occupant."³² And in *U.S. v. Morning* the Ninth Circuit ruled that, because the defendant and the consenting person were living together in a house, the consenting person "had an at least equal interest in the use and possession of the house."³³

As noted, however, such a search may be invalidated if officers were aware of objective circumstances that reasonably indicated the consenting person lacked common authority over the place or thing they searched. Thus the Court of Appeal pointed out that there is a "sensible distinction" between "jointly occupied areas of a house and those areas where sole occupancy by a co-occupant dictates a stronger expectation of privacy."³⁴

Two additional questions arise: First, can the consenting person authorize a search of a computer in the home the couple shared? It appears the answer is yes if the consenting person had common authority over the computer and its files, meaning that (1) the computer must have been in a room over which the consenting person had common authority, and (2) he or she must have known the password (if any).³⁵ Second do the rules pertaining to objecting spouses (discussed above) also apply to people who are living together in a relationship? We think they do because there is nothing in the law of consent searches that would indicate otherwise, and the Court in *Fernandez* apparently assumed that they did.

³¹ Also see *People v. Fry* (1998) 18 Cal.4th 894, 990; *U.S. v. Stabile* (3rd Cir. 2011) 633 F.3d 219, 231 ["an unmarried cohabitant has authority to consent to a search of shared premises"]; *U.S. v. Robinson* (7th Cir. 1973) 479 F.2d 300, 302 ["A defendant's paramour may give valid consent to the search of premises they jointly occupy."]; *U.S. v. Meada* (1st Cir. 2005) 408 F.3d 14, 21-22 [woman who shared apartment with defendant could consent to a search of the apartment].

³² *United States v. Matlock* (1974) 415 U.S. 164, 169.

³³ (9th Cir. 1995) 64 F.3d 531, 534.

³⁴ *People v. Engel* (1980) 105 Cal.App.3d 489, 501.

³⁵ See *U.S. v. Nichols* (8th Cir. 2009) 574 F.3d 633, 636; *U.S. v. Stabile* (3rd Cir. 2011) 633 F.3d 219, 233; *U.S. v. King* (3rd Cir. 2010) 604 F.3d 125, 137. Compare *Trulock v. Freeh* (4th Cir. 2001) 275 F.3d 391, 403.

Consent By Roommates

A suspect's roommate may admit officers into the shared residence and also consent to limited searches. As for permitting officers to enter, the California Supreme Court observed in *People v. Frye*, "It may be inferred from the fact [that the consenting roommate] and defendant resided together in the apartment that she possessed authority to consent to the officers' entry."³⁶

A suspect's roommate may also consent to a search if it is restricted to common areas and any rooms or things to which the consenting roommate had joint ownership, use, access, or control. For example, the courts have ruled that roommates could ordinarily consent to a search of a shared bedroom closet,³⁷ a bag under a sofa in a common area,³⁸ and a container in a common area.³⁹ A roommate may not, however, consent to a search of rooms and things that reasonably appear to be owned, used, accessed, and controlled exclusively by the nonconsenting roommate.⁴⁰ Thus, the Court of Appeal noted that consent searches have usually been invalidated when the place or thing searched was "the *individual* property of the nonpresent co-occupant."⁴¹

Consequently, a suspect's roommate cannot authorize a search of a bedroom controlled exclusively by the suspect or jointly with another non-consenting roommate.⁴² Said the Seventh Circuit, "Two friends

inhabiting a two-bedroom apartment might reasonably expect to maintain exclusive access to their respective bedrooms, without explicitly making this expectation clear to one another."⁴³ Or, to put it another way, "[I]f part of a dwelling is appropriated for the exclusive use of one occupant, other inmates of the house have no right to consent to police entry of the space."⁴⁴

Consent By Parents

Whether a parent has common authority over the bedroom and possessions of a child depends on whether the child was a minor or an adult.

MINOR CHILDREN: Parents may consent to a search of all property belonging to a minor child because parents have a duty to supervise their children, which means that a minor child will not have exclusive control over anything.⁴⁵ Said the Court of Appeal, "Given the legal rights and obligations of parents toward their minor children, common authority over the child's bedroom is inherent in the parental role."⁴⁶ Furthermore, it is immaterial that the minor objected to the search.⁴⁷

ADULT SONS AND DAUGHTERS: If the suspect was an adult who was living with his parents for whatever reason, the parents' authority will be necessarily reduced but not eliminated. For example, if the adult was paying rent and had a locked bedroom, this

³⁶ (1998) 18 Cal.4th 894, 990. Also see *People v. Ledesma* (2006) 39 Cal.4th 641, 703 ["Cases from a number of jurisdictions have recognized that a guest who has the run of the house in the occupant's absence has the apparent authority to give consent to enter an area where a visitor normally would be received."].

³⁷ See *People v. Boyer* (1989) 48 Cal.3d 247, 276. Also see *People v. McClelland* (1982) 136 Cal.App.3d 503, 507.

³⁸ See *People v. Reed* (1967) 252 Cal.App.2d 994, 995-96; *United States v. Matlock* (1974) 415 U.S. 164, 177-78.

³⁹ See *U.S. v. Ruiz* (9th Cir. 2005) 428 F.3d 877, 881.

⁴⁰ See *People v. Hamilton* (1985) 168 Cal.App.3d 1058, 1067; *U.S. v. McGee* (2nd Cir. 2009) 564 F.3d 136, 141.

⁴¹ *People v. Engel* (1980) 105 Cal.App.3d 489, 502.

⁴² See *Beach v. Superior Court* (1970) 11 Cal.App.3d 1032, 1035-36; *People v. Hamilton* (1985) 168 Cal.App.3d 1058, 1067; *P v. Veiga* (1989) 214 CA3 817, 821; *U.S. v. Davis* (9th Cir. 2003) 332 F.3d 1163, 1169, fn.4; *U.S. v. Dearing* (9th Cir. 1993) 9 F.3d 1428; *U.S. v. Almeida-Perez* (8th Cir. 2008) 549 F.3d 1162, 1172 ["[I]f part of a dwelling is appropriated for the exclusive use of one occupant, other inmates of the house have no right to consent to police entry of the space"]; *US v. Jimenez* (1C 2005) 419 F3 34, 40 [roommate did not have common authority over locked bedroom used exclusively by other roommate].

⁴³ *U.S. v. Duran* (7th Cir. 1992) 957 F.2d 499, 504-505.

⁴⁴ *U.S. v. Almeida-Perez* (8th Cir. 2008) 549 F.3d 1162, 1172

⁴⁵ See *In re Robert H.* (1978) 78 Cal.App.3d 894, 898 ["Where the police search a minor's home, the courts uphold parental consent on the premise of either the parents' right to control over the minor, or their exercise of control over the premises."]; *Vandenberg v. Superior Court* (1970) 8 Cal.App.3d 1048, 1055 ["[A] father has full access to the room set aside for his son for purposes of fulfilling his right and duty to control his son's social behavior"]. Also see *Griffin v. Wisconsin* (1987) 483 U.S. 868, 876 ["one might contemplate how parental custodial authority would be impaired by requiring judicial approval for search of a minor child's room."].

⁴⁶ *In re D.C.* (2010) 188 Cal.App.4th 978, 985.

⁴⁷ See *Georgia v. Randolph* (2006) 547 U.S. 103, 114; *In re D.C.* (2010) 188 Cal.App.4th 978, 989.

might indicate a landlord-tenant arrangement which might give the suspect exclusive control over his room and property.⁴⁸ In the absence of a landlord-tenant relationship or other unusual circumstance, officers may infer that the parent has retained common authority over, at least, all rooms used by the son.⁴⁹ As the Court of Appeal explained, “Parents with whom a son is living, on premises owned by them, do not ipso facto relinquish exclusive control over that portion thereof used by the son.”⁵⁰ A parent would not, however, have common authority over a closed container that was used exclusively by the adult son or daughter.⁵¹

Consent By Minors

Although there is not much law on the subject, it is safe to say that a teenager who appears to be in control of the premises and also relatively mature (admittedly very subjective factors) may permit officers to enter the home but not search it.⁵² As the California Supreme Court observed, “As a child advances in age she acquires greater discretion to admit visitors on her own authority.”⁵³

Furthermore, such a person might possess authority to allow officers to “look about” common areas but not search them.⁵⁴ This is especially likely if the child had been the victim of a crime and the officers were looking for corroborating evidence. “Exceptional circumstances” said the court in *People v. Jacobs*, may

justify a search that otherwise would be illegal. For example, some courts have upheld searches made at the request of a child or when a child is the victim of or a witness to a crime.⁵⁵ For example, in *People v. Santiago*⁵⁶ the Court of Appeal ruled that a 12-year old girl who lived with her aunt, and who had been regularly beaten by her aunt, has sufficient authority to permit officers to enter the premises and seize evidence of the crimes in plain view. Said the court, “None of the items was hidden, and none was found within a private area such as a locked box or bureau drawers.”

Consent By Property Managers

Property managers—such as landlords and apartment managers—seldom have common authority over premises they had leased to others. Even if the property manager expressly consented to the search, and even if he retained some degree of authority to access and control the premises, he will unlikely have common authority.⁵⁷ As the Supreme Court explained in a hotel case, “when a person engages a hotel room he undoubtedly gives implied or express permission to such persons as maids, janitors or repairmen to enter his room in the performance of their duties.”⁵⁸ But the Court added that it would be a stretch to infer that a hotel guest, by giving such permission, also grants the property manager the authority to allow officers to enter or search his room.

⁴⁸ *US v. Whitfield* (D.C. Cir. 1991) 939 F.2d 1071, 1075.

⁴⁹ See *People v. Oldham* (2000) 81 Cal.App.4th 1, 10; *U.S. v. Romero* (10th Cir. 2014) 749 F.3d 900, 905; *U.S. v. Lewis* (2nd Cir. 2004) 386 F.3d 475, 481; *U.S. v. Rith* (10th Cir. 1999) 164 F.3d 1323, 1331 [18-year old defendant was not paying rent, no lock on door, no exclusive use]; *U.S. v. Block* (4th Cir. 1978) 590 F.2d 535, 541.

⁵⁰ *People v. Daniels* (1971) 16 Cal.App.3d 36, 44.

⁵¹ See *People v. Egan* (1967) 250 Cal.App.2d 433, 436 [suspect’s stepfather “claimed no right, title or interest in the kit bag. He made it abundantly clear that it was not his, and that Egan had left it there.”].

⁵² See *Georgia v. Randolph* (2006) 547 U.S. 103, 112; *People v. Hoxter* (1999) 75 Cal.App.4th 406, 412 [“[M]any California 16-year-olds are mature enough to be left in charge of their homes.”]; *In re Reginald B.* (1977) 71 Cal.App.3d 398, 403; *Raymond v. Superior Court* (1971) 19 Cal.App.3d 321, 326 [“Here the policeman could not in good faith believe that the [12 year old] boy had authority to fetch a sample of his father’s incriminating inventory.”].

⁵³ *People v. Jacobs* (1987) 43 Cal.3d 472, 483.

⁵⁴ (1987) 43 Cal.3d 472, 483.

⁵⁵ See *People v. Jacobs* (1987) 43 C3 472, 482 [11 year-old could not effectively consent to search of her stepfather’s bedroom]; *Raymond v. Superior Court* (1971) 19 Cal.App.3d 321, 326.

⁵⁶ (1997) 55 Cal.App.4th 1540.

⁵⁷ See *Georgia v. Randolph* (2006) 547 U.S. 103, 112; *People v. Joubert* (1981) 118 Cal.App.3d 637, 648; *People v. Jacquez* (1985) 163 Cal.App.3d 918, 929; *People v. Escudero* (1979) 23 Cal.3d 800, 807-8 [“[T]he tenant is generally deemed to give implied consent to reasonable entries by the owner or his agents, but only for certain narrowly limited purposes”].

⁵⁸ *Stoner v. California* (1964) 376 U.S. 483, 489.

The rule is slightly different if premises were for sale and an officer was admitted by a real estate agent: If the agent knew that the person requesting admittance was an officer, the entry would be unlawful because it would be unreasonable to believe that the agent had the authority to permit a warrantless intrusion by law enforcement. For example, in *People v. Jacquez*⁵⁹ an agent was showing a home to some prospective buyers when she saw what she thought was stolen property. She notified the police and permitted an officer to enter and examine the property which he confirmed was stolen. But the Court of Appeal ruled that, although the agent had some control over the house while the owners were away, it was limited authority—not common authority.

If, however, the agent was not aware that the person seeking entry was an officer, not a potential buyer, the entry will be lawful because (as we discussed in the accompanying article in the section “Consent By Trickery”) it would be unreasonable to expect real estate agents to confirm that every person who toured the premises was, in fact, an interested buyer. (Especially because many are not.)

Finally, there is an exception to the rule restricting the authority of property managers: Officers may enter the premises based on the manager’s consent if the officers reasonably believed that the tenant had abandoned the premises or had been evicted. As the Court of Appeal observed, “[T]he owners of property may consent to a police search thereof as long as no other persons are legitimately occupying that property.”⁶⁰ For example, the courts have ruled that officers reasonably believed that a tenant had abandoned a motel room because of the following:

- The tenant had “paid his bill and vacated the room.”⁶¹
- “The manager had been advised that defendant was leaving. She had seen him packing.”⁶²
- Because the landlady had found a dead body [not the tenant] hidden in the apartment, it was unlikely that the tenant would return.⁶³
- The tenant “disappeared [from his motel room] without paying for an additional night’s stay or checking out by the 11:00 A.M. deadline.”⁶⁴
- The door was open and the maid was cleaning the room for the next tenant.⁶⁵

Consent By Car Owners

The owner of a vehicle, or a person who has the owner’s permission to drive it, may ordinarily permit officers to search both the vehicle and its contents because he has not only a right to joint access and control, he is exercising that right.⁶⁶ For example, in *People v. Clark*⁶⁷ homicide investigators in Ukiah learned that, on the night of a murder, Clark had slept in a car owned by Smith. So they obtained Smith’s consent to search the car and found blood-spattered clothing belonging to Clark. In ruling that Smith had common authority over the car, the California Supreme Court said, “As the owner of the searched car, Smith unquestionably had a possessory interest in it.” However, as discussed in the accompanying article in the section “Scope of the Search” (Searching containers in searchable areas) a car owner could not ordinarily consent to a search of personal property that reasonably appeared to be owned, used, accessed, and controlled exclusively by the nonconsenting passenger.

POV

⁵⁹ (1985) 163 Cal.App.3d 918. Also see *People v. Roman* (1991) 227 Cal.App.3d 674, 680.

⁶⁰ *People v. Superior Court (Walker)* (2006) 143 Cal.App.4th 1183, 1200

⁶¹ *Abel v. United States* (1960) 362 U.S. 217, 241. Also see *People v. Bennett* (1998) 17 Cal. 4th 373, 391, fn.6 [“Ordinarily, a suspect has no expectation of privacy with regard to items left in a motel room after a tenancy has expired, and the police may search such items with the consent of the owner of the motel.”]; *U.S. v. Rahme* (2nd Cir. 1987) 813 F.2d 31, 34 [“[W]hen a hotel guest’s rental period has expired or been lawfully terminated, the guest does not have a legitimate expectation of privacy in the hotel room.”]; *Finsel v. Cruppenink* (7th Cir. 2003) 326 F.3d 903, 907 [“[M]otel and hotel tenancy is ordinarily short-term. If the tenancy is terminated for legitimate reasons, the constitutional protection may vanish.”].

⁶² *People v. Long* (1970) 6 Cal.App.3d 741, 748.

⁶³ *Eisentrager v. Hocker* (9th Cir. 1971) 450 F.2d 490, 491-92.

⁶⁴ *People v. Parson* (2008) 44 Cal.4th 332, 343.

⁶⁵ *People v. Ingram* (1981) 122 Cal.App.3d 673, 678.

⁶⁶ See *People v. Amadio* (1971) 22 Cal.App.3d 7, 14; *U.S. v. Guzman* (8th Cir. 2007) 507 F.3d 681, 687 [“An owner of a vehicle may consent to its search even if another person is driving the vehicle.”]; *U.S. v. Jenkins* (6th Cir. 1996) 92 F.3d 430, 438.

⁶⁷ (1993) 5 Cal.4th 950.

Recent Cases

Heien v. North Carolina

(2014) __ U.S. __ [135 S.Ct. 530]

Issue

Is a traffic stop unlawful if it was based on an officer's misinterpretation of a vehicle code statute?

Facts

A sheriff's deputy in North Carolina stopped a car because one of its brake lights was inoperative. In the course of the stop, the car's passenger and owner, Nicholas Heien, consented to a search of the vehicle. The officer found cocaine and Heien was subsequently charged with trafficking. He later filed a motion to suppress the cocaine on grounds that the stop was unlawful. Specifically, he argued that the officer mistakenly believed that North Carolina's vehicle code required two working brake lights when, in fact, it required only one. The trial court summarily denied the motion but the state's appellate court ruled it should have been granted because a vehicle code statute reads, in relevant part, that all vehicles "shall be equipped with a stop lamp on the rear of the vehicle." And because the statute mandates only "a stop lamp" (in the singular), not "stop lamps" (in the plural), the court ruled the traffic stop was unlawful.

The North Carolina Supreme Court disagreed, ruling that the stop was lawful because there was another state statute which essentially required two operable brake lights. That statute specified that motor vehicles "shall have all originally equipped rear lamps or the equivalent in good working order." And because all cars are equipped with two working brake lights, and because Heien's car had only one, the court ruled the traffic stop was lawful under the latter statute. Heien appealed to the United States Supreme Court.

Discussion

Before we begin, it should be noted that the Supreme Court could have ruled the stop was lawful because one North Carolina statute plainly required two working brake lights. But it apparently assumed

for the sake of argument that the stop was based solely on the other statute which requires only one. (This assumption might have been necessary because the Court wanted to clear up some confusion pertaining to mistakes of law by officers.)

As a general rule, if officers are mistaken as to the existence or nature of a fact, the mistake will not result in a Fourth Amendment violation if there was a logical reason for the mistake. As the Supreme Court observed, "[W]hat is generally demanded of the many factual determinations that must regularly be made by agents of the government is not that they always be correct, but that they always be reasonable."¹ As an example of a mistake of fact, the Court in *Heien* noted that an officer might stop a driver for traveling alone in an HOV lane "only to discover upon approaching the car that two children are slumped over asleep in the back seat." The driver, said the Court, "has not violated the law, but neither has the officer violated the Fourth Amendment."

In contrast, if an officer was mistaken as to the existence or nature of a law, any search or seizure resulting from the error will be deemed unlawful even if an objectively reasonable officer could have made the same mistake. This rule is based on the sound public policy that officers are expected to know the laws they enforce.²

In *Heien*, however, the Supreme Court—for the first time—acknowledged that a mistake of law can also be reasonable; that "reasonable men make mistakes of law, too." For this reason the Court decided to abandon the rule that all mistakes of law are per se unreasonable. Instead, it concluded that there may be circumstances in which an officer's mistake of law was just as reasonable as a mistake of fact.

The question, then, was whether the mistake by the deputy who stopped Heien fell into this category, and the Court ruled it did. That was because the state's vehicle code contained two apparently conflicting statutes on brakelight requirements, and one of them permitted a vehicle stop when, as here, there was only

¹ *Illinois v. Rodriguez* (1990) 497 U.S. 177, 185 [edited].

² See *People v. Teresinski* (1982) 30 Cal.3d 822, 831 ["Courts on strong policy grounds have generally refused to excuse a police officer's mistake of law."].

one operable brake light. Accordingly, the Court ruled that the deputy's mistake (if there was one) had been reasonable and therefore there were sufficient grounds for the stop.

Comment

The Court in *Heine* was careful to point out that its decision was not merely another application of the good faith rule or any other rule that lessens the consequences of a Fourth Amendment violation. Instead, it is a rule that the courts must apply to determine whether a search or seizure violated the Fourth Amendment when it resulted from an officer's misinterpretation of a law.

The Court emphasized, however, that its ruling must *not* be interpreted to excuse reasonable mistakes as to the constitutional laws pertaining to criminal investigations; e.g., that the installation of a tracking device on a vehicle constitutes a "search," or that a suspect will be deemed "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 formal arrest. As the Court observed, "[A]n officer can gain no Fourth Amendment advantage through a sloppy study of the laws that he is duty-bound to enforce." Finally, it appears that *Heine* will be limited to situations in which officers must make a quick decision as to the applicability of a statute or, as the Court put it, when officers "suddenly confront a situation in the field as to which the application of a statute is unclear—however clear it may later become."

People v. Harris

(2015) __ Cal.App.4th __ [2015 WL 708606]

Issues

(1) If a DUI arrestee consents to a blood test, is the consent necessarily involuntary if an officer had previously notified him of the legal penalties for refusing? (2) Did the Supreme Court, in its 2013 decision in *Missouri v. McNeely*, prohibit consensual blood draws in DUI cases?

Facts

On a freeway in Riverside County, a sheriff's department motor officer made a traffic stop on the driver of a car traveling at approximately 90 m.p.h. and crossing all four lanes of traffic without signaling. While speaking with the driver, Harris, the deputy noticed several objective indications that he was under the influence of a stimulant. So he arrested Harris and notified him that, because he had been arrested for DUI-drugs, he was required under California's implied consent law to submit a sample of his blood for testing. Harris responded "Okay" and another deputy drove him to the Moreno Valley sheriff's station where a sample of his blood was drawn by a phlebotomist. The test results were positive for methamphetamine. When the Riverside County appellate division denied Harris's motion to suppress the blood test results, the case was transferred to the Court of Appeal because the court thought it presented an "issue of statewide importance."

Discussion

Although Harris had consented to the blood draw, he argued that the test results should have been suppressed for two reasons. The Court of Appeal rejected both of them.

VOLUNTARINESS: Harris's main argument was that a DUI arrestee's consent to a blood test must be deemed involuntary—and therefore the test results must be suppressed—if the officer had previously informed him of California's implied consent law.³ This argument was based on the rule that consent is involuntary if he was motivated by an officer's threats, promises, pressure, or other form of coercion⁴ and, according to Harris, an implied consent warning is a threat that the arrestee will suffer serious legal penalties if he refuses.

So far, Harris was making a logical argument. As the Supreme Court observed in *Missouri v. McNeely*,⁵ implied consent laws "impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against in a subsequent criminal prosecution."

³ See Veh. Code § 23612(a)(1)(B).

⁴ See *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 228 ["[Consent must] not be coerced, by explicit or implicit means, by implied threat or covert force."]; *Florida v. Bostick* (1991) 501 U.S. 429, 438 ["'Consent' that is the product of official intimidation or harassment is not consent at all."].

⁵ (2013) __ U.S. __ [133 S.Ct 1552].

But it is also settled that consent is not involuntary if an officer merely informed the arrestee that certain legal penalties would flow from a refusal. For example, a suspect's consent to search his home is not involuntary merely because an officer informed him that, if he refused, the officer would seek a search warrant. As the Court of Appeal observed, such a warning does not constitute a threat but is merely "a declaration of the officer's legal remedies."⁶

Applying this logic, the court in *Harris* noted that "it is difficult to see why the disclosure of accurate information about a particular penalty that may be imposed—if it is permissible for the state to impose that penalty—could be constitutionally coercive."⁷ Consequently, the court ruled that forcing a motorist "to choose between submitting to the chemical test and facing serious consequences for refusing to submit, pursuant to the implied consent law, does not in itself render the motorist's submission to be coerced or otherwise invalid for purposes of the Fourth Amendment." The court then examined the other surrounding circumstances and ruled that nothing else happened that might have been deemed coercive. Among other things, the court noted that Harris responded "Okay" when asked if he would submit to a blood test and that "at no time did defendant appear unwilling to provide a blood sample." Accordingly, the court ruled that Harris's consent was voluntary.

CONSENT AFTER MISSOURI V. MCNEELY: In *McNeely*, the Supreme Court ruled that the natural elimination of alcohol from an impaired driver's bloodstream does not, in and of itself, constitute an exigent circumstance so as to dispense with the warrant requirement. Thus, the Court ruled that officers could no longer rely on this circumstance as justification for forcing DUI arrestees to submit to a chemical test. From this ruling, Harris jumped to the conclusion that a warrant is *required* even if the arrestee freely consented to the blood draw. In other words, he argued that, unlike any other person who has been arrested, DUI arrestees are legally prohibited from consenting to a DUI blood draw—even if they want to. The argument was frivolous, and the court in *Harris* pointed out that, despite some language in *McNeely* that was "confusing and somewhat

unhelpful," the Supreme Court said nothing that supported it. Consequently, the court ruled that, because Harris had voluntarily consented to the blood test, the test results were admissible at his trial.⁸

People v. Jones

(2014) 231 Cal.App.4th 1257

Issue

If a DUI arrestee refuses to take a breath test, may an officer order a forcible blood draw if he learns that the arrestee is on parole, searchable probation, or subject to supervision under California's new realignment system?

Facts

Shortly before midnight, Fairfield police officers were dispatched to an injury accident involving two cars. When they arrived they saw that the airbag on one of the cars, a Toyota, had been deployed and they learned from witnesses that the driver had fled on foot, last seen walking in the direction of Air Base Parkway. A few minutes later, officers spotted Bobby Jones walking on Air Base Parkway, about 400 yards from the scene of the crash. He was disheveled, smelled of alcohol, had bloodshot eyes and an unsteady gate. He told the officers that he was on probation, so they ran a records check and learned that he was actually under supervised release pursuant to California's new realignment system and was therefore subject to a warrantless search. So they searched him and found airbag deployment powder on the front of his clothing and keys to a Toyota in his pants pocket. Having confirmed that the keys opened the abandoned Toyota at a crash site, they *Mirandized* him and he admitted he had been the driver.

The officers then advised him of the requirement that he submit to a blood or breath test, and he said he would not take a blood test. So they took him to the police station for a breath test but, when they arrived, he "refused to provide a breath sample." So they drove him to nearby hospital where, against Jones's wishes, they had a phlebotomist draw a sample of Jones's blood. It tested at 0.25% and Jones was subsequently

⁶ *People v. Rodriguez* (2014) 231 Cal.App.4th 288, 303.

⁷ Quoting from *State v. Moore* (Or. 2013) 318 P.3d 1133, 1138.

⁸ **NOTE:** The court also rejected the argument that a blood draw that occurs in a police station does not comply with the requirement that the blood be drawn in a reasonable manner.

charged with, among other things, causing bodily injury while driving under the influence. Before trial, he filed a motion to suppress the test results, but the motion was denied. (He apparently did not contest the legality of the searches that resulted in the discovery of the airbag powder or the keys to the Toyota.) Jones then pled no contest and was sentenced to five years in prison.

Discussion

Under California's Criminal Justice Realignment Act of 2011, people who have been convicted of certain low-level felonies may be permitted serve their prison sentences in a local county jail. Then, upon release, they will be supervised for up to three years by a local probation officer. Even though the person is neither confined in a state prison nor supervised by a parole officer, his status is "akin to a state prison commitment; it is not a grant of probation or a conditional sentence."⁹ As the court explained in *Jones*, the Postrelease Community Supervision program (PRCS) "does not change any terms of a defendant's sentence, but merely modifies the agency that will supervise the defendant after release from prison." Significantly, convicts who are under PRCS supervision are automatically subject to the same search conditions as parolees; i.e., the convict, his residence and possessions "shall be subject to search at any time of the day or night, with or without a warrant, by an agent of the supervising county agency or by a peace officer."

The issue on appeal was whether this search condition impliedly authorizes officers to take a blood sample for testing in a DUI case, or whether a search warrant is required. Jones argued that a warrant was necessary because the act of drawing blood from a person is a more significant intrusion than the usual type of search to which parolees are subject. The court disagreed, pointing out that "[t]he drawing of blood is sufficiently routine that it is one of the procedures to which every California driver implicitly consents as a condition of operating a motor vehicle in this state."¹⁰ In addition, the court noted that the purpose of a search condition is "to deter the commission of crimes and to protect the public," and that both of these goals

are served in cases where, as here, the postrelease convict has been arrested for DUI. Consequently, the court ruled that "Jones's mandatory PRCS search and seizure condition authorized the blood draw without the necessity of a warrant and offends no interest the Fourth Amendment is intended to protect."

Jones's conviction was therefore affirmed.

Comment

Four things should be noted. First, although the court's ruling technically applies only to convicts on PRCS, the court indicated that its ruling should also apply to blood draws of parolees and probationers who are subject to a search condition; i.e., that a blood draw "falls within the scope of a search-and-seizure condition of parole, probation, or PRCS." Second, a PRCS search will likely be ruled illegal if officers were unaware that the suspect was on postrelease supervision, and that the search will definitely be ruled illegal if it was "arbitrary, capricious, or harassing."¹¹ Third, as the result of the Supreme Court's ruling in *Missouri v. McNeely*,¹² a warrant would still be required to draw blood from a DUI arrestee who was not subject to a search condition. Fourth, it goes without saying (but we'll say it anyway) that such blood draws must be conducted by a medical professional in accordance with "accepted medical practices."¹³

People v. Toure

(2015) 232 Cal.App.4th 1096

Issue

Did exigent circumstances justify a warrantless blood draw from a combative DUI arrestee who had caused an injury accident?

Facts

At approximately 9 P.M. Madou Toure was driving a tractor-trailer rig westbound on State Route 58 in San Bernardino County. Witnesses said Toure started swerving into the eastbound lane several times, causing several oncoming drivers to take evasive action by running off the road. Toure eventually began driving continuously in the eastbound lane for about two miles, at which point he crashed into an oncoming car.

⁹ *People v. Fandinola* (2013) 221 Cal.App.4th 1415, 1422.

¹⁰ Citing Veh. Code § 23612(a)(1)(A).

¹¹ See *Samson v. California* (2006) 547 U.S. 843, 856; *People v. Schmitz* (2012) 55 Cal.4th 909, 916.

¹² (2013) ___ U.S. ___ 133 S.Ct. 1552. **NOTE:** The court in *Jones* also ruled that *McNeely* may not be applied retroactively.

¹³ *Schmerber v. California* (1966) 384 U.S. 757, 772.

Both occupants of the car were injured. Toure kept driving until a tire blew out. He then momentarily stepped down from the cab (“mumbling” to himself), but then got back inside telling himself “I’m outta here.” Fearing that Toure was going to drive off again, one of the witnesses reached into the truck and removed the ignition key.

About then CHP officers arrived at the crash site and, after determining that an ambulance was en route, they drove up to Toure’s truck and found him in the driver’s seat holding on to the steering wheel. One of the officers opened the passenger door and ordered him to step outside but Toure just started yelling obscenities at the officer. After pulling Toure out of the truck, the officer ordered him to turn around so he could pat search him for weapons. But Toure clenched his fists, spun around, and tried to hit one of the officers. Toure was eventually handcuffed but continued to yell, spit, and kick at the officers.

One officer immediately saw and smelled various classic signs that Toure was intoxicated. But he was unable to administer a field sobriety test because he was still combative. So, after arresting him for DUI, they drove him to the CHP office in Barstow where they notified him of California’s implied consent law. When an officer asked him if he would submit to a blood test, Toure swore at him. Thus, the officers were faced with a dilemma: they could not remove the handcuffs because Toure was still out of control; but they could not wait for him to settle down because that might take hours and, meanwhile, the alcohol in his bloodstream was continuously degrading. So a sergeant approved a forced blood draw, the results of which were 0.15%. Toure was charged with, among other things, DUI with injuries and resisting arrest. A jury found him guilty, and the judge sentenced him to almost five years in prison.

Discussion

On appeal, Toure argued that the results of the blood test should have been suppressed because the blood sample was obtained without a warrant. This motion was based on the United States Supreme Court’s 2013 ruling in *Missouri v. McNeely*¹⁴ in which the Court ruled that the dissipation of alcohol from the bloodstream does not, in and of itself, constitute an exigent circum-

stance that would justify a warrantless blood draw. Instead, the Court ruled there must be some additional circumstance that reasonably indicated that a delay in obtaining a blood sample would significantly undermine the reliability of the test results. And in making this determination, the Court said the relevant factors include “the practical problems of obtaining a warrant within a timeframe that still preserves the opportunity to obtain reliable evidence.” The question, then, was whether such practical problems were present in Toure’s case.

The Court of Appeal ruled they were. Specifically, it noted that, in addition to the dissipation of alcohol in the bloodstream, the following additional circumstances justified a warrantless blood draw: (1) the officers were delayed at the scene because Toure had caused an injury accident that required some of their attention; (2) Toure was combative which required that he be physically restrained, (3) it would have been dangerous to try to administer a field sobriety test to a combative arrestee; (4) Toure refused to tell the officers when he had stopped drinking, thereby making it is more difficult estimate his degree of intoxication; and (5), it was necessary to keep Toure restrained at the Barstow office because he continued to be combative.

Consequently, the court ruled that there were sufficient exigent circumstances to justify a warrantless blood draw and, accordingly, it affirmed Toure’s conviction.

People v. Alvarez et al.

(2014) 229 Cal.App.4th 761

Issue

Under what circumstances may criminal charges against a defendant be dismissed if officers failed to investigate whether the crime had been captured on a nearby surveillance camera?

Facts

At about 1:30 A.M., five men approached Jose C. in the parking lot of a bar in a high-crime high-gang area in downtown Fullerton. One of the men, Jose Renteria, grabbed a gold chain from Jose’s neck and the other men “made threatening statements,” such as asking

¹⁴ (2013) __ US __ [133 S.Ct. 1552].

him what he was going to do about it. Jose promptly reported the crime, and Fullerton officers quickly detained a group of five suspects nearby. Jose identified Renteria as the robber and two others, Daniel Alvarez and Michael Cisneros, as the ones who threatened him. The stolen chain was recovered a short distance from the men, and all three were arrested for robbery.

The central legal issue in the case pertained to what the officers did—or did not do—after arresting the men. In a motion to dismiss the charges, Cisneros and Alvarez contended that, shortly before Jose identified them as accomplices, an officer had a “lengthy” conversation with him and “encouraged” him to identify Cisneros and Alvarez as the two accomplices. Cisneros claimed to have overheard the conversation and immediately denied any involvement. More importantly, an audio tape of the detention revealed that he immediately told one of the officers, “Check the cameras, dude! There’s gotta be cameras around here, man.” The officer responded, “If I had video cameras of what took place, that’s part of my job.”

There were, in fact, nine police surveillance cameras in the downtown area, and one of them was located in the parking lot where the robbery occurred and another was situated directly across the street. Two days later (presumably at the arraignment), Cisneros’s attorney asked the prosecutor about the video footage, and the prosecutor allegedly told him there was “no possibility” that any of the recordings would be destroyed. By this time, however, the recordings had been routinely deleted after having been held for two weeks.

When the attorneys for Cisneros and Alvarez learned of this, they filed a motion to dismiss the charges on grounds that the officers failed to preserve relevant evidence that might have exonerated them. At the conclusion of the hearing the trial judge granted the motion saying, “I’ll be very candid, I find this entire case disturbing.” The DA’s Office appealed.

Discussion

It is settled that officers do not have an absolute duty to gather and preserve all potentially relevant evidence they obtained or might have obtained. This is because, as the Supreme Court explained, it would be unreasonable to impose on officers “an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution.”¹⁵ Instead, the Court ruled that a due process violation based on a breach of the duty to preserve can occur in only two situations:

(1) “Significant” evidence: If the evidence “might be expected to play a significant role in the suspect’s defense,” a due process violation will result if (a) the evidence possessed “an exculpatory value that was apparent before it was destroyed,” and (b) the evidence was “of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.”¹⁶

(2) “Potentially useful” evidence: If, on the other hand, the evidence was merely “potentially useful” to the defense, an officer’s failure to preserve it can constitute a due process violation only if the officer acted in “bad faith,” which appears to be akin to gross negligence.¹⁷ Said the court in *Alvarez*, “[I]f the best that can be said of the evidence is that it was ‘potentially useful,’ the defendant must also establish bad faith on the part of the police or prosecution.”

In this case it was unlikely that any video footage would have qualified as “significant” because it is doubtful that its exculpatory value was apparent before it was destroyed. But the court ruled the evidence was “potentially useful” and, therefore, its destruction would constitute a violation of due process if the officers acted in bad faith. Did they?

The court ruled they did, mainly because Cisneros had notified an officer at the scene that the video footage was important, and he had asked the officer to check on whether it existed. The officer said he would

¹⁵ *Arizona v. Youngblood* (1988) 488 U.S. 51, 58. Also see *People v. Kelly* (1984) 158 Cal.App.3d 1085, 1101-1102 [“The police have no obligation to collect evidence for the defense; their duty is to preserve existing material evidence on the issue of the accused’s guilt or innocence.”]; *People v. Callen* (1987) 194 Cal.App.3d 558, 561 [“The law does not impose upon law enforcement agencies the requirement that they take the initiative, or even any affirmative action, in procuring evidence deemed necessary to the defense of an accused.”]; *People v. Harris* (1985) 165 Cal.App.3d 324, 329 [“To date there is no authority for the proposition that sanctions should be imposed for a failure to gather evidence as opposed to a failure to preserve evidence.”].

¹⁶ *California v. Trombetta* (1984) 467 U.S. 479, 488-89. Also see *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 8.

¹⁷ See *Arizona v. Youngblood* (1988) 488 U.S. 51, 58 [“unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law”]; *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 8 [“a different standard applies when the prosecution fails to retain evidence that is potentially useful to the defense. In the latter situation, there is no due process violation unless the accused can show bad faith by the government”].

but he didn't. Nor did anyone else. In addition, it appeared that the court believed that the officers on the scene should have known that the department routinely destroyed such evidence after only two weeks. Finally, although it had no bearing on the officers' bad faith, the court also expressed concern that a prosecutor told a defense attorney that "there's no possibility" that the video recordings would be destroyed when their destruction had already occurred.

In attempting to rebut the defendants' arguments, the prosecution claimed there were two reasons why the footage was not "potentially useful" to Cisneros and Alvarez. First, it was not known whether either of the cameras had actually recorded the holdup. To support this claim, the prosecution presented testimony that the cameras did not focus on a particular area but, instead, were remotely "moved and zoomed" and, therefore, they could have been pointed anywhere. But the court ruled that it was more sensible to infer "that the police would try to keep the cameras pointed where they would be the most useful." Said the court, "[I]t would be silly to assume that the cameras were pointing at trees or the ground."

Second, the prosecution argued that any video recording of the robbery would not have exonerated Cisneros or Alvarez because, as members of the group that had accosted Jose, the footage would have proven they were at least guilty of being accessories or aiding and abetting. But the court pointed out that unpreserved evidence can be potentially useful to the defense even if, as here, it could only have resulted in reduced criminal liability and therefore a lesser sentence.

For these reasons the court ruled that the due process rights of Cisneros and Alvarez had been violated as the result of the officers' inaction, and it upheld the trial court's ruling that the proper remedy for the violation was dismissal. The court then concluded its discussion with the following observation which we think was noteworthy: "Police and prosecutors are more than willing to avail themselves of technology when it is to their advantage; there must be a level playing field that gives defendants equal access to the same evidence."

Comment

This was an especially important case because of the prevalence of police and private video surveillance cameras in many cities and counties, particularly in high-crime areas. Although such evidence usually helps prosecutors, there are some cases, as demonstrated in

Alvarez, in which it may benefit the defendant. But it really shouldn't matter which side benefits. What matters is that the officers at the scene of a crime took reasonable measures to learn what really happened.

People v. Hensley

(2014) 59 Cal.4th 788

Issues

While interrogating a serial killer and obtaining a confession, did a detective violate his *Miranda* rights? If not, did he pressure him into confessing?

Facts

During a period of 48 hours in 1992, Hensley robbed an ice cream store in Stockton, shot and killed his father-in-law in rural San Joaquin County, shot and paralyzed a prostitute in Stockton, and then killed a man during a robbery in Sacramento. The next day, a Sacramento police officer found Hensley sleeping in a stolen car and arrested him. In Hensley's possession the officer found a checkbook and a payroll check, both issued to the Sacramento murder victim. He also found the murder weapon.

Hensley was taken to a police interview room where he answered a few preliminary questions but then invoked his *Miranda* right to counsel when he said "I'm being set up, I want to see my lawyer." Hensley was then left alone in the interview room for about three hours, after which a detective reentered the interview room to take a photo of him. While the detective was doing this, Hensley asked, "When am I gunna get to see a lawyer or get a phone call?" The detective responded, "Once you're booked into the county jail, you'll get that and you'll get your phone calls." At that point, the detective started to leave the room but Hensley stopped him by asking, "Can I talk to you for a minute?" The detective said "sure." The following is a heavily edited account of their subsequent conversation which, for *Miranda* purposes, constituted "interrogation" because the detective's words were reasonably likely to elicit an incriminating response:

Hensley: Why are you guys trying to work me so hard? I told you I didn't do anything.

Detective: Well, unfortunately there was a man killed here in Sacramento and you have his checkbook, you have casings in your car, you have a gun on you, you have a check in his name. It's kind of hard to explain. Why wouldn't we work you hard?

Hensley: Hey well, hey—I understand.

Detective: I can't really talk to you because you want an attorney, okay?

Hensley: No, I just—all I said was you know, you can't put it all on me. You've gotta find Donzelle.

Detective: You wanna talk or you want an attorney?

Hensley: No, man. I didn't do any—I didn't fuckin do shit! But accept some fuckin stuff you know?"

Detective: Accept what?

Hensley: An I.D. and some checks.

Detective: I want to talk to you, but I've got to clarify something. You had initially told me in my first interview with you that you wanted an attorney; that you thought you were being set up, and you wanted an attorney.

Hensley: Not by you; I mean Donzelle and her fuckin buddy tried to set me up for what they did; I didn't do nothing but steal my fuckin father-in-law's car.

Detective: Well, can I continue to talk to you without an attorney? "

Hensley: Yeah, I don't give a fuck. I'm going to jail anyway.

Over the next few hours, Hensley "confessed in detail" to all of the crimes. His confession was used against him at trial and he was convicted. The trial court sentenced him to death.

Discussion

Among other things, Hensley argued on appeal that his confession should have been suppressed because the detective continued to question him after he had invoked his *Miranda* rights, and also because his confession was involuntary. The court rejected both arguments.

MIRANDA: It was apparent that Hensley had, in fact, invoked his *Miranda* right to counsel when, at the start of the interview, he said "I'm being set up. I want to see my lawyer." Although there was some subsequent small talk between them, the detective complied with *Miranda* because he did not ask Hensley any questions that constituted "interrogation"; i.e., questions that were reasonably likely to elicit an incriminating response.¹⁸ A few minutes later, however, the detective resumed the interview. Did this violate *Miranda*?

It is settled that officers may resume an interview following an invocation if four things occurred: (1) the suspect initiated the questioning, (2) the suspect was not pressured to do so, (3) the suspect's words indicated he wanted to open up a general discussion about the crime (as opposed to merely discussing incidental or unrelated matters),¹⁹ and (4) the suspect then waived his *Miranda* rights. The question was whether these requirements were satisfied.

The California Supreme Court ruled they were because, as the detective was leaving the room, Hensley initiated further questioning when he spontaneously asked, "Can I talk to you for a minute." He then impliedly waived his *Miranda* rights by freely discussing the case after the detective "repeatedly sought to confirm that defendant understood he did not have to speak but was nonetheless choosing to do so."²⁰ Accordingly, the court ruled that the detective's resumption of the interview was in full compliance with *Miranda*.

COERCION: Hensley also argued that his confession was involuntary because, at the start of the interview, the detective impliedly promised him a reduced sentence if he talked to him about the case. This allegation was based on the following comment made by the detective: "There are two sides to every story, okay? And we're real anxious to get your side of what happened today." But the court ruled that these remarks did not constitute an implied promise but, instead, he had "simply indicated a willingness to listen to defendant" and had "encouraged him to tell what happened."

ERRONEOUS WARNING: Finally, Hensley argued that the detective "improperly diluted" the *Miranda* warning when, instead of asking the standard waiver question ("Having these rights in mind, do you wish to talk to us now?") he said, "I want to talk to you about what you've been doing over the last couple of days. Can I talk to you about that?" Hensley responded "yes." In rejecting the argument, the court simply observed that "*Miranda* and its progeny have never mandated some sort of talismanic recitation."

Accordingly, the court affirmed the trial court's ruling that Hensley's confession was admissible. POV

¹⁸ See *Rhode Island v. Innis* (1980) 446 U.S. 291, 301.

¹⁹ See *Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1045.

²⁰ See *People v. Nelson* (2012) 53 Cal.4th 367, 375 ["Although he did not expressly waive his *Miranda* rights, he did so implicitly by willingly answering questions after acknowledging that he understood those rights."]; *People v. Hawthorne* (2012) 46 Cal.4th 67, 86.

The Changing Times

ALAMEDA COUNTY DISTRICT ATTORNEY'S OFFICE

Senior Deputy DA **Jeff Rubin** left the office to join the Santa Clara County DA's Office. Jeff had been a prosecutor here for 30 years, during which time he pursued his most passionate professional interest: learning as much as he could about the criminal law and using his knowledge to assist officers and prosecutors in Alameda County and, later, throughout California. Among other things, Jeff was *the* state-wide expert on criminal discovery, he wrote and hosted the weekly legal video series *Points and Authorities*, and was a respected contributor to POST's video series *Case Law Today*.

Two other veteran prosecutors have retired and will also be missed very much. Assistant DA **John Jay** retired after 38 years of service. John had been in charge of the Fremont office since 2008. Assistant DA **Karen Meredith** retired after 34 years of service. During her career, Karen's responsibilities included branch head, CALICO liaison, and realignment coordinator. The new head of the Fremont office is Assistant DA **Kim Hunter**. Assistant DA **Jill Nerone** has been appointed Supervising DA of the Insurance Fraud Division.

Inspectors' Division: Lateral appointment: **Ricardo Orozco** (former OPD captain) to Consumer and Environmental Protection Division (CEPD). Transfers: **Frank Moschetti** transferred out of the SAFE Task Force, and **Mike Foster** transferred in as the new Task Force Commander. **Harry Hu** from CEPT/Auto to CEPD Worker's Comp, **Tom Haselton** from CEPD Worker's Comp to Fremont, **Paul Dalzouman** from Fremont to CEPD/Auto, **Jim Gordon** from CEPT/Urban Auto to Wiley Manuel, **Jeff Ferguson** from Wiley Manuel to RCD trials, **Jeff Jouanicot** from Department of Child Support Services (DCSS) to CEPD/Urban Auto, **Tom Simonetti** from CEPD/Consumer to CEPD/Workers Comp, and **Simon Rhee** from RCD Trials to DCSS.

Retired senior DA **Gary Cummings** died on January 11, 2015. Gary joined the office in 1970 and retired in 2001. He was 70 years old.

ALAMEDA COUNTY NARCOTICS TASK FORCE

Ross Clippinger (ACSO) was promoted to sergeant and left the task force to pursue his new role as ACSO sergeant. ACSO deputy **Fenton Culler** has replaced Sgt. Clippinger.

ALAMEDA COUNTY SHERIFF'S OFFICE

Capt. **Dale Amaral** was promoted to division commander. Lts. **Melanie Ditzenberger** and **Jack Tucker** were promoted to captain. Sgts. **Michael Carroll**, **Victor Fox**, and **Robert McGrory** were promoted to lieutenant. Deputies **Daniel McNaughton III**, **Gustavo Mora**, **Lauren Tucker**, and **Michael Tolero** were promoted to sergeant.

The following deputies have retired: Division Commander **Thomas McCarthy** (32 years), Lt. **Daniel Harrison** (28 years), Lt. **John Worley** (27 years), **Robert Zavala** (30 years), **Steven Corey** (10 years), **Dawn Sullivan Adams** (14 years), **David Garcia** (18 years), and **John Olson** (7 years).

Lateral appointments: **Lance Bye**, **Johnny Davis Jr.**, **John Fukuda**, **Daniel Gill Jr.**, **Gregory Lemmon**, **Raymond Leong**, **Jason Mears**, and **Douglas Walker**. Newly hired POST graduates: **Nathaniel Davison**, **Patrick Helfrick**, **Daniel Murphy**, and **Erik Stavert**.

ALAMEDA POLICE DEPARTMENT

Capt. **David Boersma** retired after 30 years of service. Lt. **Lance Leibnitz** was promoted to captain. Sgts. **Hoshmand Durani**, **Anthony Munoz**, and **Ronald Simmons** were promoted to lieutenant. **Mike Agosta**, **Richard Soto**, and **Erik Klaus** were promoted to sergeant.

New hires: **Tyler Horn** and **Darryl DeRespini**. **Jeanette Cazares** and **Joseph Couch** graduated from the ACSO Academy.

Transfers: Sgt. **Wayland Gee** to Inspectional Services; Sgts. **Mark Reynolds** and **Jennifer Basham**, and Officer **Emilia Mrak** to Patrol; Sgt. **Matt McMullen** to Personnel and Training; Sgt. **David Pascoe** and officers **Robby Stofle** and **David Lloyd** to Special Investigations Unit; **Frank Petersen** to Com-

munity Oriented Policing Preventative Services (COPPS); **Cameron Miele** to School Resource Officer at Encinal High School; and **Adam McCallon** to Traffic/Motors.

BART POLICE DEPARTMENT

Andy Dachauer retired after 25 years of service. Community Service Officer **Al Marish** retired after 19 years of service. Lateral appointments: **Eric Hofstein**, **Lyman Chan**, **Nicholas Luzano**, and **Miguel Tellez**. Sgt. **Mike Williamson** was appointed to Critical Asset Patrol. FTO **Kristin Rincon** was appointed to Canine Protection Handler. Supervisor **Matt Cromer** was appointed to CALEA manager.

CALIFORNIA HIGHWAY PATROL

HAYWARD: Lt. **Timothy Pearson** was promoted to captain and transferred in from the Mission Grade Commercial Vehicle Enforcement Facility. Sgt. **Scott Loso** was promoted to lieutenant and transferred from Research and Planning to Hayward CHP. **Steven Reid** was promoted to sergeant and assigned to Hayward CHP.

Transfers: Capt. **Linda Franklin** to Dublin CHP, Lt. **Edward De La Cruz** to the Mission Grade Commercial Vehicle Enforcement Facility, Sgt. **Brian King** to the Office of Inspector General, and Sgt. **Keith Pessa** to Castro Valley CHP. CHP Academy graduates **Thadeus Johnson** and **Robert Castillas** were assigned to Hayward CHP.

EAST BAY REGIONAL PARK DISTRICT POLICE DEPT.

Capt. **Mark Ruppenthal** retired with over 40 years of service in law enforcement. Sgt. **David Hall** retired after 29 years of service. Reserve officer **Carroll France** retired with 46 years of service. Communications and Records manager **Lynette Journeay** retired with eight years of public safety service and 33 years of service to the district. **Andra Gallagher** was hired as Property and Evidence Specialist. New dispatchers: **Eva Samorano** and **Candyce Witt-Albedi**.

EMERYVILLE POLICE DEPARTMENT

On June 30, 2015, Chief **Ken James** retired after serving the City of Emeryville for 40 years, the past 16 years as chief. (There is a very interesting inter-

view with Chief James, which includes some of Emeryville's "colorful" past, that can be viewed at the E'Ville Eye newspaper's web site: [evilleeye.com/news-commentary/crime/.](http://evilleeye.com/news-commentary/crime/))

FREMONT POLICE DEPARTMENT

The following officers have retired: Lt. **Thomas Mikkelsen** (25 years), Lt. **John Liu** (26 years), and Sgt. **Chris Hummel** (18 years). Sgt. **Steve Pace** was promoted to lieutenant. **Jared Morrison**, **Kurtis Romley**, and **Shawn Decker** were promoted to sergeant. New hires: **Tyler Davis**, **Gregory Alexander**, **Chelsea Knudson**, **Gregory Wong**, **Lucas Thornburg**, **Richard Sun**, **Jeffrey Jackson**, and **Brian Burch**. New dispatcher: **Po-Wei Tsai**.

NEWARK POLICE DEPARTMENT

Det. **Scott Baswell** transferred from the Major Crimes Task Force to Patrol. **Rod Hogan** transferred from Patrol to Traffic. **Matt Warren** transferred from Patrol to the Special Enforcement Team

OAKLAND HOUSING AUTHORITY POLICE DEPT.

James Williams was promoted to captain after returning from the Oakland Unified School District PD where he served three years as acting chief. New Officer: **Brauli Rodriguez** (formerly a police reserve officer). New Police Service Aides: **Muang Saeteurn**, **Duy Vo**, and **Cullis Hawkins**. **Bradley Phillips** resigned and accepted a position with Vallejo PD. Police Service Aides **Lisette Elizalde**, **Maria Ventura Rios**, and **Stephanie Chan** have left the department.

OAKLAND POLICE DEPARTMENT

Capt. **Oliver Cunningham** was promoted to deputy chief. Lt. **Freddie Hamilton** was promoted to captain. Sgts. **James Bassett** and **Steven Paich** were promoted to lieutenant.

The following officers retired: Lt. **Kirt Mullnix** (28 years), Lt. **Peter Lau** (20 years), Sgt. **William Bardsley** (18 years), Sgt. **Raymond Backman** (26 years), **Douglas Walker** (27 years), **John Fukuda** (25 years), **Richard Williams** (25 years), **Wendy Rae** (27 years), and **Monica Russo** (28 years). The following officers have taken disability retirements: Sgt. **Robert Nolan** (25 years), Sgt. **Sean Barre** (8 years), **Patrick Egan** (15 years), **Julio Pinzon** (17 years), and **Yucel Tatlisu**

(9 years). Correction to the Winter 2015 edition: **Anthony K. Rachal** was deputy chief (not captain) when he took a disability retirement.

New officers: **Josef Callaghan, Adam Devin, Brent McCord, Forest Maio, Sean Minnehan, Joseph Phillips, Donall Rowe, Keith Sheppard, and Yu John.**

PIEDMONT POLICE DEPARTMENT

Capt. **Scot Wyatt** retired after 35 years of service (27 with Sausalito PD and 8 years with PPD). Scot will be succeeded by **Jeremy Bowers**, an 18-year veteran of San Jose PD. New officer **Matt Ornellas.**

PLEASANTON POLICE DEPARTMENT

Mark Braaten retired after 26 years of service.

SAN LEANDRO POLICE DEPARTMENT

Sgt. **Ronald C. Clark** was promoted to lieutenant. **Liaquat "Ali" Khan** was promoted to sergeant. **Megan Wilske** was promoted to Senior Public Safety Dispatcher. New Officers: **Stephen Barnes, Christopher Barris, Zachary Sampson, Anthony Spediacci, and Andrea Rodriguez.**

SLPD is hosting United 4 Safety/4th Annual Open House/Safety Faire on Saturday, June 27th from 9:00 A.M. to 2:00 P.M. The event will be held in the courtyard in front of the police department located at 901 E. 14th Street in San Leandro and will focus on community involvement, education, technology enhancement, and will include demonstrations from the traffic, K9, and SWAT units.

UNION CITY POLICE DEPARTMENT

Chief **Brian Foley** retired after 29 years of service. Dep. Chief **Darryl McAllister** was appointed chief. Cmdr. **Ben Horner** and Sgt. **John Elissiry** retired after 29 years of service. Sgt. **Tom Gorrie** and **Kevin Afonso** retired after 27 years of service.

The following lieutenants were promoted to captain: **Gloria Lopez-Vaughan** (to Support Services), and **Jared Rinetti** (to Field Operations). Sgts. **Travis Souza** and **Victor Derting** were promoted to lieutenant. Sgts. **Matt Pardo** and **Dean Sato** were promoted to acting lieutenant. Corporals **Stan Rodrigues, Lisa Graetz,** and **Jeff Stewart** were promoted to sergeant. The following officers were promoted to ser-

geant: **Fred Camacho Paul Kanazeh, Bob Kensic, and Yousuf Shansab.**

Lateral appointments: Lt. **Doug Calcagno** (San Leandro PD), **Ronny Ziya** (Modesto PD), **Terrance Olson** (San Jose PD), and **Jean Jimenez** (San Jose PD). Transfers: Sgt. **Mark Housley** (from Patrol to Records and Communications) and Sgt. **Stan Rodrigues** (from Patrol to Personnel and Training).

Newly appointed officers: **Michael Bedford, Randy Stables, Daniel Rivas, Steven Fong, Scott Jensen, Steffen Parodi, Ninja Allen, Ryan Ramos, Nicolas Perry,** and **Travis Solverson.**

On December 12, 2014, retired chief **Mike Manick** passed away in Sonoma. Chief Manick was Union City's fifth police chief, serving from 1981 to 1987. He also served as a police chief for the City of Hayward and the City of Arcata.

U.C. BERKELEY POLICE DEPARTMENT

Lt. **Efric Tejada** retired after more than 24 years of service. **Brandon Netz** and **Charissa Arthur** were selected for the EOD K9 assignment. The following officers were selected for the Special Response Unit: **Robert Ibanez, Gabriel Irving, Nathan Proffitt,** and **Nicholas Rosato.**

POV

War Stories

A burglar with bad judgment

After working out at the gym one Saturday evening, a Union City burglar felt so invigorated he decided to pull a job. He quickly found a house that was darkened, so he broke in and took lots of valuable stuff. He returned home in good spirits, just in time to watch his favorite TV show, "Cops." But as the theme song started playing, he remembered he had left his gym bag inside the house. So he raced back to retrieve it. But, unfortunately, the lights were now on and there was a car in the driveway. The owner had returned!

Undeterred, the burglar walked up and knocked on the door. When the homeowner opened up (he had just reported the burglary), the burglar said, "Hey, I was here earlier and forgot my gym bag. I think it's in the hallway." The homeowner slammed the door and called 911 again. Although the burglar was gone when officers arrived, they arrested him shortly thereafter when they found that his gym bag contained his gym membership card (with photograph) and home address.

The things school staff need to know

A Livermore officer was summoned to a local high school to take possession of some methamphetamine that a parent had dropped off after finding it in his son's bedroom. When the officer asked the principal how he knew the powder was meth, the principal said, "Actually, my secretary received the bag from the parent; and she dipped her finger in, tasted it, and said 'It's meth all right.'" The principal continued, "I did the same thing and confirmed it." Thinking this might be a medical emergency, the officer asked the secretary and principal, "How long ago did you test this stuff?" The principal said, "Oh, about a week ago; I've had it sitting in my desk, but I've been too busy to call."

To protect and deliver

A patrol officer in Oswego, Illinois stopped a pizza delivery driver for making an illegal turn. When the officer saw drug paraphernalia in the car, he arrested the deliveryman and took custody of the extra large pizza he was delivering ("The Ultimate Extreme Carnivore"). Although the pizza smelled great and he was hungry, the officer decided to do a good deed by

stopping off and delivering it to the family that ordered it. As he handed it to the woman who answered the door, she said, "It's about time. I ordered this pizza over an hour ago."

A nice coincidence

One night in Oakland, two men on an AC Transit bus got into an argument that ended when one of them shot the other. The victim was taken to Highland Hospital in critical condition. Although the shooting was captured on the bus's surveillance camera, investigators were unable to identify the shooter. Fast forward two weeks: The victim had just been loaded into an ambulance outside the Emergency Room (he was being transferred to an extended care facility) when he looked out the window and saw the shooter walking into the ER. So he notified paramedics who notified OPD who arrested the shooter a few minutes later in the ER. He had a sore throat.

Thanks for the help

At the close of the trial in Compton, the DA picked up the handgun used by the robber and asked that it be admitted into evidence. The judge took the gun and tried to cock it but it stuck. From the defense table, the defendant blurted out, "Excuse me, judge, you gotta put the clip in first." Thereupon, the People rested.

Another cocky defendant

A deputy DA in Oakland was cross-examining a defendant who was charged with pickpocketing:

DA: You say you're innocent but, as you know, five people have testified they saw you steal the wallet.

Defendant: So what. I can find 500 people who will testify they *didn't* see me steal it.

Humanizing snitches

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

Own one.

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