

# “Reasonableness”

## The Standard for Police Conduct

*“To err is human; to forgive divine.”<sup>1</sup>*

Although forgiveness is divine, officers who err seldom get off that easily. More likely they will be disciplined by their departments, sued for damages, blamed for the suppression of evidence (which may put another felonious predator on the streets), or all of the above.

To make matters worse, officers are routinely thrust into uncertain situations that demand hurried decisions.<sup>2</sup> In other words, it’s absolutely guaranteed that officers will make mistakes. As noted by the United States Supreme Court:

[The law] cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures on law enforcement and the vagaries of human nature would make such an expectation unrealistic.<sup>3</sup>

While mistakes are inevitable, the suppression of evidence resulting from those mistakes is not. There are two reasons for this. First, as discussed in the lead article, there are several situations in which evidence obtained unlawfully may be admissible. Second, not every mistake by officers results in suppression. What types of mistakes fall into this category? That is the subject of this article.

### THE TEST: Reasonableness

The courts require only one thing of officers: that they act reasonably.<sup>4</sup> Thus, the only types of mistakes that may result in suppression are “unreasonable” ones. In the words of the U.S. 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.”<sup>5</sup>

The problem, naturally, is determining what’s a “reasonable” mistake. The dictionary definition of “reason” helps a little. The *Oxford English Dictionary* says that to “reason” is to “think in a connected or logical manner; use one’s reason in forming conclusions.” Still, the term is necessarily subjective—it all depends on the surrounding circumstances, especially whether quick action is essential.<sup>6</sup> As the First Circuit observed, “The term [‘reasonableness’] embodies a concept, not a constant. It cannot be usefully defined in order to evolve some detailed formula for judging cases.”<sup>7</sup>

As the result, to determine whether a mistake was “reasonable” the courts utilize the old standby: the “reasonable officer” test. Specifically, a mistake is “reasonable” if the mythical “reasonably well-trained officer” might have done what the real officer did. To

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<sup>1</sup> Alexander Pope, “An essay on criticism.”

<sup>2</sup> See *Graham v. Connor* (1989) 490 US 386, 396-7 [“The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving . . .”].

<sup>3</sup> *Michigan v. Tucker* (1974) 417 US 433, 446.

<sup>4</sup> See *United States v. Knights* (2001) 534 US \_\_\_ [151 L.Ed.2d 497, 505 [“The touchstone of the Fourth Amendment is reasonableness”].

<sup>5</sup> *Illinois v. Rodriguez* (1990) 497 US 177, 185. Quote edited.

<sup>6</sup> See *Cady v. Dombrowski* (1973) 413 US 433, 448; *Bell v. Wolfish* (1979) 441 US 520, 559.

<sup>7</sup> *U.S. v. Rodriguez-Morales* (1st Cir. 1991) 929 F.2d 780, 785. ALSO SEE *Sierra Club v. Secretary of the Army* (1st Cir. 1987) 820 F.2d 513, 517 [reasonableness is “a mutable cloud, which is always and never the same.” Quoting from Ralph Waldo Emerson].

make this determination, the courts usually need to determine two things: (1) What did the officers know? (2) What *should* they have known?

What did officers know?

Whether officers acted reasonably in a given situation often depends on what they knew. For example, if officers knew that the getaway car in a liquor store robbery that had just occurred was a black 2001 Crown Victoria, and the last two numbers on the license plate were “23,” their act of stopping such a car would have been reasonable; i.e. lawful. But if they didn’t have a description of the getaway car and, instead, stopped the car because the driver looked “suspicious,” the stop would have been unlawful.

**WHAT OFFICERS SHOULD HAVE KNOWN:** Whether officers acted reasonably may also depend on what they *should* have known. Although officers are not expected to know everything that might somehow be relevant in a given incident or case, they *are* expected to be aware of important information that they could have obtained with reasonable effort.<sup>8</sup>

**TRAINING AND EXPERIENCE:** Officers will naturally interpret the meaning and significance of the surrounding circumstances in light of their training and experience. For example, officers know from experience that furtive gestures and extreme nervousness often have significant meaning.

The courts are aware that officers tend to develop the ability to detect the hidden meaning and significance of circumstances. Consequently, the courts will take the officers’ interpretation into account if it appears to be reasonable. As the U.S. Supreme Court noted, “[T]he evidence thus collected 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.”<sup>9</sup>

What would a “reasonable” officer do?

After determining what the officers knew or should have known, the courts attempt to determine whether their responses were reasonable under the circumstances. This can be accomplished in two ways: (1) by finding an published appellate case on point, or (2) applying the “reasonable officer” test.

**CASE LAW:** The shortcut method of determining whether a police action was reasonable is to see if an appellate court has already decided the issue. If so, and if the decision is binding on the trial court, or if the court likes its analysis, it will rule accordingly.<sup>10</sup>

**WHAT CASES APPLY?** In California, the only cases that are relevant in determining the reasonableness of an officer’s actions are those based on the United States Constitution,<sup>11</sup>

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<sup>8</sup> See *Maryland v. Garrison* (1987) 480 US 79, 86; *Illinois v. Rodriguez* (1990) 497 US 177, 188.

<sup>9</sup> *Illinois v. Gates* (1983) 462 US 213, 232.

<sup>10</sup> NOTE: California appellate courts are bound by decisions of the U.S. Supreme Court on questions of federal constitutional law. See *Del Monte v. Wilson* (1992) 1 Cal.4th 1009, 1023. In the absence of a controlling opinion from the U.S. Supreme Court, the courts look to decisions of the California Supreme Court. See *People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1613. In the absence thereof, the courts look to the published decisions of the California Court of Appeal. See *People v. Superior Court (Clark)* (1994) 22 Cal.App.4th 1541, 1547-9. Decisions by the U.S. Court of Appeals interpreting federal law are not binding on California courts, but may be persuasive and entitled to great weight. See *People v. Williams* (1997) 16 Cal.4th 153, 190; *Magill v. Superior Court* (2001) 86 Cal.App.4th 61, 121.

<sup>11</sup> See *In re Lance W.* (1985) 37 Cal.3d 873; *People v. May* (1988) 44 Cal.3d 309; *People v. McKay* (2002) 27 Cal.4th 601, 608.

usually the 4th Amendment (unreasonable search or seizure). The courts will not hold officers to a higher standard based on independent state grounds or state statutes.<sup>12</sup>

If there are no published cases in which the exact issue has been decided, the trial court can consider, at least for their persuasive value, cases involving similar facts or questions of law.

“REASONABLE OFFICER” TEST: In the absence of a controlling or well-reasoned case on point, the courts apply the “reasonable officer test.” Specifically, they compare the real officer’s conduct with that of the fictional “reasonable and prudent officer.” And if the fictional officer would have done what the real one did, the officer’s actions are deemed lawful.

Not much is known about the “reasonable and prudent officer,” except that he or she seems to possess those qualities that the judge hearing the case thinks an officer should have. So it varies.

In any event, all judges agree that a reasonable and prudent officer has a good working knowledge of the law of search and seizure, *Miranda*, and the other areas of the law that limit their authority or restrict their actions. In the words of the United States Supreme Court, this officer has “a reasonable knowledge of what the law prohibits.”<sup>13</sup>

SERIOUSNESS OF CRIME: The seriousness of the crime under investigation is a relevant factor in determining whether an officer’s actions were reasonable. This makes sense because officers will naturally be more zealous and thorough when the crime under investigation was serious.<sup>14</sup> As the court stated in *People v. Profit*, “Nor can we ignore the seriousness of the offense involved, which is a highly determinative factor in any evaluation of police conduct.”<sup>15</sup>

“Reasonable” mistakes

Because it is inevitable that officers will make mistakes, the law punishes only those mistakes that were unreasonable. Although the courts sometimes say that suppression is not required if the officer’s mistake was “honest” or “understandable,”<sup>16</sup> in reality these are just other names for reasonable mistakes. As the Court of Appeal explained, “The touchstone inquiry in all Fourth Amendment cases is the reasonableness—not certainty—of the official’s conduct.”<sup>17</sup> At this point, it is necessary to distinguish between mistakes of fact and law.

MISTAKES OF FACT: A mistake of fact occurs when officers were wrong about one or more of the circumstances that caused them to take action. If their mistake was

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<sup>12</sup> See *In re Lance W.* (1985) 37 Cal.3d 873, 886-7; *People v. McKay* (2002) 27 Cal.4th 601, 607-9; *Snowden v. Hughes* (1944) 321 US 1, 11.

<sup>13</sup> *United States v. Leon* (1984) 468 US 897, 919, fn.20. ALSO SEE *People v. Pressey* (2002) 102 Cal.App.4th 1178, 1191.

<sup>14</sup> See *People v. Herrera* (1975) 52 Cal.App.3d 177, 182 [“The more serious the crime under investigation, the greater the governmental interest in its prevention and detection.”]; *People v. Schader* (1965) 62 Cal.2d 716, 724; *Brinegar v. United States* (1949) 338 US 160, 183 [dis.opn. of Jackson, J.]; *People v. Bellomo* (1984) 157 Cal.App.3d 193, 197.

<sup>15</sup> (1986) 183 Cal.App.3d 849, 883. Citing *People v. Johnson* (1971) 15 Cal.App.3d 936, 940-1.

<sup>16</sup> See *Maryland v. Garrison* (1987) 480 US 79, 87; *People v. Rodrigues-Fernandez* (1991) 235 Cal.App.3d 543, 551; *People v. Alvarez* (1989) 209 Cal.App.3d 660, 666.

<sup>17</sup> *People v. Glick* (1988) 203 Cal.App.3d 796, 800. ALSO SEE *Brinegar v. United States* (1949) 338 US 160, 176; *Illinois v. Wardlow* (2000) 528 US 119, 125; *Atwater v. City of Lago Vista* (2001) 532 US 318, 347; *Maryland v. Garrison* (1987) 480 US 79, 86-8; *In re Jeremy G.* (1998) 65 Cal.App.4th 553, 556.

reasonable, the courts will analyze the officer's conduct as if the circumstance did, in fact, exist.<sup>18</sup>

For example, if an officer pat searched a detainee because he mistakenly thought a bulge under his jacket might be a gun, the pat search will be lawful if the size and shape of the bulge was not inconsistent with that of a gun.

**MISTAKES OF LAW:** A mistake of law occurs when officers were wrong about the law upon which their actions were based. Thus, in the pat-search example, the search would have been unlawful if the officer knew that the bulge under the detainee's jacket was caused by a beeper but he mistakenly believed that the law permitted officers to pat search all detainees who were carrying beepers.

Technically, a mistake of law will not result in suppression if the mistake was reasonable.<sup>19</sup> As a practical matter, however, there are no reasonable mistakes of law—or at least they are rare. This is because officers are expected to know the laws they enforce and the laws that govern police procedure. As the California Supreme Court put it, “Courts on strong policy grounds have generally refused to excuse a police officer's mistake of law.”<sup>20</sup>

**MISTAKES OF LEGAL BASIS FOR ACTION:** There is one type of legal mistake that is virtually irrelevant: a mistake as to the technical legal grounds for taking action. Specifically, if officers were aware of facts that would have permitted them to take the action they took, it is immaterial that they were wrong about the legal justification for their action.<sup>21</sup>

For example, in *People v. Rodriguez* officers arrested the defendant for a certain murder. Although it turned out they did not have probable cause to arrest for *that* murder, the arrest was lawful because they were aware of facts that provided them with probable cause to arrest him for another murder.<sup>22</sup>

Similarly, in *United States v. Sokolow*<sup>23</sup> a DEA agent detained a suspect at Honolulu International Airport because his behavior at “had all the classic aspects of a drug courier.” Although the agent mistakenly believed that detentions could be based solely on profiling, the mistake was irrelevant because the suspect's conduct—regardless of whether it had been incorporated into a profile—provided the agent with grounds to detain him.

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<sup>18</sup> See *People v. Glick* (1988) 203 Cal.App.3d 796, 801-2; *People v. White* (2003) 107 Cal.App.4th 636, 643-4; *U.S. v. Twilley* (9th Cir. 2000) 222 F.3d 1092, 1096, fn.1

<sup>19</sup> See *People v. Glick* (1988) 203 Cal.App.3d 796, 801.

<sup>20</sup> *People v. Teresinski* (1982) 30 Cal.3d 822, 831. ALSO SEE *People v. White* (2003) 107 Cal.App.4th 636, 643-4; *People v. Lopez* (1987) 197 Cal.App.3d 93, 101; *In re Arthur J.* (1987) 193 Cal.App.3d 781, 787; *U.S. v. Twilley* (9th Cir. 2000) 222 F.3d 1092, 1096. NOTE: Although the California Supreme Court in *People v. Teresinski* (1982) 30 Cal.3d 822, 831-2) said there might be “exceptional circumstances” that could excuse a mistake of law, this rarely happens. See *U.S. v. Lopez-Valdez* (5th Cir. 1999) 178 F.3d 282, 289.

<sup>21</sup> See *People v. McKay* (2002) 27 Cal.4th 601, 607-9; *In re Justin K.* (2002) 98 Cal.App.4th 695, 699; *People v. Le* (1985) 169 Cal.App.3d 186, 193; *People v. Loudermilk* (1987) 195 Cal.App.3d 996, 1006; *People v. Clark* (1973) 30 Cal.App.3d 549, 557-8.

<sup>22</sup> (1997) 53 Cal.App.4th 1250, 1262.

<sup>23</sup> (1989) 490 US 1, 10. ALSO SEE *People v. Lloyd* (1992) 4 Cal.App.4th 724.

## APPENDIX

### Mistakes of Fact and Law

Although it not difficult to provide abstract definitions of mistakes of fact and law, in real life it is often difficult to distinguish between the two. As the Court of Appeal observed, “What is an error of fact and what is an error of law in a given matrix is not always capable of easy resolution.”<sup>24</sup> Still, some examples should help.

#### DETENTION

**MISTAKE OF FACT:** An officer stopped a young pedestrian at 10:30 P.M. for violating the city’s 10 P.M. curfew applicable to minors. He misjudged the pedestrian’s age: he was actually 22 years old. This was a mistake of fact, and it was a reasonable one because the man looked young.

**MISTAKE OF LAW:** The officer was correct in his belief that the detainee was a minor, but he was wrong about the language of the curfew statute: curfew actually started at 11 P.M. This was an unreasonable mistake of law because officers are supposed to know the laws they enforce.<sup>25</sup>

#### TRAFFIC STOP

**MISTAKE OF FACT:** An officer stopped the driver because he believed the license plate light was broken when, in fact, is was operable, though dim.<sup>26</sup> Probably a reasonable mistake.

**MISTAKE OF LAW:** An officer stopped an out-of-state car for not having a front license plate, but the issuing state did not issue front plates. This was a mistake of law which was probably unreasonable because the officer was unfamiliar with the law he was enforcing.<sup>27</sup>

#### PAT SEARCH

**MISTAKE OF FACT:** An officer pat searched a detainee because he mistakenly believed the bulge under the detainee’s jacket was a gun. Actually, it was a large baggie of marijuana. This was a mistake of fact which would probably be reasonable if the officer had reason to believe the bag was a gun.

**MISTAKE OF LAW:** An officer pat searched the detainee because he believed the law permits officers to pat search every person they detain. This was an unreasonable mistake of law because the officer he did not know that pat searches are generally permitted only if there is reason to believe the detainee is armed or dangerous.

#### CONSENT SEARCH

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<sup>24</sup> *People v. Washington* (1982) 131 Cal.App.3d 434, 439 [“What is an error of fact and what is an error of law in a given matrix is not always capable of easy resolution.”]. ALSO SEE *People v. Glick* (1988) 203 Cal.App.3d 796, 801 [“The distinction between a reasonable mistake of fact, which is excusable, and a mistake of law, which is not, is often hard to draw . . .”].

<sup>25</sup> See *People v. Teresinski* (1982) 30 Cal.3d 822, 832 [the curfew ordinance “clearly does not prohibit such behavior as ‘loitering’ or ‘idling’ on the streets; the officer’s belief that Dixon had enacted a blanket curfew ordinance should have been dispelled by a simple reading of the terms of the enactment.”]; *People v. Teresinski* (1982) 30 Cal.3d 822, 830-2; *In re Arthur J.* (1987) 193 Cal.App.3d 781, 786 [“Here, as in *Teresinski*, the officer’s error could have been corrected by simply reading the ordinance.”].

<sup>26</sup> See Vehicle Code §§40150-1; *People v. Grace* (1973) 32 Cal.App.3d 447.

<sup>27</sup> See *People v. White* (2003) 107 Cal.App.4th 636, 643-4; *U.S. v. Twilley* (2000) 222 F.3d 1092, 1096; *U.S. v. Lopez-Soto* (9th Cir. 2000) 205 F.3d 1101. COMPARE *People v. Glick* (1988) 203 Cal.App.3d 796, 804.

MISTAKE OF FACT: An officer conducted a “consent” search of a house after obtaining consent from the person who answered the door. Although it turned out the consenting person was a neighbor, the mistake of fact was probably reasonable because most people who answer doors and give consent to search are the owners.

MISTAKE OF LAW: The officer in the above example was aware that the consenting person was a neighbor, but he believed that any person who answers the door can legally consent to a search of the house. This was an unreasonable mistake of law because the officer did not know that consent can only be given by a person who reasonably appears to have common authority over the premises.<sup>28</sup>

MISTAKE OF FACT: An officer conducted a “consent” search of an apartment based on information from the apartment manager that the occupants were being evicted for being 90 days behind in their rent, and that there was marijuana in a bowl that was left behind. Actually, the eviction procedure had not been completed. This was a mistake of fact because the mistake pertained to the “fact” that the eviction had been completed; it was not a mistake of law because the officer was correct in his conclusion that the law permits the landlord to consent to a search of premises that have been abandoned or from which the occupants have been evicted. Said the court, “Even if we assume that a police officer is presumed to know the law relative to the eviction of tenants for nonpayment of rent, there is no evidence in the record that the officer in this matter was aware that the landlord had failed to follow the law.”<sup>29</sup>

MISTAKE OF LAW: An officer conducted a search of a suspect’s motel room because he mistakenly believed that the hotel clerk could lawfully consent to a search the guest’s rooms. This was an unreasonable mistake of law because hotel clerks and other property managers do not ordinarily have common authority over leased premises, and therefore cannot consent to a police entry or search.<sup>30</sup>

MISTAKE OF FACT: An officer went to the home of a minor who, according to a tip, was selling marijuana from his house. When the minor answered the door, the officer asked if he was “searchable.” The minor responded, “Yes. For weapons.” Although it turned out the minor was not on “searchable” probation, the court ruled the officer’s

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<sup>28</sup> See *Illinois v. Rodriguez* (1990) 497 US 177; *People v. MacKenzie* (1995) 34 Cal.App.4<sup>th</sup> 1256, 1273 [“(W)e ask whether the facts available to the officer at the moment would warrant in a person of reasonable caution a belief that the consenting party had authority over the premises.”]; *People v. Jacobs* (1987) 43 Cal.3d 472, 481 [“(T)here must be some objective evidence of joint control or access to the places or items to be searched which would indicate that the person authorizing the search has the authority to do so.”].

<sup>29</sup> *People v. Superior Court (York)* (1970) 3 Cal.App.3d 648, 658. ALSO SEE *People v. Robinson* (1974) 41 Cal.App.3d 658, 666; *U.S. v. Sledge* (9<sup>th</sup> Cir. 1981) 650 F.2d 1075, 1080 [“If one who has abandoned property from all outward appearances in fact has retained a subjective expectation of privacy, then a search of the property is nevertheless valid if that expectation is intrinsically unreasonable or not otherwise entitled to protection.”].

<sup>30</sup> See *Stoner v. California* (1964) 376 US 483, 488; *People v. Roman* (1991) 227 Cal.App.3d 674, 680; *People v. Jaquez* (1985) 163 Cal.App.3d 918, 928 [“A real estate agent is authorized to consent to the entry of persons the agent believes in good faith to be potential purchasers of the property. Here, of course, [the officer] was not such a person nor did [the agent] believe that he was.”]; *People v. Superior Court (York)* (1970) 3 Cal.App.3d 648, 657 [“(R)eliance on a landlord’s consent to enter and search premises known by the officer to be in the possession of the tenant is not reasonable.”]; *People v. Burke* (1962) 208 Cal.App.2d 149, 160 [“The mere fact that a person is a hotel manager does not import an authority to permit the police to enter and search the rooms of her guests.”]; *U.S. v. Warner* (9<sup>th</sup> Cir. 1988) 843 F.2d 401, 403 [“The officer stated that he did not obtain a warrant because he believed that no warrant was necessary if the landlord consented to the entry.”].

“reliance on the minor’s statement that he was searchable for weapons was reasonable.”<sup>31</sup>

#### PROBABLE CAUSE

**MISTAKE OF FACT:** An officer arrested a man because his physical description and clothing were fairly close to those of a man who had just robbed a nearby liquor store. Although the man was not the robber, this was a reasonable mistake of fact because the descriptions were sufficiently close.

**MISTAKE OF LAW:** An officer arrested a man because an anonymous 9-1-1 caller said the man was selling drugs. Although the man was, in fact, selling drugs, the arrest was unlawful because it was based on an unreasonable mistake of law; i.e., that probable cause to arrest can be based on nothing more than information from an anonymous source.

#### SEARCH WARRANT DESCRIPTION

**MISTAKE OF FACT:** The warrant must describe the premises to be searched with reasonable particularity. An officer whose description does not meet this test, or who lists an incorrect address, has made a mistake of fact; i.e., he knows what the law requires, but he failed to comply with it. Consequently, the warrant will be upheld if the mistake was reasonable; e.g., due to the configuration of the premises, the mistake was understandable;<sup>32</sup> the description was so general that no reasonable officer would have believed it was sufficient;<sup>33</sup> the mistake was so glaring, or there were so many mistakes, that it was apparent the officer acted unreasonably.<sup>34</sup>

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<sup>31</sup> See *In re Jeremy G.* (1998) 65 Cal.App.4<sup>th</sup> 553. ALSO SEE *People v. MacKenzie* (1995) 34 Cal.App.4<sup>th</sup> 1256, 1273; *People v. Hoxter* (1999) 75 Cal.App.4<sup>th</sup> 406, 411-2.

<sup>32</sup> See *Maryland v. Garrison* (1987) 480 US 79, 86-9; *People v. Amador* (2000) 24 Cal.4<sup>th</sup> 387, 392; *People v. Superior Court (Fish)* (1980) 101 Cal.App.3d 218, 225; *U.S. v. Gitcho* (8<sup>th</sup> Cir. 1979) 601 F.2d 369, 372.

<sup>33</sup> See *U.S. v. Ellis* (11<sup>th</sup> Cir. 1992) 971 F.2d 701, 703-4.

<sup>34</sup> See *U.S. v. Collins* (9<sup>th</sup> Cir. 1987) 830 F.2d 145, 145-6 [“The police were remarkably unparticular. They got the street address wrong twice. They got the sides of the street wrong once. They did not have a physical description that brought them to the right place.”]; *U.S. v. Williamson* (10<sup>th</sup> Cir. 1993) 1 F.3d 1134.