

POINT of VIEW



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Proving it's reliable

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Point of View

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The Principles of Probable Cause

*“[T]here are few absolutes in the area of the law dealing with what constitutes probable cause.”*¹

What is probable cause? More to the point, how can officers determine whether they have it? These are questions that officers encounter on a regular basis, and they are questions that have serious repercussions. After all, thousands of times each day, officers throughout the country are arresting people and searching homes and other places because they think they know the answers.

Another persistent question—What is reasonable suspicion?—is almost as important because reasonable suspicion (which is merely probable cause lite) is the level of proof required for detentions and pat searches.²

Despite their importance, these questions have no straightforward answers. As the United States Supreme Court observed, “Articulating precisely what ‘reasonable suspicion’ and ‘probable cause’ mean is not possible.”³ As a result, when the courts need to explain these subjects they will often take evasive action and say something like:

- “It is not a finely-tuned standard.”⁴
- “It is somewhat abstract.”⁵
- “It is incapable of precise definition.”⁶
- “It is a fluid concept.”⁷
- “There is no exact formula.”⁸
- “It cannot be reduced to a neat set of rules.”⁹

This does not mean that probable cause is a difficult concept or that it depends largely guesswork or intuition. Instead, like many things in life, it just requires a careful assessment of the circum-

stances at hand. And this, in turn, requires an understanding of the principles upon which probable cause is based.

We begin an extended discussion of probable cause and reasonable suspicion by examining those principles and explaining how the courts apply them to the circumstances that officers tend to encounter on patrol and in the course of their investigations. In the article beginning on page 11, we take on an issue that frequently torments officers: How to establish the reliability of informants and other people who furnish information that is used to establish probable cause.

We will conclude our discussion in the Summer edition by surveying the circumstances upon which probable cause and reasonable suspicion are commonly based, and examining the problems that arise in establishing probable cause to conduct searches.

But first, we must define terms.

DEFINITIONS

Although definitions are often pointless, the definitions of probable cause and reasonable suspicion are helpful because they direct attention to two core principles: (1) the amount of probability required, and (2) the importance of common sense.

PROBABLE CAUSE TO SEARCH: In the landmark case of *Illinois v. Gates*, the Supreme Court introduced the term “fair probability.” Specifically, it ruled that probable cause to search exists if there is a “fair probability” or “substantial chance” that evidence of a crime will be found at a certain location.¹⁰

¹ *Jackson v. U.S.* (D.C. Cir. 1962) 302 F.2d 194, 196.

² See *Alabama v. White* (1990) 496 U.S. 325, 330 [“Reasonable suspicion is a less demanding standard than probable cause”]; *Terry v. Ohio* (1968) 392 U.S. 1, 27-8; *Humphrey v. Appellate Division* (2002) 29 Cal.4th 569, 574 [“The lesser burden of persuasion warrants a lesser burden of production.”].

³ *Ornelas v. United States* (1996) 517 U.S. 690, 695.

⁴ *Ornelas v. United States* (1996) 517 U.S. 690, 696. ⁵ *United States v. Arvizu* (2002) 534 U.S. 266, 274. ⁶ *Maryland v. Pringle* (2003) 540 U.S. 366, 371. ⁷ *Illinois v. Gates* (1983) 462 U.S. 213, 232. ⁸ *People v. Ingle* (1960) 53 Cal.2d 407, 412. ⁹ *United States v. Sokolow* (1989) 490 U.S. 1, 7.

¹⁰ (1983) 462 U.S. 213, 244.

PROBABLE CAUSE TO ARREST: Before *Gates*, probable cause to arrest was variously defined as an “honest and strong suspicion,”¹¹ or a state of facts that would cause a “prudent” person to believe that the suspect committed the crime under investigation.¹² And while some courts continue to cite these definitions, the trend is to apply the same “fair probability” standard that is used in determining the existence of probable cause to search.¹³ Specifically, probable cause to arrest exists if there is a fair probability or substantial chance that the suspect committed the crime.

REASONABLE SUSPICION: There is no useful definition of reasonable suspicion. There is not even a nominal test, such as “fair probability.” This is because, as noted, reasonable suspicion is merely a variant of probable cause.¹⁴ So, rather than trying to define it, the courts usually say that reasonable suspicion exists if officers had some concrete facts that a reasonable person would have considered suspicious to some unspecified degree.

WHAT INFORMATION WILL (AND WILL NOT) BE CONSIDERED

Because probable cause and reasonable suspicion are merely assessments of the convincing force of information, the question arises: What information may be considered? The answer is very simple but important: *hard facts*. This is such a fundamental principle that the United States Supreme Court has described it as the “central teaching” of its cases on the Fourth Amendment.¹⁵ Or, as the California Court of Appeal observed, “Over and over again the cases instruct that the question of reasonable cause is to

be determined by reference to the particular facts and circumstances in the case at hand.”¹⁶

A good example of hard facts and their importance in establishing probable cause and reasonable suspicion is found in another landmark case: *Terry v. Ohio*.¹⁷ Here, an officer in downtown Cleveland detained Terry after watching him and another man engage in “suspicious” activity. In court, however, the officer did not merely assert that the men were acting “suspiciously.” On the contrary, he explained exactly what he saw. As the Court noted:

[The officer] saw one of the men leave the other one and walk southwest on Huron Road, past some stores. The man paused for a moment and looked in a store window, then walked on a short distance, turned around and walked back toward the corner, pausing once again to look in the same store window. He rejoined his companion at the corner, and the two conferred briefly. Then the second man went through the same series of motions, strolling down Huron Road, looking in the same window, walking on a short distance, turning back, peering in the store window again, and returning to confer with the first man at the corner. The two men repeated this ritual alternately between five and six times apiece—in all, roughly a dozen trips.

Notice the number of pertinent details the officer provided. This is how reasonable suspicion and probable cause are established—and it’s the first thing that judges look for.

Here’s another example. In *People v. Spears*¹⁸ the court ruled that the following facts established probable cause to believe that the defendant, an employee of a Chili’s restaurant in Cupertino, had shot

¹¹ See *People v. Guajardo* (1994) 23 Cal.App.4th 1738, 1742; *People v. Wilkins* (1993) 14 Cal.App.4th 761, 770.

¹² See *Henry v. United States* (1959) 361 U.S. 98, 102; *Beck v. Ohio* (1964) 379 U.S. 89, 91.

¹³ See *Bailey v. Superior Court* (1992) 11 Cal.App.4th 1107, 1111 [“Probable cause to issue an arrest or search warrant [exists if] there is a fair probability that a person has committed a crime or a place contains contraband or evidence of a crime.”]; *People v. Rosales* (1987) 192 Cal.App.3d 759, 767-8 [“We see no reason why the full *Gates* [‘fair probability’] rationale . . . should not be as fully applicable to the question of probable cause to support an arrest as it is to a search.”].

¹⁴ See *Alabama v. White* (1990) 496 U.S. 325, 330; *U.S. v. McCoy* (4th Cir. 2008) 513 F.3d 405, 411 [reasonable suspicion “defies precise definition”].

¹⁵ *Terry v. Ohio* (1968) 392 U.S. 1, 21, fn.18; *U.S. v. Cortez* (1981) 449 U.S. 411, 418. ALSO SEE *Brown v. Texas* (1979) 443 U.S. 47, 51 [“[T]he Fourth Amendment requires that a seizure must be based on specific, objective facts”].

¹⁶ *People v. Maltz* (1971) 14 Cal.App.3d 381, 390-1. ALSO SEE *U.S. v. McCoy* (4th Cir. 2008) 513 F.3d 405, 415 [“Particularized, articulable facts are always required.”].

¹⁷ (1968) 392 U.S. 1.

¹⁸ (1991) 228 Cal.App.3d 1.

and killed the manager while robbing him before the restaurant opened for the day: the defendant had left home shortly before the murder occurred even though it was his day off; there were no signs of forced entry; the defendant had given conflicting statements about his whereabouts when the murder occurred; and, after discovering the victim's body, the defendant told other employees that the manager had been "shot," even though he could not have known this based on the condition of the victim's body.

Baseless "facts" and hunches

In sharp contrast to facts with substance are vague or unsubstantiated tidbits of information. Included in this category are unsupported conclusions of fact, conclusions of law, and hunches. Not only do judges ignore these things, they will usually assume that officers who rely on them have a weak case or that they do not understand the basics of probable cause.

UNSUPPORTED CONCLUSIONS OF FACT: As we will discuss shortly, judges will consider an officer's opinion on relevant matters if it is based on his training and experience. But unsupported conclusions of fact are another matter. As the Court in *Illinois v. Gates* pointed out, officers cannot establish probable cause to search a suspect's home by saying something like, "I have received reliable information from a credible person and believe that heroin is stored there." Said the Court, "[T]his is a mere conclusory statement that gives the magistrate virtually no basis at all for making a judgment regarding probable cause."¹⁹

For example, in a recent case from Texas, the federal district court ruled that a DEA agent's pen register application was inadequate because he merely said that the DEA had "identified" certain

suspects, and that its investigation had "revealed" certain things. As the court pointed out, the application "fails to focus on specifics necessary to establish probable cause, such as relevant dates, names, and places."²⁰

CONCLUSIONS OF LAW: Officers should never offer legal opinions such as, "I have probable cause," or "My informant is reliable." These are determinations that are solely within the province of the judge. Instead, when writing affidavits or testifying in court, officers should just set forth the facts which would assist the judge in making these kinds of findings.

HUNCHES: Although hunches are useful in police work, they are irrelevant in determining the existence of probable cause. As the Ninth Circuit noted: A hunch may provide the basis for solid police work; it may trigger an investigation that uncovers facts that establish reasonable suspicion, probable cause, or even grounds for a conviction. A hunch, however, is not a substitute for the necessary specific, articulable facts required to justify a Fourth Amendment intrusion.²¹

Opinions and inferences

In determining whether probable cause exists, the courts will consider an officer's opinion as to the meaning or significance of the facts if it was based on his training and experience.²² In the words of the United States Supreme Court, "The evidence must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."²³ Or, as the Court explained in *United States v. Arvizu*:

This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person.²⁴

¹⁹ *Illinois v. Gates* (1983) 462 U.S. 213, 239.

²⁰ *In the Matter of the Application of the United States* (S.D. Texas 2007) Slip copy [2007 WL 3355602].

²¹ *U.S. v. Thomas* (9th Cir. 2000) 211 F.3d 1186, 1192.

²² See *United States v. Arvizu* (2002) 534 U.S. 266, 273 ["This process allows officers to draw on their own experience and specialized training"]; *Ornelas v. United States* (1996) 517 U.S. 690, 699 ["[A] police officer views the facts through the lens of his police experience and expertise."]; *United States v. Cortez* (1981) 449 U.S. 411, 418 ["[A] trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person."]; *U.S. v. McCoy* (4th Cir. 2008) 513 F.3d 405, 414 ["[T]he reasonable suspicion determination demands that facts—whether seemingly innocent or obviously incriminating—be assessed in light of their effect on the respective officer's perception of the situation at hand."].

²³ *Illinois v. Gates* (1983) 462 U.S. 213, 232.

²⁴ (2002) 534 U.S. 266, 273.

We saw an example earlier in *Terry v. Ohio* where an officer, having watched Terry and another man for a few minutes, concluded they were casing a store for a robbery. As the United States Supreme Court pointed out, the officer testified that he had “been assigned to patrol this vicinity of downtown Cleveland for shoplifters and pickpockets for 30 years,” and that he had “developed routine habits of observation over the years and that he would ‘stand and watch people or walk and watch people at many intervals of the day.’ He added: ‘Now, in this case when I looked over they didn’t look right to me at the time.’” Because this was a reasonable inference based on specific facts, the Court ruled it was properly considered.

The courts will also consider reasonable inferences based on facts. For example, in *People v. Soun*²⁵ the defendant and three other men killed the owner of a video store in San Jose during a botched robbery. The men were all described as Asian, but witnesses provided conflicting descriptions of the getaway car. One said it was a two-door Japanese car; another said it was a “small foreign car,” maybe a Toyota. Two of the witnesses saw the license number. One said he thought it began with 1RCS, possibly 1RCS525 or 1RCS583. The other said he thought the number was 1RC[?]538.

A San Jose officer who was monitoring these developments at the station figured that the actual license plate probably began with 1RCS, and he theorized that the last three numbers included a 5 and an 8. So he started running these combinations through DMV until he got a hit on 1RCS558, a 1981 Toyota registered in Oakland. There was another circumstance that added to the likelihood that this was the right car: the registered owner had an Asian surname.

This information was transmitted to officers in Oakland who, the next day, stopped the car, detained the occupants, and eventually arrested them. On appeal, one of the occupants, Soun, argued that the detention was based on nothing more than “hunch and supposition.” On the contrary, said the court, it was based on “intelligent and resourceful police work.”

Information not transmitted

As a general rule, information will not be considered in determining the existence of probable cause or reasonable suspicion unless it had been communicated to the officer who made the arrest, detention, or search. To put it another way, a search or seizure without sufficient justification cannot be validated in court by showing that it would have been justified if the officers had been aware of information possessed by their colleagues.²⁶ As the California Supreme Court explained in *People v. Gale*, “The question of the reasonableness of the officers’ conduct is determined on the basis of the information possessed by the officer at the time a decision to act is made.”²⁷

For example, in *United States v. Colon*²⁸ a woman phoned 911 in New York City and said she was just inside a bar when a man, whom she described, hit her over the head with a gun. Although she would not give her name, she said the “same guy” hit her about three weeks earlier, and that “[t]he cops know about the incident so I don’t have to give you my name.” The operator transmitted the call to a dispatcher but did not include the information about the prior incident. When the responding officers spotted a man inside the bar who matched the description, they pat searched him and found a handgun.

²⁵ (1995) 34 Cal.App.4th 1499.

²⁶ See *United States v. Jacobsen* (1984) 466 U.S. 109, 115; *Maryland v. Garrison* (1987) 480 U.S. 79, 85 [“But we must judge the constitutionality of [the officers’] conduct in light of the information available to them at the time they acted.”]; *People v. Coleman* (1968) 258 Cal.App.2d 560, 563, fn.2 [“The police cannot pool their information after an arrest made on insufficient cause.”]; *Giannis v. City of San Francisco* (1978) 78 Cal.App.3d 219, 224 [“[T]he knowledge which may have been possessed by anyone besides the arresting officers is irrelevant.”]; *People v. Talley* (1967) 65 Cal.2d 830, 835 [“The question of probable cause to justify an arrest without a warrant must be tested by the facts which the record shows were known to the officers at the time the arrest was made.”]; *People v. Adams* (1985) 175 Cal.App.3d 855, 862 [“[A] warrantless arrest or search cannot be justified by facts of which the officer was wholly unaware at the time.”].

²⁷ (1973) 9 Cal.3d 788, 795.

²⁸ (2nd Cir. 2001) 250 F.3d 130.

The parties agreed that if the officers had been told that the woman had, in effect, identified herself, they would have had grounds for the pat search. It might also have been lawful if the operator had been trained in making reliability determinations for Fourth Amendment purposes and had notified the officers that the caller met the necessary requirements. But, as the court noted, “The record here contains no evidence of whether or how 911 operator training is directed in any way to developing that ability, and thus contains nothing from which to conclude that the operator taking the call was capable of determining whether reasonable suspicion for the stop and frisk existed.” Thus, the court ruled the pat search was unlawful.

The “collective knowledge” rule

Although the courts do not permit post-arrest pooling of information to establish probable cause, they will presume that officers who were working on a case had shared relevant information if they had been generally keeping each other informed. As the court recently observed in *U.S. v. Banks*:

When officers function as a search team, it is appropriate to judge probable cause upon the basis of their combined knowledge, because we presume that the officers have shared relevant knowledge which informs the decision to seize evidence or to detain a particular person.²⁹

The “official channels” rule

Under the “official channels” rule, officers may detain, arrest, or search a suspect based solely on a request or authorization to do so transmitted via a law enforcement database, such as NCIC, CLETS, and AWS. As the court noted in *U.S. v. McDonald*, “NCIC printouts are reliable enough to form the basis of the reasonable belief which is needed to establish probable cause for an arrest.”³⁰

Officers may also detain or arrest a suspect based solely on a request to do so from another officer. As the Supreme Court pointed out, “[E]ffective law enforcement cannot be conducted unless police officers can act on directions and information transmitted by one officer to another and that officers, who must often act swiftly, cannot be expected to cross-examine their fellow officers about the foundation for the transmitted information.”³¹

For example, in *People v. Lara*³² LAPD detectives developed probable cause to believe that Lara had committed a murder they were investigating. They also learned that he was staying with his sister in South Gate. So they asked South Gate officers to arrest him, which they did. On appeal, Lara contended that the arrest was unlawful because the South Gate officers had no information about the case. But the California Supreme Court ruled it didn’t matter because they were “entitled to make an arrest on the basis of this information, as it was received through official channels.”

Note, however, that when officers rely on information disseminated through official channels, the defendant may require prosecutors to prove they had received the information and that the disseminating officer reasonably believed it was accurate.³³

Hearsay

In determining whether probable cause or reasonable suspicion exist, officers may rely on hearsay, which is essentially information from a civilian about something that he had seen or heard.³⁴ As the California Court of Appeal observed:

The United States Supreme Court has consistently held that hearsay information will support issuance of a search warrant. . . . Indeed, the usual search warrant, based on a reliable police informer’s or citizen-informant’s information, is *necessarily* founded upon hearsay.³⁵

²⁹ (8th Cir. 2008) __ F.3d __ [2008 WL 80577]. ALSO SEE *Illinois v. Andreas* (1983) 463 U.S. 765, 771, fn.5 [“[W]here law enforcement authorities are cooperating in an investigation, as here, the knowledge of one is presumed shared by all.”].

³⁰ (5th Cir. 1979) 606 F.2d 552, 554.

³¹ *United States v. Hensley* (1985) 469 U.S. 221, 231. ALSO SEE *People v. Gomez* (2004) 117 Cal.App.4th 531, 540 [“[A]n officer may arrest an individual on the basis of information and probable cause supplied by another officer.”].

³² (1967) 67 Cal.2d 365. ALSO SEE *U.S. v. Burton* (3rd Cir. 2002) 288 F.3d 91, 99.

³³ See *People v. Harvey* (1958) 156 Cal.App.2d 516; *People v. Madden* (1970) 2 Cal.3d 1017.

³⁴ See *United States v. Matlock* (1974) 415 U.S. 164, 175; *Humphrey v. Appellate Division* (2002) 29 Cal.4th 569, 573.

³⁵ *People v. Superior Court (Bingham)* (1979) 91 Cal.App.3d 463, 472.

Nevertheless, the value of hearsay depends on whether there was reason to believe it was accurate or that the source was reliable. As the court said in *People v. Superior Court (Bingham)*, “[W]hether hearsay or double hearsay information of criminal activity will support a search warrant depends not upon terminology or ritualistic formula, but upon the quality and persuasiveness of the information itself.”³⁶ We will discuss this subject in more detail in the article beginning on page 11.

HOW THE FACTS ARE ANALYZED

Common sense takes center stage

Before 1983, probable cause rulings were often based on a “complex superstructure of evidentiary and analytical rules.”³⁷ For example, even though there was good reason to believe that an informant’s information was accurate, the courts would not consider it unless it satisfied the so-called “two-pronged” test of *Aguilar-Spinelli*.³⁸

Fortunately, we don’t need to discuss *Aguilar-Spinelli* or any of the other rules. That’s because the United States Supreme Court in 1983 announced its decision in the case of *Illinois v. Gates*.³⁹ And in *Gates*, the Court did two things that had a dramatic impact on probable cause determinations: (1) it ruled that probable cause must be based on a consideration of all the relevant circumstances; and (2) it announced that the touchstone of probable cause is common sense.

Totality of the circumstances

Prior to *Gates*, many courts would begin their analysis by subjecting each of the facts cited by officers to a hypercritical examination, then disregard any that were not particularly suspicious or incriminating. This often resulted in rulings that officers lacked probable cause because none of the facts were compelling.⁴⁰

In *Gates*, however, the Supreme Court rejected this “divide-and-conquer approach”⁴¹ and replaced it with the “totality of the circumstances” standard by which the courts were required to base their rulings on an assessment of the convincing force of the information as a whole.⁴²

This ruling resulted in two big changes in the law. First, probable cause can now be established by means of a combination of modestly incriminating information. Thus, when the defendant in *People v. McFadin* tried the old “divide and conquer” maneuver, the court responded with an apt metaphor:

Defendant would apply the axiom that a chain is no stronger than its weakest link. Here, however, there are strands which have been spun into a rope. Although each alone may have insufficient strength, and some strands may be slightly frayed, the test is whether when spun together they will serve to carry the load of upholding the action of the magistrate in issuing the warrant.⁴³

The other development was that an innocuous circumstance could become highly incriminating in

³⁶ (1979) 91 Cal.App.3d 463, 473.

³⁷ See *Illinois v. Gates* (1983) 462 U.S. 213, 235.

³⁸ See *Bailey v. Superior Court* (1992) 11 Cal.App.4th 1107, 1111 [“Prior to *Gates*, the reliability of an informer depended upon the prosecution establishing his veracity and the basis of his knowledge.”].

³⁹ (1983) 462 U.S. 213.

⁴⁰ See *Massachusetts v. Upton* (1984) 466 U.S. 727, 732 [the lower court had judged “bits and pieces of information in isolation”].

⁴¹ *United States v. Arvizu* (2002) 534 U.S. 266, 274.

⁴² See *Illinois v. Gates* (1983) 462 U.S. 213, 230-1; *United States v. Arvizu* (2002) 534 U.S. 266, 273; *United States v. Sokolow* (1989) 490 U.S. 1, 9 [“Any one of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion.”]; *U.S. v. Edwards* (5th Cir. 1978) 577 F.2d 883, 895 [“[P]robable cause is the sum total of layers of information and the synthesis of what the police have heard, what they know, and what they observed as trained officers. We weigh not individual layers but the ‘laminated’ total.”]; *People v. Pitts* (2004) 117 Cal.App.4th 881, 889 [“While each of the individual pieces of information [the officer] relied upon were somehow flawed or inadequate . . . this court must take into account the totality of the circumstances—the whole picture.”]. *People v. Avila* (1997) 58 Cal.App.4th 1069, 1074 [“All of these factors, although perhaps individually harmless, could reasonably combine to create fear in the detaining officer.”]; *U.S. v. Cantu* (10th Cir. 2005) 405 F.3d 1173, 1177 [“While one fact alone may not support a finding of probable cause, a cumulative assessment may indeed lead to that conclusion.”]; *U.S. v. Lovelock* (2nd Cir. 1999) 170 F.3d 339, 344 [“[Defendant] attempts to segment, isolate, and minimize each item of evidence”]; *U.S. v. Hoyos* (9th Cir. 1989) 892 F.2d 1387, 1393 [“The fact that some of these acts, if reviewed separately, might be consistent with innocence is immaterial.”].

⁴³ (1982) 127 Cal.App.3d 751, 767.

light of other facts. As the Ninth Circuit observed, “Individual factors that may appear innocent in isolation may constitute suspicious behavior when aggregated together.”⁴⁴ Thus, in *People v. Juarez* the court pointed out:

Running down a street is in itself indistinguishable from the action of a citizen engaged in a program of physical fitness. Viewed in context of immediately preceding gunshots, it is highly suspicious.⁴⁵

Another example is found in *Maryland v. Pringle*⁴⁶ in which an officer made a traffic stop on a car occupied by three men. Before long, he noticed some things inside the vehicle that caused him to think the men were involved in drug trafficking. One of the things was a wad of cash (\$763) that the officer had seen in the glove compartment. But the lower court refused to consider the money because, in its myopic view, “[m]oney, without more, is innocuous.” Not surprisingly, the United States Supreme Court reversed, simply pointing out that that “[t]he [lower] court’s consideration of the money in isolation, rather than as a factor in the totality of the circumstances, is mistaken in light of our precedents.”

Common sense

The Court in *Gates* also ruled that, in determining whether probable cause exists, the circumstances must be evaluated in light of common sense. Although probable cause was, from the start, conceived as a realistic assessment of the facts,⁴⁷ some courts had become relentless in their pursuit of some deficiency. So it became necessary for the Supreme Court to remind them of something:

Perhaps the central teaching of our decisions bearing on the probable cause standard is that it is a practical, nontechnical conception. In dealing with probable cause, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.⁴⁸

Thus, in discussing probable cause for a search warrant, the California Court of Appeal pointed out, “[W]e do not examine [the affidavit] as if it had been drafted by a Wall Street law firm. Our touchstone is common sense.”⁴⁹

For example, in *U.S. v. Zamudio-Carillo* the court ruled that a Highway Patrol officer in Kansas reasonably believed that two cars were traveling together because both vehicles had Arizona license plates and they had been driven in close proximity for 25 miles.⁵⁰

WHAT’S “PROBABLE?”

Probable cause is all about, well, probabilities. As the Fifth Circuit explained in *United States v. Garcia*, “It is almost a tautology to say that determining whether probable cause existed involves a matter of probabilities, but it nevertheless fairly describes the analysis we undertake.”⁵¹ Or, as the Supreme Court observed in *Illinois v. Rodriguez*, “[Probable cause] demands no more than a proper assessment of probabilities in particular factual contexts.”⁵²

But how much probability is required? Is it 80%? Or 51%? Less than 50%? The courts can’t or won’t say because they view probable cause and reasonable suspicion as nontechnical standards based on

⁴⁴ *U.S. v. Diaz-Juarez* (9th Cir. 2002) 299 F.3d 1183, 1141.

⁴⁵ (1973) 35 Cal.App.3d 631, 636.

⁴⁶ (2003) 540 U.S. 366.

⁴⁷ See *Brinegar v. United States* (1949) 338 U.S. 160, 176 [“The rule of probable cause is a practical, nontechnical conception”]; *United States v. Cortez* (1981) 449 U.S. 411, 418 [“Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers.”].

⁴⁸ At p. 231. ALSO SEE *Illinois v. Wardlow* (2000) 528 U.S. 119, 125 [reasonable suspicion “must be based on commonsense judgments and inferences about human behavior.”]; *U.S. v. Diaz* (9th Cir. 2007) 491 F.3d 1074, 1077 [“common sense is key”]; *U.S. v. Rice* (10th Cir. 2007) 483 F.3d 1079, 1083 [“We view the officer’s conduct through a filter of common sense and ordinary human experience”].

⁴⁹ *People v. Veasey* (1979) 98 Cal.App.3d 779, 785.

⁵⁰ (10th Cir. 2007) 499 F.3d 1206.

⁵¹ (5th Cir. 1999) 179 F.3d 265, 268. ALSO SEE *Illinois v. Gates* (1983) 462 U.S. 213, 231 [“In dealing with probable cause, as the very name implies, we deal with probabilities.”]; *Maryland v. Garrison* (1987) 480 U.S. 79, 87 [“Sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment.”].

⁵² (1990) 497 U.S. 177, 184.

common sense, not mathematical precision. “The probable-cause standard,” said the United States Supreme Court, “is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of circumstances.”⁵³

Still, it is often assumed that probable cause requires at least a 51% probability because anything less than 50% would not be “probable.” Although this is true as a matter of statistics, the law views the matter somewhat differently. As noted earlier, the Supreme Court has ruled that probable cause requires only a “fair probability” or “substantial chance.” And although the Court has never quantified this standard, it has said that it does not require more than a 50% chance.

Specifically, the Court ruled that probable cause requires neither a “preponderance of the evidence” nor “any showing that such belief be correct or more likely true than false.”⁵⁴ Thus, the Fifth Circuit pointed out in *United States v. Garcia* that “the requisite ‘fair probability’ is something more than bare suspicion, but need not reach the fifty percent mark.”⁵⁵

As for reasonable suspicion, the Supreme Court has said it requires “considerably less” than a preponderance of the evidence,⁵⁶ which means it requires much less than a 50% chance.

Multiple incriminating circumstances

Instead of trying to calculate probability percentages (which is usually impractical or impossible

anyway), officers are more likely to reach the right conclusion if they look for multiple circumstances linking the suspect to the crime. Although a single incriminating circumstance is sometimes enough (e.g., a positive ID by a victim, a fingerprint or DNA match), in most cases probable cause is based on a combination of circumstances that are much less incriminating. If so, each additional circumstance that comes to light—each “coincidence of information”⁵⁷—will result in an exponential increase in the chances of having probable cause. And if one of them happens to be distinctive or unusual, it would be hard to imagine a court ruling that probable cause did not exist.⁵⁸

For example, in *People v. Brian A.*⁵⁹ two teenage boys robbed a cab driver in Seaside. The next day, an officer spotted two teenagers in the vicinity who matched the general physical descriptions provided by the victim. He also noticed that, like the perpetrators, one of the boys was wearing a red sweat shirt, and the other was carrying a duffle bag. So he arrested them. On appeal, one of the boys contended that the officer lacked probable cause, but the court disagreed, pointing out:

Where, as here, there were two perpetrators and an officer stops two suspects who match the descriptions he has been given, there is much greater basis to find sufficient probable cause for arrest. The probability of there being other groups of persons with the same combination of physical characteristics, clothing, and trappings is very slight.

⁵³ *Maryland v. Pringle* (2003) 540 U.S. 366, 371. ALSO SEE *People v. Ledesma* (2003) 106 Cal.App.4th 857, 863 [reasonable suspicion “is an abstract concept, not a ‘finely tuned standard’”].

⁵⁴ *Brown v. Texas* (1983) 460 U.S. 730, 742. ALSO SEE *People v. Tuadles* (1992) 7 Cal.App.4th 1777, 1783 [“requires less than a preponderance of the evidence”]; *People v. Fourshey* (1974) 38 Cal.App.3d 426, 430 [preponderance of the evidence is not required].

⁵⁵ (5th Cir. 1999) 179 F.3d 265, 269.

⁵⁶ See *United States v. Sokolow* (1989) 490 U.S. 1, 7 [“That level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence.”]; *United States v. Arvizu* (2002) 534 U.S. 266, 274 [reasonable suspicion “falls considerably short of satisfying a preponderance of the evidence standard”]. ALSO SEE *Richards v. Wisconsin* (1997) 520 U.S. 385, 394 [“This showing [for reasonable suspicion] is not high”].

⁵⁷ *Ker v. California* (1963) 374 US 23, 36. ALSO SEE *People v. Soun* (1995) 34 Cal.App.4th 1499, 1523 [“The coincidence with descriptions of the assailants, and the use of a car which was, at least, a very likely candidate for further investigation”].

⁵⁸ See *In re Brian A.* (1985) 173 Cal.App.3d 1168, 1174 [“Uniqueness of the points of comparison must also be considered in testing whether the description would be inapplicable to a great many others.”].

⁵⁹ (1985) 173 Cal.App.3d 1168. ALSO SEE *People v. Joines* (1970) 11 Cal.App.3d 259, 263 [“The fact that there were two persons fitting descriptions given for the two suspects narrowed the chance of coincidence.”]; *People v. Britton* (2001) 91 Cal.App.4th 1112, 1118-9 [“This evasive conduct by two people instead of just one person, we believe, bolsters the reasonableness of the suspicion that there is criminal activity brewing.”]; *In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1092.

Another example is found in *People v. Pranke*⁶⁰ in which Los Angeles police officers who were investigating a residential burglary learned the following: A few minutes before the break-in, a man had knocked on the door. When the owner opened it, he recognized the man as a casual acquaintance whom he had not seen in 18 months. The man said the reason for his unexpected visit was that he needed the phone number of a mutual friend. The owner gave him the number and the man left. A few minutes later, the owner left and, upon his return, discovered that his home had been burglarized.

When the victim reported the burglary, he told the officers about the unusual visit. So they went to the man's last known address and spoke with a neighbor who said the suspect had moved out, but that he had left some things with him. The officers examined the items and noted that some of them matched the descriptions of property taken in the burglary.

Did these circumstances add up to probable cause? Most definitely, said the court:

It is unnecessary to establish the mathematical probability statistics, of (1) any given person visiting a casual acquaintance for the first time in a year and one-half; (2) a burglary occurring thereafter the moment the resident has departed the premises; (3) property stolen therefrom being found the following day in a box located in an apartment adjoining that formerly occupied by the visitor; and (4) the party in possession of the box having volunteered the information that its contents belonged to the visitor prior to the discovery that it contained the fruits of the burglary. It is merely necessary for us to hold, as we do, that when such remarkable coincidences coalesce, they are sufficient to warrant a prudent man in believing that the defendant has committed an offense.

One more example. In *People v. Hillery*⁶¹ the body of a 15 year old girl was found in an irrigation ditch near her home in Kings County. She had been sexually assaulted. Witnesses reported seeing a "uniquely painted" black and turquoise 1952 Plymouth parked about two-tenths of a mile from the victim's house at about the time of her disappearance. There were boot prints in the area where the car had been parked, and they led in the direction of the victim's house. Deputies located the car and learned that the registered owner had a prior conviction for rape, and that he had worked at a ranch where the victim was employed as a baby sitter.

In ruling that this combination of circumstances established probable cause to arrest the defendant, the California Supreme Court said:

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

Possibility of an innocent explanation

If probable cause or reasonable suspicion exist, it is immaterial that there might have been an innocent explanation for the suspect's conduct, or that it was otherwise possible that he had not committed the crime under investigation.⁶² As the California Supreme Court explained in a detention case:

The possibility of an innocent explanation does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct. Indeed, the principal function of his investigation is to resolve that very ambiguity and establish whether the activity is in fact legal or illegal.⁶³

This is also the view of the Supreme Court which has pointed out that the Constitution "accepts the risk that officers may stop innocent people. Indeed,

⁶⁰ (1970) 12 Cal.App.3d 935.

⁶¹ (1967) 65 Cal.2d 795.

⁶² See *United States v. Arvizu* (2002) 534 U.S. 266, 277 ["A determination that reasonable suspicion exists need not rule out the possibility of innocent conduct."]; *People v. Glaser* (1995) 11 Cal.4th 354, 373 ["[T]hat a person's conduct is consistent with innocent behavior does not necessarily defeat the existence of reasonable cause to detain."]; *People v. Guajardo* (1994) 23 Cal.App.4th 1738, 1743 ["[T]he fact there may be some room for doubt is immaterial."]; *People v. Spears* (1991) 228 Cal.App.3d 1, 18-9 ["[T]he fact that particular conduct may be innocent is not the relevant inquiry."]; *People v. Tuadles* (1992) 7 Cal.App.4th 1777, 1784; *U.S. v. Del Vizo* (9th Cir. 1990) 918 F.2d 821, 827 ["It is of no moment that the acts of Del Vizo and his confederates, if viewed separately, might be consistent with innocence."].

⁶³ *Fare v. Tony C.* (1978) 21 Cal.3d 888, 894.

the Fourth Amendment accepts the risk in connection with more drastic police action; persons arrested and detained on probable cause to believe they have committed a crime may turn out to be innocent.”⁶⁴

OTHER ISSUES

CRIME NOT YET REPORTED: If the facts reasonably indicated that a crime had occurred, grounds to arrest or detain may exist even though the crime had not yet been reported.⁶⁵

MISTAKES OF FACT: If probable cause was based in whole or in part on information that was subsequently determined to be inaccurate or even false, a court may nevertheless consider this information in determining the existence of probable cause if the officers reasonably believed it was true. In the words of the Supreme Court, “[W]hat is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they always be correct, but that they always be reasonable.”⁶⁶

DURATION OF PROBABLE CAUSE: How long does probable cause last? It depends on whether it’s probable cause to arrest or to search. Probable cause to arrest lasts forever unless new exculpatory evidence comes to light. This is because a person who is guilty of a crime will *always* be guilty of that crime. For example, officers in Washington D.C. still have probable cause to believe that John Wilkes Booth murdered President Lincoln.

On the other hand, probable cause to search for evidence of a crime will ordinarily disappear after a while because most physical evidence is moved, destroyed, or used up over time, sometimes a very short time. We will discuss this subject in more detail in the Summer edition.

WHAT’S “ENOUGH” INFORMATION? If probable cause or reasonable suspicion exist, officers are not required to go out and look for exculpatory evidence.⁶⁷ As the court observed in *Ricciuti v. New York City Transit Authority*, “Once a police officer has a reasonable basis for believing there is probable cause, he is not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest.”⁶⁸

But if the existence of probable cause is questionable, officers should, of course, continue their investigation. In such cases, said the California Court of Appeal, “it is the policeman’s lot, with perhaps some difficulty, to smother his feeling that a suspect is occupied in crime, and to do his duty of gathering further evidence before applying for a search warrant.”⁶⁹

MAKING A JUDGMENT: In *Brinegar v. United States*, the Supreme Court pointed out that the line between mere suspicion and probable cause “must be drawn by an act of judgment.”⁷⁰ We conclude this article with a comment by the U.S. Court of Appeals for the District of Columbia in which it reflected on the nature of this judgment:

It is a very specialized form of judgment, an expertness in making evaluations under pressure in circumstances where an untrained person might well be at a loss. . . . As information is accumulated in the process of an investigation, the police must make not a single evaluation but a series of judgments. Inevitably this is something of a balance sheet process. Some of the information, and some of the factors which they observe, will add up in support of probable cause; some, on the other hand, may undermine that support. Finally, at some point the officer must make a decision, culled from a balance of these negatives and positives, and then act on his decision.⁷¹ POV

⁶⁴ *Illinois v. Wardlow* (2000) 528 U.S. 119, 126.

⁶⁵ See *People v. Vasquez* (1983) 138 Cal.App.3d 995, 1001; *People v. Stokes* (1990) 224 Cal.App.3d 715, 721.

⁶⁶ *Illinois v. Rodriguez* (1990) 497 U.S. 177, 185.

⁶⁷ See *People v. Guajardo* (1994) 23 Cal.App.4th 1738, 1743 [“[T]he fact that there may be some room for doubt is immaterial.”].

⁶⁸ (2nd Cir. 1997) 124 F.3d 123, 128; *Baker v. McCollan* (1979) 443 U.S. 137, 145-6 [“[W]e do not think a sheriff executing an arrest warrant is required by the Constitution to investigate independently every claim of innocence.”]; *Hamilton v. City of San Diego* (1990) 217 Cal.App.3d 838, 845 [“[W]here probable cause to arrest has been established, we are not aware of any authority which suggests police officers must conduct some additional investigation before incarcerating a suspect.”].

⁶⁹ *Bailey v. Superior Court* (1992) 11 Cal.App.4th 1107, 1113.

⁷⁰ (1949) 338 U.S. 160, 176.

⁷¹ *Jackson v. U.S.* (D.C. Cir. 1962) 302 F.2d 194, 197.

Probable Cause Information: Proving it's reliable

“Any rookie officer knows that uncorroborated, unknown tipsters cannot provide probable cause for an arrest or search warrant.”¹

Probable cause is, of course, built on information. But not just any information. There must be reason to believe it is accurate, or at least “reasonably trustworthy.”² Reliable information is also necessary to establish reasonable suspicion to detain or pat search a suspect, but the required showing is less, maybe much less, than that for probable cause.³

The question, then, is how can officers determine whether their information is sufficiently reliable? As we will explain, it depends mainly on the nature of the source.⁴ This is because some sources are considered so inherently trustworthy that any information they furnish will automatically be deemed reliable if it was based on their personal knowledge.

On the other hand, if the source was a police informant or other “denizen of the underworld,”⁵ officers will be required to prove that there is reason to trust him; or, if he is a hopeless flake, that there is reason to believe that this particular information is accurate.

OFFICERS AND POLICE RECORDS

The courts presume that law enforcement officers are reliable sources if their information was based on something they saw or heard.⁶ In the words of the California Court of Appeal, “A police officer is presumptively reliable in the official communication of matters within his direct knowledge.”⁷

OFFICERS WHO DISSEMINATE INFORMATION: Officers are also presumptively reliable *transmitters* of information. Thus, information from a crime victim or a reliable informant that is transmitted from one officer to another remains reliable for the purpose of determining the existence of probable cause.⁸ As the court explained in *Mueller v. Department of Motor Vehicles*, “[O]ne police officer who has received a report from a citizen-informant of a crime’s commission, and who has passed the information on to a brother officer in the crime’s investigation, will be deemed to have reliably done so.”⁹

POLICE RECORDS: The presumption of reliability also covers information that is routinely gathered and maintained by law enforcement agencies and other arms of the government.¹⁰ For example, offic-

¹ *Higgason v. Superior Court* (1985) 170 Cal.App.3d 929, 952 (conc. opn. of Crosby, J.).

² See *Beck v. Ohio* (1964) 379 U.S. 89, 91.

³ See *Alabama v. White* (1990) 496 U.S. 325, 330 [“[R]easonable suspicion can arise from information that is less reliable than that required to show probable cause.”].

⁴ See *U.S. v. Hauk* (10th Cir. 2005) 412 F.3d 1179, 1188 [“Information is only as good as its source.”].

⁵ See *On Lee v. United States* (1952) 343 U.S. 747, 756.

⁶ See *United States v. Ventresca* (1965) 380 U.S. 102, 111 [“Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number.”]; *People v. Hill* (1974) 12 Cal.3d 731, 761 [the officers are “presumed to be reliable”]; *People v. Superior Court (Bingham)* (1979) 91 Cal.App.3d 463, 472 [“Law enforcement officers, working together on a case, are reasonably “presumed to be reliable”]; *U.S. v. Angulo-Lopez* (9th Cir. 1986) 791 F.2d 1394, 1397 [“[P]olice officers may be presumed reliable.”].

⁷ *People v. Superior Court (Brown)* (1975) 49 Cal.App.3d 160, 167.

⁸ See *People v. Hogan* (1969) 71 Cal.2d 888, 891 [“Reliable information furnishing probable cause for an arrest does not lose its reliability when it is transmitted through official channels to arresting officers.”]; *People v. Superior Court (Bingham)* (1979) 91 Cal.App.3d 463, 472; *People v. Senkir* (1972) 26 Cal.App.3d 411.

⁹ (1985) 163 Cal.App.3d 681, 686.

¹⁰ See *People v. Reserva* (1969) 2 Cal.App.3d 151, 156-7 [fingerprint records]; *People v. Aho* (1985) 166 Cal.App.3d 984, 992 [rap sheet]; *People v. Kershaw* (1983) 147 Cal.App.3d 750, 760 [rap sheet]; *People v. Sanchez* (1972) 24 Cal.App.3d 664, 676 [rap sheet]; *People v. Childress* (1979) 99 Cal.App.3d 36, 41 [rap sheet]; *People v. Zepeda* (1980) 102 Cal.App.3d 1, 5 [information in police reports]; *People v. Cleland* (1990) 225 Cal.App.3d 388, 390-1 [PG&E records]; *People v. Rooney* (1985) 175 Cal.App.3d 634, 648 [telephone records]; *People v. Andrino* (1989) 210 Cal.App.3d 1395, 1400 [phone trap information]; *People v. Hill* (1970) 3 Cal.App.3d 294, 298 [military records]; *U.S. v. McDonald* (5th Cir. 1979) 606 F.2d 552, 554 [NCIC printouts].

ers may rely on fingerprint records, rap sheets, and other information stored in databases maintained by the National Crime Information Center (NCIC), the California Department of Justice, probation and parole offices, and the DMV.

CITIZEN INFORMANTS

The courts will presume that information from a “citizen informant” is reliable if it was based on his personal knowledge.¹¹ As explained in *People v. Lombera*, “[A] citizen informant is presumptively reliable even though reliability has not previously been tested.”¹² The question, then, is when will a person be deemed a citizen informant?

Before answering that question, we must point out that it will not happen merely because an officer labeled him a “citizen informant” in an affidavit or while testifying in court. Instead, the law requires that officers set forth the facts upon which their belief was based so that a judge can make the determination. The California Supreme Court called attention to this requirement in *People v. Smith* when it said, “The designation ‘citizen informant’ is just as conclusionary as the designation ‘reliable informant.’ In either case the conclusion must be supported by facts stated in the affidavit.”¹³

Although there are technically no hard-and-fast rules, as a practical matter a person will ordinarily be deemed a citizen informant only if the following circumstances existed:

- (1) **Victim or witness:** The person was the victim of the crime under investigation or a witness.
- (2) **Identity known:** Officers knew his identity.
- (3) **Information appears reliable:** There was no reason to disbelieve him.

Crime victim or witness

Most citizen informants are crime victims or eyewitnesses who simply reported their observations to officers. In the words of the California Supreme Court:

[I]t may be stated as a general proposition that private citizens who are witnesses to or victims of a criminal act, absent some circumstance that would cast doubt upon their information, should be considered reliable.¹⁴

Or, as the court observed in *People v. Kershaw*, “The prototypical citizen informant is a victim reporting a crime that happened to him or a witness who personally observed the crime.”¹⁵

EXAMPLES: The following are examples of people who have been deemed citizen informants:

- a rape victim¹⁶
- a telephone company installer who reported seeing drugs inside a residence¹⁷
- a motel housekeeper who reported seeing drugs in a motel room¹⁸
- a woman who reported that her parents possessed drugs¹⁹
- a person who reported seeing drug activity in the neighborhood²⁰

¹¹ See *People v. Hill* (1974) 12 Cal.3d 731, 761 [citizen informant “is presumptively reliable” even though his reliability “has not previously been tested”]; *People v. Kershaw* (1983) 147 Cal.App.3d 750, 754 [“[C]itizen informants, in contrast to criminal informants, are assumed to supply reliable information.”]; *People v. Paris* (1975) 48 Cal.App.3d 766, 773 [the tip “was obviously based on his personal observations”]; *People v. Schulle* (1975) 51 Cal.App.3d 809, 814 [“[I]f Kimberly Simmons is deemed to be a citizen-informant she is presumptively reliable.”].

¹² (1989) 210 Cal.App.3d 29, 32.

¹³ *People v. Smith* (1976) 17 Cal.3d 845, 851.

¹⁴ *People v. Ramey* (1976) 16 Cal.3d 263, 269. ALSO SEE *People v. Herdan* (1974) 42 Cal.App.3d 300, 305 [citizen informants “usually, but not always” are people who “unexpectedly” witnessed a crime or were the victim]; *Mueller v. DMV* (1985) 163 Cal.App.3d 681, 685 [“A report to a police officer, by a citizen-informant who has witnessed a crime’s commission, will ordinarily be supportive of probable cause for an arrest.”]; *People v. Paris* (1975) 48 Cal.App.3d 766, 773 [Martin, as a witness to a crime, was presumptively reliable as a citizen-informant.”].

¹⁵ (1983) 147 Cal.App.3d 750, 754.

¹⁶ *People v. Rigsby* (1971) 18 Cal.App.3d 38, 42.

¹⁷ *People v. Paris* (1975) 48 Cal.App.3d 766, 773-4.

¹⁸ *Krauss v. Superior Court* (1971) 5 Cal.3d 418, 421-2.

¹⁹ *People v. Schulle* (1975) 51 Cal.App.3d 809, 815.

²⁰ *People v. Terrones* (1989) 212 Cal.App.3d 139, 147-9.

- the manager of a bowling alley who notified officers that he saw a gun in the defendant's locker²¹
- a bartender who reported that a customer was carrying a gun²²

WITNESSES WHO ARE NOT EYEWITNESSES: A person who was not an eyewitness, but who provided officers with information concerning a crime, may be deemed a citizen informant if it reasonably appeared that he furnished the information for honorable reasons, not for some personal advantage. The following are examples:

- an employee of a rent-a-car company who reported that a rented vehicle was overdue²³
- an insurance company investigator who told officers about some of the things he had learned in the course of his investigation into a suspicious fire²⁴
- a civil engineer who said he had worked on a machine after the defendant claimed it had been destroyed in a fire²⁵
- a store security officer who furnished employment information about a suspect²⁶
- a woman who told officers that her son had reported seeing a fellow student with a handgun²⁷

Identity known

In most cases, a person will be deemed a citizen informant only if officers knew his identity.²⁸ There are three reasons for this. First, the reliability of anonymous sources is unknown. "Without knowing the identity of the source," said the Court of Appeal, "the police cannot even determine whether he or she is a criminal, a drug addict, a 'stoolie' or an otherwise inherently unreliable individual."²⁹ Second, officers seldom know how anonymous sources obtained their information, which means it might have been based on nothing more than rumor or speculation.³⁰ Third, sources who have been identified are less likely to furnish information they know is false.³¹

EXPOSURE TO IDENTIFICATION: If the person spoke face-to-face with officers but, because of the need for quick action, they did not stop to identify him, he may nevertheless be deemed a citizen informant because he exposed himself to identification; i.e., he did not know that the officers would not ID him before acting on his tip.³² This occurred in *U.S. v. Thompson* in which the court noted, "The informant in this case subjected himself to ready identification by the police when he approached them in his car; the police need only have asked for his identification or simply noted the license plate on his car."³³

²¹ *People v. Baker* (1970) 12 Cal.App.3d 826, 841.

²² *People v. Duren* (1973) 9 Cal.3d 218, 239.

²³ *U.S. v. Dorais* (9th Cir. 2001) 241 F.3d 1124, 1130.

²⁴ *People v. Superior Court (Bingham)* (1979) 91 Cal.App.3d 463, 472.

²⁵ *People v. Superior Court (Bingham)* (1979) 91 Cal.App.3d 463, 472.

²⁶ *People v. Jordan* (1984) 155 Cal.App.3d 769, 779-80.

²⁷ *People v. Joseph G.* (1995) 32 Cal.App.4th 1735.

²⁸ See *People v. Ramey* (1976) 16 Cal.3d 263, 269 ["[T]he rule presupposes that the police be aware of the identity of the person"].

²⁹ *People v. Kershaw* (1983) 147 Cal.App.3d 750, 755.

³⁰ *People v. Kershaw* (1983) 147 Cal.App.3d 750, 757 ["[T]he police and the magistrate cannot possibly know how the [anonymous] informant obtained the information."].

³¹ See *People v. Brueckner* (1990) 223 Cal.App.3d 1500, 1504-5 ["Reliability is indicated where the informer's identity is known to the police, as the informer exposes himself or herself to potential liability for malicious prosecution or false reporting."]; *People v. McFadin* (1982) 127 Cal.App.3d 751, 766-7 [the reliability of an untested informant may be bolstered when the informant was "in a position where he would have reason to believe that a false report would probably be readily disclosed."]; *People v. Hogan* (1969) 71 Cal.2d 888, 891 ["[A citizen informant] may be exposing himself to an action for malicious prosecution if he makes unfounded charges"]; *U.S. v. Elmore* (2nd Cir. 2007) 482 F.3d 172, 182 ["Mazza gave the police enough information about herself to allow them to identify her and track her down later to hold her accountable if her tip proved false."].

³² See *Florida v. J.L.* (2000) 529 U.S. 266, 276 ["If an informant places his anonymity at risk, a court can consider this factor in weighing the reliability of the tip." conc. opn. of Kennedy, J.]; *People v. Superior Court (Meyer)* (1981) 118 Cal.App.3d 579, 584 ["When the informant approached the officer, he had no way of knowing that the officer would elect to begin the pursuit without waiting to record the identity of the informant."]; *People v. Coulombe* (2000) 86 Cal.App.4th 52, 58 ["The citizens who supplied the information subjected themselves to scrutiny and the risk of losing their anonymity by directly approaching the police officers rather than calling in their information."]; *U.S. v. Holmes* (D.C. Cir. 2004) 360 F.3d 1339, 1344 ["[E]ither officer could easily have asked [the witness] for identification."].

³³ (D.C. Cir. 2000) 234 F.3d 725, 729.

Information appears reliable

A person will not be deemed a citizen informant if officers had reason to doubt his reliability or the accuracy of his information.³⁴ Consequently, the following circumstances are relevant in determining whether a source qualifies:

INCONSISTENT INFORMATION: A person who furnished inconsistent or conflicting information will not necessarily be deemed unreliable if the information pertained to a peripheral issue.³⁵ But if it pertained to something significant, there will be problems.

For example, in *Gillian v. City of San Marino*³⁶ officers arrested a high school basketball coach based on an allegation by a former student that he had sexually harassed her. Although the student would ordinarily have been viewed as a citizen informant, the court ruled she did not measure up because, among other things, some of her allegations “were inconsistent in the details provided.”

VAGUENESS: A person is not apt to be deemed a citizen informant if, under the circumstances, he should have been able to provide solid information, but did not do so. This was another reason the woman in *Gillian* did not qualify. As the court pointed out, “Some of the accusations were generalized and not specific as to time, date, or other details, including claims of touching in the gym. Other accusations concerning more specific events lacked sufficient detail.”³⁷

CORROBORATION: A person will ordinarily be considered sufficiently reliable if the officers, upon arrival, saw or heard something that was consistent with his report.³⁸

OFFICERS ATTEMPTED TO GAUGE RELIABILITY: It is also relevant that the officers utilized interview techniques or other means of detecting deception. For example, in *John v. City of El Monte*, where a ten-year old girl accused her teacher of sexually molesting her, the officer tested her reliability by, for example, inserting false or exaggerated facts into her descriptions of the incident. This helped bolster her reliability because, as the court noted, “each time she would correct [him] and would stay consistent with her original description.”³⁹

NOT CRIMINALLY INVOLVED: A person who provides information about a crime will not qualify as a citizen informant if he was implicated in that crime; e.g., a drug buyer who identified his supplier, or a burglar who identified his fence.⁴⁰ A person with a criminal history may, however, be a citizen informant if his information pertained to a crime in which he was not implicated, and the other requirements were met.⁴¹

UNDER THE INFLUENCE: A person may be deemed a citizen informant even though he was under the influence of drugs when he spoke with officers.⁴²

TRACK RECORD: The fact that the citizen furnished accurate information in the past is an indication he is reliable.⁴³

³⁴ See *People v. Ramey* (1976) 16 Cal.3d 263, 269 [reliability depends on the absence of “some circumstance that would cast doubt upon their information, should be considered reliable.”].

³⁵ See *Peng v. Hu* (9th Cir. 2003) 335 F.3d 970, 979 [“[I]nconsistencies in incidental facts [are] to be expected where different people are called upon to remember startling events.”].

³⁶ (2007) 147 Cal.App.4th 1033.

³⁷ At p. 1045. Quote edited. ALSO SEE *People v. Mardian* (1975) 47 Cal.App.3d 16, 33 [“Such details would permit the magistrate to draw the reasonable conclusion that [the citizen’s] report was of real substance”].

³⁸ See *Haynie v. County of Los Angeles* (9th Cir. 2003) 339 F.3d 1071, 1076 [the suspects failed to yield when the officer activated his lights and siren]; *People v. Boissard* (1992) 5 Cal.App.4th 972, 979.

³⁹ (9th Cir. 2007) 505 F.3d 907.

⁴⁰ See *People v. Ramey* (1976) 16 Cal.3d 263, 269 [citizen informants are “innocent of criminal involvement”]; *People v. Smith* (1976) 17 Cal.3d 845, 852; *People v. Gray* (1976) 63 Cal.App.3d 282, 287-8 [court notes “the absence of anything in the affidavit which tends to connect [the informant] with the illegal narcotics activity going on in Gray’s apartment.”].

⁴¹ See *People v. Schulle* (1975) 51 Cal.App.3d 809, 815 [“Miss Simmons’ admission to [the officer] that she has smoked marijuana, although an admission of criminal activity, does not establish as a matter of law that she was a person criminally involved or disposed”]; *People v. Hill* (1974) 12 Cal.3d 731, 761; *People v. Lombera* (1989) 210 Cal.App.3d 29, 33.

⁴² See *People v. Superior Court (Haflich)* (1986) 180 Cal.App.3d 759, 767 [“Police officers should not be required to ignore reports of ongoing violent criminal activity merely because the informant is under the influence.”].

⁴³ See *People v. Ramey* (1976) 16 Cal.3d 263, 269 [“there was evidence that he had dealt with the Sacramento police on other occasions without raising doubts as to his trustworthiness”].

ANONYMOUS 911 CALLERS

With the proliferation of cell phones, more and more people are calling 911 to report suspicious circumstances and crimes in progress, especially drunk and reckless driving. But, for obvious reasons, many callers won't identify themselves,⁴⁴ which means they cannot qualify as citizen informants. As the U.S. Supreme Court observed, "[A]n anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity."⁴⁵

Although this means that an uncorroborated tip from an anonymous caller cannot establish probable cause for an arrest, there are now cases in which such information was found to justify car stops and detentions.

Circumstantial evidence of reliability

Information from an anonymous caller may establish reasonable suspicion if there was some circumstantial evidence of his reliability. "Even though anonymous," said the court in *People v. Coulombe*, "a tip from an unidentified citizen may have other features giving it sufficient reliability."⁴⁶

What circumstances are considered relevant? As we will now explain, they generally fall into the following categories: (1) whether the caller phoned 911, (2) the amount of detail he furnished, (3) his demeanor, and (4) whether there was at least some minimal corroboration of the tip.

CALLING 911: The fact that the caller phoned 911 (as opposed to a non-emergency number) is an indication that he is reliable because most people know that 911 calls are recorded,⁴⁷ and that the callers' phone numbers (and maybe their addresses) are automatically transmitted to the operators.⁴⁸ Thus, the Ninth Circuit said that "merely calling 911 and having a recorded telephone conversation risks the possibility that police could trace the call or identify the caller by his voice."⁴⁹

For example, in *U.S. v. Copening* the court ruled that a 911 caller was sufficiently reliable to justify a car stop because, "though the caller declined to provide his name, he called 911 from an unblocked telephone number. The caller should have expected that 911 dispatch tracks incoming calls and that the originating phone number could be used to investigate the caller's identity."⁵⁰

FURNISHING DETAILS: Another indication of a caller's reliability is that he provided the 911 operator with detailed information, especially specifics about what he saw or heard.⁵¹ Although it is, of course, possible that these details are bogus, it happens so rarely that the courts consider specificity a relevant circumstance. As the court pointed out in *United States v. Wheat*, there is only a "slight" risk that the caller's report "could be a complete work of fiction, created by some malicious prankster to cause trouble for another motorist."⁵²

⁴⁴ See *People v. Dolly* (2007) 40 Cal.4th 458, 464 ["residents, also fearful of the consequences, may not always wish to identify themselves"]; *U.S. v. Holloway* (11th Cir. 2002) 290 F.3d 1331, 1339 ["[S]ome callers, particularly neighbors, may be understandably reticent to give identifying information for fear of retaliation or danger. Thus, the fact that a 911 caller chooses to remain anonymous may have little bearing on the veracity of the caller."].

⁴⁵ *Florida v. J.L.* (2000) 529 U.S. 266, 270. ALSO SEE *Illinois v. Gates* (1983) 462 U.S. 213, 227 ["[T]he veracity of persons supplying anonymous tips is by hypothesis largely unknown, and unknowable."].

⁴⁶ (2000) 86 Cal.App.4th 52, 59. ALSO SEE *Florida v. J.L.* (2000) 529 U.S. 266, 275 (conc. opn. of Kennedy, J.) [while a call "might be anonymous in some sense," it may have "certain other features" that may provide sufficient reliability for a detention].

⁴⁷ See *People v. Dolly* (2007) 40 Cal.4th 458, 471 ["The call was recorded, eliminating the possibility of after-the-fact police fabrication and allowing after-the-fact review (albeit limited) of the caller's sincerity."].

⁴⁸ See *People v. Lindsey* (2007) 148 Cal.App.4th 1390, 1398 ["It is unlikely that a caller would phone in a 'hoax' when police can travel to the person's home after receiving only a [911] hang-up call."]; *People v. Dolly* (2007) 40 Cal.4th 458, 467 [a 911 caller "risks the possibility that the police could trace the call or identify the caller by his voice."]; *Wisconsin v. Williams* (Wisc. 2001) 623 N.W.2d 106, 115 ["The recording [of 911 calls] adds to the reliability of the tip in a number of ways."].

⁴⁹ *U.S. v. Terry-Crespo* (9th Cir. 2004) 356 F.3d 1170, 1176.

⁵⁰ (10th Cir. 2007) 506 F.3d 1241, 1247.

⁵¹ See *People v. Dolly* (2007) 40 Cal.4th 458, 467 [the caller provided "an accurate and complete description of the perpetrator and his location"]; *U.S. v. Wheat* (8th Cir. 2001) 278 F.3d 722, 732 ["[T]he caller identified the color and make of the vehicle, named the first three letters of its license plate, and gave its location and direction."]; *Lowry v. Gutierrez* (2005) 129 Cal.App.4th 926, 939 [a tip's reliability "depends on its detail"]; *U.S. v. Copening* (10th Cir. 2007) 506 F.3d 1241, 1247 ["[T]he caller's detailed description of the QuikTrip events and the individuals involved, as well as their vehicle and its tag number, further bolstered the tip's reliability."].

⁵² (8th Cir. 2001) 278 F.3d 722, 735. ALSO SEE *People v. Wells* (2006) 38 Cal.4th 1078, 1084.

(In addition to furnishing details about the crime and where it occurred, the caller must have furnished a sufficiently detailed description of the perpetrator or his vehicle so that officers could be reasonably certain they were detaining the right person.⁵³)

GIVING HIS WHEREABOUTS: It is relevant that the caller told the operator where he was presently located, or that he furnished information from which his whereabouts might have been determined.⁵⁴

DEMEANOR: Although the caller's demeanor is highly subjective, it is a valid consideration because emergency operators, as a result of their training and experience, are especially able to detect dissembling and deception.⁵⁵ Similarly, if the caller was reporting an emergency, it would be relevant that he sounded excited.⁵⁶

MULTIPLE CALLS: It is relevant that the caller made subsequent calls to provide officers with additional information,⁵⁷ or that other callers reported the same or similar information. Also see "Untested police informants" (Multiple independent tips), below.

CORROBORATION: A caller would probably be deemed sufficiently reliable if the responding officers, upon their arrival, saw or heard something that was consistent with the caller's tip.⁵⁸ Also see "Untested police informants" (Corroboration), below.

NEED FOR IMMEDIATE ACTION: Technically, the seriousness of the crime has no bearing on the caller's reliability. But if reliability is a close question, the courts are apt to uphold a detention if the crime posed an imminent threat to a person or property, such as DUI or brandishing.⁵⁹ Thus, in *People v. Wells* the California Supreme Court observed, "[A] citizen's tip may itself create a reasonable suspicion sufficient to justify a temporary vehicle stop or detention, especially if the circumstances are deemed exigent by reason of possible reckless driving or similar threats to public safety."⁶⁰

Transmitting reliability information to officers

If the responding officers locate a suspect, the question arises: Can they stop him if they saw nothing that gave them independent grounds for a detention? In other words, can they detain him based solely on information from the caller?

Although this is a developing area of the law, it appears they may if either of the following occurred: (1) the operator had informed the officers of the relevant circumstances (discussed above) and they determined that this information was sufficient, or (2) the operator notified the officers by radio code or other means that the operator had determined that the caller satisfied the reliability requirements.

⁵³ See *Lowry v. Gutierrez* (2005) 129 Cal.App.4th 926, 938 ["the report must contain a sufficient quantity of information to allow the responding officer to be certain she is stopping the 'right' suspect"]; *U.S. v. Copening* (10th Cir. 2007) 506 F.3d 1241, 1247 ["[T]he detailed nature of the tip significantly circumscribed the number of people police could have stopped in reliance on it."].

⁵⁴ See *People v. Pinckny* (2001) 729 N.Y.S.2d 830, 835 ["[T]he present caller's connection to an apartment on a specific floor at a specific address still made the caller potentially identifiable which provides greater accountability than a mere anonymous informant who had no fear of ever being identified or located."].

⁵⁵ *People v. Dolly* (2007) 40 Cal.4th 458, 467, fn.2.

⁵⁶ See *U.S. v. Terry-Crespo* (9th Cir. 2004) 356 F.3d 1170, 1176 [the caller was "laboring under the stress of recent excitement"]; *U.S. v. Joy* (7th Cir. 1999) 192 F.3d 761, 766 ["[A] person is unlikely to fabricate lies (which presumably takes some deliberate reflection) while his mind is preoccupied with the stress of an exciting event."]; *U.S. v. Nelson* (3d Cir. 2002) 284 F.3d 472.

⁵⁷ See *People v. Dolly* (2007) 40 Cal.4th 458, 468 ["The tip's reliability was further enhanced by the tipster-victim's second call to 911"].

⁵⁸ See *U.S. v. Elmore* (2nd Cir. 2007) 482 F.3d 172, 181 [a "lesser degree of corroboration" may suffice when the caller is not "completely anonymous"].

⁵⁹ See *Florida v. J.L.* (2000) 529 U.S. 266, 273-4 ["We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk."]; *U.S. v. Nelson* (3d Cir. 2002) 284 F.3d 472, 483 ["[I]n determining whether there is reasonable suspicion, [the courts] may take into account reports of an active threat, including the presence and use of dangerous weapons."]; *People v. Profit* (1986) 183 Cal.App.3d 849, 883 ["Nor can we ignore the seriousness of the offense involved, which is a highly determinative factor in any evaluation of police conduct."]; *U.S. v. Holloway* (11th Cir. 2002) 290 F.3d 1331, 1339 ["[W]hen an emergency is reported by an anonymous caller, the need for immediate action may outweigh the need to verify the reliability of the caller."]; *U.S. v. Wheat* (8th Cir. 2001) 278 F.3d 722, 732, fn.8 ["The rationale for allowing less rigorous corroboration of tips alleging erratic driving is that the imminent danger present in this context is substantially greater (and more difficult to thwart by less intrusive means) than the danger posted by a person in possession of a concealed handgun."].

⁶⁰ (2006) 38 Cal.4th 1078, 1083.

The first option might be impractical because it would probably take too much time. While the second option is better, it appears that it can be utilized only if the operator had received training in making Fourth Amendment reliability determinations.⁶¹ For example, in *U.S. v. Colon*⁶² the court ruled that a 911 operator's knowledge that a caller appeared to be reliable could not be imputed to the responding officers because, said the court, "the record here contains no evidence of whether or how 911 operator training is directed in any way to developing that ability, and thus contains nothing from which to conclude that the operator taking the call was capable of determining whether reasonable suspicion for the stop and frisk existed."

TESTED INFORMANTS

Most of the information that officers use to establish probable cause and reasonable suspicion comes from police informants. In fact, the U.S. Court of Appeals has pointed out that "[w]ithout informants, law enforcement authorities would be unable to penetrate and destroy organized crime syndicates, drug trafficking cartels, bank frauds, telephone solicitation scams, public corruption, terrorist gangs, money launderers, espionage rings, and the likes."⁶³

The problem is that informants tend to be shifty, which is one reason they are called snitches, stoolies, scumbags, and much worse.⁶⁴ As the U.S. Supreme Court observed, "The use of informers, accessories, accomplices, false friends, or any of the other be-

trayals which are 'dirty business' may raise serious questions of credibility."⁶⁵ Or, as the Ninth Circuit summed it up, "By definition, criminal informants are cut from untrustworthy cloth."⁶⁶

Consequently, information from informants is deemed "suspect on its face,"⁶⁷ which means it cannot be considered in determining the existence of probable cause unless officers can, (1) prove there is reason to believe it is accurate (which is discussed below in the section on untested informants), or (2) prove that the informant has a good history or "track record" for providing accurate information to officers. Informants who fall into this category are known as "tested informants," "confidential reliable informants," or just "CRIs"; and they will be considered reliable if their information was based on their personal knowledge. "If the informant has provided accurate information on past occasions," said the Court of Appeal, "he may be presumed trustworthy on subsequent occasions."⁶⁹

The question, then, is how can officers prove that an informant is "tested?" Before getting into the specifics, we should point out that, like proving a person qualifies as a citizen informant, the courts require facts—not opinions or conclusions. For example, an informant does not become "tested" merely because an officer said he was "credible" or "trustworthy." In fact, judges may assume that officers who resort to baseless conclusions do not understand the fundamentals of probable cause. This occurred in a search warrant case in which the

⁶¹ See *Lowry v. Gutierrez* (2005) 129 Cal.App.4th 926, 941 [court notes the importance of "training patrol officers, 911 operators and police dispatchers"]; *U.S. v. Cutchin* (D.C. Cir. 1992) 956 F.2d 1216, 1217 [if the 911 caller appears to be reliable, "a dispatcher may alert other officers by radio, who may then rely on the report, even though they cannot vouch for it."]. **NOTE:** Because the operator may be required to testify at a suppression hearing, he or she should write a brief report explaining the basis for his determination.

⁶² (2d Cir. 2001) 250 F.3d 130, 138.

⁶³ *U.S. v. Bernal-Obeso* (9th Cir. 1993) 989 F.3d 331, 335.

⁶⁴ See *People v. Schulle* (1975) 51 Cal.App.3d 809, 814-5 ["[E]xperienced stool pigeons or persons criminally involved or disposed are not regarded as citizen-informants because they are generally motivated by something other than good citizenship."]; *U.S. v. Brown* (1st Cir. 2007) 500 F.3d 48, 54 [use of informants "entails a risk that police action may be predicated on malicious or unfounded reports"]; *People v. Brunner* (1973) 32 Cal.App.3d 908, 913 ["It is a fact of life that the quality of veracity and honor among thieves and murderers leaves something to be desired."].

⁶⁵ *On Lee v. United States* (1952) 343 U.S. 747, 757.

⁶⁶ *U.S. v. Bernal-Obeso* (9th Cir. 1993) 989 F.2d 331, 333. Edited.

⁶⁷ See *People v. Lopez* (1985) 173 Cal.App.3d 125, 134.

⁶⁸ See *Adams v. Williams* (1972) 407 U.S. 143 ["[W]e believe [the officer] acted justifiably in responding to his informant's tip. The informant was known to him personally and had provided him with information in the past."]; *People v. Love* (1970) 8 Cal.App.3d 23, 27 ["Probable cause for an arrest may consist of information obtained from an undisclosed informer of known reliability."]; *U.S. v. Elmore* (2nd Cir. 2007) 482 F.3d 172, 181 ["Where the informant is known from past practice to be reliable, no corroboration will be required to support reasonable suspicion."].

⁶⁹ *People v. Terrones* (1989) 212 Cal.App.3d 139, 146.

Court of Appeal commented that “[t]he entire affidavit is infected [with conclusions] beginning with its bald description of the informant as a ‘confidential reliable informant.’”⁷⁰

NUMBER OF ACCURATE REPORTS: To determine whether an informant qualifies as “tested,” the first thing that judges need to know is the number or approximate number of times he furnished accurate information. For this reason, it will not suffice to say that an informant furnished information “many times” or “on numerous occasions” because judges have no way of knowing what these terms mean.⁷¹

There is, however, no minimum number. In fact, a court could find that an informant is tested if he had provided accurate information just once, and had never furnished false information. As the court explained in *People v. Gray*:

Just where along the line an untested informant becomes a reliable one is not subject to rigid standards and given numbers. While one past incident showing reliability is not sufficient to *compel* a magistrate to accept the reported observations of an informant as true, he does not abuse his discretion if he arrives at that conclusion.⁷²

WHY ACCURATE: Officers must also explain how they determined that the information provided by the informant in the past was accurate. Here, too, the courts need specifics. For example, in *Rodriguez v. Superior Court* an officer claimed that his informant was reliable because his tips had been “corroborated with various sources and that information has been found to be factual.” This explanation was inadequate, said the court, because “[t]here is

nothing to indicate how the information was corroborated nor how it was shown to be factual; no reference is made to previous search warrants issued on the basis of information supplied by the informant, evidence seized pursuant to those warrants, or arrests and convictions resulting from those seizures.”⁷³

Similarly, officers cannot establish an informant’s track record by saying that his tips led to “ongoing investigations,” police surveillance, or some other ambiguous achievement. Claims such as these are insufficient because they do not logically lead to the conclusion that the accuracy of the information had been verified. For the same reason, the fact that the informant made a successful controlled buy from a suspect will not establish his reliability unless the informant was the person who furnished the tip that the suspect was selling drugs.⁷⁴

One circumstance that strongly indicates an informant’s tip had been proven reliable is that it led to one or more convictions. But convictions are not required. As the California Supreme Court pointed out, “It is sufficient that the prior information was accurate or was of such substance as to cause a reasonable person to conclude that it is reliable.”⁷⁵ Thus, an informant’s reliability may also be established if it resulted in one or more holding orders, indictments, arrests, or productive search warrants.⁷⁶

For example, in *People v. Mayer* the court ruled that an informant was tested because he had “given information to the affiant in excess of ten times over the last two years resulting in the issuance of search warrants, the seizure of controlled substances and the arrest of numerous suspects.”⁷⁷

⁷⁰ *People v. Superior Court (McCaffery)* (1979) 94 Cal.App.3d 367, 374. Edited.

⁷¹ See *Rodriguez v. Superior Court* (1988) 199 Cal.App.3d 1453, 1464 [“[T]he affiant vaguely refers to ‘numerous occasions’ on which the informant has provided [information].”].

⁷² (1976) 63 Cal.App.3d 282, 288. Quote edited. Emphasis added.

⁷³ (1988) 199 Cal.App.3d 1453, 1464. ALSO SEE *People v. Hansborough* (1988) 199 Cal.App.3d 579, 584 [“It would have been the better practice for the affiant to have stated the details surrounding the informant’s reliability in a more factual fashion.”].

⁷⁴ See *People v. Mason* (1982) 132 Cal.App.3d 594, 599 [“On each of those five occasions McNeil bought a controlled substance. But there is no evidence he ever provided any information to the police. Therefore, there is nothing in the affidavit to establish the reliability and credibility of McNeil as an informant.”]; *People v. Cedeno* (1963) 218 Cal.App.2d 213, 222.

⁷⁵ *People v. Dumas* (1973) 9 Cal.3d 871, 876.

⁷⁶ See *People v. Superior Court (Johnson)* (1972) 6 Cal.3d 704, 714 [“[T]he fact that he had previously given information which led to the arrest of a forgery suspect is additional justification for regarding him as a reliable informant.”]; *People v. Neusom* (1977) 76 Cal.App.3d 534, 537-8 [previous tips “had resulted in the arrest of nine persons and recovery of a large quantity of heroin and on each occasion an arrest resulted”].

⁷⁷ (1987) 188 Cal.App.3d 1101, 1117.

INCLUDING NEGATIVE INFORMATION: Officers must notify the court if, despite the informant's good track record, there was reason to believe his latest information was unreliable; e.g., he had reason to fabricate evidence against the suspect. As the California Supreme Court explained in *People v. Kurland*, "[W]hen the affiant knows or should know of specific facts which bear adversely on the informant's probable accuracy in the particular case, those facts must be disclosed."⁷⁸

Officers need not, however, disclose information that merely indicates the informant's reliability is questionable if they make it clear he is untested.⁷⁹ Quoting again from *Kurland*:

[I]n most cases, the issue of possible unreliability is adequately presented to the magistrate when the affidavit reveals that the affiant's source of information is not a citizen-informant but a garden-variety police tipster. In such circumstances, predictable details of the informer's criminal past will usually be cumulative and therefore immaterial.⁸⁰

WITHHOLDING DETAILS: Officers may, of course, withhold details that would reveal or tend to reveal the informant's identity. As the court observed in *United States v. Taylor*, "[A]n informant's reliability need not invariably be demonstrated through a detailed narration of the information previously furnished to law enforcement—for example, by listing the number or names of persons arrested or convicted as a consequence of the informant's prior assistance."⁸¹

⁷⁸ (1980) 28 Cal.3d 376, 395.

⁷⁹ See *People v. Lopez* (1985) 173 Cal.App.3d 125, 134 ["[T]he magistrate was put on notice in the statement of probable cause that the informant was in the sheriff's custody. This fact alone was sufficient to warn the magistrate that a typical citizen-informant situation was not at hand."]; *People v. Webb* (1993) 6 Cal.4th 494, 522 ["[W]e deem it unrealistic to require that a warrant affidavit include an informant's detailed drug and psychiatric history, or every past act that can be considered unlawful or dishonest."]; *People v. Mayer* (1987) 188 Cal.App.3d 1101, 1122 ["[T]he magistrate was well aware the informant was not a citizen-informant, but was instead an experienced informant motivated by something other than good citizenship."]; *People v. Gallo* (1981) 127 Cal.App.3d 828, 841 [because the informant was a "garden-variety police tipster," there was "no reasonable probability that the details of his criminal record would have [mattered]."]; *U.S. v. Stropes* (8th Cir. 2004) 387 F.3d 766, 772 [omission of untested police informant's criminal history and his previous lies to officers was not material because judges "understand that criminal suspects often have criminal records and frequently are uncooperative or untruthful before they eventually cooperate and provide truthful admissions."].

⁸⁰ (1980) 28 Cal.3d 376, 394.

⁸¹ (1st Cir. 1993) 985 F.2d 3, 5-6. ALSO SEE *Swanson v. Superior Court* (1989) 211 Cal.App.3d 594, 599 ["Even though an informant is not named, sufficient information must be given in the written affidavit to establish that the information given by the informant is reliable. This may necessitate limiting the details which might reveal identity."].

⁸² See *Illinois v. Gates* (1983) 462 U.S. 213, 235.

⁸³ See *Massachusetts v. Upton* (1984) 466 U.S. 727, 732.

⁸⁴ *Illinois v. Gates* (1983) 462 U.S. 213, 238.

⁸⁵ *U.S. v. Brown* (1st Cir. 2007) 500 F.3d 48, 55

⁸⁶ (1983) 462 U.S. 213, 244.

UNTESTED INFORMANTS

As the name implies, "untested" informants are tipsters who have no track record for providing accurate information. This may be because they had never furnished information before, or because their tips had been proven erroneous. In either case, their information is virtually worthless unless officers can prove there is sufficient reason to believe otherwise. How can they accomplish this?

In the past, it could be a formidable task because, over the years, the courts had created a "complex superstructure"⁸² of requirements which resulted in an "excessively technical dissection of informant's tips."⁸³ But that changed in 1983 when the Supreme Court in *Illinois v. Gates* dismantled this superstructure and ruled that, from now on, the reliability of information from untested informants would be based on a "practical, common-sense" analysis.⁸⁴ As the First Circuit recently observed, "[A]ll that the law requires is that, when all the pertinent considerations are weighed, the information reasonably appears to be reliable."⁸⁵

Corroboration

The most effective way of proving that information furnished by an untested informant is probably accurate is to prove that some of it is true. This is known as "corroboration" and, as the Court explained in *Gates*, it is based on a simple but logical premise: "Because an informant is right about some things, he is more probably right about other facts."⁸⁶

As we approach this subject, it will be helpful to distinguish between “guilty” and “innocent” corroborated information. “Guilty” information is information that directly links the suspect to the commission of a crime. For example, if the informant said that the suspect is selling drugs, officers could corroborate it by having the informant make a controlled buy, or by having him phone the suspect and engage him in a recorded conversation about his drug business.⁸⁷

But if officers are able to corroborate guilty information they will usually have established probable cause themselves, in which case the informant’s tip becomes irrelevant.⁸⁸

In contrast, “innocent” information is loosely defined as information pertaining to matters that are peripheral or incidental to the suspect’s actual criminal activities. Examples might include his typical preparations for committing the crime, his purchase of certain materials or substances, the kinds of weapons he uses, the names of his accomplices, and his record for committing the same or similar crimes.

It should be noted that, in the past, some courts in California and elsewhere would rule that the corroboration of “innocent” information could never establish the accuracy of an informant’s tip.⁸⁹ But in *Illinois v. Gates*, the United States Supreme Court flatly rejected this approach, pointing out that “the relevant inquiry is not whether particular conduct is ‘innocent’ or ‘guilty,’” but whether the nature of the corroborated information logically leads to the conclusion that the informant’s “guilty” information is “probably right.”⁹⁰ As the California Supreme Court explained this rule:

Such corroboration need not itself amount to reasonable cause to arrest; its only purpose is to provide the element of reliability missing when the police have had no prior experience with the informant. Accordingly, it is enough if it gives the officers reasonable grounds to believe the informant is telling the truth, for in this type of case the issue is not whether the information obtained by the officers emanated from a reliable source, but whether the officers could reasonably rely upon that information under the circumstances.⁹¹

The question, then, is what type of “innocent” information, when corroborated, tends to prove the rest of the tip is accurate? Although they frequently overlap, there are essentially three types: (1) “inside” information, (2) “predictive” information, and (3) “suspicious” information.

VERIFYING “INSIDE” INFORMATION: “Inside” information is essentially any information that would probably be possessed only by people who were privy to the suspect’s criminal activities, such as accomplices, collaborators, or trusted associates. Thus, if the informant furnished some inside information, and if officers were able to prove that some of it was accurate, they might reasonably conclude that the informant knows what he is talking about.

For example, in *Massachusetts v. Upton*⁹² an unidentified woman phoned the Yarmouth Police Department and reported the following: (1) Upton lives in a motor home at a certain location; (2) the motor home is “full of stolen stuff”; (3) the stolen property includes jewelry, silver, and gold; (4) Upton bought the stolen property from Ricky Kelleher; and (5) Upton was getting nervous because officers had just “raided” Kelleher’s motel room.

⁸⁷ See, for example, *People v. Rothen* (1988) 203 Cal.App.3d 684, 689 [“[W]e have a CI with personal knowledge of [the suspect’s] activities, and a corroborative monitored telephone conversation.”]; *People v. McFadin* (1982) 127 Cal.App.3d 751, 763, fn.3 [during monitored phone call, the suspect told the informant that he had a pound of marijuana which he would sell for \$485].

⁸⁸ See *People v. Kershaw* (1983) 147 Cal.App.3d 750, 759 [“In this situation it may be more accurate to say that the informer’s statement corroborated the police investigation rather than the other way around.”].

⁸⁹ See *People v. Lissauer* (1985) 169 Cal.App.3d 413, 422 [“Prior to passage of Proposition 8, the corroboration required to support an untested informant under California law had to relate to criminal activity. Information which merely related to the suspect generally was insufficient to supply probable cause.”].

⁹⁰ (1983) 462 U.S. 213, 239, 245, fn.13.

⁹¹ *People v. Lara* (1967) 67 Cal.2d 365, 374-5. ALSO SEE *People v. Levine* (1984) 152 Cal.App.3d 1058, 1065 [Corroboration is not limited to a given form but includes within its ambit any facts, sources, and circumstances which reasonably tend to offer independent support for information claimed to be true.”].

⁹² (1984) 466 U.S. 727. ALSO SEE *People v. Glenos* (1992) 7 Cal.App.4th 1201, 1207 [after the informant claimed that the suspect was manufacturing methamphetamine, officers learned that the suspect had purchased meth precursors under false name”].

Officers then confirmed that Upton lived in the motor home; that the caller's description of the stolen property "tallied with the items taken in recent burglaries"; and that officers had recently executed a warrant on Ricky Kelleher's motel room. Although this was all technically "innocent" information, the Supreme Court ruled this corroboration was adequate because "[t]he informant's story and the surrounding [corroborated] facts possessed an internal coherence that gave weight to the whole."

Similarly, in *People v. Lara*⁹³ LAPD officers found the body of a man named Mitchell in a ditch. His hands were tied behind his back, and he had been shot twice with a shotgun. A few hours later, officers found Mitchell's car abandoned about two miles away. There was blood on the steering column.

Two days later, an informant told investigators that, shortly before the murder, Mitchell was driving a car in which the informant and two other men, Lara and Alvarez, were passengers. About two hours after Mitchell dropped the informant off, Alvarez notified him that he and Lara had each shot Mitchell after tying him up. The coroner determined that Mitchell had been killed between the time he had dropped the informant off and the time Alvarez told the informant about the shooting.

In ruling that this corroboration was satisfactory, the California Supreme Court said, "Viewed together, these independently established facts justified the officers in placing reliance on [the informant's] information for the limited purpose [of establishing probable cause]."

Here are some other examples of "innocent" information that was deemed sufficiently corroborated:

- the informant told officers they would find stolen computer equipment inside Costello's home, that Costello had obtained the equipment while burglarizing two schools and a business which the informant identified, and that Costello broke in by using a pipe wrench. Among other things, officers confirmed that the three locations had been recently burglarized, that computer equipment had been stolen, and that a pipe wrench had been used to gain entry⁹⁴
- the informant knew where stolen oil field equipment had been stored⁹⁵
- the informant knew that the suspect was a parole violator, and that warrants for his arrest had been issued⁹⁶
- the informant "had independent information as to a crime detail not reported by the news media, i.e., that the murder victim was black"⁹⁷
- the informant said he saw "Delaware, Lackawanna and Western Railroad" bonds in the defendant's possession. Officers confirmed that 33 such bonds had been stolen two months earlier⁹⁸

Keep in mind that, while the corroboration of "inside" information is significant, the corroboration of information that is easily obtainable or commonly known proves nothing.⁹⁹ For example, an informant would not be deemed reliable merely because he knew the suspect's physical description, where he lived, where he worked, and the type of car he drove. As the court observed in *Higgason v. Superior Court*, "The courts take a dim view of the significance of such pedestrian facts."¹⁰⁰ Similarly, the United States Supreme Court explained:

⁹³ (1967) 67 Cal.2d 365.

⁹⁴ *People v. Costello* (1988) 204 Cal.App.3d 431.

⁹⁵ *People v. Superior Court (Williams)* (1978) 77 Cal.App.3d 69, 75.

⁹⁶ *U.S. v. Hauk* (10th Cir. 2005) 412 F.3d 1179, 1191.

⁹⁷ *People v. McCarter* (1981) 117 Cal.App.3d 894, 902.

⁹⁸ *People v. Dumas* (1973) 9 Cal.3d 871, 876.

⁹⁹ See *Alabama v. White* (1990) 496 U.S. 325, 332 ["Anyone could have 'predicted' [that a certain make of car would be in front of a certain building] because it was a condition presumably existing at the time of the call."]; *People v. Jordan* (2004) 121 Cal.App.4th 544, 564 [corroboration of the suspect's clothing "did not strengthen the weak inference that because the informant knew about the appearance of a person (information readily observable by the public), the informant also had knowledge of the concealed criminal activity alleged."]; *People v. Lissauer* (1985) 169 Cal.App.3d 413, 423 [the informant's information "was such as could be acquired by any casual observer"]; *U.S. v. Soto-Cervantes* (10th Cir. 1998) 138 F.3d 1319, 1323 ["The verification of facts readily observable to anyone on the street, without more, is insufficient"]; *Bailey v. Superior Court* (1992) 11 Cal.App.4th 1107, 1112 ["Independent police investigation merely confirmed that Ms. Bailey lived at the address in question."].

¹⁰⁰ (1985) 170 Cal.App.3d 929, 940.

An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity.¹⁰¹

CONFIRMING PREDICTIONS: Another indication that an informant is an insider is his ability to accurately predict where the suspect will be going or what he will be doing in connection with his criminal activities.¹⁰² "The ability to predict an individual's future actions," said the Court of Appeal, "indicates the informant has some familiarity with that individual's affairs."¹⁰³ This occurred in *Alabama v. White* in which the Supreme Court said, "What was important was the caller's ability to predict [White's] *future behavior*, because it demonstrated inside information—a special familiarity with [her] affairs."¹⁰⁴

The facts in *Gates* provide a good illustration. It started with an anonymous letter that was sent to the Police Department in Bloomingdale, Illinois. The writer claimed that Lance and Sue Gates were local drug dealers, and that they obtained their drugs in Florida. Included in the letter was a description of a typical drug run: Sue drives the family car to Florida; Lance flies. After the car is "loaded up with drugs," Lance drives it back to Bloomingdale. The informant also said that Sue would be leaving for Florida immediately, and that Lance would be flying down "in a few days." Here's what happened then:

- Two days after officers received the letter, they learned that a person identified as "L. Gates" had boarded a flight from Chicago to Florida.
- When Gates arrived in Florida, he entered a motel room registered to his wife.
- The next day, the couple drove back to Chicago in the family car.

On appeal, the United States Supreme Court ruled that this corroboration provided the officers with probable cause because, said the Court, "It is enough that there was a fair probability that the writer of the anonymous letter had obtained his entire story either from the Gates or someone they trusted. And corroboration of major portions of the letter's predictions provides just this probability."

Similarly, in *Draper v. United States*¹⁰⁵ an informant told a narcotics officer in Denver that Draper had recently moved into town, and that he was "peddling narcotics to several addicts." Three days later, the informant told the officer that Draper had just left for Chicago to buy heroin, that he had taken the train, that he would be returning by train within the next two days, and that he would be carrying a tan zipper bag. He also described the clothing Draper was wearing when he left, and he added that Draper usually "walked real fast."

Two days later, an officer in Denver noticed that a man who had arrived on the train from Chicago had "the exact physical attributes" and clothing described by the informant, that he was carrying a tan zipper bag, and he was walking "fast." So the officer arrested him and, during a search incident to the arrest, found heroin.

In ruling that the officer had probable cause, the United States Supreme Court pointed out:

[The officer] had personally verified every facet of the information given him by [the informant] except whether [Draper] had accomplished his mission and had the three ounces of heroin on his person or in his bag. And surely, with every other bit of information being thus personally verified, [the officer] had reasonable grounds to believe that the remaining unverified bit of information—that Draper would have the heroin with him—was likewise true.

¹⁰¹ *Florida v. J.L.* (2000) 529 U.S. 266, 272.

¹⁰² See *U.S. v. Hawk* (10th Cir. 2005) 412 F.3d 1179, 1189 ["Predictive information is defined broadly as knowledge that the informant could not acquire from any source but the suspect, whether directly or indirectly, providing reason to believe that the informant has 'inside' information"]; *People v. Rivera* (2007) __ Cal.App.4th __ [2007 WL 2874855] [officers confirmed that arrestee would be at certain location]; *U.S. v. Brack* (7th Cir. 1999) 188 F.3d 748, 756 [confirmed details "related to future actions of third parties," which demonstrated the likelihood that the informant obtained his information from the suspects "or from someone they trusted"]; *U.S. v. Graham* (6th Cir. 2007) 483 F.3d 431, 439.

¹⁰³ *People v. Jordan* (2004) 121 Cal.App.4th 544, 559.

¹⁰⁴ (1990) 496 U.S. 325, 332.

¹⁰⁵ (1959) 358 U.S. 307.

SUSPICIOUS ACTIVITY: Officers may also reasonably believe that an informant is reliable if they saw the suspect engage in activities that, while “innocent” on the surface, were consistent with the informant’s allegation—or at least sufficiently consistent to generate the necessary level of suspicion.¹⁰⁶ Thus, in *Gates*, the Court pointed out that the suspect’s “seemingly innocent activity became suspicious in the light of the initial tip.”¹⁰⁷

For example, in *United States v. Landis*¹⁰⁸ an untested informant told officers that Lee Clark was a physician in Chico, and that he “did not work but derived his income from selling ‘speed.’” He also said that he had seen “several strange chemicals” inside Clark’s house, and that Clark’s son had told him that his father was manufacturing methamphetamine in the basement.

Among other things, officers confirmed that Clark was a physician, but that he “apparently did not practice”; his listed place of business was his home “at which there was no visible evidence of a medical practice”; and he had recently made several phone calls to suppliers of chemicals that were “apparently unrelated to medical practice.” This corroboration, said the court, “would have been an acceptable basis for a probable cause determination.”

Similarly, in *People v. Sotelo*¹⁰⁹ an informant told officers that Vito and Esther Sotelo are selling heroin from their home in Los Angeles, that there is a lot of foot traffic in and out of the house, and that the buyers often inject heroin in an adjoining garage. Later that day, an officer checked outside the garage and found “balloon fragments, many of which were knotted in the end.” Other officers saw “numerous”

people going in and out of the house. They detained one of them, saw needle marks, and noticed that his eyes were pinpointed and that his voice was slow and slurred. Not surprisingly, the court ruled that this corroboration was sufficient.

Detailed information

Although not as formidable as corroboration, an informant’s ability to provide officers with detailed information is relevant, especially if the details pertain to the suspect’s criminal activities.¹¹⁰ The theory here, or so it appears, is that informants are seldom so imaginative and crafty that they can invent a story that is both plausible and detailed. Thus, in *People v. Kershaw*, the court pointed out:

What [the informant] supplied was more akin to a full scenario naming the cast of characters, the castle at Elsinore and the modus operandi of the crimes. This raises an inference, at least, that the [informant] was speaking from personal knowledge.¹¹¹

For example, in *People v. Rosales*¹¹² a man riding in the back of a pickup truck shot and killed a woman who was standing outside a house in South Gate. There were three other men in the truck. Officers suspected they were all members of the Elm Street Gang because the victim was the girlfriend of a rival gang member; and that, earlier that evening, the two gangs had fought. A few hours later, CHP officers spotted the truck and arrested the driver who was identified as Rodriguez.

The next day, a woman phoned the police department and said she had witnessed the shooting from inside the house. Although she refused to identify

¹⁰⁶ See *People v. Jordan* (2004) 121 Cal.App.4th 544, 558 [“Where police officers follow up an anonymous tip and observe suspicious behavior, the totality of the circumstances may generate a reasonable suspicion that justifies a [detention].”]; *People v. Costello* (1988) 204 Cal.App.3d 431, 446 [“Even observations of seemingly innocent activity suffice alone, as corroboration, if the anonymous tip casts the activity in a suspicious light.”]; *People v. Ramirez* (1996) 41 Cal.App.4th 1608, 1616 [court looks for “probative indications of criminal activity along the lines suggested by the informant”].

¹⁰⁷ (1983) 462 U.S. 213, 245, fn.13.

¹⁰⁸ (9th Cir. 1984) 726 F.2d 540.

¹⁰⁹ (1971) 18 Cal.App.3d 9.

¹¹⁰ See *Illinois v. Gates* (1983) 462 U.S. 213, 234 [“An informant’s explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand, entitles his tip to greater weight than might otherwise be the case.”]; *U.S. v. Brown* (1st Cir. 2007) 500 F.3d 48, 55 [“[A] tip that describes the criminal activity in detail is more likely to be reliable.”]; *People v. Rivera* (2007) 156 Cal.App.4th 60, 66 [“Some information is so detailed as to be self-verifying.”]; *U.S. v. Barnard* (1st Cir. 2002) 299 F.3d 90, 93 [“The credibility of a informant is enhanced to the extent he has provided information that indicates first-hand knowledge.”]; *U.S. v. Hauk* (10th Cir. 2005) 412 F.3d 1179, 1191 [“[T]he information is highly detailed, reporting the presence of drugs ‘in the ceiling, hall closet by the bedroom, night stand next to the bed’”].

¹¹¹ (1983) 147 Cal.App.3d 750, 758.

¹¹² (1987) 192 Cal.App.3d 759.

herself, she provided several details, including the following: The men in the truck were members of the Elm Street Gang; the shooter was known as “Big Tudy”; two of the others were Rodriguez (the man who had been arrested) and Mayfield; Big Tudy lives on Iowa Street, and he is getting ready to flee to Texas.

Officers knew that Rosales was known as Big Tudy, that he was a member of the Elm Street Gang, and that he had fled to Texas several years ago when he was wanted for robbery. So they arrested him, took his fingerprints, and matched them with some latent prints found in the truck.

Rosales contended that his booking fingerprints should have been suppressed because the officers lacked probable cause to arrest him, but the court disagreed, saying:

[T]he anonymous telephone caller possessed a wealth of specific information about the shooting. She knew the identity of the respective gangs involved and of their enmity, how the shooting occurred, and when it occurred; she recognized the shooter (Rosales) and one of his accomplices (Mayfield); she knew that each was a member of the Elm Street gang; and she knew where Rosales lived. Finally, she knew that Rosales was planning to flee to Texas.

Other circumstantial evidence of reliability

MULTIPLE INDEPENDENT TIPS: If a second untested informant furnished the same information, officers

may reasonably believe that both of them are reliable if it appeared the informants obtained their information independently.¹¹³ Thus, in *United States v. Nielsen* the court noted that “the veracity of [the informants] is buttressed by the similarity of their accounts.”¹¹⁴

UNWITTING INFORMANTS: Information obtained from a person who did not know he was talking to an undercover officer may be deemed reliable if it was apparently based on his personal knowledge, and there was no reason to believe it was false.¹¹⁵

STATEMENTS AGAINST PENAL INTEREST: Information from an informant that implicates the suspect in a crime may be deemed reliable if, (1) the information also implicated the informant, and (2) the informant knew he was making the statement to an officer or to someone who might disclose the information to officers.¹¹⁶ But an informant’s statement is not “against penal interest” if it places major responsibility for the crime on others.¹¹⁷

SWORN TESTIMONY BY INFORMANT: Finally, if officers are seeking a search warrant, the accuracy of the informant’s tip may be established, or at least bolstered, by having the informant appear before the issuing judge in chambers, swear to the truthfulness of his information, and submit to questioning by the judge, prosecutor, or investigating officer.¹¹⁸ The theory here is that because judges routinely determine the credibility of witnesses in court, they may do the same with informants in chambers. POV

¹¹³ See *People v. Balassy* (1973) 30 Cal.App.3d 614, 621 [“[O]ne ‘unreliable’ informer’s statements may be corroborated by those of another, if they were interviewed independently, at a different time and place.”]; *People v. Terrones* (1989) 212 Cal.App.3d 139, 147; *People v. Coulombe* (2000) 86 Cal.App.4th 52, 58 [“Here we have not one, but two independent tips.”]; *U.S. v. Landis* (9th Cir. 1984) 726 F.2d 540, 543 [“Interlocking tips from different confidential informants enhance the credibility of each.”]; *People v. Hirsch* (1977) 71 Cal.App.3d 987, 991, fn.1 [“The totality of information coming from a number of independent sources, may be sufficient even though no single item meets the test of reliability. If the smoke is heavy enough, the deduction of a fire becomes reasonable.”].

¹¹⁴ (9th Cir. 2004) 371 F.3d 574, 580.

¹¹⁵ See *People v. Aho* (1985) 166 Cal.App.3d 984, 991 [“These statements by Russell must be presumed reliable since they were unwittingly made to an undercover police officer.”]; *People v. Hutchins* (1979) 100 Cal.App.3d 406, 412 [“Wynn supplied the information to Deputy Carpenter believing him to be a narcotic trafficker.”]; *People v. Fleming* (1981) 29 Cal.3d 698, 708.

¹¹⁶ See *United States v. Harris* (1971) 403 U.S. 573, 583; Evid. Code § 1230; *People v. Christopher R.* (1989) 216 Cal.App.3d 901, 904; *People v. Cooks* (1983) 141 Cal.App.3d 224, 295; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 335.

¹¹⁷ See *People v. Campa* (1984) 36 Cal.3d 870, 882; *People v. Larry C.* (1982) 134 Cal.App.3d 62, 69; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 327-342 [“Clearly the least reliable circumstance [in determining whether a statement was ‘against penal interest’] is one in which the declarant has been arrested and attempts to improve his situation with the police by deflecting criminal responsibility onto others.”].

¹¹⁸ See Pen. Code §§ 1526(a), 1526(b)(1), 1528(a), 1529, 1534, 1537; *Skelton v. Superior Court* (1969) 1 Cal.3d 144, 153; *People v. Goldberg* (1984) 161 Cal.App.3d 170, 183; *People v. Peck* (1974) 38 Cal.App.3d 993, 999; *People v. Campa* (1984) 36 Cal.3d 870, 884; *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 526 [one advantage of having a judge hear the witness’s own words is that the judge will hear “all the inflections, intonations and pauses that add meaning to bare words.”].

Recent Cases

U.S. v. Mowatt

(4th Cir. 2008) 513 F.3d 395

ISSUE

Did exigent circumstances justify a warrantless entry into the defendant's apartment?

FACTS

At about 9 P.M., a security guard in an apartment building in Maryland notified the police that he could smell the odor of marijuana coming from a certain apartment. He also said the occupants of the apartment were causing a disturbance by playing loud music. Three officers were dispatched to the call.

When they knocked on the door, no one responded. So they "pounded" on it, at which point they heard someone moving around inside, then the sound of an aerosol can discharging, and then a man inside asking, "Who's there?" An officer responded, "It's the police. Open the door. We need to investigate something." The man, later identified as Mowatt, initially refused to open the door. But when the officers "became demanding" and ordered him to do so, he opened it a few inches.

As the officers were speaking with Mowatt, it appeared to them that he was holding something behind his back. So they ordered him several times to show his hands, but he refused and insisted that the officers leave because they didn't have a warrant. One of the officers then grabbed Mowatt's shoulder, which prompted Mowatt to "smack" the officer's hand. The officers then forced their way inside and wrestled him to the floor.

It turned out that Mowatt was not holding anything behind his back. Nevertheless, two of the officers conducted a protective sweep of the premises, during which they saw a revolver on the bedroom floor. Just then, Mowatt started wrestling with the officer who was guarding him; and during the struggle, the door to the refrigerator swung open, revealing a baggie containing several hundred "ecstasy" pills.

After subduing Mowatt, the officers obtained a warrant to search the apartment. During the search they recovered the pills plus two semiautomatic assault rifles, a body armor vest, and almost \$20,000 in cash. As a result, Mowatt was indicted on charges of possessing ecstasy with intent to distribute, being a felon in possession of a firearm, possession of a firearm in connection with drug trafficking, and being a violent felon in possession of body armor.

In the trial court, Mowatt filed a motion to suppress the evidence, contending that the warrantless entry was unlawful. But the court disagreed, ruling it was justified because of the likelihood that the marijuana would be destroyed if the officers had left to obtain a warrant. Consequently, prosecutors were permitted to introduce the evidence at Mowatt's trial, and he was found guilty on all counts.

DISCUSSION

The first issue on appeal was whether the officers' act of commanding Mowatt to open the door constituted a "search" under the Fourth Amendment. The issue was quickly decided based on the general rule that a search occurs if, (1) officers commanded an occupant of a residence to open the door, (2) the occupant complied with the command, and (3) the occupant's act of opening the door permitted the officers to see inside the residence. As the court explained, a search occurs "when officers gain visual or physical access to a room after an occupant opens the door not voluntarily, but in response to a demand under color of authority."¹

The question, then, was whether there were sufficient grounds for the search. Prosecutors argued it was because the officers reasonably believed that an immediate entry was necessary to prevent the occupants from destroying the marijuana. There is, in fact, a "destruction of evidence" exception to the warrant requirement by which officers may enter a residence without a warrant if both of the following circumstances existed:

¹ Quoting *U.S. v. Connor* (8th Cir. 1997) 127 F.3d 663, 666. ALSO SEE *U.S. v. Winsor* (9th Cir. 1988) 846 F.2d 1569, 1573 ["[W]e hold that the police did effect a 'search' when they gained visual entry into the room through the door that was opened at their command."].

(1) **Probable cause:** Officers must have had probable cause to believe there was destructible evidence on the premises.

(2) **Imminent destruction:** They must have reasonably believed that the evidence would have been destroyed if they left to obtain a warrant.²

In *Mowatt*, the probable cause requirement was easily satisfied because of the odor of marijuana. As for the second requirement, it appeared at first glance that it, too, was satisfied because the officers could have reasonably believed that Mowatt would have destroyed the marijuana if, after ordering him to open the door, they had left to seek a warrant.

But there is another rule—the “manufactured” exigency doctrine—which says that officers are not permitted to invoke the “destruction of evidence” exception if both of the following circumstances existed: (1) the danger of destruction was created by the officers’ actions, and (2) the officers had no immediate need to take those actions. As the court recently observed in *U.S. v. Collins*, “Many cases say that law-enforcement officers cannot be allowed to manufacture an emergency and then use the emergency to justify dispensing with the procedures ordinarily required to search a home.”³

Applying this rule to the facts, the court concluded that the threat to the marijuana fell into the category of a manufactured exigency because the officers “were aware of the marijuana in the apartment before they decided to alert Mowatt of their presence”; and because, by not seeking a warrant, they created the “wholly foreseeable risk” that the occupants, upon being notified of the officers’ presence, would seek to destroy the evidence.”

Consequently, the court ruled the evidence should have been suppressed because, “Having created the ‘exigency’ themselves, for no apparent reason, the officers were foreclosed from relying on it to dispense with the warrant requirement.”

COMMENT

The “destruction of evidence” exigent circumstance was also the subject of a recent case decided by the California Court of Appeal. In *People v. Hua*⁴ the court ruled that, in determining whether an entry was

necessary to prevent destruction, officers and judges must consider the gravity of the crime. In *Hua*, the evidence was drugs—but it was marijuana, and it was straight possession of less than 28.5 grams. Possession of such a small quantity, said the court, does not justify the serious intrusion that results from a warrantless entry into a residence.

U.S. v. Snipe

(9th Cir. 2008) __ F.3d __ [2008 WL 216996]

ISSUE

Did exigent circumstances justify a warrantless entry into the defendant’s home?

FACTS

At about 5 A.M., an “hysterical” man phoned the Fort Hall Police Department in Idaho on a non-emergency line and screamed, “*Get the cops here now!*” After the man gave his address, the phone line was disconnected.

As the two responding officers walked up to the house, they saw that the lights were on, and that the front door was ajar. When one of them knocked on the door, it opened wider, so they entered. The first thing they saw was several people sitting around a table in the kitchen; and all of them “reacted with surprise,” probably because the table was covered with drugs.

Although the officers saw the drugs, they did not let on. Instead, they told the people about the frantic phone call and, after determining that no one needed help, they went back to the office and sought a search warrant. The search netted a firearm, in addition to the drugs. Snipe was charged with possession of a firearm with an obliterated serial number.

In the trial court, he filed a motion to suppress the evidence, claiming the officers had insufficient reason to believe that an immediate entry was necessary. When the court denied the motion, he pled guilty.

DISCUSSION

By way of background, there are three types of exigent circumstances: (1) emergency aid, (2) investigative emergencies (discussed earlier in *Mowatt*),

² See *Illinois v. McArthur* (2001) 531 U.S. 326, 332; *Richards v. Wisconsin* (1997) 520 U.S. 385, 391.

³ (7th Cir. 2007) 510 F.3d 697. Citations omitted.

⁴ (2008) 157 Cal.App.4th 1027.

and (3) community caretaking. While they all have certain requirements, an entry to render emergency aid or otherwise protect a person or property is so obviously justified that a warrantless entry will be permitted if the following circumstances existed:

- (1) **Need vs. intrusiveness:** The need for the entry must have outweighed its intrusiveness.⁵
- (2) **Motivation:** If the degree of proof that an emergency exists was less than probable cause, an entry is permitted only if the officers' primary motivation for entering was to prevent or minimize the harm, not to obtain evidence.⁶
- (3) **Actions necessary:** The officers' entry and their actions inside the residence must have been reasonably necessary.⁷

In *Snipe*, the defendant challenged the first requirement, claiming there was insufficient proof that an emergency existed because, (1) the caller had not identified himself before the line was disconnected; and (2) the officers saw nothing before entering the house that tended to confirm there was, in fact, an emergency.

Although the caller had not identified himself, the court refused to rule that there must be some verification or corroboration before officers may enter a residence in response to an emergency aid call that otherwise appears to be reliable. Such a requirement, said the court, "would dramatically slow emergency response time." Instead, the court ruled that officers may enter if they reasonably believed that an emergency existed. And here they did because, (1) the operator had told them that the caller was "hysterical" and that he said he needed help immediately; (2) the door to the house was ajar; and (3) although it was 5 A.M., the lights in the house were on.

It was, of course, possible that the call was a hoax and that the caller's hysteria was feigned. But the court ruled that officers cannot be expected to determine whether a caller's apparent mental state was simulated or authentic. Said the court, "We will not

impose a duty of inquiry on the police to separate a true cry for help from a less deserving call for attention because the delay may cost lives that could have been saved by an immediate police response."

People v. Jefferson

(2008) 158 Cal.App.4th 830

ISSUE

Did sheriff's deputies violate *Miranda* by secretly recording a conversation between two murder suspects who had previously invoked their rights?

FACTS

At about 11 P.M., members of a Compton-area street gang were driving around in a Chevy Suburban looking to kill someone belonging to a rival gang known as Varrío Tortilla Flats. The driver was named Staten and one of the passengers was Jefferson. Their motive was retaliation. It seems that a member of their gang had been shot and killed the day before, and they figured the shooter was a V.T.F. member.

A car parked in front of a house drew their attention because it appeared that the man sitting in the driver's seat had "V.F." tattooed on his arm. In their minds, "V.F." was close enough to "V.T.F." to justify killing him. So they pulled up and fired at least 15 rounds into the car. The man, Anthony Staniforth, was killed instantly. (It turned out that Staniforth was not a gang member; the letters tattooed on his arm were "V.H.," which stood for Van Halen, his favorite band.)

No one could identify any of the occupants of the Suburban, but investigators at the scene did find a shell casing and pieces of tinted vehicle glass. The lead investigator, Sgt. John Corina of the Los Angeles County Sheriff's Department, theorized that one of the shooters must have inadvertently broken the window of the Suburban while he was firing. So, when it was confirmed that the glass had, in fact,

⁵ See *Illinois v. Lidster* (2004) 540 U.S. 419, 426 ["in judging reasonableness, we look to the gravity of the public concerns"].

⁶ See *Indianapolis v. Edmond* (2000) 531 U.S. 32, 45-6 ["while subjective intentions play no role in ordinary probable-cause Fourth Amendment analysis, programmatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion."]; *Brigham City v. Stuart* (2006) 547 U.S. 398, ___ [because the officers had probable cause to believe an emergency existed, it did not matter "whether the officers entered the kitchen to arrest respondents and gather evidence against them or to assist the injured and prevent further violence."].

⁷ See *Mincey v. Arizona* (1978) 437 U.S. 385, 393 [the search "must be strictly circumscribed by the exigencies which justify its initiation."].

come from a Suburban, he started looking around for one with a broken tinted window. A day or so later he found it parked on a street, so he had it impounded. During an inventory search, officers found three shell casings which matched a casing found at the crime scene. They did not, however, find any latent prints.

A day or two later, deputies arrested the registered owner, Staten. They also arrested Jefferson, but it's not clear how they linked him to the crime.

The two suspects were interviewed separately. Before *Mirandizing* them, Corina and his partner informed them that they had figured out the motive for the murder. They also told them about all the incriminating evidence they had uncovered—much of which did not exist. For example, they told Jefferson that they had found his fingerprints in the Suburban and on some shell casings inside it. They also implied that at least one of the other passengers in the Suburban was snitching. Nevertheless, both suspects invoked, so the deputies reverted to Plan B.

They put Staten and Jefferson in a bugged cell and let them sit together for awhile. As the investigators had hoped, the men immediately started talking about the shooting. For over an hour they discussed various details and expressed amazement that the deputies could have amassed so much evidence so quickly. They also decided that, in order to avoid snitching problems in the future, they would commit their crimes only with selected gang members. Here are some edited excerpts:

Staten: That's fuckin scandalous man. I wasn't expecting these motherfuckers to put the smash down that quick. I'm not ever fittin to do no shit like that again, and when I do you can believe me I'm only going with one or two motherfuckers. Now all of a sudden they know everything, because of ballistics they know that was the truck used.

Jefferson: You should have left that motherfucker parked and got the window fixed.

Jefferson also talked about how he had hidden the "hot K's" (stolen AK-47s) at "Rick's house," and he assured Staten that he had gotten rid of all the bullets

from the shooting. Staten responded that he was sure the deputies were lying about finding fingerprints in the Suburban because they had both worn gloves. He also said he figured the deputies were lying when they said that Staniforth was not a gangster. "[T]hey trying to say he didn't bang," said Staten, "but I know. I've seen tattoos on this motherfucker."

Prosecutors played a recording of the conversation to the jury which found both men guilty of murder.

DISCUSSION

Jefferson and Staten contended that the recording should have been suppressed because it was obtained after they had invoked their *Miranda* rights. The court disagreed.

Officers may not, of course, interrogate a suspect in custody who has invoked. Furthermore, the term "interrogate," as used in *Miranda*, is defined broadly to include any words or actions that are reasonably likely to elicit an incriminating response.⁸ The purpose of this broad definition is to prevent officers from circumventing *Miranda* by devising "methods of indirect questioning."⁹

Citing these principles, Jefferson and Staten argued that the deputies' act of putting them together in a bugged cell after they had invoked constituted interrogation because the deputies knew that an incriminating response was reasonably likely.

Although the deputies certainly hoped and maybe even expected that Jefferson and Staten would say something incriminating, the court noted that the United States Supreme Court has ruled that the various restrictions imposed by *Miranda* do not apply if the person asking the questions was an undercover officer or a police agent. This rule, which is sometimes called the "undercover agent exception," is based on the Court's determination that these types of conversations do not generate the type of coercion that *Miranda* was designed to alleviate. As the Court explained in *Illinois v. Perkins*, "When a suspect considers himself in the company of cellmates and not officers, the coercive atmosphere is lacking."¹⁰

⁸ See *Rhode Island v. Innis* (1980) 446 U.S. 291, 301 ["the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response."].

⁹ See *Rhode Island v. Innis* (1980) 446 U.S. 291, 299, fn.3 ["To limit the ambit of *Miranda* to express questioning would place a premium on the ingenuity of the police to devise methods of indirect interrogation"].

¹⁰ (1990) 496 U.S. 292, 297.

Although the undercover agent exception is usually applied when the person asking the questions was an undercover officer or a police agent, the court in *Jefferson* ruled that it applies equally—and maybe even more so—when the conversation is between two friends. As the court pointed out:

Jefferson and Staten were more than just fellow cellmates. They were friends and neighbors. They spoke freely—too freely, they now realize. From their perspective, the problem was the opposite of compulsion. They were candid because they thought no one else was listening, not because they were getting the third degree.

Consequently, the court ruled that the recording was properly received in evidence.

COMMENT

In another recent case, *Saleh v. Fleming*,¹¹ a murder suspect who had earlier invoked his *Miranda* right to counsel, phoned the investigating officer from jail and, in the course of the conversation, made some incriminating statements. On appeal, the Ninth Circuit ruled that a telephone conversation between an officer and a suspect who has invoked did not violate *Miranda* because, as in *Jefferson*, the situation was not inherently coercive. As the court pointed out, “[I]t is undisputed that Saleh could have terminated the phone call he had begun at any time.”

U.S. v. Colonna

(4th Cir. 2007) 511 F.3d 431

ISSUE

Was Colonna “in custody” for *Miranda* purposes when FBI agents questioned him outside his home?

FACTS

An FBI agent accessed an internet server containing child pornography. After determining that the server was inside Colonna’s home in Virginia, agents obtained a warrant to search the premises.

A total of 23 agents executed the warrant at 6:30 A.M.¹² Upon entering, they awakened Colonna’s parents who informed them that Colonna was asleep in

the third floor attic. With guns drawn, agents went to the attic, kicked open the door, and ordered Colonna to dress and accompany them to the living room where Colonna’s parents and younger sister were being detained. At about this time, Colonna’s mother started to light a cigarette, but an agent told her that she could not smoke inside the house. So she went outside, and the rest of the family went with her.

While the search was underway, Colonna agreed to speak with two agents. The interview occurred inside an FBI vehicle parked behind the house. Although the agents did not seek a *Miranda* waiver, they told Colonna that he was not under arrest. In the course of the interview, which lasted about three hours, Colonna made some incriminating statements.

Meanwhile, agents who were searching one of his computers found that it contained pornographic videos of young girls. As a result, Colonna was charged with transporting and possessing child pornography.

Colonna filed a motion to suppress his statement on grounds that he was “in custody” for *Miranda* purposes when the agents questioned him, and therefore the agents violated *Miranda* when they failed to obtain a waiver. The district court disagreed, mainly because the agent had told Colonna that he was not under arrest. Thus, Colonna’s statement was admitted into evidence at his trial, and he was convicted.

DISCUSSION

Officers must, of course, obtain a *Miranda* waiver before questioning a suspect who is “in custody.”¹³ It is also settled that a suspect who has not been formally arrested is nevertheless “in custody” if a reasonable person in his position would have believed that his freedom had been restricted to the degree associated with an actual arrest.¹⁴

One circumstance that is especially important in making this determination is the location of the interview. For example, suspects who are questioned in police stations are often “in custody” because these places are “police dominated” which, from a suspect’s standpoint, is a highly coercive circumstance.¹⁵ On the other hand, *Miranda* waivers are seldom neces-

¹¹ (9th Cir. 2008) 512 F.3d 548.

¹² **NOTE:** An agent testified that the large number of agents was necessary because “the house was of considerable size; three stories high, four bedrooms, and a large detached garage.”

¹³ See *Stansbury v. California* (1994) 511 U.S. 318, 322; *People v. Mayfield* (1997) 14 Cal.4th 668, 732.

¹⁴ See *Yarborough v. Alvarado* (2004) 541 U.S. 652, 662; *Berkemer v. McCarty* (1984) 468 U.S. 420, 442.

¹⁵ See *Miranda v. Arizona* (1966) 384 U.S. 436, 445, 456.

sary when suspects are interviewed at their homes because they are on their own “turf.”¹⁶ This is especially true if the suspect was told he was not under arrest.¹⁷ It appears these were the reasons the district judge ruled Colonna was not in custody.

But the Court of Appeals noted that, in making such a ruling, the courts must consider the totality of circumstances.¹⁸ And here, said the court, there were several that would have caused a reasonable person in Colonna’s position to believe he was under arrest.

Especially important was the manner in which the agents arrived and took control of the family home. As the court pointed out, the house was “inundated” with 23 FBI agents who awakened Colonna “at gunpoint,” told Colonna and his family where to sit, and “restricted their access to the home.” In addition, Colonna was “guarded at all times” and he was “bracketed” by two agents when he was questioned.

The court acknowledged that a “you’re not under arrest” advisory is significant, but it pointed out that these words have little meaning when, as here, there were conflicting circumstances. Said the court, “[T]here is no precedent for the contention that a law enforcement officer simply stating to a suspect that he is ‘not under arrest’ is sufficient to end the inquiry into whether the suspect was ‘in custody’ during an interrogation.”

Consequently, the court ruled that Colonna was “in custody” when he was questioned. And because he had not waived his *Miranda* rights, his statements to the agents should have been suppressed.

U.S. v. Revels

(10th Cir. 2007) 510 F.3d 1269

ISSUE

Was the defendant “in custody” for *Miranda* purposes when officers questioned her inside her home?

FACTS

At about 6 A.M., seven ATF agents and Tulsa police officers went Marco Murphy’s home to execute a warrant to search for cocaine. When no one responded to their knock and announcement, they

broke in, at which point they encountered Murphy and his friend Shequita Revels. After handcuffing both, the officers conducted the search and found cocaine, over \$6,000 in cash, and a handgun.

When the search was completed, three officers escorted Revels into a back bedroom where, after closing the door and removing her handcuffs, they asked if she “would be willing to cooperate” with their investigation. Revels responded by making “several incriminating statements.” A few minutes later, an officer entered the room “conspicuously carrying a bag of cocaine” that had been discovered during the search. When Revels saw the cocaine, she said, “Oh, my god. I didn’t know he had that much.”

Before trial, Revels filed a motion to suppress her statements on grounds that she was “in custody” when she was questioned and, therefore, the officers were required to obtain a waiver before questioning her. The court agreed, and the government appealed.

DISCUSSION

As discussed earlier in *U.S. v. Colonna*, officers must obtain a *Miranda* waiver before questioning a suspect who is “in custody.” And a suspect who has not been formally arrested is nevertheless “in custody” if a reasonable person in his position would have believed that his freedom had been restricted to the degree associated with an actual arrest.

Prosecutors argued that Revels was not “in custody” for two reasons. First, she was not under arrest when the agents questioned her; instead, she was merely being “detained.” (This argument was presumably based on the fact that Murphy—not Revels—was the primary suspect.) Second, the questioning occurred in Revel’s home, and a person’s home is an inherently noncoercive location.

The court rejected the first argument, pointing out that, although most detainees are not in custody for *Miranda* purposes, this is because the circumstances surrounding most detentions do not generate the coercive atmosphere that the *Miranda* procedure was designed to alleviate.¹⁹ Thus, the issue is not whether the encounter can be characterized as a “detention,” but whether the circumstances were coercive.

¹⁶ See *Michigan v. Summers* (1981) 452 U.S. 692, 702, fn. 15.

¹⁷ See *Oregon v. Mathiason* (1977) 429 U.S. 492, 495; *California v. Beheler* (1983) 463 U.S. 1121, 1122.

¹⁸ See *Yarborough v. Alvarado* (2004) 541 U.S. 652, 663.

¹⁹ See *Berkemer v. McCarty* (1984) 468 U.S. 420, 440.

As for the second argument, the court said that, although the interview occurred in Revels' home, her home on this particular morning hardly qualified as the "traditional comfortable environment that we normally would consider a neutral location for questioning." On the contrary, said the court, "seven police officers abruptly roused Revels and Murphy from their bedroom after forcibly entering their home. Revels was immediately detained, restrained in handcuffs, and placed face down on the floor."

Consequently, the court ruled that Revels' statements were properly suppressed.

U.S. v. Jamison

(4th Cir. 2007) 509 F.3d 623

ISSUE

Was a shooting victim "in custody" when he was questioned in an emergency room?

FACTS

Just after midnight, three police officers were talking near the entrance to the University of Maryland Hospital emergency department when a car pulled up. The driver told them that a man in the back seat had been shot, so they opened the door and encountered Jamison who said, "I've been shot, man, I've been shot." Jamison was then wheeled into the hospital where medical staff cut off his clothing and started an IV. Doctors then examined him and determined that he had been shot in the groin.

At about this time, one of the officers asked Jamison to tell him how the shooting occurred, and Jamison responded by saying that someone shot him as he was trying to buy drugs. The officer then covered Jamison's hands with bags as a preliminary step for a gunshot residue test. The officer testified that this was necessary to reduce contamination, and that it was standard procedure.

Shortly after that, a detective arrived and asked Jamison to tell him what had happened. This time, Jamison gave a somewhat different story, which caused the detective to think that Jamison was lying. So he checked the location of Jamison's entry and exit wounds, and noticed two things that indicated he was shot at close range: the bullet had a downward trajectory, and there was "charring and stippling." He also examined Jamison's clothing and was unable to find a bullet hole.

When the detective confronted Jamison with these inconsistencies, he admitted he had accidentally shot himself. Meanwhile, an officer found the gun near some vending machines. As a result, Jamison was charged with being a felon in possession of a firearm.

DISCUSSION

Jamison contended that his statements were obtained in violation of *Miranda*. Specifically, he claimed that he was "in custody" when he was questioned and, therefore, the detective violated *Miranda* when he failed to obtain a waiver. The district court judge agreed, ruling that the officers had treated Jamison's body and clothing as a "crime scene," that they effectively restricted his freedom of movement when they bagged his hands, and that they had interviewed him in a "police-dominated environment." The Fourth Circuit saw things differently.

As noted earlier, a person is "in custody" for *Miranda* purposes if a reasonable person in his position would have believed he was under arrest, or if his freedom of movement had been restricted to the degree associated with an actual arrest. Citing this "freedom of movement" language, Jamison contended that he was in custody because he had been strapped to a gurney, an IV had been attached to his arm, and he was questioned by officers who had examined his body and covered his hands with bags.

The court responded by pointing out that any restrictions on a suspect's freedom of movement are relevant only if those restrictions were imposed by officers. But here, said the court, "[m]any of the indignities suffered by Jamison at the hands of the police during his hospital stay were the direct result of his seeking medical treatment and initiating a police investigation."

Even so, said Jamison, the officers' act of bagging his hands rendered him "in custody" because the bags had "paralyzed his hands." The court disagreed:

Of course, a reasonable person without a detailed knowledge of police procedures might find it odd that his hands were bagged as soon as he arrived at the hospital for treatment for a gunshot wound. [But] a reasonable person would feel free to inquire as to why the bags were employed and whether he could refuse them or further questioning.

Consequently, the court ruled that Jamison's statements were not obtained in violation of *Miranda*.

Anderson v. Terhune

(9th Cir. 2008) __ F.3d __ [2008 WL 399199]

ISSUE

Did a suspect's statement—"I plead the Fifth"—constitute an invocation of the right to remain silent?

FACTS

Sheriff's deputies in Shasta County suspected that Anderson had murdered a man whose body was found by the side of a road. So after arresting him on a parole violation, they sought to question him about the killing. Anderson initially waived his *Miranda* rights, but then apparently changed his mind when a deputy suggested that the methamphetamine pipe found next to the body belonged to him:

Anderson: I'm through with this. I'm through. I wanna be taken into custody, with my parole . . .

Deputy: Well, you already are. I wanna know what kinda pipes you have.

Anderson: I plead the Fifth.

Deputy: Plead the Fifth. What's that?

The deputy continued to question Anderson, who eventually confessed. The California Court of Appeal affirmed the murder conviction, ruling that the deputy's subsequent questioning was simply an attempt to clarify whether Anderson intended to invoke, or whether he was merely refusing to talk about his drug use. Anderson filed a writ of habeas corpus which was reviewed en banc by the Ninth Circuit.

DISCUSSION

Officers must, of course, terminate an interview if the suspect says something that clearly and unambiguously demonstrates an intent to invoke the right to remain silent or the right to counsel. But they may continue to question him if his words were ambiguous or equivocal.²⁰

Thus, an invocation does not result if a suspect merely indicated he *might* want to remain silent or that he *might* want an attorney. As the California Supreme Court explained, to invoke *Miranda* the

suspect "must *unambiguously* assert his right to silence or counsel."²¹ For example, the courts have ruled the following statements were not invocations because the suspects' words did not clearly demonstrate an intent to terminate the interview:

- "I don't know if I wanna talk anymore since it's someone killed, you know."²²
- "How long would it take for a lawyer to get here."²³
- "My mother will put out money for a high price lawyer out of New York."²⁴
- "Maybe I should talk to a lawyer."²⁵

In contrast to ambiguous statements such as these, Anderson's words ("I plead the Fifth") were fairly straightforward. Said the court, "This is not a case where the officers or the court were left scratching their heads as to what Anderson meant. Nothing was ambiguous about the statement 'I plead the fifth.'"

In addition, the court flatly rejected the argument that the deputy's response ("Plead the Fifth. *What's that?*") demonstrated that he was confused as to Anderson's intent. According to the court, the deputy was "playing dumb," and "[his] effort to keep the conversation going was almost comical. At best, the officer was mocking and provoking Anderson. The officer knew what 'I plead the Fifth' meant."

Consequently, the court ruled that Anderson's confession was obtained in violation of *Miranda*, and it ordered the district court to grant his writ of habeas corpus.

COMMENT

What could the deputy have done? In *Michigan v. Mosley* the United States Supreme Court ruled that if officers "scrupulously honor" a suspect's invocation of the right to remain silent, they may return later and ask if he had changed his mind.²⁶ If so, they may resume the interview if he waives his rights. Thus, under *Mosley*, the deputy could have recontacted Anderson if, (1) he had immediately terminated the interview when Anderson invoked, and (2) he had given Anderson some time (two hours sufficed in *Mosley*) to think about the situation. POV

²⁰ See *Davis v. United States* (1994) 512 U.S. 452, 459.

²¹ *People v. Stitely* (2005) 35 Cal.4th 514, 535.

²² *People v. Wash* (1993) 6 Cal.4th 215, 238-9.

²³ *People v. Simons* (2007) 155 Cal.App.4th 948, 958.

²⁴ *People v. Johnson* (1993) 6 Cal.4th 1, 28.

²⁵ *Davis v. United States* (1994) 512 U.S. 452, 462.

²⁶ (1975) 423 U.S. 96.

The Changing Times

ALAMEDA COUNTY DISTRICT ATTORNEY'S OFFICE

Lt. **Lisa Foster**, director of the DA's Victim-Witness Assistance Division, was promoted to captain. Lt. **Evencio Hurtado**, formerly an Oakland police officer, retired after 26 years with the DA's Office. Prosecutor **Alyce Sandbach** retired after 19 years of service.

Federal District Court Judge and former prosecutor **Marty Jenkins** was appointed to the California Court of Appeal.

Retired Superior Court judge and former prosecutor **Al Delucchi** died on February 26, 2008 at the age of 76. Al was brought out of retirement in 2004 when, at the request of the Chief Justice of the California Supreme Court, he presided over the murder trial of Scott Peterson in Redwood City.

ALAMEDA COUNTY REGIONAL AUTO THEFT TASK FORCE

CHP Lt. **Mike Maskarich** was promoted to captain and assigned to the CHP Headquarters. Mike had served as coordinator of Golden Gate Division Investigative Services, and was the lieutenant in charge of ACRATT. He will be succeeded by CHP Lt. **Ron Lum**.

ALAMEDA POLICE DEPARTMENT

Sgt. **John Cayanne** has taken a medical retirement. Sgt. **Steven Rodekoher** transferred from patrol to personnel and training. New Officers: **Frank Petersen** and **Scott Dole**.

ALBANY POLICE DEPARTMENT

Transfers: Lt. **Daniel Adams** from Patrol to Support Services, Lt. **John Geissberger** from Support Services to Patrol. **Bill Boehm** resigned to accept a position with San Pablo PD. New officer: **Monique Limon**. Retired sergeant **Ed Zentner**, who served from 1951 to 1977, has passed away.

BART POLICE DEPARTMENT

Sgt. **Kevin Franklin** was promoted to lieutenant and assigned to Patrol. Sgt. **Nathan Weissich** transferred from Patrol to Administrative Services. Lat-

eral appointments: **Michael Kalagayan** (South San Francisco PD), and **Joshua Reddoch** (Pittsburg PD). New officers: **Sonny Jung**, **Edward Palor**, and **Daud Puktianie**.

The department mourned the passing of retired sergeant **Edward Ladd** who was 63 years old. Ed's 35-year career included serving as president of the CNOA.

BERKELEY POLICE DEPARTMENT

Capt. **William Pittman** retired after 35 years of service. Lt. **Wesley Hester** retired after 31 years of service. Sgt. **Andrew Murray** retired after 23 years of service. Lt. **Cynthia Harris** was promoted to captain.

The following sergeants were promoted to lieutenant: **Diane Delaney**, **David Reece**, and **Craig Juster**. The following officers were promoted to sergeant: **Brian Wilson**, **Angela Hawk**, and **Jennifer Tate**. New officers: **Andre Bell-Watkins**, **Scott Gonsalves**, **Shonn Graham**, **Nikos Kastmiller**, **Jeremy Lathrop**, **Nathan Patrick**, and **Kyle White**.

CALIFORNIA HIGHWAY PATROL

CASTRO VALLEY AREA: Capt. **Paul Fontana** has assumed command of the San Francisco Area. Lt. **Ed Whitby** was promoted to captain and transferred to the Castro Valley Command. Sgt. **Scott McCann** transferred from the Castro Valley Area to the Cordelia Inspection Facility. **Stephen Perea** from the San Jose Area was promoted to sergeant and assigned to the Castro Valley Area. **Lianne Barbour** transferred to the Dublin Area. The following cadets were promoted to officer and assigned to the Castro Valley Area: **Christopher Allen**, **Matthew Brown**, and **Eric Morales**.

DUBLIN AREA: **Tammy Callahan-Monego** retired after 21 years of service. **Michael Herman** retired 13 years of service. Cadet **Zachary Yosh** was promoted to officer and assigned to the Dublin Area.

HAYWARD AREA: Officers transferring out: Lt. **Eric Rozenoff** (Traffic Management Center, Oakland), Sgt. **Bryan Lilly** (Internal Affairs, Sacramento), **Kathleen Hayes** (Governors' protective detail, Sacra-

mento), **Marvin Turn** (Oakland), **Trent Pochop** (Woodland), and **Jack Lowder** (Contra Costa). Transferring in: Sgt. **Bryan Yops** (Marin).

OAKLAND AREA: Sgt. **Ross Ross** retired. **Greg Askew** was promoted to sergeant. The following cadets were promoted to officer and assigned to the Oakland Area: **Hugh Council**, **Erik Martinez**, **Matthew Maxwell**, **Kyle McCue**, **Matthew Nelson**, and **Richard Quintana**.

FREMONT POLICE DEPARTMENT

Anthony Morales has retired. **Stephen Delema** was promoted to sergeant. New officers: **Kyle Barker**, **Christopher Walker**, **James Merrill**, **Garrett Savage**, and **Stephen Hunt**. Retired officer **Gilbert Cobarruviaz** passed away.

HAYWARD POLICE DEPARTMENT

Sgt. **Larry Vargas** was promoted to lieutenant. **Jeffrey Snell** was promoted to sergeant. Lt. **Gary Branson** retired after nearly 30 years of service. **Kenneth Hedrick** retired following more than 24 years of service. New officers: **Romeo Aberin**, **Richard McLeod**, **Timothy Meier**, **Sukhjeet Singh**, and **Brandon Wilson**. Det. **Eric Hutchinson** was honored as 2007 Officer of the Year by the Hayward Chamber of Commerce.

LIVERMORE POLICE DEPARTMENT

Lt. **Scott Trudeau** was promoted to captain and appointed commander of Operations.

NEWARK POLICE DEPARTMENT

Lieutenants **Andrew Bidou** and **Jim Leal** were promoted to captain. Capt. Bidou will oversee Field Operations, and Capt. Leal will oversee Support Services. Sgt. **Jeff Mapes** transferred to the Community Safety Team. Sgt. **Dave Parks** transferred to Patrol. **David Lee** was assigned to SACNET.

OAKLAND POLICE DEPARTMENT

The following officers have retired: Deputy Chief **Gregory Lowe**, Lt. **Paul Berlin**, **Larry Jones**, and **Gary Tolleson**. The following officers have taken disability retirements: Sgt. **Hugh Kidd**, Sgt. **Brian Tremper**, **Leward Cage**, **Daniel Castanho**, **Rudy**

Villegas, and **Leonard White**. The following officers have resigned: **Stephanie Ross**, **Joel Hernandez**, **Courtney Gordon**, and **Tamara Cundy**. Lateral appointment: **Thomas Ciccarelli**. Officers rehired: **Kamilah Jackson** and **Anthony Ramos**.

New officers: **Nicholas Albert**, **Keith Ballard-Geiger**, **James Belote**, **Christopher Chandler**, **Timothy De La Vega**, **Pedro Elias**, **Antonio Fregoso**, **Joel Hassna**, **Brian Hernandez**, **Daniel Higgins**, **Najia Jackson**, **Michael Jaeger**, **Donald Lane**, **Roger Lowe**, **Billy Matthews**, **Jonathan Muniz**, **Francisco Nieves**, **Patrick O'Donnell**, **David Pullen**, **Arnie Rutten**, **Kurt Schneider**, **Eric Thaw**, **Justin Vidal**, **Joel Warford**, and **Ashlei Williams**.

PIEDMONT POLICE DEPARTMENT

Tamary Cundy has joined the department after serving as an Oakland police officer for eight years.

PLEASANTON POLICE DEPARTMENT

Officer **Tara Dolan** resigned. Reserve officer **Lliza Dukik** passed away on February 21, 2008 as a result of a rare liver disease. He was 41-years old and became a reserve officer in 2004. Lliza dedicated many hours to the department and he will be sorely missed by his peers.

UNION CITY POLICE DEPARTMENT

Transfers: Sgt. **Matt Pardo** from Personnel and Training to Patrol; Sgt. **Javier Diaz** from Patrol to Personnel and Training; Sgt. **Mark Quindoy** and **Howard Baron** from COPPS to Investigations; Sgt. **Gloria Lopez-Vaughn**, **Mike Watson**, **James Martin**, and **Eric Wittmer** from Patrol to COPPS; **Fred Camacho** and **Sean Mace** from COPPS to Patrol. The following officers transferred from Investigations to Patrol: Sgt. **Dean Sato**, **Jeff Stewart**, and **Cheryl Tassano**. **Steve Cesaretti** transferred from Patrol to Investigations.

UNIVERSITY OF CALIFORNIA, BERKELEY POLICE DEPARTMENT

Transfers: **Tim Zuniga** to Animal Rights Extremist Work Group, **Chris Samuels** to Crime Prevention, and **Sabrina Reich** to Criminal Investigations. New security patrol officer: **Jean Gorecki**. POV

California Criminal Investigation

2008 Edition

We are now shipping the 2008 edition of *California Criminal Investigation*. By way of background, *CCI* is a reference book containing the rules and principles that control criminal investigations in California. The 2008 edition—which is the 12th annual edition—contains over 700 pages, including more than 3,000 endnotes with comments, examples, noteworthy quotes from court decisions, and over 15,000 California and federal case citations. The coverage is thorough, but concise and practical. Whether you need a quick answer to a specific question, or a dependable analysis of a particular subject, you'll find that *CCI* is indispensable.

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War Stories

A failure to communicate

A Stockton Unified School District police officer was dispatched to a high school where a 16-year old student had reportedly hit her counselor. The officer interviewed the parties separately, and learned from the outraged student that the assault was justified. “She called me a ho, bitch, and a liar,” screamed the student, “and I don’t take that shit from nobody.”

The counselor’s account was slightly different. As she explained, “This young lady has been spreading lies about her friends. So I called her an *habitual* liar.”

Dodge Charger Story #1

A man who was driving a stolen Lexus rear-ended a Dodge Charger on Interstate 580 near Castro Valley. The man sped off, so the driver of the Charger went after him. A few minutes later, the Lexus was surrounded by Alameda County sheriff’s patrol cars, and the man was promptly arrested. While sitting in jail, he probably wondered why he was apprehended so quickly, and with such a show of force. Well, it might have been because the driver of the Charger was Greg Ahern, the sheriff of Alameda County.

Dodge Charger Story #2

One afternoon, the Senate Pro Tem of the state legislature, Don Perata, was in Oakland, driving to a friend’s house in his Dodge Charger. Although the Charger was leased by the state, it was flashy, painted candy-apple red and sporting 22-inch wheel rims. Police figure those rims are what caught the attention of a carjacker, who walked up to the car at a traffic light, pointed a handgun at Perata and yelled, “Get out of the motherfucking car.” A good idea, thought Perata, and the man sped off with his car.

Although the Charger was recovered undamaged a few hours later, the senator decided to trade it in on a car with absolutely no flamboyance: a used Ford Crown Victoria painted plain old silver. Perata said there was one other reason he chose the Crown Vic: “I figure that no one is gonna mess with me if I’m driving around in something that looks like an unmarked police car.”

What a coincidence

A police officer from Australia and his wife were vacationing in San Francisco when a man grabbed the woman’s purse and ran off. The next day, the woman was in a record store, waiting in line to buy some CDs, when she noticed that the man in front of her was paying with a credit card—hers! So she notified her husband, who followed the suspect while she called SFPD. Officers arrested the man a few minutes later.

A jail with a view—and a doorman

If you’re looking for a place to stay in Boston, you might try the old Charles Street Jail which was recently converted into a five-star luxury hotel. According to the developers, the guards’ catwalks have been transformed into elegant iron-railing balconies, the sally port was converted into a restaurant called “Scampo” (which means “escape” in Italian), another restaurant called “Clink” features waiters wearing old prison garb, and the former drunk tank is now a bar called “Alibi.” The cells, which used to be free, now cost anywhere from \$350 to \$5,500 per night.

Visitors who can’t afford these rates can stay at Boston’s old Police Headquarters Building which has been converted into a four-star hotel.

A day on work furlough

A deputy county counsel walked into her office in the Alameda County Administration Building and found a work-furlough janitor going through her purse. Stating the obvious, the man said, “I know this look bad. But, you see, I was just looking for recyclables.” Sensing the attorney wasn’t buying his story, he ran off. The next day he was recycled back into Santa Rita Jail.

A close call in Berkeley

One day in Berkeley, a man happened to notice an elderly woman sitting in a parked car, holding her head. “Are you all right?” he asked. “No,” said the woman, “I’ve been shot. I think it was a drive-by.” While the man’s wife ran for help, the woman told the

man that she'd been shot in the back of her head. The man opened the back door to take a look at her head but there was no blood and no apparent injury. Just then he noticed a bag of groceries on the back seat, and he saw that the side of the bag appeared to have been blown out. After asking the woman a few questions, he figured out what had happened.

It was a hot day, and because the windows were rolled up, a package of Pillsbury muffin dough exploded, sending an uncooked muffin flying into the back of the woman's head. When she heard the pop, she figured she'd been shot, and that the dough was actually her brains leaking out of the bullet hole. Officers say she was quite relieved when she learned it was only a muffin.

Bank robbery blues

Not everybody can be a successful bank robber. Take Barrett Roberts, for instance. Although he had no trouble robbing the Wells Fargo bank on Piedmont Avenue in Oakland, he was unable to elude the OPD officer who ran after him. That was probably because Barrett is 5'7" tall and weighs over 300 pounds.

And then there was the man who walked into the Coldwell Banker real estate office in Menlo Park and announced, "This is a bank robbery! Give me all your money!" "I'm sorry, sir," said the secretary, "but this isn't a bank. This is Coldwell Banker, the real estate company." "In that case," said the robber, "I guess I'll be leaving."

Bailbond blues

An Oakland man was arrested for grand theft after he sold six computers to six people, taking their money but neglecting to deliver a single megabyte. At the City Jail, the crook told his bondsman that he didn't have any money to make the \$650 bail, but that he'd sell him a great computer for only \$650. "Sounds like a good deal," said the bondsman, as he posted the crook's bail. The whereabouts of the crook and the bondsman's computer are presently unknown.

Striking testimony

A woman who had been raped in a car was testifying at a trial in Oakland when, during direct examination, she happened to mention to the jurors that the defendant's pants were down when officers pulled

him out of the vehicle. "Objection! Non-responsive. Move to strike," screamed the defense attorney. "He's right, judge," said the victim, "that low-life needs to be struck."

Yes you can!

A prosecutor at a special circumstances murder case in Oakland was questioning a prospective juror:

DA: "Do you think you personally could ever vote to execute another human being? Could you do something like that?"

Juror: "Do you mean I'm actually gonna get to pull the lever!"

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