POINT of VIEW

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Nancy E. O'Malley, District Attorney

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Point of View

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Executive Editor
Nancy E. O'Malley
District Attorney

Writer and Editor
Mark Hutchins

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This edition of Point of View
is dedicated to the memory of
Sergeant Tom Smith
of the BART Police Department
who was killed in the line of duty
on January 21, 2014

Officers Juan Gonzalez and **Brian Law**
of the California Highway Patrol
who were killed in the line of duty
on February 17, 2014

Deputy Ricky Del Fiorentino
of the Mendocino County Sheriff's Office
who was killed in the line of duty
on March 19, 2014

Contents

Principles of Probable Cause and Reasonable Suspicion

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

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

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

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

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

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

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

What Probability is Required?

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

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

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

Probable cause

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

Reasonable suspicion

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

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

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

Basic Principles

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

Totality of the circumstances

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

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

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

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

Common sense

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

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

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

Legal, but suspicious, activities

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

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

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

Multiple incriminating circumstances

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Unique circumstances

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

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

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

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

Inferences based on circumstantial evidence

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

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

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

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

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

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

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

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

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

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

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

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

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

Hunches and unsupported conclusions

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

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

Information known to other officers

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

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

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[51] (2010) 47 Cal.4th 145.

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

[53] Ibid. Also see *U.S. v. Cash* (10th Cir. 2013) 733 F.3d 1264, 1274 [reasonable suspicion "must be based on something more than an inchoate and unparticularized suspicion or hunch"].

[54] See *Illinois v. Gates* (1983) 462 U.S. 213, 239 [a "wholly conclusory statement" is irrelevant]; *People v. Leonard* (1996) 50 Cal.App.4th 878, 883 ["Warrants must be issued on the basis of facts, not beliefs or legal conclusions."]; *U.S. v. Garcia-Villalba* (9th Cir. 2009) 585 F.3d 1223, 1234; *Gentry v. Sevier* (7th Cir. 2010) 597 F.3d 838, 845 ["The officer was acting solely upon a general report of a 'suspicious person,' which did not provide any articulable facts that would suggest the person was committing a crime or was armed."].

[55] (9th Cir. 2013) 725 F.3d 1076.

[56] See *Ker v. California* (1963) 374 U.S. 23, 40, fn.12 ["It goes without saying that in determining the existence of probable cause we may concern ourselves only with what the officers had reason to believe at the time of their entry." Edited.]; *Maryland v. Garrison* (1987) 480 U.S. 79, 85 ["But we must judge the constitutionality of [the officers'] conduct in light of the information available to them at the time they acted."]; *Dyke v. Taylor Implement Mfg. Co.* (1968) 391 U.S. 216, 222 [officer "had not been told that Harris and Ellis had identified the car from which shots were fired as a 1960 or 1961 Dodge."]; *People v. Adams* (1985) 175 Cal.App.3d 855, 862 ["warrantless arrest or search cannot be justified by facts of which the officer was wholly unaware at the time"]; *People v. Superior Court (Haflich)* (1986) 180 Cal.App.3d 759. 766 ["The issue of probable cause depends on the facts known to the officer prior to the search."]; *John v. City of El Monte* (9th Cir. 2008) 515 F.3d 936, 940 ["The determination whether there was probable cause is based upon the information the officer had at the time of making the arrest."]; *U.S. v. Ellis* (7th Cir. 2007) 499 F.3d 686, 690 ["As there was no communication from Officers Chu and McNeil at the front door to [Officer] Lopez at the side door, it was improper to imputer their knowledge to Lopez."].

[57] *People v. Gale* (1973) 9 Cal.3d 788, 795.

[58] See *Whiteley v. Warden* (1971) 401 U.S. 560, 568; *People v. Soun* (1995) 34 Cal.App.4th 1499, 1521; *U.S. v. Ramirez* (9th Cir. 2007) 473 F.3d 1026, 1037.

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

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

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

Information inadmissible in court

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

Mistakes of fact and law

If probable cause was based on information that was subsequently determined to be inaccurate or false, the information may nevertheless be considered if the officers reasonably believed it was true. As the Court of Appeal put it, "If the officer's belief is reasonable, it matters not that it turns out to be mistaken."[66] Or, in the words of the Supreme Court, "[W]hat is generally demanded of the many factual determinations that must regularly be made by agents of the government is not that they always be correct, but that they always be reasonable."[67]

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

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

Probable Cause: Reliability of Information

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

Probable cause is necessarily built on information. But not just any information: There must be reason to believe it is reliable. The same is true of reasonable suspicion to detain or pat search but, as discussed in the previous article, the required degree of reliability is less.[2]

This means that whenever officers detain or arrest a suspect, conduct most types of warrantless searches, or apply for search or arrest warrants, they must be able to prove—whether in an affidavit or in testimony at a suppression hearing—that their information was "reasonably trustworthy."[3] As the Supreme Court explained, probable cause and reasonable suspicion are "dependent upon both the content of information possessed by police and its degree of reliability. Both factors—quality and quantity—are considered in the totality of circumstances."[4]

In most cases, however, officers will not have direct evidence of reliability (unless they are the source), which means they must ordinarily rely on circumstantial evidence. But how much is required? And what circumstances are relevant? The answer to both questions depends on the nature of the source.

At one extreme are untested police informants and other "denizens of the underworld"[5] who are viewed as so untrustworthy that only some substantial circumstantial evidence of reliability will suffice. Also lurking at this extreme are "tested" police informants who, although also of dubious character, are considered fairly reliable because they have an established track record for providing accurate information.

At the other extreme are officers and "citizen informants" who are viewed as so inherently dependable that their information is usually regarded as presumptively reliable. Between these extremes are 9-1-1 callers who are considered only semi-reliable, which means that the value of their information will depend on whether there is some additional circumstantial evidence of reliability or, in some cases, necessity.

Because a source's reliability depends on how the courts classify him, we will begin by explaining the criteria they use in making this determination. Then, in the remainder of the article, we will cover the wide range of circumstantial evidence that is relevant in establishing the reliability of untested informants and enhancing the reliability of other sources.

Sources of Information

Anyone can be a source of information. As the Supreme Court put it, "Informants' tips doubtless come in many shapes and sizes from many different types of persons."[6] But because "information is only as good as its source,"[7] the first step in determining the reliability of a tip is to figure out where the source fits in the hierarchy of reliable sources.

Law enforcement officers

At the top of the hierarchy are law enforcement officers who, because of their objectivity and professionalism, will be deemed presumptively reliable if their information was based on their personal knowledge.[8] As the Court of Appeal explained, "A police officer is presumptively reliable in the official communication of matters within his direct knowledge."[9]

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[1] *Higgason v. Superior Court* (1985) 170 Cal.App.3d 929, 952 (conc. opn. of Crosby, J.).
[2] See *Alabama v. White* (1990) 496 U.S. 325, 330.
[3] *Beck v. Ohio* (1964) 379 U.S. 89, 91.
[4] *Alabama* v. White (1990) 496 U.S. 325, 330.
[5] See *On Lee v. United States* (1952) 343 U.S. 747, 756.
[6] *Illinois v. Gates* (1983) 462 U.S. 213, 232.
[7] See *U.S. v. Hauk* (10th Cir. 2005) 412 F.3d 1179, 1188.
[8] See *United States v. Ventresca* (1965) 380 U.S. 102, 111; *People v. Hill* (1974) 12 Cal.3d 731, 761.
[9] *People v. Superior Court (Brown)* (1975) 49 Cal.App.3d 160, 167.

Law enforcement officers are also presumptively reliable *transmitters* of information. As the court explained in *Mueller v. D.M.V.,* "[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."[10]

Although police dogs are perhaps the most virtuous of all sources, they are not presumptively reliable in detecting drugs, explosives, or other items they are trained to find. But this only means that prosecutors may later be required to present testimony in court as to the dog's training and performance.[11]

Official and business records

The presumption of reliability also covers information that is routinely gathered and maintained by law enforcement agencies, other governmental agencies, and many businesses. The most common examples are rap sheets, parole and probation records, DMV records, fingerprint records, DNA reports, employment records, internet and telephone provider records, and public utility customer data.[12]

"Citizen informants"

If a source qualifies as a "citizen informant" his information will be considered presumptively accurate.[13] In the words of the Court of Appeal, "[C]itizen informants, in contrast to criminal informants, are assumed to supply reliable information."[14]

Although there are technically no circumstances that are mandatory for a person to be deemed a citizen informant, in most cases the following are required: (1) the person was a victim or witness to the crime, (2) officers knew or could have obtained the person's identity, and (3) there was no objective reason to disbelieve the person. Before we discuss these subjects in detail, it should be noted that a person will not qualify as a "citizen informant" merely because an officer labeled him as one in a search warrant affidavit or while testifying in court. As the California Supreme Court explained, "The designation 'citizen informant' is just as conclusionary as the designation 'reliable informant.' In either case the conclusion must be supported by facts."[15]

(1) **VICTIM OR WITNESS**: Most citizen informants are crime victims or eyewitnesses who simply reported their observations to officers.[16] "The prototypical citizen informant," said the Court of Appeal, "is a victim reporting a crime that happened to him or a witness who personally observed the crime."[17] The following are examples of eyewitnesses to crimes who were deemed citizen informants:

- A robbery or rape victim provided information about the crime to officers.[18]
- A witness to a shooting reported that the perpetrators had just fled in a certain direction.[19]
- A man drove up to a patrol car and notified officers that he had just seen an occupant of a certain vehicle point a gun at other cars.[20]

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[10] (1985) 163 Cal.App.3d 681, 686. Also see *Cantrell v. Zolin* (1994) 23 Cal.App.4th 128, 133.
[11] See *Florida v. Harris* (2013) __ U.S. __ [133 S.Ct. 1050, 1056-57].
[12] See, for example, *People v. Reserva* (1969) 2 Cal.App.3d 151, 156-57 [fingerprint records]; *People v. Aho* (1985) 166 Cal.App.3d 984, 992 [rap sheet]; *People v. Cleland* (1990) 225 Cal.App.3d 388, 390-91 [PG&E records]; *People v. Rooney* (1985) 175 Cal.App.3d 634, 648 [phone records]; *People v. Andrino* (1989) 210 Cal.App.3d 1395, 1400 [phone trap data]; *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]. Also see Ev. Code §§ 1270 *et seq*.
[13] See *People v. Kershaw* (1983) 147 Cal.App.3d 750, 754; *Gillian v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1045 ["Information provided by a crime victim or chance witness alone can establish probable cause if the information is sufficiently specific"].
[14] *People v. Kershaw* (1983) 147 Cal.App.3d 750, 754. Also see *People v. Lombera* (1989) 210 Cal.App.3d 29, 32 [a citizen informant "is presumptively reliable even though reliability has not previously been tested"].
[15] *People v. Smith* (1976) 17 Cal.3d 845, 851. Edited.
[16] See *People v. Herdan* (1974) 42 Cal.App.3d 300, 305 [citizen informants are "usually, but not always" 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."].
[17] *People v. Kershaw* (1983) 147 Cal.App.3d 750, 754.
[18] *People v. Rigsby* (1971) 18 Cal.App.3d 38 42 [rape]; *People v. McCluskey* (1981) 125 Cal.App.3d 220, 226-28 [robbery].
[19] *People v. Rico* (1979) 97 Cal.App.3d 124, 131.
[20] *People v. (Superior Court) (Meyer)* (1981) 118 Cal.App.3d 579, 584. ALSO SEE *U.S. v. Sanchez* (10th Cir. 2008) 519 F.3d 1208 [a woman flagged down a patrol car and reported that a man was beating a woman nearby].

- The manager of a bowling alley told officers that he saw a gun in the defendant's locker.[21]
- A student told the school principal that another student had given him illegal drugs.[22]
- A telephone company installer reported seeing drugs inside the defendant's home.[23]
- A person reported seeing drug activity in his neighborhood.[24]
- An employee of a company notified officers of illegal practices at the firm.[25]
- A man told officers that his roommate was planning to bomb a police station.[26]

A person who was not a victim or eyewitness may also qualify as a citizen informant if it appeared he furnished the information to assist officers or otherwise provide a public service. Some examples:

- An employee of a rent-a-car company said the defendant's accomplice had rented a vehicle that was overdue.[27]
- An insurance company investigator explained some of the things he had learned in the course of an arson investigation.[28]
- A civil engineer said that he had worked on a machine after the defendant claimed it had been destroyed in a fire.[29]
- A store security officer furnished employment information about a suspect.[30]
- A high school football coach reported that he had learned from his aunt that the defendant was carrying a gun on the school grounds and was planning to shoot someone.[31]
- A co-worker of a murder suspect said the suspect came to work "dressed as a ninja, carrying a sword, a long knife and a gun" and that he said he had "recently stabbed someone."[32]

(2) **IDENTITY KNOWN OR AT RISK**: A person may qualify as a citizen informant only if he identified himself to officers or at least risked having his identity revealed.[33] There are two reasons for this. First, such a person "exposes himself or herself to potential liability for malicious prosecution or false reporting."[34] As the Court of Appeal observed, "[T]he mere fact that [citizen informants] make their identity known to the police is, itself, some indication of their honesty."[35] Second, an officer who speaks directly with a person should be able to make "at least a very rough assessment of her reliability."[36]

The most common situation in which a person risks revealing his identity to the authorities occurs when he flags down an officer and reports a crime that had just occurred; and then the officer, instead of waiting to confirm the person's identity, starts searching for—and eventually apprehends—the perpetrator. Thus, in such a case, *People v. Superior Court (Meyer),* the Court of Appeal said, "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."[37] Under similar facts, the Tenth Circuit said in *U.S. v. Sanchez*, "That the police understandably did not take the time to obtain [the citizen's] personal information does not mean she was anonymous."[38]

(3) **INFORMATION APPEARS RELIABLE**: The last requirement is that officers must have had no reason to doubt the source's reliability or the accuracy of his information.[39] However, in the absence of some affirmative indications to the contrary, the courts will ordinarily presume that information from a victim or witness appeared reliable. "The veracity of

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[21] *People v. Baker* (1970) 12 Cal.App.3d 826, 841. [22] *Safford Unified School District v. Redding* (2009) 557 U.S. 364, 372. Also see *New Jersey v. T.L.O.* (1985) 469 U.S. 325, 345 [teacher reported that a student was smoking in the lavatory]. [23] *People v. Paris* (1975) 48 Cal.App.3d 766, 773-74. [24] *People v. Terrones* (1989) 212 Cal.App.3d 139, 147-49. [25] *U.S. v. Greenburg* (1st Cir. 2005) 410 F.3d 63, 67. [26] *U.S. v. Croto* (1st Cir. 2009) 570 F.3d 11, 14.
[27] *U.S. v. Dorais* (9th Cir. 2001) 241 F.3d 1124, 1130. [28] *People v. Superior Court (Bingham)* (1979) 91 Cal.App.3d 463, 472. [29] *People v. Superior Court (Bingham)* (1979) 91 Cal.App.3d 463, 472.[30] *People v. Jordan* (1984) 155 Cal.App.3d 769, 779-80. [31] *People v. Turner* (2013) 219 Cal.App.4th 151, 167. [32] *People v. Scott* (2012) 52 Cal.4th 452, 483-84.
[33] See *Florida v. J.L.* (2000) 529 U.S. 266, 270; *Illinois v. Gates* (1983) 462 U.S. 213, 227.
[34] *People v. Brueckner* (1990) 223 Cal.App.3d 1500, 1504-5. Also see *Florida v. J.L.* (2000) 529 U.S. 266, 269-70.
[35] *People v. Kershaw* (1983) 147 Cal.App.3d 750, 756.
[36] *Illinois v. McArthur* (2001) 531 U.S. 326, 332.
[37] (1981) 118 Cal.App.3d 579, 584.
[38] (10th Cir. 2008) 519 F.3d 1208, 1214.
[39] See *People v. Terrones* (1989) 212 Cal.App.3d 139, 148.

identified private citizen informants," said the Second Circuit, "is generally presumed in the absence of special circumstances suggesting that they should not be trusted."[40]

What circumstances suggest untruthfulness? The following are examples:

INCONSISTENCIES: In most cases, a person will not qualify as a citizen informant if, in making his report, he made inconsistent statements about material issues. For example, in *Gillian v. City of San Marino*[41] officers arrested a high school basketball coach based solely on an allegation by a former student that he had sexually harassed her. Although the student might ordinarily have been viewed as a citizen informant, the court ruled she did not qualify because, among other things, some of her allegations "were inconsistent in the details provided." On the other hand, the fact that the person furnished inconsistent or conflicting information pertaining to an incidental issue does not necessarily mean that his information pertaining to material issues was unreliable.[42] Still, officers should usually inquire about it.

DUBIOUS MOTIVATION: A person will seldom be deemed a citizen informant if it appeared that one of his reasons for assisting officers was to obtain some personal benefit, such a reduced sentence or revenge. As the Court of Appeal explained, "If a narcotics trafficker is in custody at the time he gives information implicating others his statement cannot form the basis for an arrest because his obvious motivation is to ingratiate himself with the police for purely selfish reasons."[43]

INVOLVEMENT IN THE CRIME UNDER INVESTIGATION: Despite his motivation, a person who provides information about a crime will ordinarily not be deemed a citizen informant if officers reasonably believed he was implicated in *that* crime.[44] For example, in *People v. Smith*[45] a 17-year old was present in an apartment while the occupants smoked marijuana and packaged it for sale. After about 12 hours, the boy was accused by the occupants of stealing money, so he left and notified police of what he had seen. This led to a search warrant for the apartment. But the California Supreme Court ruled the warrant lacked probable cause because the boy did not qualify as a citizen informant and, thus, his information was not sufficiently reliable. Said the court, "Nothing appears which would establish him as, on the one hand, a participant in the illegal activities or as, on the other hand, an observer whose presence there was innocent of the illegal activity."

9-1-1 callers

Because of the popularity of cell phones, a lot of information that leads to detentions and sometimes arrests now comes from people who phone 9-1-1. Although these calls are automatically traced and recorded, the callers are essentially anonymous voices on the phone. So, the question arises: Is this information sufficiently reliable to justify a detention or even an arrest?

We may have a better answer to that question shortly when the United States Supreme Court announces its decision in *Navarette v. California*. The issue in *Navarette* is whether an officer could make a traffic stop on a car based on an unidentified 9-1-1 caller's report that a certain vehicle had just run him off the road.

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[40] *U.S. v. Elmore* (2nd Cir. 2007) 482 F.3d 172, 180.

[41] (2007) 147 Cal.App.4th 1033.

[42] 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."]; *U.S. v. Pontoo* (1st Cir. 2011) 666 F.3d 20, 27 ["But a witness's statement need not be a letter-perfect replica of an earlier statement in order to be given credence."]; *U.S. v. Greenburg* (1st Cir. 2005) 410 F.3d 63, 68 [the inconsistency was "not sufficiently compelling"].

[43] *Ming v. Superior Court* (1970) 13 Cal.App.3d 206, 213.

[44] See *People v. Ramey* (1976) 16 Cal.3d 263, 269 [citizen informants are "innocent of criminal involvement"]; *People v. Schulle* (1975) 51 Cal.App.3d 809, 814-15 ["[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."]. Compare *People v. Hill* (1974) 12 Cal.3d 731, 761 [witness was a citizen informant in a murder case even though he accompanied the victim to the murder scene to buy drugs]; *People v. Gray* (1976) 63 Cal.App.3d 282, 287-88 [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."].

[45] (1976) 17 Cal.3d 845.

But, as things stand now, 9-1-1 callers are viewed as having some built-in reliability because, although technically anonymous, they knowingly exposed themselves to identification (at least to some extent) even if they gave a false name or refused to identify themselves.[46] This is because, as the California Supreme Court explained, "[M]erely calling 911 and having a recorded telephone conversation risks the possibility that the police could trace the call or identify the caller by his voice."[47] Or, as the court noted in *U.S. v. Copening*, "[T]hough 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."[48]

Unlike citizen informants, however, 9-1-1 callers are not inherently reliable because they are semi-anonymous. Still, it appears their information will suffice for detaining a suspect if either of the following circumstances existed: (1) the caller had reported an imminent threat to people or property, and the detention was reasonably necessary to investigate the threat; or (2) there was some additional circumstantial evidence of the caller's reliability.

IMMINENT THREAT: If the caller reported that a person's actions constituted an imminent threat to life or property, and if they reasonably belived that they had located the right person, they may detain him so long as there was no reason to believe the call was a hoax. What constitutes an imminent threat? Not surprisingly (because of the many "CALL 9-1-1" signs on the freeways) the most common is unsafe driving. As the California Supreme Court said:

> [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.[49]

Other such threats include driving while intoxicated and brandishing a firearm but, according to the United States Supreme Court, they do not include mere possession of a concealed firearm.[50]

CIRCUMSTANTIAL EVIDENCE OF RELIABILITY: If the caller was reporting a crime or condition that did not constitute an imminent threat to life or property, the caller's reliability will depend on the same test that is used for most sources; i.e., whether there was sufficient circumstantial evidence that the caller or his information was reliable.[51] Most of the circumstances that are relevant in making this determination are covered later in the section entitled "Corroboration." However, the following circumstances are especially relevant when the source was a 9-1-1 caller:

> CALLER IDENTIFIED HIMSELF: Although the caller's identity could not be confirmed, he voluntarily gave his name or phone number.[52] Note that a caller's refusal to identify himself will not necessarily render him unreliable.[53]

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[46] See *People v. Lindsey* (2007) 148 Cal.App.4th 1390, 1398; *Lowry v. Gutierrez* (2005) 129 Cal.App.4th 926, 941; *U.S. v. Ruidiaz* (1st Cir. 2008) 529 F.3d 25, 31. Also see *U.S. v. Hicks* (7th Cir. 2008) 531 F.3d 555, 561 ["any body of law requiring 911 operators to carefully make credibility determinations would unacceptably delay the necessary responses to all emergency calls, including genuine ones"].

[47] *People v. Dolly* (2007) 40 Cal.4th 458, 467.

[48] (10th Cir. 2007) 506 F.3d 1241, 1247.

[49] *People v. Wells* (2006) 38 Cal.4th 1078, 1083.

[50] *Florida v. J.L.* (2000) 529 U.S. 266, 271. Also see *People v. Jordan* (2004) 121 Cal.App.4th 544, 563 [concealed firearm not an imminent threat]. Compare *People v. Dolly* (2007) 40 Cal.4th 458, 465 [brandishing a firearm]; *People v. Turner* (2013) 219 Cal.App.4th 151, 169 [murder threat]; *P v. Lindsey* (2007) 148 CA4 1390, 1397 [shots fired]; *U.S. v. Terry-Crespo* (9th Cir. 2004) 356 F.3d 1170, 1176 [threat with a firearm]; *U.S. v. Williams* (7th Cir. 2013) 731 F.3d 678, 684 [people with "guns out"].

[51] See *Florida v. J.L.* (2000) 529 U.S. 266, 271; *U.S. v. Ruidiaz* (1st Cir. 2008) 529 F.3d 25, 31.

[52] See *U.S. v. Terry-Crespo* (9th Cir. 2004) 356 F.3d 1170, 1174 ; *U.S. v. Ruidiaz* (1st Cir. 2008) 529 F.3d 25, 31; *U.S. v. Johnson* (3rd Cir. 2010) 592 F.3d 442, 449; *U.S. v. Elmore* (2nd Cir. 2007) 482 F.3d 172, 181; *U.S. v. Gomez* (5th Cir. 2010) 623 F.3d 265, 279; *U.S. v. Conner* (10th Cir. 2012) 699 F.3d 1225, 1229 ["Here, the caller did not disclose his name but provided enough information to render himself readily identifiable—he gave the operator his phone number and address."].

[53] 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."]; *U.S. v. Colon* (2nd Cir. 2001) 250 F.3d 130, 132 ["If I leave you my name, and they start saying my name over there. I don't wanna be, you know, I don't want no problems because I have three children."].

CALLER GAVE HIS WHEREABOUTS: The caller disclosed his whereabouts or furnished information from which his whereabouts might have been determined; e.g., the caller said he was currently following the suspect on a certain street.[54]

DETAILED INFORMATION: The caller provided details of what he had seen or heard.[55] Also see "Corroboration" (Detailed information), below.

DEMEANOR: The caller's manner of speaking—his "tone, demeanor, or actual words"[56]—was consistent with his tip; e.g., a caller who reported an emergency sounded upset.[57]

TIME LAPSE: The caller was reporting something that was now happening or had just occurred, and officers promptly responded to the call.[58]

MULTIPLE CALLERS: Other 9-1-1 callers reported the same or similar information.[59] Also see "Corroboration" (Multiple independent tips), below.

9-1-1 OPERATOR TRAINING: Because 9-1-1 operators are usually the only people who can gauge a caller's reliability, they must have some way of notifying the responding officers of their conclusion, especially if the caller's information may be used to detain someone. This means that 9-1-1 operators must understand the relevant circumstances discussed above and in the "Corroboration" section. Thus, in addressing a failure to implement such procedures, the Second Circuit observed in *U.S. v. Colon* that "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."[60]

"Police informants"

A "police informant" is defined as a person who furnished information for a reason "other than good citizenship,"[61] usually a disreputable purpose such as serving a lighter sentence for his own crimes, immunity, revenge, or eliminating competition.[62] "It is a fact of life," said the Court of Appeal, "that the quality of veracity and honor among thieves and murderers leaves something to be desired."[63] Or, as the Seventh Circuit put it, "[I]nformants are often an unsavory lot."[64] Thus, information from such people is "suspect on its face,"[65] which essentially means it is presumptively unreliable.

Still, the criminal justice system desperately needs police informants because, without them, many more crimes would go unsolved, and it would be much more difficult "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."[66]

Consequently, information from police informants may, in and of itself, establish reasonable suspicion or probable cause—but only if officers can prove there was sufficient reason to believe it was accurate.[67] How can they accomplish this? It depends on whether the informant was "tested" or "untested."

TESTED POLICE INFORMANTS: A "tested" informant (also known as a "confidential reliable informant" or "CRI") is a person who has a history or "track record" of providing accurate information to officers. For this reason, an informant who qualifies as "tested" will be presumed reliable unless there was reason to believe otherwise.[68]

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[54] See *U.S. v. Conner* (10th Cir. 2012) 600 F.3d 1225, 1229; *U.S. v. Chavez* (10th Cir. 2011) 660 F.3d 1215, 1222.
[55] See *People v. Wells* (2006) 38 Cal.4th 1078, 1088 [a "relatively precise and accurate description" of the vehicle and its location].
[56] *People v. Dolly* (2007) 40 Cal.4th 458, 467, fn.2.
[57] See *U.S. v. Terry-Crespo* (9th Cir. 2004) 356 F.3d 1170, 1176 [the caller was "laboring under the stress of recent excitement"].
[58] See *People v. Jordan* (2004) 121 Cal.App.4th 544, 557; *U.S. v. Terry-Crespo* (9th Cir. 2004) 356 F.3d 1170, 1177.
[59] See *U.S. v. Hampton* (7th Cir. 2009) 585 F.3d 1033, 1039; *U.S. v. Copening* (10th Cir. 2007) 506 F.3d 1241, 1246.
[60] (2nd Cir. 2001) 250 F.3d 130, 138. Also see *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"].
[61] *People v. Mason* (1982) 132 Cal.App.3d 594, 597.
[62] *People v. Kershaw* (1983) 147 Cal.App.3d 750, 755.
[63] *People v. Brunner* (1973) 32 Cal.App.3d 908, 913.
[64] *U.S. v. Feekes* (7th Cir. 1989) 879 F.2d 1562, 1564.
[65] *People v. Lopez* (1985) 173 Cal.App.3d 125, 134.
[66] *U.S. v. Bernal-Obeso* (9th Cir. 1993) 989 F.2d 331, 335. Also see *On Lee v. United States* (1952) 343 U.S. 747, 756.
[67] See *U.S. v. Brown* (1st Cir. 2007) 500 F.3d 48, 56.
[68] See *Adams v. Williams* (1972) 407 U.S. 143, 146-47; *U.S. v. Jones* (1st Cir. 2012) 700 F.3d 615, 621-22.

If it becomes necessary to prove that an informant was "tested," officers must do two things. First, they must state in their affidavits or suppression hearing testimony the exact or approximate number of times he furnished accurate information to officers in the past.[69] There is, however, no minimum number. In fact, a court *might* find that an informant was tested if he furnished accurate information just once and had never furnished false information.[70] As the court explained in *People v. Gray*, "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."[71]

Second, officers must state *why* they believed the informant's past information was accurate.[72] This is usually accomplished by explaining that the informant's information led to arrests, holding orders, indictments, or convictions; or that his information resulted in the issuance of a search warrant which, in turn, resulted in the discovery of evidence that the informant said would be there.[73] Thus, in *People v. Mayer* the court ruled that "[t]he assertion that the informant 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, establishes the reliability of the informant."[74] In contrast, a track record will not be established by an officer's assertion that the informant's tips led to "many ongoing investigations" or resulted in some other ambiguous achievement because this does not demonstrate that his information was accurate.[75]

The question sometimes arises whether an informant will be deemed tested if he participated in a controlled buy of drugs or other contraband. The answer appears to be no if the informant was merely carrying out instructions from officers. As the court observed in *People v. Mason*, "On its face, the statement that McNeil 'made controlled buys of controlled substances under the direction and supervision of law enforcement officers' does not indicate McNeil provided any information to the police."[76] But a successful (or even unsuccessful[77]) controlled buy may suffice if the informant was the person who initiated the investigation into the seller.[78]

Two other things should be noted. First, an informant will not be deemed "tested" merely because an officer described him as "tested," "credible," or "trustworthy" in an affidavit or in testimony at a suppression hearing.[79] For example, in *People v. French* the court noted that "CRI-1 is described as a 'confidential reliable informant,' but that simple assertion is inadequate to establish reliability because the affidavit contains no facts in support."[80] Indeed, when officers neglect to provide such facts, judges often assume they do not understand the basics of probable cause. This occurred in a search warrant case in which the Court of Appeal commented, "The entire affidavit is infected [with conclusions] beginning with its bald description of the informant as a 'confidential reliable informant.'"[81]

Second, although tested informants may be deemed reliable, officers should, if possible, include in their affidavits and testimony any corroborative evidence that tends to bolster their reliability.[82] We will discuss the subject of corroboration shortly.

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[69] See *People v. Superior Court (Johnson)* (1972) 6 Cal.3d 704, 714; *People v. Hansborough* (1988) 199 Cal.App.3d 579, 584; *People v. Dumas* (1973) 9 Cal.3d 871, 876; *People v. Mayer* (1987) 188 Cal.App.3d 1101, 1117.
[70] *People v. Berkoff* (1985) 174 Cal.App.3d 305, 309; *People v. Barger* (1974) 40 Cal.App.3d 662, 667-68.
[71] (1976) 63 Cal.App.3d 282, 288.
[72] See *People v. Dumas* (1973) 9 Cal.3d 871, 876; *People v. French* (2011) 201 Cal.App.4th 1307, 1317.
[73] See *Adams v. Williams* (1972) 407 U.S. 143, 146; *People v. Neusom* (1977) 76 Cal.App.3d 534, 537; *People v. Dumas* (1973) 9 Cal.3d 871, 876; *U.S. v. Elliott* (9th Cir. 2003) 322 F.3d 710, 716.
[74] (1987) 188 Cal.App.3d 1101, 1117.
[75] See *People v. McFadin* (1982) 127 Cal.App.3d 751, 764.
[76] (1982) 132 Cal.App.3d 594, 599.
[77] See *U.S. v. Jennen* (9th Cir. 2009) 596 F.3d 594, 599-600.
[78] See *People v. Cedeno* (1963) 218 Cal.App.2d 213, 222; *People v. Love* (1985) 168 Cal.App.3d 104, 106-7, 110.
[79] See *Illinois v. Gates* (1983) 462 U.S. 213, 239; *U.S. v. Dismuke* (7th Cir. 2010) 593 F.3d 582, 587.
[80] (2011) 201 Cal.App.4th 1307, 1317.
[81] *People v. Superior Court (McCaffrey)* (1979) 94 Cal.App.3d 367, 374. Edited.
[82] See *People v. McFadin* (1982) 127 Cal.App.3d 751, 767.

UNTESTED POLICE INFORMANTS: Like all police informants, "untested" informants have credibility problems—except much worse. Not only are they in a shady business, they cannot even claim to be good at it. As Justice Crosby wrote in *Higgason v. Superior Court*, "There are few principles of human affairs more self-evident than this: The unverified story of an untested informer is of no more moment than a fairy tale on the lips of a child."[83]

And yet, it turns out that information from untested informants is often accurate. Moreover, in many cases a tip from an untested informant is the only information that officers can get. Consequently, the courts have ruled that, despite its sordid lineage, such information can generate probable cause or reasonable suspicion if it is corroborated. What is "corroboration"? That is the subject of the remainder of this article.

Corroboration

"Corroboration" is essentially any circumstantial evidence of the source's reliability or the accuracy of his information. "Corroboration is not limited to a given form," said the California Court of Appeal, "but includes within its ambit any facts, sources, and circumstances which reasonably tend to offer independent support for information claimed to be true."[84]

As discussed earlier, corroboration is an absolute requirement when a source was an untested police informant. But it may also be necessary, or at least useful, when the source was a citizen informant, a tested informant, a 9-1-1 caller, or anyone else. That is because informants "do not all fall into neat categories"[85] and a court may disagree with an officer's conclusion that a source fell into a category that was presumptively reliable. Accordingly, regardless of the nature of the source, officers should be sure to include in their affidavits or suppression hearing testimony any corroborative information they were able to obtain.

It should also be noted that, while trying to obtain corroboration, officers will sometimes acquire information that constitutes direct evidence of the suspect's guilt (e.g., an incriminating statement, a successful controlled buy). When this happens the officer may become the primary source for probable cause, and the informant's tip may become secondary or even superfluous. Thus, in such a case, *People v. Kershaw*, the court said "it may be more accurate to say that the informer's statement corroborated the police investigation rather than the other way around."[86]

In most cases, corroboration consists of proof that *some* information furnished by the source was accurate. "Because an informant is right about some things," said the U.S. Supreme Court, "he is more probably right about other facts."[87] But demonstrating that a source was right about "some things" does not necessarily prove he was right about the important things. Instead, as we will now discuss, what matters most is that the corroborated information was such that it would ordinarily be known or predicted by someone with special knowledge about the suspect or his criminal activities.

Corroborating "inside" information

A police informant is likely to be deemed reliable if officers confirmed that he possessed "inside" information about the crime under investigation or the suspect's criminal operations.[88] The theory here is that the only people with access to such information would ordinarily be trusted associates or people with a "special familiarity" with the suspect.[89]

For example, in *Massachusetts v. Upton*[90] an unidentified woman telephoned police 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 stuff includes jewelry, silver, and gold; (4) Upton bought the stolen property from a man named Ricky Kelleher; and (5) Upton was getting nervous because he learned that the police had just "raided" Kelleher's motel room.

[83] (1985) 170 Cal.App.3d 929, 946 (conc. opn. of Crosby, J.).
[84] *People v. Levine* (1984) 152 Cal.App.3d 1058, 1065; *People v. Aho* (1985) 166 Cal.App.3d 984, 992.
[85] *U.S. v. Elmore* (2nd Cir. 2007) 482 F.3d 172, 181.
[86] (1983) 147 Cal.App.3d 750, 759.
[87] *Illinois v. Gates* (1983) 462 U.S. 213, 244.
[88] See *U.S. v. Zamora-Lopez* (8th Cir. 2012) 685 F.3d 787, 790.
[89] See *Alabama v. White* (1990) 496 U.S. 325, 332.
[90] (1984) 466 U.S. 727.

Officers then confirmed the following: Upton lived in a motor home at the location described by the caller; the caller's description of the stolen property "tallied" with the items taken in recent burglaries; and officers had recently executed a search warrant on Kelleher's motel room. Based on this information, officers obtained a warrant to search Upton's motor home and found stolen property. In ruling that the officers' corroboration of the tip was sufficient, the Supreme Court said, "The informant's story and the surrounding [corroborated] facts possessed an internal coherence that gave weight to the whole."

Similarly, in *People v. Rosales*[91] an anonymous caller phoned police in South Gate and said she had witnessed a murder that had occurred one day earlier when a man in a pickup truck opened fire on a house. The woman said she was inside the house at the time, that she saw the shooter, he was known as "Big Tudy," the shooting was gang-related, Big Tudy was a member of the Elm Street Gang, and he was getting ready to flee to Texas. Officers then determined 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 earlier when he was wanted for robbery. So they arrested him and, as the result, obtained evidence of his guilt.

On appeal, the court ruled the caller's tip was sufficiently corroborated mainly because she "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 [and] she knew that Rosales was planning to flee to Texas."

The following are some other examples of corroborated "inside" information that sufficed to justify a detention, arrest, or search:

- The informant knew the routine that a suspected drug dealer would follow in retrieving drugs.[92]
- The informant knew that a drug trafficker would be staying at a certain hotel and would use a certain false name when he registered.[93]
- The informant knew about "a crime detail" that had not been released to the news media.[94]
- The informant knew how the suspect had committed two burglaries and how he had bypassed the alarm system.[95]
- The informant knew the approximate time that a murder victim had been shot.[96]
- The informant knew where the body of a murder victim had been dumped.[97]
- The informant said the suspect possessed certain railroad bonds, and officers confirmed that such bonds had been stolen.[98]
- The informant knew the suspect was a parole violator and was wanted on warrants.[99]

Note that, by definition, the term "inside" information does not cover any type of information that could have been obtained without much difficulty or was commonly known, such as the suspect's address and his physical description.[100] As the court observed in *Higgason v. Superior Court*, "The courts take a dim view of the significance of such pedestrian facts."[101] Or, as the Supreme Court put it, "An accurate description of a subject's readily observable location and appearance . . . does not show that the tipster has knowledge of concealed criminal activity."[102]

Corroborating predictions

For the same reason that corroboration of "inside" information is a good indication of an informant's reliability, it is significant that the informant told officers that the suspect would take some action in

[91] (1987) 192 Cal.App.3d 759.
[92] *People v. Aston* (1985) 39 Cal.3d 481, 496; *U.S. v. Stearn* (3rd Cir. 2010) 597 F.3d 540, 557.
[93] *U.S. v. Brown* (1st Cir. 2007) 500 F.3d 48, 56.
[94] *People v. McCarter* (1981) 117 Cal.App.3d 894, 902. Also see *U.S. v. Elmore* (2nd Cir. 2007) 482 F.3d 172, 182.
[95] *People v. Costello* (1988) 204 Cal.App.3d 431. Also see *People v. Stewart* (1983) 140 Cal.App.3d 11,15.
[96] *People v. Lara* (1967) 67 Cal.2d 365.
[97] *People v. Cooks* (1983) 141 Cal.App.3d 224.
[98] *People v. Dumas* (1973) 9 Cal.3d 871, 876. Also see *People v. Superior Court (Williams)* (1978) 77 Cal.App.3d 69, 75.
[99] *U.S. v. Hauk* (10th Cir. 2005) 412 F.3d 1179, 1191.
[100] See *Alabama v. White* (1990) 496 U.S. 325, 332; *People v. French* (2011) 201 Cal.App.4th 1307, 1320.
[101] (1985) 170 Cal.App.3d 929, 940.
[102] *Florida v. J.L.* (2000) 529 U.S. 266, 272.

the future pertaining to his crimes, and officers saw him do it.[103] "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."[104]

For example, in *Alabama v. White*[105] an informant called an officer and said that, at a certain time, Vanessa White would drive a brown Plymouth station wagon from the Lynwood Apartments to Dobey's Motel, and she would be carrying an ounce of cocaine. Everything checked out. So surveillance officers stopped the car, obtained White's consent to search it, and found cocaine in her purse. In ruling that the officers had sufficient reason to credit the informant, 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."

In applying this logic, other courts have upheld detentions based on the following:

- An informant said the suspect planned to shoot someone at a certain time and place; when he arrived on schedule, officers detained him.[106]
- ICS agents confirmed a tip from an arrested drug smuggler that his associates would enter California from Mexico at about the same time, driving a Toyota Tacoma and a PT Cruiser.[107]
- Officers confirmed an informant's tip that the suspect would be making a delivery of drugs to Midland, Texas and that he would be driving a certain type of car.[108]
- Officers confirmed a 9-1-1- report from an identified caller that a car that had been used in a shooting would soon be heading southbound on a certain street.[109]

Observing suspicious activity

Probably the most common type of corroboration results from surveillance during which officers see the suspect do something that, although not illegal, was consistent with the informant's tip about the suspect's criminal activities.[110] Said the Court of Appeal, "Even observations of seemingly innocent activity suffice alone, as corroboration, if the anonymous tip casts the activity in a suspicious light."[111] Here are some examples of corroborative suspicious activity that warranted a detention:

- When officers arrived in response to a report of an impending shooting, the suspect "broke away" from a group of men and started walking away.[112]
- As officers in a patrol car approached a house in which the occupants were reportedly selling drugs, they saw four or five men outside "scattered around" a wall; apparently in response to seeing the patrol car, one of the men "quickly walked behind the wall."[113]
- The suspect matched the source's description of a man who had just fired a gun; and he "was holding what appeared to be something heavy in his pocket or waistline, in an unusual manner, where a gun was ultimately found."[114]
- Having stopped a car that reportedly belonged to a drug dealer who was sometimes armed, officers saw the suspect reach "in and out of his jacket pocket," a movement that, according to the court, "could be interpreted by an officer as a retrieval of a weapon."[115]
- Responding to a tip that the a man in a parked car was carrying a gun, officers saw the man make a "furtive" gesture as if he was putting something under the seat.[116]

[103] See *Illinois v. Gates* (1983) 462 U.S. 213, 245, fn.13; *U.S. v. Brack* (7th Cir. 1999) 188 F.3d 748, 756.
[104] *People v. Jordan* (2004) 121 Cal.App.4th 544, 559.
[105] (1990) 496 U.S. 325.
[106] *People v. Turner* (2013) 219 Cal.App.4th 151, 168.
[107] *U.S. v. Villasenor* (9th Cir. 2010) 608 F.3d 467, 473-74.
[108] *U.S. v. Powell* (5th Cir. 2013) 732 F.3d 361, 371.
[109] *U.S. v. Johnson* (3rd Cir. 2010) 592 F.3d 442, 450.
[110] See *People v. Jordan* (2004) 121 Cal.App.4th 544, 558; *U.S. v. Greenburg* (1st Cir. 2005) 410 F.3d 63, 69.
[111] *People v. Costello* (1988) 204 Cal.App.3d 431, 446.
[112] *People v. Turner* (2013) 219 Cal.App.4th 151, 168.
[113] *U.S. v. Soto-Cervantes* (10th Cir. 1998) 138 F.3d 1319, 1323. Also see *U.S. v. Thompson* (D.C.Cir. 2000) 234 F.3d 725, 727.
[114] *People v. Lindsey* (2007) 148 Cal.App.4th 1390.
[115] *U.S. v. Thomas* (7th Cir. 2008) 512 F.3d 383, 388. Also see *U.S. v. Simmons* (2nd Cir. 2009) 560 F.3d 98, 108.
[116] *U.S. v. Graham* (6th Cir. 2007) 483 F.3d 431, 439. Also see *Adams v. Williams* (1972) 407 U.S. 143, 146-47 [driver was asked to open the door, but he rolled down the window instead].

- After receiving a tip that a certain man was selling heroin, officers saw him meet with another man and exchange money for two balloons containing a tan powder.[117]
- When officers arrived at a motel in which a man was reportedly pointing a gun at a woman, they saw a man and a woman in a car; the man was "waiving his arms" at the woman and there was a dark object (like a gun) in his lap.[118]
- After an informant said the suspect was selling meth from his motel room, officers knocked and "heard considerable movement, opening and closing of doors, and a toilet flushing."[119]
- Responding to a report that a man was selling drugs in the dark hallway of an apartment building, officers saw a man there "strangely crouched over in a corner, peering down at them."[120]
- Checking out a report of a drug house, officers found balloon fragments nearby, "many of which were knotted in the end"; they also saw "numerous people going in and out of the house," one of whom was detained and determined to be under the influence of heroin.[121]

Other relevant corroboration

In addition to the above, the following circumstances are often noted by the courts and may help bolster the reliability of an informant or his tip:

INFORMANT FURNISHED DETAILED INFORMATION: The courts often note whether the informant provided officers with detailed information, as opposed to vague or generalized assertions.[122] "[E]ven if we entertain some doubt as to an informant's motives," said the Supreme Court, "his 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."[123] The theory here, or so it appears, is that informants are seldom so imaginative and crafty that they can invent a false story that is both plausible and full of particulars. Still, details alone will not always render a tip reliable. As one court put it, "The quantification of the information does not necessarily improve its quality; the information does not rise above its doubtful source because there is more of it."[124]

SUSPECT'S CRIMINAL HISTORY: It is relevant that officers determined that the suspect had been previously arrested or convicted of crimes similar to the one reported by the informant.[125] As the Supreme Court stated in *United States v. Harris*:

> [A] policeman's knowledge of a suspect's reputation [is] a practical consideration of everyday life upon which an officer (or a magistrate) may properly rely in assessing the reliability of an informant's tip.[126]

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[117] *People v. Medina* (1985) 165 Cal.App.3d 11, 18-19. Also see *Illinois v. Gates* (1983) 462 U.S. 213, 243. fn.13.
[118] *U.S. v. Sandoval* (9th Cir. 2004) 390 F.3d 1077.
[119] *U.S. v. Hendrix* (10th Cir. 2011) 664 F.3d 1334, 1339.
[120] *People v. Johnson* (1991) 231 Cal.App.3d 1, 11.
[121] *People v. Sotelo* (1971) 18 Cal.App.3d 9.
[122] See *People v. Kershaw* (1983) 147 Cal.App.3d 750, 758 ["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."]; *United States v. Hensley* (1985) 469 U.S. 221, 234; *People v. Wells* (2006) 38 Cal.4th 1078, 1088; *People v. Dolly* (2007) 40 Cal.4th 458, 468; *People v. Rosales* (1987) 192 Cal.App.3d 759, 768; *Lowry v. Gutierrez* (2005) 129 Cal.App.4th 926, 941; *In re Richard G.* (2009) 173 Cal.App.4th 1252, 1258; *U.S. v. Jennen* (9th Cir. 2010) 596 F.3d 594, 598 ["a range of details"]; *U.S. v. Conner* (10th Cir. 2012) 699 F.3d 1225, 1230; *U.S. v. Chavez* (10th Cir. 2011) 660 F.3d 1215, 1222 [the caller "provided the dispatchers with detailed information about the events he witnessed, including the model of each vehicle involved in the disturbance and each vehicle's license plate number"]; *U.S. v. Carson* (7th Cir. 2009) 582 F.3d 827, 832; *U.S. v. Torres* (3rd Cir. 2008) 534 F.3d 207, 213 [the caller "provided a detailed account of the crime he had witnessed"].
[123] *Illinois v. Gates* (1983) 462 U.S. 213, 234.
[124] *Orvalle v. Superior Court* (1962) 202 Cal.App.3d 760, 763.
[125] See *People v Rooney* (1985) 175 Cal.App.3d 634, 648 [bookmaking prior]; *People v. Murphy* (1974) 42 Cal.App.3d 81, 87 [drug prior]; *People v. Kershaw* (1983) 147 Cal.App.3d 750, 760 [drug prior]; *People v. Hill* (1970) 3 Cal.App.3d 294, 299 [drug prior]; *U.S. v. Taylor* (1st Cir. 1993) 985 F.2d 3, 6 [marijuana growing prior]; *U.S. v. Ayers* (9th Cir. 1990) 924 F.2d 1468, 1478 [drug prior]; *U.S. v. Morrison* (8th Cir. 2010) 594 F.3d 626, 632 [previous arrest for possession of pseudoephedrine with intent to manufacture, "a charge implicating the same conduct that the informant alleged"]; *U.S. v. Jones* (1st Cir. 2012) 700 F.3d 615, 623.
[126] (1971) 403 U.S. 573, 583.

MULTIPLE INDEPENDENT TIPS: A tip that a suspect was engaging in certain criminal activities may be deemed corroborated if one or more other untested informants provided officers with the same or substantially the same information. As the Court of Appeal put it, "If the smoke is heavy enough, the deduction of a fire becomes reasonable."[127] But such a deduction necessarily requires proof that the informants were not cohorts and that each provided their information independently of the other. Thus, in *People v. Balassy* the court explained that "one 'unreliable' informer's statements may be corroborated by those of another, if they were interviewed independently, at a different time and place."[128]

STATEMENTS AGAINST PENAL INTEREST: Information from an informant that implicates the suspect in a crime may be deemed reliable if both of the following circumstances existed: (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 it to officers.[129] Note that an informant's statement is not "against penal interest" if, although it incriminated the informant, it placed most of the responsibility for the crime on someone else.[130]

UTILIZING INTERVIEWING TECHNIQUES: It is relevant that officers attempted to test the informant's reliability by carefully observing his conduct or mannerisms, and utilizing interview techniques which contributed to their determination that he appeared to be reliable. For example, in *John v. City of El Monte*,[131] where a ten year old girl accused her teacher of sexually molesting her, the Ninth Circuit noted that the officer tested the girl's reliability by, for example, inserting false or exaggerated facts into her descriptions of the incident; and each time "she would correct [him] and would stay consistent with her original description."

SWORN TESTIMONY BY INFORMANT (*Skelton* hearings): If officers are seeking a search or arrest 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.[132] The theory here is that, because judges routinely determine the credibility of witnesses in court, they may do the same with informants in chambers.

EMERGENCIES: An informant does not become reliable merely because he was reporting an emergency. But it is a factor that the courts have taken into account in determining whether the officer's response to the tip was reasonable. "[W]hen an emergency is reported by an anonymous caller," said the court in *U.S. v. Holloway*, "the need for immediate action may outweigh the need to verify the reliability of the caller."[133] Note that, as discussed earlier, the U.S. Supreme Court is expected to address this issue in the pending case of *Navarette v. California*. POV

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[127] *People v. Hirsch* (1977) 71 Cal.App.3d 987, 991, fn.1.

[128] (1973) 30 Cal.App.3d 614, 621. Also see *People v. Green* (1981) 117 Cal.App.3d 199, 205 ["[C]orroboration of an unreliable informant's statements may be met by those of another, if they were interviewed independently"]; *People v. Coulombe* (2000) 86 Cal.App.4th 52, 58; *People v. Amos* (1977) 70 Cal.App.3d 562, 567; *People v. Camarella* (1991) 54 Cal.3d 592, 606; *People v. Terrones* (1989) 212 Cal.App.3d 139, 149.

[129] See *United States v. Harris* (1971) 403 U.S. 573, 583; Evid. Code § 1230; *In re 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; *People v. Mardian* (1975) 47 Cal.App.3d 16, 31; *People v. Bryden* (1998) 63 Cal.App.4th 159, 175; *People v. Frierson* (1991) 53 Cal.3d 730, 745; *People v. Gordon* (1990) 50 Cal.3d 1223, 1251; *People v. Terrones* (1989) 212 Cal.App.3d 139; *People v. Hall* (1974) 42 Cal.App.3d 817, 823; *U.S. v. Villasenor* (9th Cir. 2010) 608 F.3d 467, 474.

[130] See *People v. Campa* (1984) 36 Cal.3d 870, 882; *In re Larry C.* (1982) 134 Cal.App.3d 62, 69; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 327-42 ["Clearly the least reliable circumstance is one in which the declarant has been arrested and attempts to improve his situation with the police by deflecting criminal responsibility onto others."].

[131] (9th Cir. 2007) 505 F.3d 907.

[132] 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."].

[133] (11th Cir. 2002) 290 F.3d 1331, 1339. Also see *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."].

Recent Cases

Fernandez v. California

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

Issue

If a suspect refuses to consent to a search of his home, can officers obtain consent to search from another resident after they arrest the suspect and remove him from the premises?

Facts

At about 11 A.M., a man armed with a knife robbed and stabbed a young man in Los Angeles. As LAPD officers arrived, they were approached by a witness who pointed to a certain apartment and said, "The guy is in the apartment." The officers then saw a man run into the apartment and he matched a general description of the robber and his clothing. Shortly after the man entered the apartment, the officers heard a commotion inside: a woman screaming and the sounds of fighting.

The officers knocked on the door which was answered by a woman, Roxanne Rojas, who was bleeding and had apparently just been beaten. When they asked her to step outside so they could search for the robber, the man they were chasing stepped from behind her and said, "You don't have any right to come in here. I know my rights." The officers promptly arrested the man for beating Rojas and removed him from the apartment. The man was Walter Fernandez.

About one hour later (after the robbery victim identified Fernandez at a field showup), officers returned to the apartment and obtained Ms. Rojas's consent to search the premises for evidence pertaining to the robbery. The search netted, among other things, a butterfly knife, clothing similar to that worn by the robber, and gang indicia which prosecutors used at trial to prove that the holdup was gang-related. After Fernandez's motion to suppress the evidence was denied, he was convicted of various crimes and sentenced to 14 years in prison. The California Court of Appeal affirmed the conviction and Fernandez appealed to the United States Supreme Court.

Discussion

Fernandez argued that the evidence found in his house should have been suppressed because the search violated the rule of *Georgia v. Randolph*.[1] This controversial rule, which was announced by the United States Supreme Court in 2006, prohibits officers from searching a home pursuant to the consent of one resident if another resident objected to the search and the following three circumstances existed:

(1) **SEARCH TO OBTAIN EVIDENCE**: The purpose of the search was to obtain evidence against the objecting resident.

(2) **EXPRESS OBJECTION**: The objecting resident specifically said he was objecting to the search; i.e., an objection will not be implied.

(3) **OBJECTION IN OFFICERS' PRESENCE**: The objection was made in the officers' presence at the time they sought consent.

Citing the third requirement, Fernandez argued that, for the following reasons, the search of his home should have been deemed unlawful pursuant to *Randolph*.

First, he claimed that the objecting resident should not be required to voice an objection at the time the officers obtained consent if he was incapable of doing so because they had removed him from the premises. This argument was based on language in *Randolph* that a search might be illegal if officers had removed the "potentially objecting tenant from the entrance for the sake of avoiding a possible objection."

The Court in *Fernandez*, however, interpreted this language as meaning that the officers' removal of the objecting resident could render the search unlawful only if they lacked reasonable grounds to do so.[2] And in this case, said the Court, the officers had two good

[1] (2006) 547 U.S. 103.

[2] **NOTE**: The Court also ruled that the officers' motivation for removing the objecting resident is immaterial—what matters is that they had reasonable grounds to do so.

reasons for removing Fernandez: (1) they had grounds to detain or arrest him for robbery, and (2) they needed to speak with Ms. Rojas privately about their suspicion that Fernandez had just beaten her.[3]

Fernandez also argued that, even if his removal from the premises did not violate *Randolph*, the search was nevertheless unlawful because he had objected to the search at the door before he was removed ("You don't have any right to come in here. I know my rights"), and that his objection should be deemed to have remained in full force unless and until he notified the officers that he had changed his mind. The Court disagreed, noting that such a rule "would produce a plethora of practical problems." One of them, said the Court, was that people would be unable to obtain assistance from officers in ridding their homes of dangerous drugs or weapons—possibly for years—unless the objecting resident changed his mind or a court somehow determined that the objecting resident had lost his right to object.

Consequently, the Court ruled that a resident's objection to the search lasts only while he is present at the scene. As it pointed out, "If *Randolph* is taken at its word—that it applies only when the objector is standing at the door saying 'stay out' when officers propose to make a consent search—all of these problems disappear."

Although *Fernandez v. California* did not make *Randolph* disappear, it did the next best thing.

People v. Duff

(2014) 58 Cal.4th 527

Issues

(1) Did officers violate *Miranda* before they obtained an incriminating statement from a murder suspect? (2) Was the suspect's statement voluntary?

Facts

Duff was a small-time gun trafficker in Sacramento. One of his customers, Roscoe Riley, purchased a .357 from him but neglected to pay for it. Over the next few months, Duff became increasingly angry at such "disrespect," so he decided to kill Riley. He then concocted a plan whereby Riley would pick him up in a car and Duff would shoot him. But when Riley arrived he had an unexpected passenger: Brandon Hagan.

Duff did not consider this a serious obstacle, so he got into the car, and Riley began driving to Rio Linda to get some drugs. But before they left Sacramento, Duff told Riley to stop at a bar so he could use the restroom. When he returned, he stood outside the car and opened fire on Riley and Hagan with a .38, killing both. After that, he abandoned the car and the bodies in a muddy field, took the victims' money and jewelry, and started walking to his mother's house.

As he approached the residence, he spotted a patrol car—at which point both he and the officers in the patrol car made a miscalculation. Duff mistakenly thought the officers had somehow found out about the murders and were looking for him. So he started running. The officers—who didn't yet know about the murders and were looking for a fugitive—mistakenly believed that Duff was the fugitive because he was fleeing. So they gave chase and quickly apprehended him. They then searched the area where they had first spotted him and found two rings (later identified as Riley's) and a .357 revolver with blood in the chamber. Suspicious, they went back to Duff's mother's home and obtained her consent to search the premises. When they found .22 caliber bullets, they arrested Duff for being a felon in possession of ammunition.

As the homicide investigation got underway, detectives learned that the victims had been killed with a .357 or a .38; and they figured that Duff might have been the killer because, shortly after the murders, he was carrying a .357 and had run from officers. So they decided to interview him at the jail. After *Mirandizing* him and asking if he would talk to them, Duff said, "I don't know. Sometimes they say it's—it's better if I have a—lawyer." One of the detectives said he just wanted to clear up some things, and that Duff could stop answering questions at any time. Duff then agreed to speak with the detectives and eventually confessed to the shootings but claimed it was self-defense. He was subsequently convicted of two counts of first-degree murder and sentenced to death.

[3] **NOTE**: The Court's ruling in *Fernandez* effectively abrogated the Ninth Circuit's controversial rule in *U.S. v. Murphy* (9th Cir. 2008) 516 F.3d 1117 that consent given by a spouse is invalid if the suspect was no longer at the door because he had been lawfully arrested.

Discussion

On appeal to the California Supreme Court, Duff argued that his conviction should be reversed because his incriminating statement had been obtained in violation of *Miranda* and was also involuntary. The court disagreed.

MIRANDA: As noted, when Duff was asked if he would talk to the detectives, he responded, "I don't know. Sometimes they say it's—it's better if I have a—lawyer." In the past, the mere mention of the word "lawyer" would have been interpreted as an invocation of the *Miranda* right to counsel. But in 1994 the Supreme Court ruled in *Davis v. United States* that such a remark can constitute an invocation only if it clearly and unambiguously manifested a desire to invoke.[4] Clearly, Duff's words did not satisfy that requirement. So he argued instead that if a suspect makes an ambiguous statement *before* he waived his rights, officers should be required to stop the interview and clarify whether he had intended to invoke.

Citing an opinion from the Ninth Circuit, the court agreed with Duff. But it also ruled that such clarification does not require that officers specifically ask the suspect to "clarify" his words. Instead, it is sufficient that officers "talk to him to see whether or not he wanted to talk." And because that is what the detective had done, and because Duff then made it clear that he was willing to undergo questioning without an attorney, the court ruled his confession was not obtained in violation of *Miranda*.

VOLUNTARINESS: Duff also argued that his statement should have been suppressed because it was involuntary. As a general rule, a statement is involuntary if (1) officers utilized tactics that were so coercive that the suspect felt compelled to confess or make a damaging admission, and (2) the coercive tactics were the motivating force behind his decision to make the statement.[5] Apart from the fact that the detectives did not utilize coercive tactics, the court ruled that "it appears Duff confessed to shooting Riley and Hagan not because his will was overborne, but because he was capable of making, and made, the rational choice to offer his side of events, in which he shot Riley and Hagan in self-defense, rather than out of a premeditated desire to obtain revenge for past slights."

Having determined that Duff's statements were obtained lawfully, the court affirmed his conviction and death sentence.

Comment

Although the court ultimately ruled that the detectives had not violated Duff's *Miranda* rights, it is necessary to discuss some of the things it said and why there is some confusion in this area of the law.

As noted, the U.S. Supreme Court in *Davis v. United States* ruled that a remark by a suspect in custody can constitute a *Miranda* invocation only if it clearly and unambiguously manifested a desire to invoke. The Court explained that such a rule was necessary because officers who are questioning a suspect need to know precisely what kind of remark will require that they terminate the interview. Any other rule, said the Court, "would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity."

Nevertheless, in 2008 the Ninth Circuit in *U.S. v. Rodriguez* narrowly construed *Davis*, ruling it does not apply if the suspect made the ambiguous remark just *before or while* officers sought a waiver from him.[6] According to the court, if that happens the officers cannot proceed with the interview unless they clarify with the suspect that he did not intend to invoke. Because the California Supreme Court in *Duff* cited *Rodriguez* as the only direct authority for its ruling that the detectives were required to clarify Duff's intent when he made the "ambiguous" remark about a lawyer, the validity of its ruling depends on whether *Rodriguez* is good law today. For the following reasons, we think it is not.

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[4] (1994) 512 U.S. 452, 459.

[5] See *Culombe v. Connecticut* (1961) 367 U.S. 568, 576; *Arizona v. Fulminante* (1991) 499 U.S. 279, 287 ["coercion can be mental as well as physical, and the blood of the accused is not the only hallmark of an unconstitutional inquisition"]; *Oregon v. Elstad* (1985) 470 U.S. 298, 304 [statement is involuntary if obtained "by techniques and methods offensive to due process, or under circumstances in which the suspect clearly had no opportunity to exercise a free and unconstrained will"]; *People v. Depriest* (2007) 42 Cal.4th 1, 34 ["Involuntariness means the defendant's free will was overborne."].

[6] (9th Cir. 2008) 518 F.3d 1072.

Two years after *Rodriguez* was decided, the United States Supreme Court announced its decision in *Berghuis v. Thompkins*.[7] In *Thompkins*, the Court ruled that *Miranda* waivers can be implied as well as express, and that a waiver will be implied if (1) the suspect was correctly informed of his rights, (2) he said he understood his rights, (3) he responded to the officers' questions, and (4) the officers neither coerced nor pressured him into speaking with them. Said the Court, "As a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford."

Of particular importance to the issue at hand, the defendant in *Thompkins* did not immediately respond to the officers' questions after he had been *Mirandized*. Instead, during the subsequent three-hour interview he was "largely" silent except for giving a "few limited verbal responses" (such as "yeah," "no," or "I don't know") and occasionally nodding his head. But—and this was significant—he did not impliedly waive his rights until later in the interview when he directly responded to an officer's question.

Consequently, both Thompkins and Rodriguez said or did something before they impliedly waived their rights, and such conduct arguably constituted an ambiguous invocation. But while the court in *Rodriguez* ruled that officers in such a situation were required to immediately stop the interview and clarify the defendant's intent, the Supreme Court in *Thompkins* ruled they were not. On the contrary, the Court said, "If an accused makes a statement concerning the right to counsel that is ambiguous or equivocal," officers "are not required to end the interrogation or ask questions to clarify whether the accused wants to invoke his or her *Miranda* rights." For these reasons, it appears *Rodriguez* was implicitly overturned by *Thompkins* and that the California Supreme Court in *Duff* should have ruled that the officers were not required to clarify Duff's ambiguous remarks.

We also question the court's ruling that Duff's pre-waiver words were, in fact, ambiguous. Let's look at what he said. First, he responded "I don't know" when asked if he wanted to waive his rights. These words were nothing more than an expression of uncertainty, not that he might have reached a decision on the matter. As for his reference to a lawyer, Duff observed that some people say it's better to have a lawyer. That is a truism, like saying that some people enjoy baloney sandwiches and others do not. In neither case, do the words demonstrate—ambiguously or unambiguously—that the speaker might have made his own decision on the matter. Consequently, even if *Rodriguez* was still good law (which we doubt), we do not think the officers would have been required to clarify Duff's remark since there was nothing about it that required clarification.

In conclusion, it is important to recall the reason the U.S. Supreme Court ruled in *Davis* that officers are not prohibited from interviewing a suspect merely because he said something that *might* have constituted an invocation. It was because, as the Court later explained in *Thompkins*, it "avoids difficulties of proof and provides guidance to officers on how to proceed in the face of ambiguity." In *Duff*, however, the California Supreme Court—unintentionally, we think—reignited these difficulties of proof and in the process undermined the guidance that the U.S. Supreme Court hoped to provide officers in situations such as these.

People v. Elizalde

(2013) 222 Cal.App.4th 351

Issue

When an inmate is booked into jail, must officers obtain a *Miranda* waiver before asking questions about his gang affiliation?

Facts

Jose Mota was a member of the Varrio Frontero Loco subset of the *Sureño* street gang in Contra Costa County. During a three-month period, members of the gang murdered at least three people who they

[7] (2010) 560 U.S. 370.

believed were members of a rival *Sureños* subset in Richmond. Mota and Elizalde were arrested for the crimes.

While Mota was being booked into the Contra Costa County Jail he told a classification deputy, "I'm a gang banger, but I'm not a murderer." Another classification deputy asked him the name of his gang, and Mota said it was the "VFL" which, as noted, was a subset of the *Sureños.* The deputy later testified that he needed to know the name of Mota's gang to make sure he was not housed with members of rival gangs.

Mota was subsequently charged with three murders and a sentencing enhancement for committing the crimes in the furtherance of street gang activity. At trial, prosecutors were permitted to use Mota's classification statement to prove the truth of the gang allegation. The jury found Mota guilty of conspiracy to commit three murders, and also concluded that the crimes were gang-related.

Discussion

On appeal, Mota contended that his statements to the classification deputy should have been suppressed because he had not waived his *Miranda* rights beforehand. The court agreed.

It is settled that officers must obtain a *Miranda* waiver before interrogating a suspect who is in custody. Furthermore, the term "interrogation" has been broadly defined as any questioning that is "reasonably likely to elicit an incriminating response."[8] Also broadly defined is the term "incriminating response," which means any statement that might be used against the suspect in court.[9] Thus, at first glance it appears the deputy should have obtained a waiver from Mota before asking about his gang affiliation.

There are, however, exceptions to the waiver requirement. And one of them, known as the "routine booking question" exception, is that a waiver is not required before officers seek basic biographical information that is necessary for booking or pretrial services; e.g., suspect's name, address, date of birth, place of birth, phone number, occupation, social security number, employment history, arrest record, spouse's name.[10] Nor is a waiver required before an officer asks questions that are reasonably necessary for a jail administrative purpose.[11]

For example, in *People v. Williams*[12] the defendant had been charged with murdering Maria Corrieo and another Hispanic woman. Prior to trial, he was transferred to Folsom Prison where, as he was being processed, an inmate named Sergio Corriero saw him. Corriero was the son and brother of the two murder victims and he knew that Williams was charged with the crimes. So Sergio approached Williams and said "You're a dead man, motherfucker." Williams told a correctional officer that "they're going to stab me," but refused to say who "they" were. The officer then asked, "why are they going to stab you?" and Williams replied, "Because I killed two Hispanics." At Williams' murder trial, this statement was used against him and he was convicted.

Williams claimed the statement was obtained in violation of *Miranda* but the California Supreme Court disagreed, saying, "The officers were appropriately responding to defendant's own security concern, and would not reasonably have expected him to produce a confession. . . . The questioning was part of a routine, noninvestigative prison process, well within the scope of the booking exception."

In another case, *People v. Gomez,*[13] the defendant was being booked into the Riverside County Jail for carjacking when a deputy asked him if he was member of a gang. He replied that he was "affiliated with Arlanza." This statement was used at trial to help prove that the carjacking was committed for the benefit of a street gang. On appeal from his conviction, Gomez argued that the statement was obtained in violation of *Miranda* but the court disagreed, saying "[t]he questions appear to have been asked in a legitimate booking context, by a booking officer

[8] *Rhode Island v. Innis* (1980) 446 U.S. 291, 301.
[9] See *Rhode Island v. Innis* (1980) 446 U.S. 291, 301, fn.5; *Shedelbower v. Estelle* (9th Cir. 1989) 885 F.2d 570, 573.
[10] See *Pennsylvania v. Muniz* (1990) 496 U.S. 582, 601; *People v. Farnam* (2002) 28 Cal.4th 107, 180.
[11] See *People v. Gomez* (2011) 192 Cal.App.4th 609, 634 [the plurality in *Pennsylvania v. Muniz* 496 U.S. 582 "indicated that the booking question exception applies not only to biographical data, but more broadly to questions "reasonably related to the *police's administrative concerns.*"].
[12] (2013) 56 Cal.4th 165.
[13] (2011) 192 Cal.App.4th 609.

uninvolved with the arrest or investigation of the crimes, pursuant to a standard booking form."

In *Elizalde*, however, the court ruled that Mota's statement should have been suppressed. Although it took note of both *Williams* and *Gomez*, it ruled that *Miranda's* routine booking question exception did not apply because it was "unlikely that the deputy would be unaware of the possibility that Mota might be a gang member and thus particularly likely to give an incriminating response."[14]

Comment

There are several problems with the court's analysis in this case. First, it repeatedly said the deputy's question did not fall within the *Miranda's* booking question exception because it was reasonably likely to elicit an incriminating response. For example: "Here, the deputy who asked Mota whether he belonged to a gang should have known that question was reasonably likely to elicit an incriminating response" and "[A] law enforcement professional should have known that an incoming inmate's admission of gang membership could well be incriminating." It is true that an incriminating response was reasonably likely—maybe even probable. But that is irrelevant because, if the question had not been reasonably likely to elicit an incriminating response, it would not have constituted "interrogation" which would have meant that *Miranda* was inapplicable and the court's entire discussion of *Miranda* and its exceptions would have been an exercise in futility.[15]

Second, *Miranda's* booking question exception generally permits questions that call for biographical data, which includes such things as the arrestee's name, address, date of birth, place of birth, phone number, and occupation.[16] But in ruling that questions about gang affiliation do not constitute biographical data, the court ignored the fact—and we think it is commonly recognized as a fact—that, for members of street gangs, their gang affiliation is one of the most important and prominent features of their identity (and in many cases it is also their "occupation"). It would therefore fall squarely within any reasonable definition of "biographical."

Third, the court summarily dismissed another *Miranda* exception that was even more pertinent to the facts of this case than the booking question exception. It is known as the "public safety" exception and it essentially states that a *Miranda* waiver is not required before officers ask questions that were reasonably necessary to protect the public from harm.[17] Significantly, this exception is not limited to harm to the general public or law-abiding citizens—it applies equally when the person at risk was a criminal such as Mota.[18] In fact, the record demonstrates that the trial judge in *Elizalde* had actually based his ruling on this exception because, in denying Mota's motion to suppress, he observed that the Contra Costa County Jail "housed a large population of gang members, so many that they created a serious and real risk to the safety of inmates in rival gangs as well as to the deputies themselves."

Furthermore, in support of its argument that the public safety exception applied, prosecutors cited *U.S. v. Washington* in which the Ninth Circuit said:

> The record in the instant case shows that agents routinely obtain gang moniker and gang affiliation information for the United States Marshals and Metropolitan Detention Center in order to ensure prisoner safety. The question regarding Washington's gang moniker therefore was a routine booking question.[19]

Although the Ninth Circuit recognized that questions about gang affiliation and monikers are asked

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[14] **NOTE**: The court also ruled that Mota's statement was harmless error, and it therefore affirmed his conviction. This ruling, however, was irrelevant to our discussion of the issue.

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

[16] See *Pennsylvania v. Muniz* (1990) 496 U.S. 582, 601; *Rhode Island v. Innis* (1980) 446 U.S. 291, 301.

[17] See *New York v. Quarles* (1984) 467 U.S. 649, 656.

[18] See *People v. Stevenson* (1996) 51 Cal.App.4th 1234, 1239 ["when it is the arrestee's life which is in jeopardy, the police are equally justified in asking questions directed toward providing lifesaving medical treatment to the arrestee"]; *People v. Gomez,* "It is reasonable to take steps to ensure that members of rival gangs are not placed together in jail cells."]; *U.S. v. Lackey* (10th Cir. 2003) 334 F.3d 1224, 1227-28 ["It is irrelevant that the principal danger in this case was the risk of injury to the officers or Defendant himself, rather than ordinary members of the 'public'"].

[19] (9th Cir. 2006) 462 F.3d 1124, 1133.

"routinely" by U.S. Marshals for prisoner safety—and "therefore" the question about Washington's gang moniker did not violate *Miranda*—the court in *Elizalde* ignored that part of the *Washington* decision. Instead, it responded by casually switching the subject back to the booking question exception, saying that the Ninth Circuit was "of no assistance to the People" because "certainly the fact of gang membership is not 'routine' identifying information."

Fourth, the court apparently sought to avoid the real-life consequences of its ruling by admitting that, although the deputy violated *Miranda* by asking the question, his decision to do so was objectively reasonable and even praiseworthy. Here are the court's words: "*We fully expect the police to continue to [ask safety questions] upon booking in order to protect jail personnel and inmates from harm.*"

But the question arises: Has the suppression sanction become so twisted that it can now be imposed on an officer whose conduct was not only objectively reasonable, but was so appropriate that the court "fully" encouraged other officers to do exactly the same? To this question, the court exercised its right to remain silent.[20]

Fifth, the court faulted the trial judge for forcing Mota "to choose between incriminating himself or risking serious physical injury." That Mota had to make this choice might have been unfortunate, but it was not the trial judge who forced him to make it. On the contrary, it was Mota's choice—and he made it the moment he joined a street gang.

People v. Waxler

(2014) __ Cal.App.4th __ [2014 WL 935470]

Issues

(1) Can an officer search a vehicle for marijuana under the "automobile exception" if he has probable cause to believe the vehicle contains substantially less than an ounce? (2) Is such a search prohibited if the driver presented the officer with a medical marijuana card?

Facts

A Del Norte County sheriff's deputy received a report that a man was illegally dumping trash in the parking lot behind the Safeway store in Crescent City. When the deputy arrived he saw a man in a parked truck, so he walked over to talk to him. As he approached the truck he could smell marijuana and then noticed a marijuana pipe on the seat next to the driver. There was a small amount of marijuana residue in the bowl, apparently about 0.3 grams.

After detaining the driver, Michael Waxler, the deputy searched the truck and, in addition to the pipe, found methamphetamine. Waxler then told the deputy he had a "215 card," otherwise known as a medical marijuana card, and he showed it to the deputy. Waxler was arrested for possession of methamphetamine. When his motion to suppress the evidence was denied, he pled guilty.

Discussion

On appeal, Waxler contended that the search was illegal for two reasons. First, because the marijuana in the pipe obviously weighed much less than one ounce, the deputy lacked probable cause to believe he had committed a criminal offense and, therefore, the search would not fall within the automobile exception. Second, even if the search was legal at the outset, it was rendered illegal when he produced his medical marijuana card. The court rejected both arguments.

PROBABLE CAUSE: Pursuant to the "automobile exception," officers may search a vehicle without a warrant if it was in a public place and they had probable cause to believe it contained contraband or other evidence of a crime.[21] Although the deputy clearly had probable cause, Waxler contended that a warrantless search of a vehicle for marijuana is not permitted if the officer had reason to believe the amount of marijuana in the vehicle was less than one ounce and, therefore, the offense under investigation was merely an "infraction."[22] The court disagreed for two reasons.

[20] See *Davis v. United States* (2011) __ US __ [131 S.Ct. 2419, 2426]; *People v. Osuna* (1986) 187 Cal.App.3d 845, 855 ["The goal of the exclusionary rule is to protect all members of society by inducing those we employ to enforce our laws to conduct themselves in a reasonable manner."].

[21] See *United States v. Ross* (1982) 456 U.S. 798, 809; *People v. Superior Court* (*Nasmeh)* (2007) 151 Cal.App.4th 85, 100.

[22] See Health & Saf. Code § 11357(b).

First, an officer who sees a small amount of marijuana "may reasonably suspect additional quantities of marijuana might be found in the car."[23] Second, probable cause to search a vehicle will exist "irrespective of whether possession of up to an ounce of marijuana is an infraction and not an arrestable offense." This is because, as the court explained, "[u]nder the current state of California law, nonmedical marijuana—even in amounts within the statutory limit set forth in section 11357(b)—is 'contraband.'" Consequently, the court ruled that if officers have probable cause to believe there is marijuana in a vehicle they may search it "regardless of its quantity."

MEDICAL MARIJUANA: As noted, Waxler also contended that the search of his truck was illegal because he had presented the deputy with a "215 card." The court explained that a "215 card" is a "government card issued under the Compassionate Use Act of 1996 (CUA), also known as Proposition 215," and that California later enacted the Medical Marijuana Program Act (MMPA) which created a voluntary medical marijuana ID card program.

Apart from the fact that Waxler presented the card to the deputy *after* the search had been completed, the court ruled that "possession of a '215 card' does not vitiate probable cause to search pursuant to the automobile exception." As the court explained, although "California has decriminalized medicinal marijuana in some situations," the law does not prohibit vehicle searches for marijuana in possession of a cardholder." This is because officers have a duty "to determine whether [the cardholder] possessed marijuana for personal medical needs and to determine whether he adhered to the CUA's limits on possession." In other words, said the court, "The CUA provides a limited immunity—not a shield from reasonable investigation."[24]

The court added that, if officers were not permitted to make such searches, anyone with a medical marijuana card would be able to "deal marijuana from his car with complete freedom from any reasonable search." For these reasons, the court ruled that the search of Waxler's truck was lawful.

People v. Spriggs

(2014) 224 Cal.App.4th 150

Issue

Does a motorist violate Vehicle Code § 23123(a) by holding a cell phone and viewing a map application on its display?

Facts

A CHP officer in Fresno County noticed that a driver—later identified as Steven Spriggs—was holding a cell phone and apparently looking at the display screen. So he pulled Spriggs over and cited him for violating Vehicle Code § 23123(a). This statute prohibits drivers from "using a wireless telephone unless the telephone is specifically designed and configured to allow hands-free listening and talking, and is used in that manner while driving." It turned out that Spriggs was not talking on the phone, but was looking at a map application on the display. He contested the ticket in traffic court but lost. He then appealed to the Court of Appeal.

Discussion

Prosecutors argued that, because the statute—Vehicle Code § 23123(a)—prohibits drivers from "using" a cell phone while driving, it necessarily prohibits drivers from using the phone for *any* purpose, and that includes viewing a map application. Although the word "using" covers a lot of ground, the court examined the legislative history of the statute and concluded that it was not intended to prohibit any and all "uses" of a cell phone while driving. Instead, said the court:

> [I]t is apparent that the Legislature both understood and intended the statute to be limited to only prohibit a driver from holding a wireless telephone while conversing on it. It did not intend to extend the prohibition to other uses of a wireless telephone and most certainly did not intend to prohibit the use at issue here, namely looking at a map application while holding the telephone and driving.

Consequently, the court ordered that the citation be dismissed. POV

[23] See *People v. Superior Court (Marcil)* (1972) 27 Cal.App.3d 404, 413.
[24] Quoting from *People v. Strasburg* (2007) 148 Cal.App.4th 1052, 1059-60.

The Changing Times

Alameda County District Attorney's Office

Harold Boscovich retired. Bosco was responsible for establishing our Victim-Witness Assistance Division almost 40 years ago. He is succeeded by **Tasia Wiggins**. **Shelah Snowden** was appointed assistant director of the division. Former prosecutor **M.J. Tocci** died at the age of 60. Retired judge **Henry Ramey Jr.** died at the age of 80. New prosecutors: **William Layne**, **Shannon Roy**, and **Charly Weissenbach**.

Alameda County Narcotics Task Force

Transferring in: **Robert Marshall** (CHP). Transferring out: **Giorgio Chevez** (East Bay Regional Parks PD).

Alameda County Sheriff's Office

The following deputies have retired: **Robert Castelluccio** (29 years), **Mark Neideffer** (26 years), and **Lamont Wright** (16 years). New deputies: **Travis Anderson**, **Jeorge Berninzon**, **Robert Connolly**, **Jason Correia**, **Christapher Cragin**, **Derrek Dagneau**, **Karen Dawkins**, **William Dunbar**, **Christopher Fiore**, **Dustin Parker**, **Michael Proulx**, **Steven Saechao**, **Daniel Scimia**, and **Stephen Sweeney**. Graduates of the 150th Academy: **Nicole Allen**, **Lisa Bender**, **Edgar Berumen**, **Adelaida Bocanegra**, **William Cowens**, **Vincent Hall**, **Brian Hughes**, **Zachary Jarvis**, **Charles Lo Krause**, **Samisoni Latu**, **James Linn**, **David Lucero Jr.**, **Matthew Mulholland**, **Alisa Nederostek**, **Kernan Ng**, **Andrew Peek**, **Jose Ramirez**, **Jesus Rubalcava-Gomez**, **Ivan Stewart**, **John Thane**, **Stephen Thompson**, **Mark Tilley**, **Curtis Tyler**, **Bryce Walters**, **Erica Weathersbee**, and **Jansen Wilson**. ACSO reports that the Urban Shield Vendor Show will be held On September 4th and 5th at the Oakland Marriott Convention Center. Over 100 vendors from all areas of emergency service fields will be there.

Alameda Police Department

Sgt. **Hoshmand Durani** was promoted to lieutenant. Sgt. **Anthony Munoz** was promoted to acting lieutenant and was also appointed by Governor Brown to the POST Commission. Acting Sgt. **Richard Soto** was promoted to sergeant. **Michael Agosta** was promoted to acting sergeant. New recruits: **Jeanette Cazares**, **Joseph Couch**, **James Litwin**, and **Anthony Padilla**.

Albany Police Department

The department suffered the unexpected loss of veteran police officer **Steven R. Foss** who passed away on February 14, 2014 following a sudden brief illness. Foss was an Albany reserve officer from 1983-1985. In 1985 he became an officer with the Richmond PD but joined Albany PD in 1986. As an FTO for nearly 20 years, he influenced a generation of Albany officers during a time of great change in the organization. Foss had planned to retire in April 2014. Sgt. **Robert Christianson** retired after 32 years of service. He had previously served as a deputy with ACSO and as a Jailer/Ambulance driver with San Leandro PD. **David Belman Jr.** and **John Costenbader** were promoted to sergeant. **Monique Limon** resigned to accept a position with Pleasanton PD. Sgt. **David Bettencourt** transferred from Patrol to Administrative Sergeant. New officers: **Justin Kurland** (lateral from Tiburon PD), **Andrew Jones**, and **Patrick Rude**. New public safety dispatcher **Rachel Ajani.**

BART Police Department

Detective Sergeant **Thomas Smith, Jr.** was killed in the line of duty on January 21, 2014. Tom spent his entire career at BART PD. He joined the department in 1990 as a police cadet. Five years later, he fulfilled his dream and became a police officer. Tom became a canine officer in 2000 and served in the unit for seven years with his dog, Boris. Tom was promoted to sergeant in 2009, and in 2011 he was selected to oversee the Detective Bureau. He was killed while conducting a probation search at a home in Dublin. Master Officer **Lori Bush** retired after 21 years of service. Officers **Sean Fenner** and **Eric White** were promoted to sergeant. Lateral appointments: Sgt. **Neil Rafanan** (Contra Costa SO), **Albert Agadier**, **Jacob Barrows**, **Roderick Brown**, **Andre Charles**, **Steven Harrison**, and **Thomas Henderson**. New officers: **Michael Fong** and **Michael Polcar**. New police recruits: **Jared Gleason** and **Robert Wright**.

Berkeley Police Department

Retired Chief **Ronald D. Nelson** passed away unexpectedly after a sudden illness. Chief Nelson served with Berkeley PD from 1982 to 1990. After his departure, he served as Chief of Police with the University of California at San Francisco PD for several years. He previously served with the Los Angeles Police Department, the Compton Police Department, and as Chief of Police at China Lake as well as having been the City Manager of Compton prior to this appointment. The following officers retired: **John Lewis** (24 years) and **Jerome Cobert** (20 years). **Marcus Fields** medically retired. Parking Enforcement Officer **Lyesha Garrett** was promoted to Parking Enforcement Supervisor.

CALIFORNIA HIGHWAY PATROL

HAYWARD AREA: **Keith Peeso** was promoted to sergeant and transferred in from Mission Grade. **Brian King** was promoted to sergeant and transferred in from the Office of Inspector General. Transferring out: **Shaun Hargrove** to CHP Santa Cruz, and **Shane Borba** to CHP San Diego. Transferring in: **Matt Olwell** from CHP Santa Ana, and **Moses Min** from CHP Baldwin Park.

EAST BAY REGIONAL PARKS POLICE DEPT.

Joseph Quiggle was hired as a recruit. **Jeffrey Green** resigned and accepted a position with the DOJ. Lt. **Gretchen Rose** transferred from Patrol to the Administrative Assignment. Lt. **Lance Brede** graduated from the FBI National Academy and transferred from the Administrative Assignment to Patrol. **Kimberly Reed-Mendes** was promoted to Dispatch Supervisor. **Carissa Rios** was voted Dispatcher of the year.

EMERYVILLE POLICE DEPARTMENT

Lt. **Dante Diotalevi** was promoted to captain. Officers **Kevin Goodman** and **Richard Lee** were promoted to sergeant. New officers: **Kyle Sramek**, **Anthony Abogado** and **Ross Burruel**. New Dispatcher: **Greg Jeong**. Sgt. **Jason Bosetti** moved from Patrol to Investigations, and **Edward Mayorga** moved from Patrol to Investigations.

FREMONT POLICE DEPARTMENT

Sgt. **John Harnett** was promoted to lieutenant. Officers **Frank Tarango**, **Jason Lambert**, and **Butch Miller** were promoted to sergeant. New officers: **Sarah Cattaneo**, **Vincent Montojo**, **Jessen San Luis**, **James Estes**, **Rob Scherer**, **Michael Catassi**, **Nicholas Forsberg**, and **Kelly Robinson**.

NEWARK POLICE DEPARTMENT

Lateral appointments: **Brian Simon** from Pleasanton PD, and **Oskar Reyes** from ACSO. Transfers: **Shannon Todd** from Special Enforcement Team to Patrol, **Jeff Revay** from School Liaison Officer to Special Enforcement Team, **Matt Warren** from Patrol to School Liaison Officer, and **Sean Eriksen** from Patrol to Investigations.

OAKLAND POLICE DEPARTMENT

Lt. **Danielle Outlaw** was promoted to captain, and is serving in the capacity of interim deputy chief. Lts. **Kirk Coleman** and **Oliver Cunningham** were promoted to captain. The following sergeants were promoted to lieutenant: **Nishant Joshi**, **Erin Mausz**, **Michelle Allison**, **Roland Holmren**, **John Lois**, **Henderson Jordan**, and **Sekou Millington**. The following officers were promoted to sergeant: **Joseph Turner**, **Eric Milina**, **Joseph McGuinn**, **Anthony Tedesco**, **Sean Hall**, **Brian Alaura**, **Michele Melham**, **Casey Johnson**, **Jeff Smoak**, **Randy White**, **Richard Niven**, **John Koster**, **Doug Keely**, **Aaron Smith**, **Everett Peterson**, **Scott Hewitt**, **Steve Valle**, **Sean Barre**, **Robert Rosin**, **Christina Land**, **Timothy Martin**, **Curtis Filbert**, **Kevin Kaney**, **Cullen Faeth**, **Joseph McGuinn**, **Miguel Ugarte**, **Warit Uttapa**, **Anthony Tedesco**, and **Timothy Watermulder**.

The following officers have retired: Sgt. **Robert Crawford** (40 years), Sgt. **Larry Riggs** (27 years), and **Keith Dodds** (25 years). The following officers have taken disability retirements: Sgt. **Barry Hofmann**, Sgt. **Jack Peterson**, **Clifford Bunn**, **Martin Burch**, **Andrew Mallory**, **Anthony Ramos**, **Keith Samuel**, and **D'Vour Thurston**.

PIEDMONT POLICE DEPARTMENT

Sgt. **Robert "Andy" Wells** retired after 13 years of service. Sgt. **Mike Munoz** also retired after 13 years of service. **George Phifer** and **Steve DeWarns** were promoted to sergeant. Retired sergeant **James Faulkner** passed away on March 12, 2014. He joined the department in 1972 and retired in 2004.

PLEASANTON POLICE DEPARTMENT

Lateral appointments: **Daniel Kunkel** (from Antioch PD) and **Monique Limon** (from Albany PD). **Brandon Cobler** was appointed as a police recruit.

SAN LEANDRO POLICE DEPARTMENT

Rick Cahall retired after 24 years of service. New officer: **Calvin Prieto**. New college intern: **Kalien Frazier**. New Police Department Specialist: **Jerico Abanico**. Part-time Parking Aide **Taylor Smith** was promoted to Police Service Technician I.

UNION CITY POLICE DEPARTMENT

Daryl McAllister was appointed Deputy Chief after 32 years of service with Hayward PD. **Frank Allsup** retired after 24 years of service. The following officers medically retired: Cmdr. **Kelly Musgrove** (24 years), Cmdr. **Mark Quindoy** (19 years), **Russell Hughes** (19 years), **Michael Watson** (9 years), and **Daniel Bankston** (9 years). **Mathew Hardin** joined Hayward PD, **Daniel Padilla** joined Concord PD, **Michael Brunicardi** joined Livermore PD, and **Andrew Gannam** joined Redwood City PD. The following officers retired: **Robert Martin** (27 years), **Cheryl Wong** (19 years), and **Ariel San Pedro** (12 years). Transfers: **Nate Geldermann** from Patrol to School Resource Officer, **Kirk Wu** from Patrol to Investigations, Corp. **Stan Rodrigues** from Patrol to Community Policing, Corp. **Paul Kanazeh** from Community Policing to Patrol. New officers: **Amo Virk**, **Miguel Llamas**, **Mathew Blanchard**, **Daniel Mendoza**, **Russell Orlando** (from LAPD Schools), **Cory Woodard**, and **Mathew Mangan**.

POV

War Stories

Getting rich on Girl Scout cookies

Looking for a place to sell Girl Scout cookies? A scout named Danielle solved this problem by setting up a stand outside a medical marijuana dispensary in San Francisco. After selling her entire inventory of 117 boxes in just two hours, she called her mother for reinforcement cookies. According to her mother, selling 117 boxes in two hours represented a 400% increase over the number of cookies she sold during full day in front of a Safeway store.

How to stop a pursuit

A Livermore PD officer in a patrol car was following a flasher who was running down the street. As the officer pulled alongside the man, the officer ordered him to stop, and he did—abruptly. When the officer got out of his car and told the man to "assume the position," the man said, "I can't! Your front tire is on my foot!"

A common mistake

An Oakland officer was dispatched to an apartment house to investigate a report that a man was standing on the sidewalk exposing himself. Said the dispatcher, "The caller says there's a man sitting naked on the curb." A few seconds later, the dispatcher notified the officer, "Correction on the flasher call. The caller actually said there was a car parked on the curb, and it was stripped."

Add another handicap to the list

A man was going through Customs at Heathrow Airport and, when asked why he was carrying a golf bag, said he had come to England for a golfing holiday. The Customs inspector, an avid golfer, asked the man, "What's your handicap?" The man said he didn't have any real handicaps, except for some acne and a bad case of athlete's foot. Suspicious, the inspector asked the man to demonstrate his golf swing, which he did—with the clubface pointing backward. Incredulous, the inspector conducted an intensive search of the golf bag and, not surprisingly, found that it was filled with various drugs.

A disappointed burglar/Casanova

At about 1:30 A.M., Ashleigh Cullen, a bartender at the Curry Up Now restaurant in San Mateo, caught a burglar in the back room as he was stacking a TV and other electronics gear by the open rear door. The man immediately fled but Ashleigh recognized him as a guy who had flirted with her just 30-minutes earlier as she was closing up for the night. San Mateo police had no trouble finding the man because he had given Ashleigh his real name and phone number just in case she ever wanted a hot date. But there's more: A few days later, at the request of investigators, Ashleigh texted the man, saying she wanted to meet him at a certain place and time. Although she didn't show, officers did. They described the man as "very disappointed."

A good idea goes up in smoke

A man in North Carolina bought a box of very expensive cigars and decided to insure them for theft and fire. A few months later, he filed an insurance claim, saying the cigars had been destroyed in a fire. An insurance fraud investigator determined that the man was technically telling the truth—he had smoked them all. Nevertheless, the claim was denied.

What's happening in court

In traffic court, a speeder was cross examining the officer who had written him a ticket:

Speeder: Isn't it true that this ticket is bogus, that you wrote me up because you have a quota?
Officer: No, sir. We can write as many as we want.

In another courtroom:
Judge: You are charged with habitual drunkenness. Have you anything to say in your defense?
Defendant: Habitual thirstiness.

From a reader in Mississippi:
Judge: Please identify yourself for the record.
Witness: Colonel Ebenezer Jackson
Judge: What does the "Colonel" stand for?
Witness: Well, it's kinda like "The Honorable" in front of your name. Not a damn thing.

DA announces shocking new policy

Announcement in the Oakland Police Department's Daily Bulletin: *"The DA's Office will no longer charge cases without evidence."*

No spinning on my beat

Here's an excerpt from an Oakland police report: "The suspect was on the sidewalk, singing to herself, and turning around in circles. So I followed her because I wanted to determine if she was intoxicated, mentally disabled, or if she was spinning for no good reason."

Bad news for Elvis fans

Here's an excerpt from an FBI report of an interview with a witness: "The subject admits he likes to watch cop shows, and believes the show 'Law and Order' accurately portrays police work. He also thinks Elvis is alive."

Been there, done that

An Alameda County probation officer ran a rap sheet on one of his probationers and noticed that the probationer's first arrest occurred in 1958. The crime? "Visiting a dive."

I stand corrected

At the Fremont Hall of Justice, a prisoner asked the judge to lower his bail. So the judge started reading aloud the prisoner's rap sheet (32 pages long). At about page 2, the prisoner interrupted him:

Prisoner: That ain't me. I ain't never been arrested.

Judge: . . . and it also says here you've got a 187 broken down to a vol.

Prisoner: Wasn't no vol. It was an *in*vol.

If you can't trust a hit man . . .

Here's an excerpt from a recent opinion from the Tenth Circuit in *U.S. v. Gwen Bergman*: "Gwen Bergman thought she had hired a hit man to kill her ex-husband. She searched the Internet, found a name, negotiated a deal, even tapped her mother's retirement account to pay the man $30,000. But it turned out he was an undercover officer." To make matters worse, after trial "it emerged that Ms. Bergman's lawyer was not a lawyer at all; he was a con man. For years he'd made a comfortable living duping clients and courts alike."

Good cop/bad cop/clueless suspect

Two OPD homicide detectives had just *Mirandized* a suspect named Bobby who had a lengthy arrest record:

Bobby: Yeah, I'll talk to you guys but don't give me any of that good cop/bad cop crap. They've tried it on me before but I don't fall for it. OK?

Detective #1: Yeah, I understand. You're real smart. Probably a genius. So tell me, genius, if you're so smart, how'd you get yourself into this mess?

Detective #2: Hey, back off! Don't be talkin' to Bobby like that. He says he'll cooperate. I believe him. You're gonna tell us the truth, aren't you Bobby?

Bobby: Well yeah, I'll talk to *you*. But I ain't talkin' to *that* asshole.

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