Principles of Probable Cause and Reasonable Suspicion

Articulating precisely what reasonable suspicion and probable cause mean is not possible.[1]

It is ordinarily a bad idea to begin an article by admitting that the subjects to be discussed cannot be usefully defined. But when the subjects are probable cause and reasonable suspicion, and when the readership is composed of people who have had some experience with them, it would be pointless to deny it. Consider that the Seventh Circuit once tried to provide a good legal definition but concluded that, when all is said and done, it just means having "a good reason to act."[2] Even the Supreme Court—whose many powers include defining legal terms—decided to pass on probable cause because, said the Court, it is "not a finely-tuned standard"[3] and is actually an "elusive" and "somewhat abstract" concept.[4] As for reasonable suspicion, the uncertainty is even worse. For instance, in *United States v. Jones* the First Circuit would only say that it "requires more than a naked hunch."[5]

But this imprecision is actually a good thing because probable cause and reasonable suspicion are ultimately judgments based on common sense, not technical analysis. Granted, they are *important* judgments because they have serious repercussions. But they are fundamentally just rational assessments of the convincing force of information, which is something the human brain does all the time without consulting a rulebook. So instead of being governed by a "neat set of rules,"[6] these concepts mainly require that officers understand certain principles—principles that usually enable them to make these determinations with a fair degree of consistency and accuracy.

Although there is certainly more to probable cause and reasonable suspicion than just principles, it's a good place to start, so that is where we will begin this four-part series. In part two, which begins on page 9, we will explain how officers can prove that the information they are relying upon to establish probable cause or reasonable suspicion was sufficiently reliable that is has significance. Then, in the Fall 2014 edition we will cover probable cause to arrest, including the various circumstances that officers and judges frequently consider in determining whether it exists. The series will conclude in the Winter 2015 edition with an discussion of how officers can determine whether they have probable cause to search.

First, however, it is necessary to explain the basic difference between probable cause and reasonable suspicion, as these terms will be used throughout this series. Both are essentially judgments as to the existence and importance of evidence. But they differ as to the level of proof that is required. In particular, probable cause requires evidence of higher quality and quantity than reasonable suspicion because it permits officers to take actions that are more intrusive, such as arresting people and searching things. In contrast, reasonable suspicion is the standard for lesser intrusions, such as detentions and pat searches. As the Supreme Court explained:

> Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quality or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.[7]

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[1] *Ornelas v. United States* (1996) 517 U.S. 690, 695.
[2] *Hanson v. Dane County* (7th Cir. 2010) 608 F.3d 335. 338.
[3] *Ornelas v. United States* (1996) 517 U.S. 690, 695.
[4] *United States v. Arvizu* (2002) 534 U.S. 266, 274 ["abstract"]; *United States v. Cortez* (1981) 449 U.S. 411, 417 ["elusive"].
[5] *U.S. v. Jones* (1st Cir. 2012) 700 F.3d 615, 621.
[6] See *United States v. Sokolow* (1989) 490 U.S. 1, 7; *United States v. Arvizu* (2002) 534 U.S. 266, 274; *Ker v. California* (1963) 374 U.S. 23, 33; *In re Rafael V.* (1982) 132 Cal.App.3d 977, 982; *In re Louis F.* (1978) 85 Cal.App.3d 611, 616.
[7] *Alabama v. White* (1990) 496 U.S. 325, 330.

What Probability is Required?

When people start to learn about probable cause or reasonable suspicion, they usually want a number: What probability percentage is required?[8] Is it 80%? 60%? 50%? Lower than 50? No one really knows, which might seem strange because, even in a relatively trivial venture such as sports betting, people would not participate unless they had some idea of the odds.

Nevertheless, the Supreme Court has refused to assign a probability percentage to these concepts because it views them as nontechnical standards based on common sense, not mathematical precision.[9] "The probable cause standard," said the Court, "is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of circumstances."[10] Similarly, the Tenth Circuit observed, "Besides the difficulty of agreeing on a single number, such an enterprise would, among other things, risk diminishing the role of judgment based on situation-sense."[11]

Still, based on inklings from the United States Supreme Court, it is possible to provide at least a ballpark probability percentage for probable cause. Reasonable suspicion, on the other hand, remains an enigma.

Probable cause

Many people assume that probable cause requires at least a 51% probability because anything less would not be "probable." While this is technically true, the Supreme Court has ruled that, in the context of probable cause, the word "probable" has a somewhat different meaning. Specifically, it has said that probable cause requires neither a preponderance of the evidence nor "any showing that such belief be correct or more likely true than false,"[12] and that it requires only a "fair" probability, not a statistical probability.[13] Thus, it is apparent that probable cause requires something less than a 50% chance.[14] How much less? Although no court has tried to figure it out, we suspect it is not much lower than 50%.

Reasonable suspicion

As noted, the required probability percentage for reasonable suspicion is a mystery. Although the Supreme Court has said that it requires "considerably less [proof] than preponderance of the evidence"[15] (which means "considerably less" than a 50.1% chance), this is unhelpful because a meager 1% chance is "considerably less" than 51.1% but no one seriously thinks that would be enough. Equally unhelpful is the Supreme Court's observation that, while probable cause requires a "fair probability," reasonable suspicion requires only a "moderate" probability.[16] What is the difference between a "moderate" and "fair" probability? Again, nobody knows.

What we *do* know is that the facts need not rise to the level that they "rule out the possibility of innocent conduct."[17] As the Court of Appeal explained, "The possibility of an innocent explanation does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct. Indeed, the principal function of his investigation is to resolve that very ambiguity."[18] We also know that reasonable suspicion may exist if the circumstances were merely indicative of criminal activity. In fact, the California Supreme Court has said that if the circumstances are consistent with criminal activity, they "demand" an investigation."[19]

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[8] See *Illinois v. Gates* (1983) 462 U.S. 213, 231 "In dealing with probable cause, as the very name implies, we deal with probabilities."].
[9] See *Texas v. Brown* (1983) 460 U.S. 730, 742; *Illinois v. Gates* (1983) 462 U.S. 213, 232.
[10] See *Maryland v. Pringle* (2003) 540 U.S. 366, 371.
[11] *U.S. v. Ludwig* (10th Cir. 2011) 641 F.3d 1243, 1251.
[12] *Texas v. Brown* (1983) 460 U.S. 730, 742. Also see *People v. Carrington* (2009) 47 Cal.4th 145, 163.
[13] See *Illinois v. Gates* (1983) 462 U.S. 213, 238; *Safford Unified School District v. Redding* (2009) 557 U.S. 364, 371.
[14] See *U.S. v. Melvin* (1st Cir. 1979) 596 F.2d 492, 495 ["appellant reads the phrase 'probable cause' with emphasis on the word 'probable' and would define it mathematically to mean more likely than not or by a preponderance of the evidence. This reading is incorrect."]; *People v. Alcorn* (1993) 15 Cal.App.4th 652, 655; *U.S. v. Garcia* (5th Cir. 1999) 179 F.3d 265, 269.
[15] *Illinois v. Wardlow* (2000) 528 U.S. 119, 123. Also see *United States v. Arvizu* (2002) 534 U.S. 266, 274.
[16] *Safford Unified School District v. Redding* (2009) 557 U.S. 364, 371.
[17] *United States v. Arvizu* (2002) 534 U.S. 266, 277.
[18] *People v. Brown* (1990) 216 Cal.App.3d 1442, 1449 [edited].
[19] *In re Tony C.* (1978) 21 Cal.3d 888, 894. Also see *United States v. Arvizu* (2002) 534 U.S. 266, 277.

Basic Principles

Having given up on a mathematical solution to the problem, we must rely on certain basic principles. And the most basic principle is this: Neither probable cause nor reasonable suspicion can exist unless officers can cite "specific and articulable facts" that support their judgment.[20] This demand for specificity is so important that the Supreme Court called it the "central teaching of this Court's Fourth Amendment jurisprudence."[21] The question, then, is this: How can officers determine whether their "specific and articulable" facts are sufficient to establish probable cause or reasonable suspicion? That is the question we will address in the remainder of this article.

Totality of the circumstances

Almost as central as the need for facts is the requirement that, in determining whether officers have probable cause and reasonable suspicion, the courts will consider the totality of circumstances. This is significant because it is exactly the opposite of how some courts did things many years ago. That is, they would utilize a "divide-and-conquer"[22] approach which meant subjecting each fact to a meticulous evaluation, then frequently ruling that the officers lacked probable cause or reasonable suspicion because none of the individual facts were compelling.

This practice officially ended in 1983 when, in the landmark decision in *Illinois v. Gates*, the Supreme Court announced that probable cause and reasonable suspicion must be based on an assessment of the convincing force of the officers' information *as a whole*. "We must be mindful," said the Fifth Circuit, "that probable cause is the sum total of layers of information and the synthesis of what the police have heard, what they know, and what they observed as trained officers. We weigh not individual layers but the laminated total.[23] Thus, in *People v. McFadin* the court responded to the defendant's "divide-and-conquer" strategy by utilizing the following analogy:

> Defendant would apply the axiom that a chain is no stronger than its weakest link. Here, however, there are strands which have been spun into a rope. Although each alone may have insufficient strength, and some strands may be slightly frayed, the test is whether when spun together they will serve to carry the load of upholding [the probable cause determination].[24]

Here is an example of how the "totality of the circumstances" test works and why it is so important. In *Maryland v. Pringle*[25] an officer made a traffic stop on a car occupied by three men and, in the course of the stop, saw some things that caused him to suspect that the men were drug dealers. One of those things was a wad of cash ($763) that the officer had seen in the glove box. He then conducted a search of the vehicle and found cocaine. But a Maryland appellate court ruled the search was unlawful because the presence of money is "innocuous." The Supreme Court reversed, saying the Maryland court's "consideration of the money in isolation, rather than as a factor in the totality of the circumstances, is mistaken."

Common sense

Not only did the Court in *Gates* rule that probable cause must be based on a consideration of the totality of circumstances, it ruled that the significance of the circumstances must be evaluated by applying common sense, not hypertechnical analysis. In other words, the circumstances must be "viewed from the standpoint of an objectively reasonable police officer."[26] As the Court explained:

> Perhaps the central teaching of our decisions bearing on the probable cause standard is that it is a practical, nontechnical conception. In dealing with probable cause, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.[27]

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[20] *U.S. v. Pontoo* (1st Cir. 2011) 666 F.3d 20, 27. Also see *Illinois v. Gates* (1983) 462 U.S. 213, 239.
[21] *Terry v. Ohio* (1968) 392 U.S. 1, 21, fn.18.
[22] *United States v. Arvizu* (2002) 534 U.S. 266, 274.
[23] *U.S. v. Edwards* (5th Cir. 1978) 577 F.2d 883, 895. Also see *U.S. v. Valdes-Vega* (9th Cir. 2013) 739 F.3d 1074.
[24] (1982) 127 Cal.App.3d 751, 767.
[25] (2003) 540 U.S. 366. Also see *Massachusetts v. Upton* (1984) 466 U.S. 727, 734 ["The informant's story and the surrounding facts possessed an internal coherence that gave weight to the whole."].
[26] *Ornelas v. United States* (1996) 517 U.S. 690, 696.
[27] *Illinois v. Gates* (1983) 462 U.S. 213, 231. Also see *United States v. Cortez* (1981) 449 U.S. 411, 418.

Legal, but suspicious, activities

It follows from the principles discussed so far that it is significant that officers saw the suspect do something that, while not illegal, was suspicious in light of other circumstances.[28] As the Supreme Court explained, the distinction between criminal and noncriminal conduct "cannot rigidly control" because probable cause and reasonable suspicion "are fluid concepts that take their substantive content from the particular contexts in which they are being assessed."[29]

For example, in *Massachusetts v. Upton* the state court ruled that probable cause could not have existed because the evidence "related to innocent, nonsuspicious conduct or related to an event that took place in public." Acknowledging that no single piece of evidence was conclusive, the Supreme Court reversed, saying the "pieces fit neatly together."[30] Similarly, the Court of Appeal noted that seeing a man running down a street "is indistinguishable from the action of a citizen engaged in a program of physical fitness." But it becomes "highly suspicious" when it is "viewed in context of immediately preceding gunshots."[31]

Another example of how noncriminal activities can become highly suspicious is found in *Illinois v. Gates.*[32] It started with an anonymous letter to a police department saying that a local resident, Lance Gates, was a drug trafficker; and it explained in some detail the procedure that Gates and his wife, Sue, would follow in obtaining drugs in Florida. DEA agents followed both of them (Gates flew, Sue drove) and both generally followed the procedure described by the letter writer. This information led to a search warrant and Gates' arrest. On appeal, he argued that the warrant was not supported by probable cause because the agents did not see him or his wife do anything illegal. It didn't matter, said the Supreme Court, because the "seemingly innocent activity became suspicious in light of the initial tip."

Multiple incriminating circumstances

Here is a principle that, while critically important, is often overlooked or underappreciated: The chances of having probable cause or reasonable suspicion increase *exponentially* with each additional piece of independent incriminating evidence that comes to light. This is because of the unlikelihood that each "coincidence of information"[33] could exist in the absence of a fair or moderate possibility of guilt.

For example, in a Kings County murder case probable cause to arrest the defendant was based on the following: When the crime occurred, a car similar to defendant's "uniquely painted" vehicle had been seen in a rural area, two-tenths of a mile from where a 15-year old girl had been abducted. In addition, an officer saw "bootprints and tire prints" nearby and "he compared them visually with boots seen in, and the treads of the tires of, defendant's car, which he knew was parked in front of defendant's hotel and registered to defendant. He saw the condition of the victim's body; he knew that defendant had a prior record of conviction for forcible rape. He also knew of the victim's occasional employment as a babysitter at the farm where defendant worked." In ruling that these pieces of independent incriminating evidence constituted probable cause, the California Supreme Court said:

> The probability of the independent concurrence of these factors in the absence of the guilt of defendant was slim enough to render suspicion of defendant reasonable and probable.[34]

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[28] See *United States v. Sokolow* (1989) 490 U.S. 1, 9 ["Any one of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion."]; *People v. Glenos* (1992) 7 Cal.App.4th 1201, 1207; *U.S. v. Ruidiaz* (1st Cir. 2008) 529 F.3d 25, 30 ["a fact that is innocuous in itself may in combination with other innocuous facts take on added significance"].

[29] *Safford Unified School District v. Redding* (2009) 557 U.S. 364, 371.

[30] (1984) 466 U.S. 727, 731-32.

[31] *People v. Juarez* (1973) 35 Cal.App.3d 631, 636.

[32] (1983) 462 U.S. 213.

[33] *Ker v. California* (1963) 374 U.S. 23, 26. Also see *People v. Pranke* (1970) 12 Cal.App.3d 935, 940 ["when such remarkable coincidences coalesce, they are sufficient to warrant a prudent man in believing that the defendant has committed an offense"]; *U.S. v. Abdus-Price* (D.C. Cir. 2008) 518 F.3d 926, 930 [a "confluence" of factors]; *U.S. v. Carney* (6th Cir. 2012) 675 F.3d 1007 ["interweaving connections"].

[34] *People v. Hillery* (1967) 65 Cal.2d 795, 804.

Similarly, in a case from Santa Clara County,[35] a man named Anthony Spears, who worked at a Chili's in Cupertino, arrived at the restaurant one morning and "discovered" that the manager had been shot and killed before the restaurant had opened for the day. In the course of their investigation, sheriff's deputies learned that Spears had left home shortly before the murder even though it was his day off, there were no signs of forced entry, and that Marlboro cigarette butts (the same brand that Spears smoked) had been found in an alcove near the manager's office. Moreover, Spears had given conflicting statements about his whereabouts when the murder occurred; and, after "discovering" the manager's body, he told other employees that the manager had been "shot" but the cause of death was not apparent from the condition of the body.

Based on this evidence, detectives obtained a warrant to search Spears' apartment and the search netted, among other things, "large amounts of blood-stained cash." On appeal, Spears argued that the detectives lacked probable cause for the warrant but the court disagreed, saying, "[W]e believe that all of the factors, considered in their totality, supplied a degree of suspicion sufficient to support the magistrate's finding of probable cause."

While this principle also applies to reasonable suspicion to detain, a lesser amount of independent incriminating evidence will be required. The following are examples from various cases:

- The suspect's physical description and his clothing were similar to that of the perpetrator.[36]
- In addition to a description similarity, the suspect was in a car similar in appearance to that of the perpetrator.[37]
- The suspect resembled the perpetrator and he was in the company of a person who was positively identified as one of two men who had just committed the crime.[38]
- The suspect resembled the perpetrator plus he was detained shortly after the crime occurred at the location where the perpetrator was last seen or on a logical escape route.[39]
- In addition to resembling the perpetrator, the suspect did something that tended to demonstrate consciousness of guilt; e.g., he lied to officers or made inconsistent statements, he made a furtive gesture, he reacted unusually to the officer's presence, he attempting to elude officers.[40]
- The suspect resembled the perpetrator and possessed fruits of the crime.[41]
- The number of suspects in the vehicle corresponded with the number of people who had just committed the crime, plus they were similar in age, sex, and nationality.[42]

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[35] *People v. Spears* (1991) 228 Cal.App.3d 1.

[36] See *Chambers v. Maroney* (1970) 399 U.S. 42, 46-47; *People v. Adams* (1985) 175 Cal.App.3d 855, 861; *People v. Anthony* (1970) 7 Cal.App.3d 751, 763.

[37] See *People v. Hill* (2001) 89 Cal.App.4th 48, 55; *People v. Soun* (1995) 34 Cal.App.4th 1499, 1524-25; *People v. Watson* (1970) 12 Cal.App.3d 130, 134-35; *People v. Davis* (1969) 2 Cal.App.3d 230, 237; *People v. Huff* (1978) 83 Cal.App.3d 549, 557; *In re Dung T.* (1984) 160 Cal.App.3d 697, 712-13; *People v. Flores* (1974) 12 Cal.3d 85, 91; *People v. Jones* (1981) 126 Cal.App.3d 308, 313-14; *People v. Moore* (1975) 51 Cal.App.3d 610, 617; *People v. Adams* (1985) 175 Cal.App.3d 855, 861; *People v. Orozco* (1981) 114 Cal.App.3d 435, 445.

[38] See *People v. Bowen* (1987) 195 Cal.App.3d 269, 274; *In re Lynette G.* (1976) 54 CA3 1087, 1092; *In re Carlos M.* (1990) 220 CA3 372, 382 ["[W]here, as here, a crime is known to have involved *multiple* suspects, some of whom are specifically described and others whose descriptions are generalized, a defendant's proximity to a specifically described suspect, shortly after and near the site of the crime, provides reasonable grounds to detain for investigation a defendant who otherwise fits certain general descriptions."].

[39] *People v. Atmore* (1970) 13 Cal.App.3d 244, 246.

[40] *People v. Fields* (1984) 159 Cal.App.3d 555, 564; *People v. Turner* (1994) 8 Cal.4th 137, 186; *People v. Loudermilk* (1987) 195 Cal.App.3d 996, 1005.

[41] *People v. Hagen* (1970) 6 Cal.App.3d 35, 43; *People v. Morgan* (1989) 207 Cal.App.3d 1384, 1389; *People v. Anthony* (1970) 7 Cal.App.3d 751, 763; *People v. Rico* (1979) 97 Cal.App.3d 124, 129.

[42] *People v. Soun* (1995) 34 Cal.App.4th 1499, 1524. Also see *People v. Brian A.* (1985) 173 Cal.App.3d 1168, 1174 ["Where there were two perpetrators and an officer stops two suspects who match the descriptions he has been given, there is much greater basis to find sufficient probable cause for arrest. The probability of there being other groups of persons with the same combination of physical characteristics, clothing, and trappings is very slight."]; *People v. Britton* (2001) 91 Cal.App.4th 1112, 1118-19 ["This evasive conduct by two people instead of just one person, we believe, bolsters the reasonableness of the suspicion"]. Compare *In re Dung T.* (1984) 160 Cal.App.3d 697, 713.

Unique circumstances

The odds of having reasonable suspicion or probable cause also increase dramatically if the matching or similar characteristics were unusual or distinctive. As the Court of Appeal observed, "Uniqueness of the points of comparison must also be considered in testing whether the description would be inapplicable to a great many others."[43]

For example, the courts have taken note of the following unique circumstances:

- The suspect and perpetrator both had bandages on their left hands;[44]
- The suspect and perpetrator were in vehicles of the same make and model with tinted windows and a dark-colored top with light-colored side.[45]

Conversely, the Second Circuit noted that "when the points of similarity are less unique or distinctive, more similarities are required before the probability of identity between the two becomes convincing."[46]

Inferences based on circumstantial evidence

As noted earlier, probable cause and reasonable suspicion must be based on "specific and articulable facts." However, the courts will also consider an officer's inferences as to the meaning or significance of the facts so long as the inference appeared to be reasonable. It is especially relevant that the inference was based on the officer's training and experience.[47] In the words of the Supreme Court, "The evidence must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."[48] Or, as the Court explained in *United States v. Arvizu:*

> The process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person.[49]

For example, in *People v. Soun*[50] the defendant and three other men killed the owner of a video store in San Jose during a botched robbery. The men were all described as Asian, but witnesses provided conflicting descriptions of the getaway car. Some said it was a two-door Japanese car, but one said it was a Volvo "or that type of car." Two of the witnesses provided a partial license plate number. One said he thought it began with 1RCS, possibly 1RCS525 or 1RCS583. The other said he thought it was 1RC(?)538.

A San Jose PD officer who was monitoring these developments at the station made two inferences: (1) the actual license plate probably began with 1RCS, and (2) the last three numbers included a 5 and an 8. So he started running these combinations through DMV until he got a hit on 1RCS558, a 1981 Toyota registered in Oakland. Because the car was last seen heading toward Oakland, officers notified OPD and, the next day, OPD officers stopped the car and eventually arrested the occupants for the murder. This, in turn, resulted in the seizure of the murder weapon. On appeal, one of the occupants, Soun, argued that the weapon should have been suppressed because the detention was based on nothing more than "hunch and supposition." On the contrary, said the court, what Soun labeled "hunch and supposition" was actually "intelligent and resourceful police work."

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[43] *In re Brian A.* (1985) 173 Cal.App.3d 1168, 1174

[44] *People v. Joines* (1970) 11 Cal.App.3d 259, 264. Also see *P v. Hill* (2001) 89 CA4 48, 55 [medallion and scar].

[45] *U.S. v. Abdus-Price* (D.C. Cir. 2008) 518 F.3d 926, 930-31. Also see *P v. Orozco* (1981) 114 CA3 435, 440 [a "cream, vinyl top over a cream colored vehicle"]; *P v. Flores* (1974) 12 C3 85, 92 [a "unique" paint job].

[46] *U.S. v. Jackson* (2nd Cir. 2004) 368 F.3d 59, 64.

[47] See *United States v. Cortez* (1981) 449 U.S. 411, 418; *People v. Ledesma* (2003) 106 Cal.App.4th 857, 866; *In re Frank V.* (1991) 233 Cal.App.3d 1232, 1240-41; *U.S. v. Lopez-Soto* (9th Cir. 2000) 205 F.3d 1101, 1105 ["An officer is entitled to rely on his training and experience in drawing inferences from the facts he observes, but those inferences must also be grounded in objective facts and be capable of rational explanation."].

[48] *Illinois v. Gates* (1983) 462 U.S. 213, 232.

[49] (2002) 534 U.S. 266, 273.

[50] (1995) 34 Cal.App.4th 1499. Also see *Maryland v. Pringle* (2003) 540 U.S. 366, 371-72 [it was reasonable to believe that all three occupants of a vehicle possessed five baggies of cocaine that were behind the back-seat armrest because they were stopped at 3:16 A.M., there was $763 in rolled-up cash in the glove box, and none of the men offered "any information with respect to the ownership of the cocaine or the money"]; *People v. Loudermilk* (1987) 195 Cal.App.3d 996, 1005; *People v. Superior Court (Johnson)* (1972) 6 Cal.3d 704, 712-13.

Similarly, in *People v. Carrington*[51] the California Supreme Court ruled that police in Los Altos reasonably inferred that two commercial burglaries were committed by the same person based on the following: "the two businesses were located in close proximity to each other, both businesses were burglarized on or about the same date, and in both burglaries blank checks were stolen."

Hunches and unsupported conclusions

It is well known that hunches play an important role in solving crimes. "A hunch," said the Ninth Circuit, "may provide the basis for solid police work; it may trigger an investigation that uncovers facts that establish reasonable suspicion, probable cause, or even grounds for a conviction."[52] Still, hunches are absolutely irrelevant in determining the existence of probable cause or reasonable suspicion. In other words, a hunch "is not a substitute for the necessary specific, articulable facts required to justify a Fourth Amendment intrusion."[53]

The same is true of unsupported conclusions.[54] For example, in ruling that a search warrant affidavit failed to establish probable cause, the court in *U.S. v. Underwood*[55] noted that much of the affidavit was "made up of conclusory allegations" that were "entirely unsupported by facts." Two of these allegations were that officers had made "other seizures" and had "intercepted conversations" that tended to prove the defendant was a drug trafficker. "[T]hese vague explanations," said the court, "add little if any support because they do not include underlying facts."

Information known to other officers

Information is ordinarily irrelevant unless it had been communicated to the officer who acted on it; i.e., the officer who made the detention, arrest, or search, or the officer who applied for the search or arrest warrant.[56] To put it another way, a search or seizure made without sufficient justification cannot be rehabilitated in court by showing that it would have been justified if the officer had been aware of information possessed by a colleague. As the California Supreme Court explained, "The question of the reasonableness of the officers' conduct is determined on the basis of the information possessed by the officer at the time a decision to act is made."[57]

There is, however, an exception to this rule known as the "official channels rule" by which officers may detain, arrest, or sometimes search a suspect based solely on an official request to do so from another officer or agency. Under this rule, officers may also act based on information transmitted via a law enforcement database, such as NCIC and CLETS.[58]

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[51] (2010) 47 Cal.4th 145.
[52] *U.S. v. Thomas* (9th Cir. 2000) 211 F.3d 1186, 1192.
[53] Ibid. Also see *U.S. v. Cash* (10th Cir. 2013) 733 F.3d 1264, 1274 [reasonable suspicion "must be based on something more than an inchoate and unparticularized suspicion or hunch"].
[54] See *Illinois v. Gates* (1983) 462 U.S. 213, 239 [a "wholly conclusory statement" is irrelevant]; *People v. Leonard* (1996) 50 Cal.App.4th 878, 883 ["Warrants must be issued on the basis of facts, not beliefs or legal conclusions."]; *U.S. v. Garcia-Villalba* (9th Cir. 2009) 585 F.3d 1223, 1234; *Gentry v. Sevier* (7th Cir. 2010) 597 F.3d 838, 845 ["The officer was acting solely upon a general report of a 'suspicious person,' which did not provide any articulable facts that would suggest the person was committing a crime or was armed."].
[55] (9th Cir. 2013) 725 F.3d 1076.
[56] See *Ker v. California* (1963) 374 U.S. 23, 40, fn.12 ["It goes without saying that in determining the existence of probable cause we may concern ourselves only with what the officers had reason to believe at the time of their entry." Edited.]; *Maryland v. Garrison* (1987) 480 U.S. 79, 85 ["But we must judge the constitutionality of [the officers'] conduct in light of the information available to them at the time they acted."]; *Dyke v. Taylor Implement Mfg. Co.* (1968) 391 U.S. 216, 222 [officer "had not been told that Harris and Ellis had identified the car from which shots were fired as a 1960 or 1961 Dodge."]; *People v. Adams* (1985) 175 Cal.App.3d 855, 862 ["warrantless arrest or search cannot be justified by facts of which the officer was wholly unaware at the time"]; *People v. Superior Court (Haflich)* (1986) 180 Cal.App.3d 759. 766 ["The issue of probable cause depends on the facts known to the officer prior to the search."]; *John v. City of El Monte* (9th Cir. 2008) 515 F.3d 936, 940 ["The determination whether there was probable cause is based upon the information the officer had at the time of making the arrest."]; *U.S. v. Ellis* (7th Cir. 2007) 499 F.3d 686, 690 ["As there was no communication from Officers Chu and McNeil at the front door to [Officer] Lopez at the side door, it was improper to imputer their knowledge to Lopez."].
[57] *People v. Gale* (1973) 9 Cal.3d 788, 795.
[58] See *Whiteley v. Warden* (1971) 401 U.S. 560, 568; *People v. Soun* (1995) 34 Cal.App.4th 1499, 1521; *U.S. v. Ramirez* (9th Cir. 2007) 473 F.3d 1026, 1037.

Although the officers who act upon such transmissions are seldom aware of many, if any, of the facts known to the originating officer, this does not matter because, as the U.S. Supreme Court pointed out, "[E]ffective law enforcement cannot be conducted unless police officers can act on directions and information transmitted by one officer to another and that officers, who must often act swiftly, cannot be expected to cross-examine their fellow officers about the foundation for the transmitted information."[59]

For example, in *U.S. v. Lyons*[60] state troopers in Michigan stopped and searched the defendant's car based on a tip from DEA agents that the driver might be transporting drugs. On appeal, Lyons argued that the search was unlawful because the troopers had no information as to *why* she was a suspected of carrying drugs. But the court responded "it is immaterial that the troopers were unaware of all the specific facts that supported the DEA's reasonable suspicion analysis. The troopers possessed all the information they needed to act—a request by the DEA (subsequently found to be well-supported)."

Note that, although officers "are entitled to presume the accuracy of information furnished to them by other law enforcement personnel,"[61] the officers who disseminated the information may later be required to prove in court that they had received such information and that they reasonably believed it was reliable.[62]

Information inadmissible in court

In determining whether probable cause or reasonable suspicion exist, officers may consider both hearsay and privileged communications.[63] For example, although a victim's identification of the perpetrator might constitute inadmissible hearsay or fall within the marital privilege, officers may rely on it unless they had reason to believe it was false. As the Court of Appeal observed, "The United States Supreme Court has consistently held that hearsay information will support issuance of a search warrant. . . . Indeed, the usual search warrant, based on a reliable police informer's or citizen-informant's information, is *necessarily* founded upon hearsay."[64] On the other hand, information may not be considered if it was inadmissible because it was obtained in violation of the suspect's constitutional rights; e.g., an illegal search or seizure.[65]

Mistakes of fact and law

If probable cause was based on information that was subsequently determined to be inaccurate or false, the information may nevertheless be considered if the officers reasonably believed it was true. As the Court of Appeal put it, "If the officer's belief is reasonable, it matters not that it turns out to be mistaken."[66] Or, in the words of the Supreme Court, "[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."[67]

The courts are not, however, so forgiving with mistakes of law. This is because officers are expected to know the laws they enforce and the laws that govern criminal investigations. Consequently, information will not be considered if it resulted from such a mistake, even if the mistake was made in good faith.[68] As the California Supreme Court explained, "Courts on strong policy grounds have generally refused to excuse a police officer's mistake of law."[69] Or, as the Ninth Circuit put it, "If an officer simply does not know the law and makes a stop based upon objective facts that cannot constitute a violation, his suspicions cannot be reasonable."[70] POV

[59] *United States v. Hensley* (1985) 469 U.S. 221, 232.
[60] (6th Cir. 2012) 687 F.3d 754, 768.
[61] *U.S. v. Lyons* (6th Cir. 2012) 687 F.3d 754, 768.
[62] See *United States v. Hensley* (1985) 469 U.S. 221, 232. Also see *People v. Madden* (1970) 2 Cal.3d 1017.
[63] See *United States v. Ventresca* (1965) 380 U.S. 102, 108; *People v. Navarro* (2006) 138 Cal.App.4th 146, 147.
[64] *People v. Superior Court (Bingham)* (1979) 91 Cal.App.3d 463, 472.
[65] See *Lozoya v. Superior Court* (1987) 189 Cal.App.3d 1332, 1340; *U.S. v. Barajas-Avalos* (9th Cir. 2004) 377 F.3d 1040, 1054.
[66] *Cantrell v. Zolin* (1994) 23 Cal.App.4th 128, 134. Also see *Hill v. California* (1971) 401 U.S. 797, 802.
[67] *Illinois v. Rodriguez* (1990) 497 U.S. 177, 185. Edited.
[68] See *People v. Reyes* (2011) 196 Cal.App.4th 856, 863; *People v. Cox* (2008) 168 Cal.App.4th 702, 710.
[69] *People v. Teresinski* (1982) 30 Cal.3d 822, 831.
[70] *U.S. v. Mariscal* (9th Cir. 2002) 285 F.3d 1127, 1130.