Investigative Contacts

Street encounters between citizens and police officers are incredibly rich in diversity.[1]

There are probably no encounters on the streets (or anywhere else) that are more "rich in diversity" than those daily exchanges between officers and the public. After all, they run the gamut from "wholly friendly exchanges of pleasantries" to "hostile confrontations of armed men involving arrests, or injuries, or loss of life."[2]

Situated between these two extremes—but much closer to the "wholly friendly exchange" end—is a type of encounter known as an investigative contact or "consensual encounter." Simply put, a contact occurs when an officer, lacking grounds to detain a certain suspect, attempts to confirm or dispel his suspicions by asking him questions and maybe seeking consent to search his person or possessions. As the Supreme Court explained:

> Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage—provided they do not induce cooperation by coercive means.[3]

One of the interesting things about contacts is that they usually pose a dilemma for both the suspect and the officer. For the suspect (assuming he's guilty) the last person on earth he wants to chat with is someone who carries handcuffs. But he also knows that his refusal to cooperate, or maybe even a hesitation, might be interpreted as confirmation that he is guilty. So he will ordinarily play along for a while and see how things go, maybe try to outwit the officer or at least make up a story that is not an obvious crock.

Meanwhile, the officer knows that, while his badge might provide some "psychological inducement,"[4] he cannot "throw his weight around."[5] Thus he must employ restraint and resourcefulness, all the while keeping in mind that the encounter will instantly become a de facto detention if it crosses the line between voluntariness and compulsion.[6] So it often happens that both the suspect and the officer are role-playing—and they both know that the other knows it.

For officers, however, acting skills and resourcefulness are not enough. As one court put it, they must also have been "carefully schooled" in certain legal rules—the "do's and don'ts" of police contacts[7]—so as to prevent these encounters from inadvertently becoming de facto detentions, at least until they develop grounds to detain or arrest. What are these "do's and don'ts"? That is the subject of this article.

To set the stage, it should be noted that, whenever an officer interacts with anyone in his official capacity, the law will classify the interaction as an arrest, detention, or contact. Arrests and detentions differ "markedly"[8] from contacts because they constitute Fourth Amendment "seizures" which require some level of suspicion; i.e., probable cause or reasonable suspicion.[9] So, as long as the encounter remains merely a contact, the Fourth Amendment and its various restrictions simply do not apply.

One other thing. Officers will sometimes contact a suspect at his home. Known as "knock and talks," these encounters are subject to the same rules as contacts that occur in public places. But because they are viewed as more of an intrusion, there are some additional restrictions that we will cover in the article "Knock and Talks" that begins on page 15.

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[1] *Terry v. Ohio* (1968) 392 U.S. 1, 13.
[2] *Terry v. Ohio* (1968) 392 U.S. 1, 13.
[3] *United States v. Drayton* (2002) 536 U.S. 194, 200. ALSO SEE *People v. Rivera* (2007) 41 Cal.4th 304, 309.
[4] *U.S. v. Ayon-Meza* (9th Cir. 1999) 177 F.3d 1130, 1133.
[5] See *U.S. v. Tavolacci* (D.C. Cir. 1990) 895 F.2d 1423, 1425.
[6] See *I.N.S. v. Delgado* (1984) 466 U.S. 210, 215.
[7] *People v. Profit* (1986) 183 Cal.App.3d 849, 877.
[8] See *People v. Profit* (1986) 183 Cal.App.3d 849, 866.
[9] See *People v. Hughes* (2002) 27 Cal.4th 287, 327.

The Test: "Free to Terminate"

A police-suspect encounter will be deemed a contact if a reasonable person in the suspect's position would have "felt free to decline the officers' requests or otherwise terminate the encounter."[10] In other words, "So long as a reasonable person would feel free to disregard the police and go about his business, the encounter is consensual and no reasonable suspicion is required."[11] Later we will discuss the many circumstances that are relevant in making this determination. But first it will be helpful to discuss some important general principles.

REASONABLE "INNOCENT" PERSON: We begin with a principle that might seem peculiar at first: The fictitious "reasonable person" is "innocent" of the crime under investigation. What this means is that the circumstances are viewed through the eyes of a person who, although not necessarily a pillar of the community, is not currently worried about being arrested.[12] Said the Third Circuit, "[W]hat a guilty [suspect] would feel and how he would react are irrelevant to our analysis because the reasonable person test presupposes an *innocent* person."[13]

The reason this is significant is that a person who was guilty of the crime under investigation would necessarily view the officers' words and actions much differently—much more ominously—than an innocent person, and might therefore erroneously conclude that any perceived restriction on his freedom was an indication that he had been detained. For example, in *In re Kemonte H.* the court ruled that a reasonable innocent person who saw two officers approaching him on the street "would not have felt restrained" but would instead "only conclude that the officers wanted to talk to him."[14]

FREE TO DO WHAT? In the past, the test was whether a reasonable person would have believed he was "free to leave" or "free to walk away" from the officers.[15] This test made sense—and it still does—if the encounter occurs on the streets or other place that the suspect could easily leave if he wanted to. But contacts also occur in places that the suspect has no desire to leave (e.g., his home, his car) and in places he cannot leave easily (e.g., a bus, the shoulder of a freeway, his workplace. For that reason, the Supreme Court in *Florida v. Bostick* simplified things by ruling that freedom to terminate—not freedom to leave—is the correct test because it can be applied "equally to police encounters that take place on trains, planes, and city streets."[16] (In this article, we will use the terms "free to terminate," "free to go" and "free to leave" interchangeably.)

OBJECTIVE VS. SUBJECTIVE CIRCUMSTANCES: In applying the "free to terminate" test the only circumstances that matter are those that the suspect could have seen or heard. Thus, the officer's thoughts, beliefs, suspicions, and plans are irrelevant unless they were somehow communicated to the suspect.[17] As the California Supreme Court explained:

> [A]n officer's beliefs concerning the potential culpability of the individual being questioned are relevant to determining whether a seizure occurred only if those beliefs were somehow manifested to the individual being interviewed—by word or deed—and would have affected how a reasonable person in that position would perceive his or her freedom to leave.[18]

For the same reason, the suspect's subjective belief that he could not freely terminate the encounter is also immaterial.[19] For example, an encounter will not be deemed a seizure merely because the suspect testified that, based on his prior experiences with officers, he thought he would be arrested if he did not comply with all of the officer's requests.[20]

SHOULD VS. MUST: The test is whether a reasonable person would have believed he *must* stay or was otherwise *required* to cooperate with officers. This means a detention will not result merely because a reasonable person would have believed he *should*

[10] *Florida v. Bostick* (1991) 501 U.S. 429, 438. ALSO SEE *Brendlin v. California* (2007) 551 U.S. 249, 256-57.
[11] *Florida v. Bostick* (1991) 501 U.S. 429, 434.
[12] See *United States v. Drayton* (2002) 536 U.S. 194, 202 ["The reasonable person test is objective and presupposes an *innocent* person."].
[13] *U.S. v. Kim* (3d Cir. 1994) 27 F.3d 947, 953.
[14] (1990) 223 Cal.App.3d 1507, 1512.
[15] See, for example, *Michigan v. Chesternut* (1988) 486 U.S. 567, 573.
[16] See *Florida v. Bostick* (1991) 501 U.S. 429, 438.
[17] See *Brendlin v. California* (2007) 551 U.S. 249, 260-61; *In re Manuel G.* (1997) 16 Cal.4th 805, 821.
[18] *People v. Zamudio* (2008) 43 Cal.4th 327, 345.
[19] See *People v. Cartwright* (1999) 72 Cal.App.4th 1362, 1371; *U.S. v. Thompson* (7th Cir. 1997) 106 F.3d 794, 798.
[20] See *U.S. v. Analla* (4th Cir. 1992) 975 F.2d 119, 124.

stay and cooperate, or because the officer's request made him "uncomfortable."[21] As the Court of Appeal noted, "Cooperative citizens may ordinarily feel they should respond when approached by an officer on the street but this does not, by itself, mean that they do not have a right to leave if they so desire."[22]

REFUSAL TO COOPERATE: Because contacts are, by definition, consensual, a suspect may refuse to talk with officers, refuse to ID himself, or otherwise not cooperate.[23] "Implicit in the notion of a consensual encounter," said the Court of Appeal, "is a choice on the part of the citizen not to consent but to decline to listen to the questions at all and go on his way."[24] Or, as the Ninth Circuit put it, "When a citizen expresses his or her desire *not* to cooperate, continued questioning cannot be deemed consensual."[25]

COMPARE MIRANDA: It is important not to confuse the "free to terminate" test with *Miranda's* test for determining whether a suspect was "in custody." While both tests attempt to gauge the coercive pressures that existed during a police encounter, a suspect will be deemed "in custody" for *Miranda* purposes only if he reasonably believed he was effectively under arrest.[26] But, as noted, a contact will become a de facto detention if the suspect reasonably believed that he was not free to terminate the encounter.

IF THE SUSPECT RUNS: There is one exception to the "free to terminate" rule: If the suspect ran from the officers when they attempted to contact him, and if they gave chase, the encounter will not be deemed a seizure until they apprehend him.[27] Thus, if the suspect discarded drugs, weapons or other evidence while running, the evidence will not be suppressed on grounds that the officers lacked grounds to detain or arrest him.

TOTALITY OF CIRCUMSTANCES: In applying the "free to terminate" test, the courts will consider the totality of circumstances.[28] Although there are some actions that will, in and of themselves, result in a seizure (e.g., pulling a gun), in most cases it takes a "collective show of authority."[29] As the California Supreme Court explained, "This test assesses the coercive effect of police conduct as a whole, rather than emphasizing particular details of that conduct in isolation."[30]

FREE TO TERMINATE VS. STREET REALITY: Before going further, it must be acknowledged that many of the things that officers may say and do without converting a contact into a detention would plainly cause some innocent people to believe they were not free to terminate the encounter. But this does not mean, as some have suggested, that the test is a sham or, at best, naive.[31]

Instead, like many other Fourth Amendment "tests" (such as determining whether there are grounds to arrest or pat search a suspect) it is simply a practical—albeit imperfect—compromise between competing interests. As the Fourth Circuit put it, if a suspect decided to walk off, it "may have created an awkward situation," but "awkwardness alone does not invoke the protections of the Fourth Amendment."[32] Similarly, the Ninth Circuit observed that "we must recognize that there is an element of psychological inducement when a representative of the police initiates a conversation. But it is not the kind of psychological pressure that leads, without more, to an involuntary stop."[33]

Having covered the basic principles, we will now examine the various circumstances that are especially relevant in determining whether an encounter with an officer was a contact or a seizure.

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[21] See *U.S. v. McCoy* (4th Cir. 2008) 513 F.3d 405, 411 ["uncomfortable does not equal unconstitutional"].
[22] *In re Kemonte H.* (1990) 223 Cal.App.3d 1507, 1512.
[23] See *Florida v. Bostick* (1991) 501 U.S. 429, 437; *Illinois v. Wardlow* (2000) 528 U.S. 119, 125; *People v. Franklin* (1987) 192 Cal.App.3d 935.
[24] *People v. Spicer* (1984) 157 Cal.App.3d 213, 220.
[25] *Morgan v. Woessner* (9th Cir. 1993) 997 F.2d 1244, 1253.
[26] See *Howes v. Fields* (2012) __ U.S. __ [132 S.Ct. 1181, 1184; *People v. Lopez* (1985) 163 Cal.App.3d 602, 607; *People v. Pilster* (2006) 138 Cal.App.4th 1395, 1403, fn.1.
[27] See *California v. Hodari D.* (1991) 499 U.S. 621, 627-28; *Brendlin v. California* (2007) 551 U.S. 249, 254.
[28] See *Florida v. Bostick* (1991) 501 U.S. 429, 439; *Ohio v. Robinette* (1996) 519 U.S. 33, 39.
[29] *U.S. v. Black* (4th Cir. 2013) 707 F.3d 531, 538.
[30] *In re Manuel G.* (1997) 16 Cal.4th 805, 821.
[31] See, for example, *People v. Spicer* (1984) 157 Cal.App.3d 213, 218 [the notion that a contacted suspect would ever feel perfectly free to disregard an officer's requests may be "the greatest legal fiction of the late 20th century"].
[32] See *U.S. v. Weaver* (4th Cir. 2002) 282 F.3d 302, 311.
[33] *U.S. v. Ayon-Meza* (9th Cir. 1999) 177 F.3d 1130, 1133. Also see *U.S. v. Ringold* (10th Cir. 2003) 335 F.3d 1168, 1174.

Engaging the Suspect

Regardless of why the officers wanted to contact the suspect—whether he was acting suspiciously, or he resembled a wanted fugitive, or he was just hanging out in a high-crime area—the manner in which they get him to stop and talk to them is critical. This is because the usual methods of stopping a suspect constitute such an assertion of police authority that they automatically result in a seizure. As the Supreme Court put it, a seizure is likely to occur if an officer's "use of language or tone of voice indicat[ed] that compliance with the officer's request might be compelled."[34]

COMMANDS TO STOP: Commanding a suspect to "stop," "hold it," "come over here," or otherwise make himself immediately available to the officer is such an overt display of police authority that it will automatically render the encounter a de facto detention.[35] "[W]hen an officer 'commands' a citizen to stop," said the Court of Appeal, "this constitutes a detention because the citizen is no longer free to leave."[36]

REQUESTS TO STOP: Unlike a command to stop, a request to do so demonstrates to the suspect that he has a choice and that the officer is not asserting his authority. For example, the courts have ruled that none of the following requests resulted in a detention: "Can I talk to you for a moment?"[37] "Hey, how you doing? You mind if we talk?"[38] "Gentlemen, may I speak with you just a minute?"[39]

The courts are aware, however, that an officer's manner and tone of voice in making such a request may send an implicit message that the suspect has no choice. As the court explained in *People v. Franklin*:

> [I]f the manner in which the request was made constituted a show of authority such that [the suspect] reasonably might believe he had to comply, then the encounter was transformed into a detention[40]

For example, in *U.S. v. Buchanon* a state trooper who had stopped to assist the occupants of a disabled vehicle started thinking they might be transporting drugs, at which point he said, "Gentlemen, why don't you all come over here on the grass a second if you would please." Although the trooper's words were phrased as a request, the court listened to a recording of the incident and concluded that his tone of voice was "one of command."[41]

DEMONSTRATING URGENT INTEREST: A request to stop might be deemed a detention if it was accompanied by one or more circumstances that demonstrated an unusual or urgent interest in the suspect.[42] This occurred in *People v. Jones* when an Oakland police officer engaged three suspects by pulling his patrol car to the wrong side of the road, parking diagonally against traffic, then asking them to stop. Said the court, "A reasonable man does not believe he is free to leave when directed to stop by a police officer who has arrived suddenly and parked his car in such a way as to obstruct traffic."[43]

APPROACH AND ASK QUESTIONS: A detention will not result if an officer merely walks up to a suspect, flashes a badge or otherwise identifies himself and—without saying or doing anything to indicate the suspect was not free to leave—begins to ask him some questions.[44] As the court observed in *People v. Derello*, "[T]he officers were doing exactly what they were lawfully entitled to do, which is to approach and talk if the subject is willing."[45]

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[34] *United States v. Mendenhall* (1980) 446 U.S. 544, 554.
[35] See *People v. Brown* (1990) 216 Cal.App.3d 1442, 1448; *People v. Verin* (1990) 220 Cal.App.3d 551, 555; *People v. Roth* (1990) 219 Cal.App.3d 211; *People v. Rodriguez* (1993) 21 Cal.App.4th 232, 238; *People v. Foranyic* (1998) 64 Cal.App.4th 186, 188.
[36] *People v. Verin* (1990) 220 Cal.App.3d 551, 556. ALSO SEE *U.S. v. Winsor* (9th Cir. en banc 1988) 846 F.2d 1569, 1573, fn.3.
[37] *People v. Bennett* (1998) 68 Cal.App.4th 396, 402.
[38] *People v. Bouser* (1994) 26 Cal.App.4th 1280, 1282.
[39] *U.S. v. McFarley* (4th Cir. 1993) 991 F.2d 1188, 1191. ALSO SEE *Ford v. Superior Court* (2001) 91 Cal.App.4th 112, 128.
[40] (1987) 192 CA3 935, 941. ALSO SEE *In re Manuel G.* (1997) 16 Cal4th 805, 821 [we consider "the use of language or of a tone of voice indicating that compliance with the officer's request might be compelled"]; *U.S. v. Jones* (4th Cir. 2012) 678 F.3d 293, 303 ["A request certainly is not an order [but it may convey] the requisite show of authority"].
[41] (6th Cir. 1995) 72 F.3d 1217, 1220, fn.2.
[42] 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."].
[43] (1991) 228 Cal.App.3d 519, 523.
[44] See *Florida v. Bostick* (1991) 501 U.S. 429, 434; *Florida v. Royer* (1983) 460 U.S. 491, 497; *U.S. v. Drayton* (2002) 536 U.S. 194, 204
[45] (1989) 211 Cal.App.3d 414, 427.

RED LIGHTS: Shining a red light at a moving or parked vehicle is essentially a command directed at the driver to stop or stay put and thus necessarily results in a seizure of the driver if he complies.[46] As the Court of Appeal noted, "A reasonable person to whom the red light from a vehicle is directed would be expected to recognize the signal to stop or otherwise be available to the officer."[47]

Although a red light constitutes a command to only those people to whom it reasonably appeared to have been directed (usually the driver),[48] when an officer lights up a vehicle *all* passengers are also deemed detained. This is because they know that, for officer-safety purposes, the officer may prevent them from leaving the vehicle and may otherwise restrict their movements while he is dealing with the driver. As the Supreme Court explained in *Brendlin v. California*, "An officer who orders one particular car to pull over acts with an implicit claim of right based on fault of some sort, and a sensible person would not expect a police officer to allow people to come and go freely."[49] Such a detention of the passengers is, however, legal so long as the officer had grounds to detain the driver or other occupant.

SPOTLIGHTS, HIGH BEAMS, AMBER LIGHTS: Using a white spotlight or high beams to get the suspect's attention is a relevant but usually insignificant circumstance. (This subject is covered below in the section "Officer-Safety Measures.") Also note that because an amber warning light is a safety measure that is directed at approaching motorists, it has no bearing on whether the suspect was detained.[50]

BLOCKING THE SUSPECT'S PATH: A detention will ordinarily result if officers stop the suspect by blocking his vehicle or path so as to prevent him from leaving.[51] For example, in *People v. Wilkins*[52] a San Jose police officer was driving through the parking lot of a convenience store when he noticed that two men in a parked station wagon had ducked down as if to conceal themselves. Having decided to contact them, the officer "parked diagonally" behind the vehicle, effectively blocking it in. He soon learned that one of the men, Wilkins, was on searchable probation, so he searched him and found drugs. The court, however, ruled that the search was unlawful because "the occupants of the station wagon were seized when [the officer] stopped his marked patrol vehicle behind the parked station wagon in such a way that the exit of the parked station wagon was prevented."

A detention will not result, however, merely because officers stopped a patrol car behind a pedestrian or to the side of a vehicle. As the court explained in *People v. Franklin*, "Certainly, an officer's parking behind an ordinary pedestrian reasonably would not be construed as a detention. No attempt was made to block the way."[53] Similarly, the courts have ruled that a seizure does not result when an officer only partially blocked the suspect.[54] For example, in *U.S. v. Basher* the Ninth Circuit ruled that, although an officer testified that he "parked his vehicle nose to nose with Basher's truck," this did not constitute a detention because the officer also testified that "there was room to drive way."[55] And in a forfeiture

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[46] See *Berkemer v. McCarty* (1984) 468 U.S. 420, 436 ["Certainly few motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so."]; *Brower v. County of Inyo* (1989) 489 U.S. 593, 597 ["flashing lights" constituted a "show of authority"]; *People v. Ellis* (1993) 14 Cal.App.4th 1198, 1202, fn.3 [a detention results when "an officer activated the overhead red light of his police car"].

[47] *People v. Bailey* (1985) 176 Cal.App.3d 402, 405-6.

[48] See *Brendlin v. California* (2007) 551 U.S. 249, 254; *Brower v. County of Inyo* (1989) 489 U.S. 593, 596-97; *U.S. v. Al Nasser* (9th Cir. 2009) 555 F.3d 722, 731.

[49] (2007) 551 U.S. 249, 257. Edited. ALSO SEE *Arizona v. Johnson* (2009) 555 U.S. 323, 332; *U.S. v. Jones* (6th Cir. 2009) 562 F.3d 768, 774.

[50] See *U.S. v. Dockter* (8th Cir. 1995) 58 F.3d 1284, 1287.

[51] See *U.S. v. Kerr* (9th Cir. 1987) 817 F.2d 1384, 1387; *U.S. v. Jones* (6th Cir. 2009) 562 F.3d 768, 772 ["Here, by blocking in the Nissan, the officers had communicated to a reasonable person occupying the Nissan that he or she was not free to drive away."]; *U.S. v. Packer* (7th Cir. 1994) 15 F.3d 654, 657 ["the officers' vehicles were parked both in front and behind the Defendant's car"]. COMPARE *Michigan v. Chesternut* (1988) 486 U.S. 567, 575 [the officers did not drive their car "in an aggressive manner to block respondent's course or otherwise control the direction or speed of his movement"].

[52] (1986) 186 Cal.App.3d 804.

[53] (1987) 192 Cal.App.3d 935, 940. ALSO SEE *People v. Banks* (1990) 217 Cal.App.3d 1358, 1362 [officer stopped "behind defendant's car"]; *People v. Brueckner* (1990) 223 Cal.App.3d 1500, 1505 [officer parked "next to" suspect's car]; *People v. Juarez* (1973) 35 Cal.App.3d 631 [officer pulled patrol car alongside suspect]; *U.S. v. Pajari* (8th Cir. 1983) 715 F.2d 1378, 1380 [the officers "simply parked behind his car"].

[54] See *People v. Banks* (1990) 217 Cal.App.3d 1358, 1362; *People v. Perez* (1989) 211 Cal.App.3d 1492, 1946; *U.S. v. Summers* (9th Cir. 2001) 268 F.3d 683, 687.

[55] (9th Cir. 2011) 629 F.3d 1161, 1167.

case, *U.S. v. $25,000,* the court ruled that two DEA agents had not inadvertently detained a person they spoke with at LAX because, among other things, one of the agents stood "about two feet" in front of the suspect, and the other stood "behind and to the side" of him.[56]

"YOU'RE FREE TO GO": The easiest and most direct method of communicating to a suspect that he is free to go is to say so.[57] Although such a notification is not required,[58] it is recommended, especially in close cases. As the Court of Appeal put it, "[T]he delivery of such a warning weighs heavily in favor of finding voluntariness and consent."[59]

When giving a "free to go" advisory, however, officers must not place any conditions or restrictions on the suspect's freedom to leave. This is because a suspect is either free to go or he's not; there's no middle ground. For example, despite such an advisory, the courts have ruled that encounters became detentions when an officer told the suspect that he would have to wait for a K9 to arrive,[60] or "wait a minute,"[61] or remain in the patrol car while the officer talked to another person.[62] Similarly, informing a suspect that he is free to go will have little impact if officers conducted themselves in a manner that reasonably indicated he was not; e.g., the officer used a "commanding tone of voice,"[63] the officer kept "leaning over and resting his arms on the driver's door."[64]

LOCATION OF THE ENCOUNTER: The courts frequently mention whether the encounter occurred in a place that was visible to others, the theory being that the presence of potential witnesses might provide the suspect with a greater sense of security.[65] For example, the courts have noted in passing that "many fellow passengers [were] present to witness the officers' conduct,"[66] "the incident occurred on a public street,"[67] "the encounter here occurred in a public place—the parking lot of a [7-Eleven] store—in view of other patrons."[68] Nevertheless, the fact that a contact occurred in a more isolated setting is seldom a significant circumstance. As the Third Circuit observed, "The location in itself does not deprive an individual of his ability to terminate an encounter; he can reject an invitation to talk in a private, as well as a public place."[69]

Officer-Safety Measures

A suspect who is being contacted may, of course, pose a threat to officers. This can present a problem because many basic officer-safety precautions are strongly suggestive of a detention. To help resolve this dilemma, the courts have ruled that some inquiries and requests pertaining to officer safety will not convert the encounter into a seizure.

REMOVE HANDS FROM POCKETS: A detention will not result if officers simply *requested* that the suspect remove his hands from his pockets or keep them in

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[56] (9th Cir. 1988) 853 F.2d 1501, 1503, 1504.
[57] See *Florida v. Royer* (1983) 460 U.S. 491, 504 ["[B]y informing him that he was free to go if he so desired, the officers may have obviated any claim that the encounter was anything but a consensual matter from start to finish."]; *People v. Profit* (1986) 183 Cal.App.3d 849, 856 ["You're not under arrest, I'm not detaining you, you're free to leave and not speak to me if you don't want to."]; *Morgan v. Woessner* (9th Cir. 1993) 997 F.2d 1244, 1254 ["Although an officer's failure to advise a citizen of his freedom to walk away is not dispositive of the question of whether the citizen knew he was free to go, it is another significant indicator of what the citizen reasonably believed."].
[58] See *United States v. Mendenhall* (1980) 446 U.S. 544, 555; *Ohio v. Robinette* (1996) 519 U.S. 33, 39-40; *People v. Daugherty* (1996) 50 Cal.App.4th 275, 283-84; *U.S. v. Jones* (10th Cir. 2012) 701 F.3d 1300, 1314 ["the officers were not required to inform Mr. Jones that he was free to leave"].
[59] *People v. Profit* (1986) 183 Cal.App.3d 849, 877.
[60] See *U.S. v. Finke* (7th Cir. 1996) 85 F.3d 1275, 1281; *U.S. v. Beck* (8th Cir. 1998) 140 F.3d 1129, 1136-37.
[61] *U.S. v. Sandoval* (10th Cir. 1994) 29 F.3d 537. ALSO SEE *U.S. v. Ramos* (8th Cir. 1994) 42 F.3d 1160, 1162-64 [although the driver's license was returned to him, he was asked to remain in the patrol car while the officer spoke with the passenger].
[62] *U.S. v. Ramos*, (8th Cir. 1994) 42 F.3d 1160, 1162-64.
[63] *U.S. v. Elliott* (10th Cir. 1997) 107 F.3d 810, 814.
[64] *U.S. v. McSwain* (10th Cir. 1994) 29 F.3d 558, 563.
[65] See *I.N.S. v. Delgado* (1994) 466 U.S. 210, 217, fn.5 ["other people were in the area"]; *U.S. v. Yusuff* (7th Cir. 1996) 96 F.3d 982, 986 ["the encounter was in a busy, public area of the airport"]; *U.S. v. Sanchez* (10th Cir. 1996) 89 F.3d 715, 718 [the encounter occurred "in an open and well illuminated parking lot"]; *U.S. v. Ringold* (10th Cir. 2003) 335 F.3d 1168, 1172 [the encounter occurred "in the public space outside the service station, in full view of other patrons"]; *U.S. v. Spence* (10th Cir. 2005) 397 F.3d 1280, 1283 ["This court does consider interaction in a nonpublic place and the absence of other members of the public as factors pointing toward a nonconsensual encounter."].
[66] *United States v. Drayton* (2002) 536 U.S. 194, 204.
[67] *People v. Sanchez* (1987) 195 Cal.App.3d 42, 45.
[68] *U.S. v. Thompson* (10th Cir. 2008) 546 F.3d 1223, 1227.
[69] *U.S. v. Kim* (3rd Cir. 1994) 27 F.3d 947, 952.

sight.[70] Thus in such a case, *U.S. v. Basher,* the Ninth Circuit explained that "[p]olice officers routinely ask individuals to keep their hands in sight for officer protection," and here the request "does not appear to have been made in a threatening manner."[71] Once again, note the importance of the officers' choice of words and their attitude. As the Court of Appeal explained, "[I]f the manner in which the request was made constituted a show of authority such that appellant reasonably might believe he had to comply, then the encounter was transformed into a detention."[72]

EXIT THE VEHICLE: For officer-safety purposes, officers may also request that the occupants of a parked vehicle step outside. But a detention will likely result if they expressly or impliedly commanded them to do so. Thus, in *People v. Rico* the court said, "While the appellants' initial stop did not constitute a detention, the officer's subsequent ordering the appellants to alight from their vehicle and remain by the patrol car constituted a detention."[73]

SPOTLIGHTS, HIGH BEAMS: A seizure does not result merely because officers utilized a white spotlight or high beams to illuminate the suspect, whether for officer safety or to get the suspect's attention.[74] For example, in *People v. Perez*[75] a San Jose police officer on patrol at night noticed two men in a car parked in an unlit section of a motel parking lot known for drug sales. As the officer pulled up to the car, he turned on his high beams and white spotlight to "get a better look at the occupants." He eventually arrested the driver for being under the influence of PCP, and one of the issues on appeal was whether his use of the lights converted the encounter into a detention. In ruling it did not, the court said, "While use of high beams and spotlights might cause a reasonable person to feel himself the object of official scrutiny, such directed scrutiny does not amount to a detention."

Similarly, in *People v. Franklin*[76] a Ridgecrest officer on patrol in a high crime area spotlighted Franklin who was walking on the sidewalk. He did this because, although it was a warm night, Franklin was wearing a full-length camouflage jacket. When the officer stopped behind him, Franklin turned and walked toward the officer and repeatedly asked, "What's going on?" Because Franklin was sweating and appeared "real jittery," the officer asked him to remove his hands from his pockets. As he did so, the officer saw blood on his hands, which ultimately led to Franklin's arrest for a murder that had just occurred in a nearby motel room. Again, the court rejected the argument that the spotlighting rendered the encounter a seizure, saying, "the spotlighting of appellant alone fairly can be said not to represent a sufficient show of authority so that appellant did not feel free to leave."

PAT SEARCHES: A nonconsensual pat search is both a search and a seizure and will therefore automatically result in a detention.[77] As the court explained in *In re Frank V.*, "Since Frank was physically restrained by the patdown, it constituted a detention."[78]

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[70] *People v. Ross* (1990) 217 Cal.App.3d 879, 885 [the officer "'asked' but did not demand that appellant remove her hands from her pockets"]; *People v. Epperson* (1986) 187 Cal.App.3d 115, 118, 120 [officer asked the suspect to identify an object in his pocket].

[71] (9th Cir. 2011) 629 F.3d 1161, 1167.

[72] *People v. Franklin* (1987) 192 Cal.App.3d 935, 941. ALSO SEE *U.S. v. Jones* (4th Cir. 2012) 678 F.3d 293, 305 [officers "quickly approached Jones . . . and nearly immediately asked first that he lift his shirt and then that he consent to a pat down"]. **NOTE**: While one California court ruled that such a command did not automatically result in a detention (*In re Frank V.* (1991) 233 Cal.App.3d 1232, 1239), to our knowledge no other court has adopted this reasoning.

[73] (1979) 97 Cal.App.3d 124, 130-31. ALSO SEE *U.S. v. Stewart* (8th Cir. 2011) 631 F.3d 453, 456.

[74] See *People v. Rico* (1979) 97 Cal.App.3d 124, 130 ["momentarily" spotlighting of a vehicle "was ambiguous"]; *People v. Brueckner* (1990) 223 Cal.App.3d 1500, 1505 ["The fact he shined his spotlight on the vehicle as he parked in the unlit area would not, by itself, lead a reasonable person to conclude he or she was not free to leave."]; *U.S. v. Mabery* (8th Cir. 2012) 686 F.3d 591, 597 ["the act of shining a spotlight on Mabery's vehicle from the street was certainly no more intrusive (and arguably less so) than knocking on the vehicle's window"]. **NOTE**: In *People v. Gary* (2007) 156 Cal.App.4th 1100, 1111 the court melodramatically described the spotlighting of the defendant as "bath[ing] him in light." Still, the dip did not appear to be a significant circumstance.

[75] (1989) 211 Cal.App.3d 1492, 1496.

[76] (1987) 192 Cal.App.3d 935.

[77] See *U.S. v. Stewart* (8th Cir. 2011) 631 F.3d 453, 456 [pat search is both a search and seizure]; *People v. Rodriguez* (1993) 21 Cal.App.4th 232, 238 [suspect was patted down and told to sit on the curb]; *U.S. v. Black* (4th Cir. 2013) 707 F.3d 531, 538. BUT ALSO SEE *People v. Singer* (1990) 226 Cal.App.3d 23, 46-67 [routine pat searching of unarrested suspect before he voluntarily got into a police car for a ride to the station did not convert the encounter into an arrest].

[78] (1991) 233 Cal.App.3d 1232, 1240, fn.3.

HANDCUFFS, OTHER RESTRAINT: Not surprisingly, a detention will also automatically result if officers handcuffed or otherwise restrained the suspect. This is because such measures are classic indications of a detention or arrest.[79]

DRAWN WEAPON: Even more obviously, a detention will result if an officer drew a handgun or other weapon as a safety precaution.[80] It is even significant that the officer "had his hand on his revolver."[81] However, the fact that an officer was visibly armed has "little weight in the analysis."[82] As the Supreme Court observed, "That most law enforcement officers are armed is a fact well known to the public. The presence of a holstered firearm thus is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon."[83]

NUMBER OF OFFICERS: Finally, the presence of backup officers, the number of them, their proximity to the suspect, and the manner in which they arrived and conducted themselves are all highly relevant.[84] For example, in *U.S. v. Washington* the court ruled the defendant was seized mainly because he was "confronted" by six officers who had gathered "around him."[85] And in *U.S. v. Buchanon* the court ruled the defendant was detained largely because of "[t]he number of officers that arrived [three], the swiftness with which they arrived, and the manner in which they arrived (all with pursuit lights flashing)." These circumstances, said the court, "would cause a reasonable person to feel intimidated or threatened."[86] In contrast, the presence of backup officers has been deemed less significant when they were "posted in the background,"[87] were "out of sight,"[88] were "four to five feet away,"[89] or were "little more than passive observers."[90]

Conducting the Investigation

After engaging the suspect and taking appropriate safety measures, officers will ordinarily begin their investigation by asking questions. As the court observed in *People v. Manis*, "When circumstances demand immediate investigation by the police, the most useful, most available tool for such investigation is general on-the-scene questioning."[91]

In addition to such questioning, there are some other investigative procedures that officers may ordinarily utilize without converting the encounter into a detention. But first, we will discuss—actually, reiterate—the all-important subject of the officers' general attitude.

Respectfulness

Lacking grounds to detain or arrest the suspect, officers must be courteous and demonstrate a respectful attitude. Even if he is a notorious sleaze with a bloated criminal record and a bad attitude, they must be careful not to impose their authority on him, at least until they develop grounds to do so. It

[79] See *People v. Zamudio* (2008) 43 Cal.4th 327, 342 ["no one was handcuffed or patted down"]; *In re Frank V.* (1991) 233 Cal.App.3d 1232, 1240, fn.3; *People v. Gallant* (1990) 225 Cal.App.3d 200, 207; *Ford v. Superior Court* (2001) 91 Cal.App.4th 112, 128 ["[he] was never handcuffed" and he "was left in the unlocked backseat of the police car"].

[80] See *United States v. Mendenhall* (1980) 446 U.S. 544, 554 ["the display of a weapon by an officer" is a circumstance "that might indicate a seizure"]; *People v. McKelvy* (1972) 23 Cal.App.3d 1027, 1034 [one of the officers carried a shotgun]; *People v. Gallant* (1990) 225 Cal.App.3d 200, 204 ["One of the police officers answered defendant's knock at the door by drawing his gun, opening the door, and confronting defendant."].

[81] See *U.S. v. Chan-Jimenez* (9th Cir. 1997) 125 F.3d 1324, 1326.

[82] See *People v. Zamudio* (2008) 43 Cal.4th 327, 346; *U.S. v. Thompson* (10th Cir. 2008) 546 F.3d 1223, 1227.

[83] *United States v. Drayton* (2002) 536 U.S. 194, 205.

[84] See *United States v. Mendenhall* (1980) 446 U.S. 544, 554 ["the threatening presence of several officers" is relevant]; *In re Manuel G.* (1997) 16 Cal.4th 805, 821; *U.S. v. Black* (4th Cir. 2013) 707 F.3d 531, 538 ["Four uniformed officers approached the men, a number that quickly increased to six uniformed officers, and then seven."]; *U.S. v. Quintero* (8th Cir. 2011) 648 F.3d 660, 670.

[85] (9th Cir. 2004) 387 F.3d 1060, 1068.

[86] (6th Cir. 1995) 72 F.3d 1217, 1224.

[87] *U.S. v. Kim* (9th Cir. 1994) 25 F.3d 1426, 1431, fn.3. ALSO SEE *People v. Profit* (1986) 183 Cal.App.3d 849, 877 ["Here initially there were three defendants and only two officers. Only later did the third officer even the numbers. This does not constitute a show of force"]; *U.S. v. Crapser* (9th Cir. 2007) 472 F.3d 1141, 1146 ["Although there were four officers present, most of the time only two talked to Defendant, while two talked to Twilligear"]; *U.S. v. Thompson* (10th Cir. 2008) 546 F.3d 1223, 1227 ["while four officers were on the premises, only one . . . approached Mr. Thompson"]; *U.S. v. Yusuff* (7th Cir. 1996) 96 F.3d 982, 986 ["the officers stood several feet away from Yusuff"].

[88] *U.S. v. Kim* (3rd Cir. 1994) 27 F.3d 947, 954.

[89] U.S. v. $25,000 (9th Cir. 1988) 853 F.2d 1501, 1504-1505.

[90] *U.S. v. White* (8th Cir. 1996) 81 F.3d 774, 779; *U.S. v. Jones* (10th Cir. 2012) 701 F.3d 1300, 1314 ["while there were three officers on the scene . . . the officers' presence was nonthreatening"].

[91] (1969) 268 CA2 653, 665.

doesn't matter whether they choose to adopt a friendly tone or one that is more businesslike. What counts is that they create—and maintain—a noncoercive environment. As the Court of Appeal explained, "It is not the nature of the question or request made by the authorities, but rather the manner or mode in which it is put to the citizen that guides us in deciding whether compliance was voluntary or not."[92]

For example, in *U.S. v. Jones*[93] an encounter quickly became a detention when, upon approaching the suspect, the officers immediately requested that he lift his shirt and consent to a search. Said the court, "A request certainly is not an order, but a request—two back-to-back requests in this case—that conveys the requisite show of authority may be enough to make a reasonable person feel that he would not be free to leave." And in *Orhorhaghe v. I.N.S*. the Ninth Circuit ruled that an encounter was converted into a de facto detention mainly because the officer "acted in an officious and authoritative manner that indicated that [the suspect] was not free to decline his requests."[94]

In contrast, in *Ford v. Superior Court* the court ruled that, "[a]lthough petitioner was never told in so many words that he was not under arrest or that he was free to leave, that advice was implicit in the sergeant's apology for the time it was taking to interview other witnesses."[95] Similarly, the courts have noted the following in ruling that a contact had not degenerated into a de facto detention:

- The officer "spoke in a polite, conversational tone."[96]
- The officer "seemed to act cordially."[97]
- His tone "was calm and casual."[98]
- The conversation was "nonaccusatory."[99]
- "[A]t no time did [the officers] raise their voices."[100]
- Their "tone of voice was inquisitive rather than coercive."[101]

To say that officers must be respectful does not mean they may not demonstrate some degree of suspicion. After all, most people are aware that officers do not go around questioning people at random in hopes that they had just committed a crime. Thus, in *People v. Lopez* the court noted that, while the officer's questions "did indicate [he] suspected defendant of something," and that his questions were "not the stuff of usual conversation among adult strangers," his tone was apparently "no different from those presumably gentlemanly qualities he displayed in the witness box."[102]

Officers may also demonstrate respectfulness if they take a moment to explain to the suspect why

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[92] *People v. Franklin* (1987) 192 Cal.App.3d 935, 941. ALSO SEE *People v. Ross* (1990) 217 Cal.App.3d 879, 884-85 ["It is the mode or manner in which the request for identification is put to the citizen, and not the nature of the request that determines whether compliance was voluntary."]; *People v. Lopez* (1989) 212 Cal.App.3d 289, 293, fn.2 ["both form and content are important."]; *In re Frank V.* (1991) 233 Cal.App.3d 1232, 1239 ["Both the nature and the manner must be examined."]; *U.S. v. Ledesma* (10th Cir. 2006) 447 F.3d 1307, 1314 [relevant circumstance is the "use of aggressive language or tone of voice indicating that compliance with an officer's request is compulsory" as opposed to "an officer's pleasant manner and tone of voice that is not insisting"].

[93] (4th Cir. 2012) 678 F.3d 293, 303.

[94] (9th Cir. 1994) 38 F.3d 488, 495.

[95] (2001) 91 Cal.App.4th 112, 128.

[96] *People v. Bennett* (1998) 68 Cal.App.4th 396, 402. ALSO SEE *United States v. Drayton* (2002) 536 U.S. 194, 204 [the officer spoke "in a polite, quiet voice"]; *U.S. v. Kim* (3rd Cir. 1994) 27 F.3d 947, 953 [the officer's tone was "polite and conversational."]; *U.S. v. Flowers* (4th Cir. 1990) 912 F.2d 707, 711 ["they spoke to him in a casual tone of voice"]; *U.S. v. Cruz-Mendez* (10th Cir. 2006) 467 F.3d 1260, 1254 [the officers "acted courteously"]; *U.S. v. Cormier* (9th Cir. 2000) 220 F.3d 1103, 1110 [the officer "never spoke to Cormier in an authoritative tone"]; *U.S. v. Ringold* (10th Cir. 2003) 335 F.3d 1168, 1172 [the officer "was polite and the conversation was friendly in tone"]; *U.S. v. Yusuff* (7th Cir. 1996) 96 F.3d 982, 986, 986 ["a normal, polite tone of voice"]; *U.S. v. Tavolacci* (D.C. Cir. 1990) 895 F.2d 1423, 1425 ["conversational tones"]; *U.S. v. Orman* (9th Cir. 2007) 486 F.3d 1170, 1175 [he "politely asked him if he could have a word with him"].

[97] *People v. Singer* (1990) 226 Cal.App.3d 23, 48.

[98] *U.S. v. Jones* (10th Cir. 2012) 701 F.3d 1300, 1314.

[99] *People v. Hughes* (2002) 27 Cal.4th 287, 328.

[100] *U.S. v. $25,000* (9th Cir. 1988) 853 F.2d 1501, 1505.

[101] *U.S. v. Dockter* (8th Cir. 1995) 58 F.3d 1284, 1287. ALSO SEE *People v. Epperson* (1986) 187 Cal.App.3d 115, 120 ["There was nothing in the officer's attitude or the nature of the inquiry which would indicate to a reasonable person that compliance with the officer's request might be compelled or that defendant was not free to leave."]; *People v. Sanchez* (1987) 195 Cal.App.3d 42, 47 ["The record lacks any indication their dialogue was coercive [there was] nothing apparent in [the officer's] attitude or the nature of his inquiry to reflect compulsory compliance"].

[102] (1989) 212 Cal.App.3d 289, 293.

they wanted to speak with him, rather than begin by abruptly asking questions or making requests. For example, in rejecting an argument that a DEA agent's initial encounter with the defendant at an airport terminal had become a de facto detention, the court in *U.S v. Gray* noted that the agent "informed Gray of the DEA's purpose and function."[103] Similarly, in *U.S. v. Crapser* the Ninth Circuit pointed out that the officer began by "explain[ing] to [the suspect] why the police had come to her motel room."[104]

In contrast, in *People v. Spicer*[105] officers pulled over a car driven by Mr. Spicer because it appeared that he was under the influence of something. While one officer administered the FSTs to Mr. Spicer, the other asked his passenger, Ms. Spicer, to produce her driver's license. Although he had good reason for wanting to see the license (to make sure he could release the car to her) he did not explain this. As Ms. Spicer was looking for her license in her purse, the officer saw a gun and arrested her. But the court ruled the gun was seized illegally mainly because the officer's blunt attitude had effectively converted the encounter into a de facto detention. Said the court, "Had the officer made his purpose known to Ms. Spicer, it would have substantially lessened the probability his conduct could reasonably have appeared to her to be coercive."

Requesting ID

Before attempting to confirm or dispel their suspicions, officers will almost always ask the suspect to identify himself, preferably with a driver's license or other official document. Like a request to stop, a request for ID will not convert an encounter into a seizure unless it was reasonably interpreted as a command.[106] As the Supreme Court put it, "[N]o seizure occurs when officers ask . . . to examine the individual's identification—so long as the officers do not convey a message that compliance with their requests is required."[107] Similarly, the Court of Appeal explained:

> It is the mode or manner in which the request for identification is put to the citizen, and not the nature of the request that determines whether compliance was voluntary.[108]

Even if the suspect freely handed over his license or other identification, a seizure might result if the officer retained it after looking it over. This is mainly because, having examined the suspect's ID, the officer's act of retaining it could reasonably be interpreted as an indication that he was not free to leave.[109] As the Ninth Circuit put it, "When a law enforcement official retains control of a person's identification papers, such as vehicle registration documents or a driver's license, longer than necessary to ascertain that everything is in order, and initiates further inquiry while holding on to the needed papers, a reasonable person would not feel free to depart."[110] For example, the courts have ruled that a detention resulted when an officer did the following without the suspect's consent:

- took his ID to a patrol car to run a warrant check[111]
- kept the ID while conducting a consent search[112]
- pinned the ID to his uniform.[113]

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[103] (4th Cir. 1989) 883 F.2d 320, 323.
[104] (9th Cir. 2007) 472 F.3d 1141, 1144. ALSO SEE *United States v. Drayton* (2002) 536 U.S. 194, 198.
[105] (1984) 157 Cal.App.3d 213. ALSO SEE *People v. Garry* (2007) 156 Cal.App.4th 1100, 1111-12 ["rather than engage in a conversation, [the officer] immediately and pointedly inquired about defendant's legal status as he quickly approached"].
[106] See *I.N.S. v. Delgado* (1984) 466 U.S. 210, 216; *Florida v. Royer* (1983) 460 U.S. 491, 501; *United States v. Mendenhall* (1980) 446 U.S. 544, 555; *United States v. Drayton* (2002) 536 U.S. 194, 201; *People v. Leath* (2013) 217 Cal.App.4th 344, 353.
[107] *Florida v. Bostick* (1991) 501 U.S. 429, 437.
[108] *People v. Ross* (1990) 217 Cal.App.3d 879, 884-85.
[109] See *Florida v. Royer* (1983) 460 U.S. 491, 503 ["Here, Royer's ticket and identification remained in the possession of the officers throughout the encounter . . . As a practical matter, Royer could not leave the airport without them."]; *U.S. v. Black* (4th Cir. 2013) 707 F.3d 531, 538 ["We have noted that though not dispositive, the retention of a citizen's identification or other personal property or effects is highly *material* under the totality of the circumstances analysis."]. COMPARE *People v. Profit* (1986) 183 Cal.App.3d 849, 879 [there was "no retention of Profit's briefcase"].
[110] *U.S. v. Chan-Jimenez* (9th Cir. 1997) 125 F.3d 1324, 1326.
[111] *U.S. v. Jones* (10th Cir. 2012) 701 F.3d 1300, 1315. BUT ALSO SEE *U.S. v. Analla* (4th Cir. 1992) 975 F.2d 119, 124 ["[The officer] necessarily had to keep Analla's license and registration for a short time in order to check it with the dispatcher."]; *U.S. v. Weaver* (4th Cir. 2002) 282 F.3d 303, 309 ["Weaver was in no way impeded physically by holding his identification from him"].
[112] *U.S. v. Chan-Jimenez* (9th Cir. 1997) 125 F.3d 1324, 1326.
[113] *U.S. v. Black* (4th Cir. 2013) 707 F.3d 531, 538.

Asking Questions

Although officers may pose investigative questions to the suspect,[114] questioning can be problematic if, as often happens, the suspect's answers were vague, nonresponsive, inconsistent, or nonsensical as this will necessarily prolong the encounter and may cause the officers to become frustrated which, in turn, may cause them to act in an aggressive or authoritative manner.[115] As the Tenth Circuit noted, "Accusatory, persistent, and intrusive questioning can turn an otherwise voluntary encounter into a coercive one."[116] Although the line between permissible probing and impermissible pressure can be difficult to detect, the following general principles should be helpful.

INVESTIGATIVE VS. ACCUSATORY QUESTIONING: There is a big difference between investigative and accusatory questions. As the name suggests, accusatory questions are those that are phrased in a manner that communicates to the suspect that the officers believe he is guilty of something, and that their objective is merely to confirm their suspicion. While this type of questioning is appropriate in a police interview room, it is strictly prohibited during contacts. As the Court of Appeal observed:

> [Q]uestions of a sufficiently accusatory nature may by themselves be cause to view an encounter as a nonconsensual detention. . . . [T]he degree of suspicion expressed by the police is an important factor in determining whether a consensual encounter has ripened into a detention.[117]

For example, in *Wilson v. Superior Court*[118] LAPD narcotics officers at LAX received a tip that comedian Flip Wilson would be arriving on a flight from Florida and that he would be transporting drugs. When one of the officers spotted Wilson in the terminal, he approached him and, according to the officer, "I advised Mr. Wilson that I was conducting a narcotics investigation, and that we had received information that he would be arriving today from Florida carrying a lot of drugs." Wilson then consented to a search of his luggage in which the officers found cocaine.

In a unanimous opinion, the California Supreme Court suppressed the drugs because the encounter had become an illegal de facto detention when Wilson gave his consent. Said the court, "[A]n ordinary citizen, confronted by a narcotics agent who has just told him that he has information that the citizen is carrying a lot of drugs, would not feel at liberty simply to walk away from the officer."

In contrast to accusatory questioning, investigative inquiries convey the message that officers are merely seeking information or, at most, are exploring the possibility the suspect might have committed a crime. In other words, while such questioning is "potentially incriminating,"[119] it is also potentially exonerating. For example, in *U.S. v. Kim*[120] a DEA agent approached two suspected drug dealers on an Amtrak train and greeted them with, "You guys don't have drugs in your luggage today, do you?" One of the men, Kim, consented to a search of his

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[114] See *Florida v. Bostick* (1991) 501 U.S. 429, 434; *I.N.S. v. Delgado* (1984) 466 U.S. 210, 216; *Florida v. Royer* (1983) 460 U.S. 491, 497.

[115] See *U.S. v. Beck* (1998) 140 F.3d 1129, 1135 [questioning can result in a seizure if "the questioning is so intimidating, threatening or coercive that a reasonable person would not have believed himself free to leave"]. COMPARE *United States v. Drayton* (2002) 536 U.S. 194, 203 ["The officer gave the passengers no reason to believe that they were required to answer the officers' questions."].

[116] *U.S. v. Ringold* (10th Cir. 2003) 335 F.3d 1168, 1174.

[117] *People v. Lopez* (1989) 212 Cal.App.3d 289, 293. ALSO SEE *Florida v. Royer* (1983) 460 U.S. 491, 502 ["[The officers] informed him they were narcotics agents and had reason to believe that he was carrying illegal drugs."]; *People v. Boyer* (1989) 48 Cal.3d 247, 268 [defendant "was subjected to more than an hour of directly accusatory questioning [at the police station], in which [an officer] repeatedly told him—falsely—that the police knew he was the killer."]; *U.S. v. Washington* (9th Cir. 2004) 387 F.3d 1060, 1069 [suspect detained when officers told him he was "arrestable"]; *U.S. v. Gonzales* (5th Cir. 1996) 79 F3 413, 420 ["There is one troubling element: the officers informed Gonzales that the car he was driving was suspected of being used to transport drugs. This may have pushed the encounter, which was initially consensual, to being a [detention]."].

[118] (1983) 34 Cal.3d 777.

[119] See *Florida v. Bostick* (1991) 501 U.S. 429, 439.

[120] (3rd Cir. 1994) 27 F.3d 947, 953. ALSO SEE *People v. Daugherty* (1996) 50 Cal.App.4th 275, 285 ["[The officer] did not directly accuse Daugherty of transporting narcotics, which may have been sufficient to convert the encounter into a detention."]; *People v. Profit* (1986) 183 Cal.App.3d 849, 865 ["[The officer] made no statement that he had information that the defendants were carrying drugs."]; *People v. Hughes* (2002) 27 Cal.4th 287, 328 ["The conversation was nonaccusatory"]; *U.S. v. Ringold* (10th Cir. 2003) 335 F.3d 1168, 1174 [although the questions were "of an incriminating nature," they were "not worded or delivered in such a manner as to indicate that compliance with any officer directives (or even inquiries) was required"]; *U.S. v. Thompson* (10th Cir. 2008) 546 F.3d 1223, 1228 ["Most importantly, under the precedents, [the officer] did not use an antagonistic tone in asking questions."].

luggage in which the agent found methamphetamine. In rejecting Kim's argument that the agent's question rendered the encounter a seizure, the court said "[t]he tone of the question in no way implied that [the agent] accused or believed that Kim had drugs in his possession; it was merely an inquiry."

PERSISTENCE: If the suspect agreed to answer the officers' questions (and, again, assuming he was guilty), officers will often be unable to obtain the truth unless they are persistent. But persistence, in and of itself, will not render an encounter a detention. For example, in *United States v. Sullivan*[121] a U.S. Parks police officer contacted Sullivan and asked him "if he had anything illegal in [his] vehicle." Sullivan hesitated, then asked "illegal"? The officer repeated the question, at which point Sullivan "turned his head forward and looked straight ahead." The officer persisted, telling Sullivan that "if he had anything illegal in the vehicle, it's better to tell me now." Still no response. Eventually, Sullivan admitted "I have a gun" and, as a result, he was convicted of being a felon in possession of a firearm. In rejecting Sullivan's argument that the officer's persistent questioning had converted the contact into a seizure, the court said, "[T]he repetition of questions, interspersed with coaxing, was prompted solely because Sullivan had not responded. They encouraged an answer, but did not demand one."

On the other hand, a seizure will certainly result if officers persisted in asking questions after the suspect made it clear that he wanted to discontinue the interview. For example, in *Morgan v. Woessner* the court ruled that baseball star Joe Morgan was unlawfully seized at Los Angeles International Airport when an LAPD narcotics officer continued to question him after Morgan had "indicated in no uncertain terms that he did not want to be bothered." Said the court, "We find that Morgan's unequivocal expression of his desire to be left alone demonstrates that the exchange between Morgan and [the officer] was not consensual."[122]

LENGTHY QUESTIONING: Because contacts are usually brief, the length of the encounter is seldom a significant issue.[123] But lengthy questioning will not ordinarily convert a contact into a seizure so long as the suspect continued to express—explicitly or implicitly—his willingness to assist officers in their investigation. An example is found in an Oakland murder case, *Ford v. Superior Court.*[124] Here, a contact with a "witness" to a murder (who was actually the murderer) began at the crime scene and ended with his arrest twelve hours later in a police interview room. Despite the length, the court ruled the encounter had remained consensual throughout because the suspect "deliberately chose a stance of eager cooperation in the hopes of persuading the police of his innocence," and the officers merely played along until they had probable cause.

***MIRANDA* WARNINGS**: If an encounter is merely a contact, officers should never *Mirandize* the suspect before asking questions.[125] This is mainly because *Miranda* warnings are commonly associated with arrests and, furthermore, they are likely to be interpreted as an indication that the officers have evidence of the suspect's guilt.

"YOU'RE FREE TO DECLINE": Just as officers are not required to inform suspects that they are free to leave (discussed earlier), they need not inform them that they can refuse to answer their questions.[126] Still, it is a highly relevant circumstance.[127]

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[121] (4th Cir. 1998) 138 F.3d 126, 133-34.

[122] (9th Cir. 1993) 997 F.2d 1244, 1253. ALSO SEE *I.N.S. v. Delgado* (1984) 466 U.S. 210, 216-17 [a seizure results "if the person refuses to answer and the police [persist]"]; *U.S. v. Wilson* (4th Cir. 1991) 953 F.2d 116, 122 ["but the persistence of [the officers] would clearly convey to a reasonable person that he was not free to leave the questioning by the police"].

[123] See *I.N.S. v. Delgado* (1984) 466 U.S. 210, 219 ["The questioning by INS agents seems to have been nothing more than a brief encounter.]; *People v. Hughes* (2002) 27 Cal.4th 287, 328 ["The conversation was nonaccusatory, routine, and brief"]; *People v. Bouser* (1994) 26 Cal.App.4th 1280, 1283 ["The whole incident took around 10 minutes from the initial contact to Bouser's arrest."]; *U.S. v. Crapser* (9th Cir. 2007) 472 F.3d 1141, 1146 ["The entire event . . . lasted about five minutes."]; *U.S. v. McFarley* (4th Cir. 1993) 991 F.2d 1188, 1192 [20 minutes was not too long under the circumstances]; *U.S. v. Cruz-Mendez* (10th Cir. 2006) 467 F.3d 1260, 1267 [30 minutes was not unreasonable under the circumstances].

[124] (2001) 91 Cal.App.4th 112, 128. ALSO SEE *People v. Hughes* (2002) 27 Cal.4th 287, 328-29; *Green v. Superior Court* (1985) 40 Cal.3d 126.

[125] See *People v. Boyer* (1989) 48 Cal.3d 247, 268.

[126] See *United States v. Mendenhall* (1980) 446 U.S. 544, 555.

[127] See *Florida v. Bostick* (1991) 501 U.S. 429, 436; *United States v. Mendenhall* (1980) 446 U.S. 544, 559. Also see *United States v. Washington* (1977) 431 U.S. 181, 188 ["Indeed, it seems self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled."

Warrant checks

Running a warrant check without the suspect's consent will not automatically result in a detention.[128] But it can be problematic, especially if the officer walks off with his ID to run the warrant check on his radio or in-car computer. For example, in *U.S. v. Jones* the court said that "[w]ithin thirty seconds" after initiating a contact with Jones, the officer asked for some identification. At that point, "Mr. Jones handed his identification to [the officer], who relayed it to [another officer who] then walked back to his patrol vehicle to run Mr. Jones's license." "Mr. Jones was seized," said the court, "once the officers took [his] license and proceeded to conduct a records check based upon it."[129]

In contrast, the court in *U.S. v. Analla* ruled that a detention did not result because, instead of taking the suspect's license to his patrol car, the officer "stood beside the car, near where Analla was standing."[130] Note that this issue can usually be avoided if officers obtain the suspect's consent to temporarily carry his ID a short distance for the purpose of running a warrant check.[131]

Seeking consent to search

Officers who have contacted a suspect will frequently seek his consent to search his person, possessions, or vehicle. Like any other request, this will not convert the encounter into a seizure if the officers neither pressured the suspect nor asserted their authority.[132] But if the suspect declines the request, they must, of course, not persist or otherwise encourage him to change his mind.

For example, in *United States v. Wilson*[133] a DEA agent approached Albert Wilson at the National Airport terminal in Washington, D.C. and asked to speak with him. At first, Wilson was cooperative. But when the agent asked if he would consent to a search of his coat he angrily refused and began walking away. Undeterred, the agent trailed behind him, repeatedly asking Wilson why he would not consent to a search. As they stepped outside the terminal, Wilson bolted but was quickly apprehended. The agents then searched his coat and found cocaine. On appeal, however, the court ordered it suppressed because the agent's "persistence" had converted the encounter into a seizure.

It should also be noted that, although officers are not required to notify the suspect that he has a right to refuse consent,[134] such a warning is a relevant circumstance.[135]

Seeking consent to transport

In some cases, officers will seek the suspect's consent to accompany them to some location such as a police station (e.g., for questioning, fingerprinting, a lineup) or to the crime scene (e.g., for a showup). Again, such a request will not convert the encounter into a detention so long as officers made it clear to the suspect that he was free to decline.[136]

For example, in *In re Gilbert R.*[137] LAPD detectives went to Gilbert's home to see if he would voluntarily accompany them to the police station to answer some questions about an ADW. Both Gilbert and his mother consented. At the station, Gilbert confessed but later argued that his confession should have been suppressed because the officers had effectively arrested him by driving him to the station. In rejecting the argument, the court said that a reasonable person in Gilbert's position "would have believed that he or she did not have to accompany the detectives."

In contrast, in *People v. Boyer*[138] several Fullerton police officers went to Boyer's home to question him about a murder. Two of them covered the back yard

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[128] See *People v. Bouser* (1994) 26 Cal.App.4th 1280, 1286; *People v. Terrell* (1999) 69 Cal.App.4th 1246.
[129] (10th Cir. 2012) 701 F.3d 1300, 1306, 1315.
[130] (4th Cir. 1992) 975 F.2d 119, 124.
[131] See *People v. Bennett* (1998) 68 Cal.App.4th 396, 402.
[132] See *Bumper v. North Carolina* (1968) 391 U.S. 543, 548; *Florida v. Royer* (1983) 460 U.S. 491, 497.
[133] (4th Cir. 1991) 953 F.2d 116.
[134] See *United States v. Drayton* (2002) 536 U.S. 194, 206; *Ohio v. Robinette* (1996) 519 U.S. 33, 39-40.
[135] See *United States v. Mendenhall* (1980) 446 U.S. 544, 559; *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 249.
[136] See *United States v. Mendenhall* (1980) 446 U.S. 544, 557-58; *Ford v. Superior Court* (2001) 91 Cal.App.4th 112, 125; *People v. Zamudio* (2008) 43 Cal.4th 327, 344-45; *People v. Hughes* (2002) 27 Cal.4th 287, 329.
[137] (1994) 25 Cal.App.4th 1121.
[138] (1989) 48 Cal.3d 247.

while the others went to the front door and knocked. Boyer responded by running out the back door, where the officers ordered him to "freeze." He complied and later agreed to be interviewed at the police station where he made an incriminating statement. But the court suppressed it on grounds the consent was involuntary. Said the court, "[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."

One other thing. Before transporting a suspect to a police station or anywhere else, officers may be required by departmental policy or officer-safety considerations to pat search him even though he is not being detained. As discussed earlier, this will not ordinarily convert the encounter into a detention provided that the suspect freely consented to the intrusion.

Converting Detentions Into Contacts

In the course of detaining a suspect, officers may conclude that, although they still have their suspicions, they no longer have grounds to hold him. At that point, the detention must, of course, be terminated. Nevertheless, they may be able to continue to question him if they can effectively convert the detention into a contact. As the Tenth Circuit said, "[I]f the encounter between the officer and the [suspect] ceases to be a detention but becomes consensual, and the [suspect] voluntarily consents to additional questioning, no further detention occurs."[139]

What must officers do to convert a detention into a contact? The cases indicate there are three requirements:

(1) **Return documents**: If officers obtained the suspect's ID or any other property from him, they must return it.[140] Again quoting the Tenth Circuit, "[W]e have consistently concluded that an officer must return a driver's documentation before a detention can end."[141] Also see "Investigative requests" (Requests for ID), above.

(2) **"You're free to go"**: While not technically a requirement,[142] officers should inform the suspect that he is now free to leave.[143] As the court explained in *Morgan v. Woessner*, "Although an officer's failure to advise a citizen of his freedom to walk away is not dispositive of the question of whether the citizen knew he was free to go, it is another significant indicator of what the citizen reasonably believed."[144]

(3) **No contrary circumstances**: There must not have been other circumstances that, despite the "free to go" advisory, would have reasonably indicated to the suspect that he was, in fact, not free to leave. For example, in *U.S. v. Beck*[145] the court ruled that a suspect was detained because, although he was told he was free to go, he was also told he could not leave unless he consented to a search or waited for a canine unit to arrive. Similarly, in *U.S. v. Ramos*[146] the court ruled that an attempt to convert a traffic stop into a contact had failed mainly because the driver and passenger remained separated.

In addition to these three requirements, it would be significant that the officers explained to the suspect *why* they wanted to continue speaking with him. As discussed earlier in the section entitled "Respectfulness," a brief explanation of this sort is significant because such openness is more consistent with a contact than a detention, and it tends to communicate the idea that the officers are seeking the suspect's voluntary cooperation.[147] POV

[139] *U.S. v. Anderson* (10th Cir. 1997) 114 F.3d 1059, 1064.
[140] See *U.S. v. Sandoval* (10th Cir. 1994) 29 F.3d 537, 540 ["no reasonable person would feel free to leave without such documentation"]; *U.S. v. White* (8th Cir. 1996) 81 F.3d 775, 779.
[141] *U.S. v. Elliott* (10th Cir. 1997) 107 F.3d 810, 814.
[142] See *Ohio v. Robinette* (1996) 519 U.S. 33, 39-40; *U.S. v. Sullivan* (4th Cir. 1998) 138 F.3d 126, 133; *U.S. v. Anderson* (10th Cir. 1997) 114 F.3d 1059, 1064.
[143] See *U.S. v. Thompson* (7th Cir. 1997) 106 F.3d 794, 798.
[144] (9th Cir. 1993) 997 F.2d 1244, 1254.
[145] (8th Cir. 1998) 140 F.3d 1129, 1136-37. ALSO SEE *U.S. v. Finke* (7th Cir. 1996) 85 F.3d 1275, 1281.
[146] (8th Cir. 1994) 42 F.3d 1160, 1162-64.
[147] See *U.S. v. Thompson* (7th Cir. 1997) 106 F.3d 794, 798 [the officer "justified his desire to ask Thompson more questions by explaining that part of his job was to prevent the transport of illegal guns and drugs"].