Averting Evidence Suppression

"A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule."[1]

When the United States Supreme Court made this comment, it was pointing out the absurdity of running a criminal justice system as if it were a game. But that was in 1927. Today, as we all know, criminal prosecutions *are* games—games that are lost daily in courtrooms throughout the country when evidence is suppressed. Murder weapon, drugs, stolen property, confessions—they are all regularly suppressed because officers have not "played" according to the rules." The result? The perpetrator goes free, or he gets a generous plea bargain, or the case goes to trial with a diminished chance of success.[2]

There are, of course, sound reasons for suppressing evidence that has been obtained unlawfully.[3] But the fact remains that suppression is an extreme sanction that takes an enormous toll on society. Think of the individuals who have been robbed, murdered, and raped by people who, if it weren't for the exclusionary rule, would have been unable to commit their crimes because they would have been locked in jail or prison. As one court put it, when a society chooses not to punish such people it is committing an act of "self-immolation."[4]

How can this be prevented? The easy answer is that officers should simply follow the law. But the law is often vague or confusing. Moreover, it must often be applied in ambiguous and tense situations, which means officers must often guess under pressure at what the law requires them to do. And because they are human, they will sometimes guess incorrectly.[5]

Which brings us to the subject of this article. Even if officers have made serious mistakes, it may be possible to avoid the loss of evidence by invoking certain rules that prohibit suppression when the evidence and the police misconduct are not closely linked. For example, it makes no sense to suppress a gun that was obtained illegally if it would have been discovered inevitably by lawful means. This is why the United States Supreme Court has categorically rejected what it calls the "indiscriminate application of the exclusionary rule."[6]

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[1] *McGuire* v. *United States* (1927) 273 US 95, 99.
[2] See *People* v. *Defore* (1926) 242 NY 13, 21 ["The criminal is to go free because the constable has blundered."].
[3] See *Elkins* v. *United States* (1960) 364 US 206, 217 ["The [exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter—compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."]; *Michigan* v. *Tucker* (1974) 417 US 433, 447 ["By refusing to admit evidence [seized illegally], the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused."]; *Schneckloth* v. *Bustamonte* (1973) 412 US 218, 242 ["The Fourth Amendment is not an adjunct to the ascertainment of truth. [It stands] as a protection of quite different constitutional values—values reflecting the concern of our society for the right to each individual to be let alone."].
[4] *In re Reginald C.* (1985) 171 Cal.App.3d 1072, 1078. ALSO SEE *United States* v. *Leon* (1984) 468 US 897, 907 ["The substantial social costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights have long been a source of concern."].
[5] See *Atwater* v. *City of Lago Vista* (2001) 532 US 318, 347 ["Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment . . . "].
[6] *United States* v. *Leon* (1984) 468 US 897, 908, 910 ["[I]t does not follow from the emphasis on the exclusionary rule's deterrent value that anything which deters illegal searches is thereby commanded by the Fourth Amendment."]. ALSO SEE *Brown* v. *Illinois* (1975) 422 US 590, 600 ["(T)he exclusionary rule has

Instead, it has established five exceptions to the exclusionary rule by which evidence will be admissible even though it was obtained by means of a Constitutional violation. These rules are commonly known as (1) good faith, (2) "standing," (3) attenuation, (4) inevitable discovery, and (5) independent source. In this article, we will discuss each of these rules, plus the special rules pertaining to suppression of physical evidence obtained by means of a *Miranda* violation.

Before we start, however, we want to call attention to one other rule that may be the most important of all. In 1982, California voters passed an initiative known as "Proposition 8." Like the rules we will be discussing, the purpose of Proposition 8 was to limit application of the exclusionary rule to those situations in which it is absolutely necessary. It accomplished this by amending the California Constitution to read that evidence can be suppressed only if suppression is required by the United States Constitution.[7] As the result, California courts can no longer suppress evidence on grounds it was obtained in violation of a state statute or a case based on independent state grounds.

One final note: Because evidence can be suppressed only if it was obtained in violation of the U.S. Constitution, in this article when we speak of police "misconduct," "mistakes," "errors," and the like, we mean Constitutional violations, usually violations of the Fourth Amendment which prohibits unreasonable searches and seizures.

GOOD FAITH

The so-called "good faith" rule was established in the landmark case of *United States* v. *Leon*[8] to prevent suppression of evidence when, although it was acquired by officers as the result of an unlawful search or seizure, the law did not fault the officers for doing what they did.[9]

At the outset, it is important to understand that the term "good faith" is misleading because it implies the rule covers "honest" or "understandable" mistakes by officers. It doesn't. As the Second Circuit put it, "Good faith is not a magic lamp for police officers to rub whenever they find themselves in trouble."[10] Or, as the California Supreme Court said in *People* v. *Machupa*:

> We reluctantly use the term "good faith" to describe the exception formulated by the high court in [*Leon*]. Although many courts and commentators routinely describe the *Leon* decision as establishing a "good faith" rule, the *Leon* exception itself focuses expressly and exclusively on the *objective reasonableness* of an officer's conduct, not on his or her subjective "good faith" (or "bad faith").[11]

Although the good faith rule focuses on the objective reasonableness of the officers' actions, it is ironic that objective reasonableness is not the test.[12] Instead, the courts

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never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against al persons."].

[7] See *In re Lance W.* (1985) 37 Cal.3d 873; *People* v. *May* (1988) 44 Cal.3d 309; *People* v. *Hull* (1995) 34 Cal.App.4th 1448, 1455 ["When a defendant moves to suppress evidence citing a violation of the Fourth Amendment, the federal standard for exclusion must be applied. There is no independent California standard."]; *Snowden* v. *Hughes* (1944) 321 US 1, 11 ["Mere violation of a state statute does not infringe the federal Constitution."].

[8] (1984) 468 US 897.

[9] See *People* v. *Willis* (2002) 28 Cal.4th 22, 30 ["(A)pplication of the exclusionary rule is unwarranted where it would not result in appreciable deterrence." Quoting from *Arizona* v. *Evans* (1995) 514 US 1, 11]. NOTE: For an interesting comment on the purpose of the "good faith" rule see *In re Christopher R.* (1989) 216 Cal.App.3d 901, 906.

[10] *U.S.* v. *Reilly* (2nd Cir. 1996) 76 F.3d 1271, 1280.

[11] (1994) 7 Cal.4th 614, 618, fn.1.

[12] See *People* v. *Willis* (2002) 28 Cal.4th 22, 29, fn.3 ["(T)he term 'good faith exception' may be somewhat of a misnomer because the exception focuses on the objective reasonableness of an

have—at least to date—restricted application of the good faith rule to a limited class of cases where officers were acting in reasonable reliance on erroneous information from a government employee who was not affiliated with law enforcement. To be more specific, the good faith rule has been applied only when both of the following circumstances existed:

(1) NOT A MISTAKE BY LAW ENFORCEMENT: The mistake was made by a public official who was not closely associated with law enforcement.

(2) OBJECTIVE RELIANCE: The officers reasonably believed they were acting lawfully.[13]

Who made the mistake?

The good faith rule does not apply if the mistake that resulted in the discovery of the evidence was made by a law enforcement officer or an unsworn employee of a law enforcement agency. For example, if a police clerk failed to recall an arrest warrant after the arrestee posted bail, the good faith rule would not apply if officers later arrested him on the warrant and discovered evidence during a search incident to the arrest.[14] As noted by the California Supreme Court, "[T]he police may not rely upon incorrect or incomplete information when they are at fault in permitting the records to remain uncorrected."[15]

In addition, the rule does not apply if the error was made by a public employee who was an affiliate or "adjunct to the law enforcement team."[16] The question, then, is who are "adjuncts" to law enforcement?

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officer's conduct."]; *United States* v. *Leon* (1984) 468 US 897, 908, 919, fn. 20 ["Many objections to a good-faith exception assume that the exception will turn on the subjective good faith of individual officers. . . . The objective standard we adopt requires officers to have a reasonable knowledge of what the law prohibits."]; *Bailey* v. *Superior Court* (1992) 11 Cal.App.4th 1107, 1114 ["The actions of the officers may have been well meant and they may have been acting in subjective good faith, but their conduct was not 'objectively reasonable' under the *Leon* guidelines."]; *U.S.* v. *Lopez-Soto* (9th Cir. 2000) 205 F.3d 1101, 1106 ["We have no doubt that Officer Hill held his mistaken view of the law in good faith, but there is no good-faith exception to the exclusionary rule for police who do not act in accordance with governing law."].

[13] See *People* v. *Willis* (2002) 28 Cal.4th 22, 38-9; *Illinois* v. *Krull* (1987) 480 US 340, 350-1; *United States* v. *Leon* (1984) 468 US 897, 917; *Arizona* v. *Evans* (1995) 514 US 1, 15; *Miranda* v. *Superior Court* (1993) 13 Cal.App.4th 1628, 1635 ["No California case has expanded the *Leon* good faith rule to reliance upon erroneous information developed within police department or related governmental executive offices."]; *U.S.* v. *Curzi* (1st Cir. 1989) 867 F.2d 36, 44 ["*Leon* requires not merely good faith, but objective good faith."]. NOTE: The prosecution has the burden of proving these requirements were met. See *People* v. *Willis* (2002) 28 Cal.4th 22, 36-8; *People* v. *Maestas* (1988) 204 Cal.App.3d 1208, 1217-8.

[14] See *People* v. *Ivey* (1991) 228 Cal.App.3d 1423, 1426 ["Here, the error was the official transmission of misinformation by the police. The arrest was based on false information, i.e., that the bench warrant was properly outstanding."]; *Miranda* v. *Superior Court* (1993) 13 Cal.App.4th 1628, 1635 ["No California case has expanded the *Leon* good faith rule to reliance upon erroneous information developed within the police department or related governmental executive offices."]. NOTE: Collective knowledge rule: If an officer conducts a search, makes an arrest, or takes other action against a suspect in reliance on information from another officer or law enforcement agency, the good faith rule does not apply even though the officer who took the action relied in "good faith" on the information. This is because the officer who took the action is deemed responsible for the error made by the officer who disseminated the information. See *People* v. *Ramirez* (1983) 34 Cal.3d 541; *People* v. *Willis* (2002) 28 Cal.4th 22, 49 [(T)he good faith exception does not apply where law enforcement is collectively at fault for an inaccurate record that results in an unconstitutional search."].

[15] *People* v. *Ramirez* (1983) 34 Cal.3d 541, 545-6.

[16] See *Arizona* v. *Evans* (1995) 514 US 1, 15; *People* v. *Willis* (2002) 28 Cal.4th 22, 38-9 [the "key consideration" is "whether parole agents are adjuncts to the law enforcement team."]; *People* v. *Glick* (1988) 203 Cal.App.3d 796, 800; *Miranda* v. *Superior Court* (1993) 13 Cal.App.4th 1628, 1636 [good faith rule not applicable to probation-search records "generated by the police department itself."]; *U.S.* v. *Curzi* (1st Cir. 1989) 867 F.2d 36, 44 ["(T)his court has not recognized a good-faith exception to warrantless searches."].

PAROLE OFFICERS: Parole officers are peace officers and, accordingly, their errors are not covered under the good faith rule. As the court noted in *People* v. *Willis*,[17] "[P]ersons classified under California law as peace officers, including parole agents, serve a law enforcement function and have a general law enforcement character."

PROBATION OFFICERS: Probation officers and their support staff are considered adjuncts to law enforcement when they provide direct assistance to the police.[18] For example, in *People* v. *Ferguson*[19] the court ruled that data clerks with the Placer County Probation Department were adjuncts to law enforcement because, among other things, they "were responsible for entering and maintaining records in the [supervised release] database, which is used to assist law enforcement."

DMV EMPLOYEES: DMV investigators are peace officers.[20] But DMV clerks who enter data into the DMV computer system are not adjuncts to law enforcement when, for example, they make a mistake while inputting data that results in an groundless detention or arrest.[21]

JUDGES AND COURT EMPLOYEES: Errors made by judges and court employees are not attributable to law enforcement. As the United States Supreme Court has noted, "Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions."[22] It's the same for court clerks. As noted in *People* v. *Hamilton*:

> [T]he good faith exception applies when police rely on information generated by court clerks that is later found to be erroneous. . . . Court clerks are not adjuncts of law enforcement and have no stake in the outcome of particular criminal prosecutions.[23]

Thus, for example, the good faith rule usually applies when officers conduct a search or make an arrest based on a warrant that was found to have been unsupported by probable cause.[24]

LEGISLATORS: Legislators make law—they don't enforce it. Consequently, when officers arrest a person for violating a statute that was later declared invalid, evidence obtained as the result of the arrest will be covered under the good faith rule.[25] As the U.S.

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[17] (2002) 28 Cal.4th 22, 40.

[18] See *People* v. *Willis* (2002) 28 Cal.4th 22, 44 ["Logically, then, employees *of the same department* who support parole officers in carrying out this law enforcement function—by preparing and maintaining parole lists indicating who is on active parole and subject to warrantless search—must be considered to be adjuncts of the law enforcement team."]; *People* v. *Ferguson* (2003) 109 Cal.App.4th 367, 375 ["But notwithstanding the probation department's ties to the court, the probation officers and employees' significant responsibilities to enforce the law and assist law enforcement distinguish them from ordinary court employees . . ."]. NOTE: Although the court in *In re Arron C.* (1997) 59 Cal.App.4th 1365, 1370-1 ruled the good faith rule covered mistakes made by probation officers, the legal basis for its ruling "appears to have been undermined" by *People* v. *Willis* (2002) 28 Cal.4th 22. See *People* v. *Ferguson* (2003) 109 Cal.App.4th 367.

[19] (2003) 109 Cal.App.4th 367.

[20] See Vehicle Code §1655(a); Penal Code §830.3(c).

[21] See *People* v. *Hamilton* (2002) 102 Cal.App.4th 1311, 1316-7 ["(T)he good faith exception to the exclusionary rule may apply when a DMV clerk creates an erroneous data base entry subsequently relied on by a police officer who acts objectively in reasonable reliance on the accuracy of the information."].

[22] *United States* v. *Leon* (1984) 468 US 897, 917.

[23] (2002) 102 Cal.App.4th 1311, 1315. ALSO SEE *Arizona* v. *Evans* (1995) 514 US 1, 15 ["Because court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime, they have no stake in the outcome of particular criminal prosecutions."]; *People* v. *Willis* (2002) 28 Cal.4th 22, 33-4.

[24] See *People* v. *Barbarick* (1985) 168 Cal.App.3d 731, 739; *People* v. *Fleming* (1994) 22 Cal.App.4th 1566, 1572-4; *People* v. *Downing* (1995) 33 Cal.App.4th 1641 [error by court clerk resulted in illegal probation search].

[25] See *United States* v. *Leon* (1984) 468 US 897, 911-2; *People* v. *Willis* (2002) 28 Cal.4th 22, 32-3.

Supreme Court observed, "Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law."[26]

Reasonable reliance

The second requirement for invoking the good faith rule is that the officers must have reasonably believed they were acting lawfully.[27] Conversely, the rule does not apply if a reasonably well-trained officer would have known the action was unlawful.[28] Thus, as noted, the key factor is not the officers' "good faith"—but whether their reliance on the erroneous information was reasonable.[29]

The question, then, is what constitutes "reasonable" reliance? To date, it has been found mainly in very limited circumstances; specifically, where the erroneous information resulted in a search or arrest warrant, or a probation search.

SEARCH AND ARREST WARRANTS: It is presumed that an officer's reliance on a search or arrest warrant was reasonable because it's usually reasonable for officers to rely on the issuing judge's determination that the warrant was valid.[30] But judges sometimes make

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[26] *Illinois* v. *Krull* (1987) 480 US 340, 349-50.

[27] See *People* v. *Camarella* (1991) 54 Cal.3d 592, 596 ["(T)he government has the burden of establishing 'objectively reasonable' reliance"]; *People* v. *Willis* (2002) 28 Cal.4th 22, 31 ["(T)he deterrence rationale for the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent conduct. Thus, exclusion is proper only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional."]; *People* v. *Palmer* (1989) 207 Cal.App.3d 663, 669 ["*Leon's* exception to the exclusionary rule operates *only* where police conduct is objectively reasonable and does not constitute misconduct."]; *People* v. *MacAvoy* (1984) 162 Cal.App.3d 746, 765 [defect in warrant was not "obvious"]; *People* v. *Hamilton* (2002) 102 Cal.App.4th 1311, 1315 ["(E)vidence obtained from a search may be suppressed only if it can be said that the police knew or should have known that the search was unconstitutional."].

[28] See *United States* v. *Leon* (1984) 468 US 897, 922, fn.23 ["(O)ur good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization."]. NOTE: A "reasonably well-trained officer" is an officer with a "reasonable knowledge of what the law prohibits." See *United States* v. *Leon* (1984) 468 US 897, 919, fn. 20; *People* v. *Johnson* (1990) 220 Cal.App.3d 742, 750; *People* v. *Maestas* (1988) 204 Cal.App.3d 1208, 1221; *Bailey* v. *Superior Court* (1992) 11 Cal.App.4th 1107, 1113.

[29] See *People* v. *Machupa* (1994) 7 Cal.4th 614, 618, fn.1.

[30] See *United States* v. *Leon* (1984) 468 US 897, 922 ["(A) warrant issued by a magistrate normally suffices to establish that a law enforcement officer acted in good faith in conducting the search."]; *Massachusetts* v. *Sheppard* (1984) 468 US 981, 989-90 ["(W)e refuse to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested."]; *Bay* v. *Superior Court* (1992) 7 Cal.App.4th 1022, 1029-30 ["Our system necessarily assumes the magistrate will either correct or refuse a deficient warrant. We do not expect the police officer to have the same degree of knowledge or objectivity as the magistrate." Quote edited]; *People* v. *Machupa* (1994) 7 Cal.4th 614, 623 ["The so-called "good faith" exception embodies the proposition that the exclusionary rule should not be applied to evidence obtained by a police officer whose reliance on a search warrant issued by a neutral magistrate was objectively reasonable, even though the warrant was ultimately found to be defective." Quote edited]; *People* v. *MacAvoy* (1984) 162 Cal.App.3d 746, 763 ["(I)t appears there is a presumption that officers are conducting a search with good faith belief in its validity when the search is conducted pursuant to a warrant."]; *People* v. *Alvarez* (1989) 209 Cal.App.3d 660, 668 ["In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient."]. NOTE: Circumstances that tend to support the presumption include the following: a prosecutor reviewed and approved the affidavit (see *Massachusetts* v. *Sheppard* (1984) 468 US 981, 989; *People* v. *Camarella* (1991) 54 Cal.3d 592, 605, fn.5 ["It is, of course, proper to consider . . . whether the affidavit was previously reviewed by a deputy district attorney."]; *U.S.* v. *Freitas* (1988) 856 F.2d 1425, 1427, 1431 [it is relevant "whether the agents had consulted with the U.S. Attorney"]; *People* v. *Alvarez* (1989) 209 Cal.App.3d 660, 665; *People* v. *Nicolaus* (1991) 54 Cal.3d 551, 575; *Dixon* v. *Wallowa County* (9th Cir. 2003) __ F.3d __ ["Though not conclusive, reliance on [the District Attorney's] advice is some evidence of good faith."]); a reasonable officer would have believed the existence of probable cause was a "close or debatable question" (see *People* v. *Camarella* (1991) 54 Cal.3d 592,

mistakes.[31] Consequently, the presumption may be rebutted if a reasonably well-trained officer would have caught the mistake.[32] In the words of the Court of Appeal, "The question is whether a well-trained officer should reasonably have *known* that the affidavit failed to establish probable cause (and hence that the officer should not have sought a warrant)."[33] To put it another way, "An officer does not manifest objective good faith in relying on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable."[34]

For example, affidavits have been deemed obviously inadequate when the warrant was based on uncorroborated information from an unreliable informant.[35] In addition, the good faith rule would not apply if the officers knew, or should have known, that the warrant was based on false information. As the Court said in *United States* v. *Leon*:

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606); the warrant was unlawful only because it violated a *new* rule that the reviewing court was announcing (see *U.S.* v. *Reilly* (2nd Cir. 1996) 76 F.3d 1271, 1281; *U.S.* v. *Thomas* (1985) 757 F.2d 1359); and, if the affiant was concerned about the part of the affidavit that resulted in its invalidity, it is relevant that the affiant notified the magistrate of the potential problem. (see *Massachusetts* v. *Sheppard* (1984) 468 US 981, 990 ["[T]here is little reason why [the affiant] should be expected to disregard assurances that everything is all right, especially when he has alerted the judge to the potential problems."]; *U.S.* v. *Freitas* (1988) 856 F.2d 1425, 1432 ["(T)he agents in this case not only noticed the potential defect in the warrant, they brought it to the attention of an Assistant U.S. Attorney and the magistrate, who both approved it."].

[31] See *Bailey* v. *Superior Court* (1992) 11 Cal.App.4th 1107, 1113-4 ["Harried magistrates may not always take the care necessary to ensure that the application for the warrant contains sufficient allegations of probable cause. An officer may not shift all of the responsibility for the protection of the accused's Fourth Amendment rights to a magistrate. Therefore, an officer applying for the warrant is required to exercise reasonable and professional judgment."]; *Malley* v. *Briggs* (1986) 475 US 335, 346, fn.9 [officers who act unreasonably cannot avoid suppression by "pointing to the greater incompetence of the magistrate."]; *People* v. *Camarella* (1991) 54 Cal.3d 592, 604 ["It is true that in an ideal system an unreasonable request for a warrant would be harmless, because no judge would approve it. But ours is not an ideal system, and it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should."].

[32] See *United States* v. *Leon* (1984) 468 US 897, 922, fn23 ["(O)ur good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization."]; *People* v. *Maestas* (1988) 204 Cal.App.3d 1208, 1217 ["The objectively ascertainable question is not whether Officer Silva was well trained or experienced, but whether a reasonably well-trained officer in his position would have known that his affidavit failed to establish probable cause."]; *People* v. *Camarella* (1991) 54 Cal.3d 592, 606-7 ["The test . . . is whether a reasonable and well-trained officer would have *known* that his affidavit failed to establish probable cause and that he should not have applied for the warrant. But if such an officer would not reasonably have known that the affidavit (and any other supporting evidence) failed to establish probable cause, there is no reason to apply the exclusionary rule, because there has been no objectively unreasonable police conduct requiring deterrence."]; *People* v. *Spears* (1991) 228 Cal.App.3d 1, 19 ["The good faith inquiry is confined to the question of whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization. Where the affidavit is sufficient to create disagreement among thoughtful and competent judges, the officer's reliance on the magistrate's determination of probable cause should be deemed objectively reasonable."]. NOTE: In addition, the good faith rule will not be applied if the judge did not appear to be neutral and detached, or if it was reasonably apparent that the warrant contained an inadequate description of the place to be searched or the person to be arrested. *United States* v. *Leon* (1984) 468 US 897, 923; *U.S.* v. *Reilly* (2nd Cir. 1996) 76 F.3d 1271, 1280 ["The officers presented only a bare-bones description of Reilly's land to [the magistrate]. It was a description that was almost calculated to mislead."].

[33] *People* v. *Pressey* (2002) 102 Cal.App.4th 1178, 1190-1.

[34] *People* v. *Lim* (2000) 85 Cal.App.4th 1289, 1297.

[35] See *People* v. *Johnson* (1990) 220 Cal.App.3d 742, 750 ["(The officer's) failure to corroborate the evidence received from the anonymous informant does not meet the standard of objective reasonableness."]; *Higgason* v. *Superior Court* (1985) 170 Cal.App.3d 929, 952 ["Any rookie officer knows uncorroborated, unknown tipsters cannot provide probable cause for an arrest or search warrant."]; *People* v. *Hulland* (2003) __ Cal.App.4th __ [warrant based on "stale" information"].

> Suppression remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth.[36]

There is one exception to the rule that the good faith rule applies when the officers' belief in the validity of a warrant was reasonable. The rule does not apply if the warrant was based on evidence or information that was later suppressed.[37] In other words, even if the officers reasonably believed the information in the affidavit was obtained lawfully, it will not be considered in determining whether probable cause existed.[38] Or, as the Ninth Circuit put it, illegally-obtained information does not become "sanitized" merely because a judge considered it in determining whether to issue a warrant.[39]

For example, in *People* v. *Machupa* officers illegally entered the suspect's house, saw drugs, then obtained a warrant based on their discovery. It was argued that the good faith rule ought to apply because the judge, by signing the warrant, must have determined that the officers' warrantless entry was lawful. But, as the court pointed out, judges who issue warrants do not conduct a "searching inquiry" into the admissibility of the information contained in the affidavit.[40] That is something that is done at a hearing on a motion to suppress.

PROBATION SEARCHES: It is usually reasonable for officers to rely on information from probation department employees that a suspect is on probation with a search condition.[41] There may, however, be circumstances that should alert officers to a problem that should be resolved before the search is conducted. If so, the officers' failure to inquire may make their reliance on the information unreasonable.[42]

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[36] (1984) 468 US 897, 923. NOTE: If the affidavit contains false or illegally-obtained information, the validity of the warrant is determined as follows. If probable cause remained after the false and illegally-obtained information was deleted from the affidavit, the warrant is valid. See *U.S.* v. *Vasey* (1987) (9th Cir. 1987) 834 F.2d 782, 788; *U.S.* v. *Reed* (9th Cir. 1989) 15 F.3d 928, 933; *U.S.* v. *Reilly* (2nd Cir. 1996) 76 F.3d 1271, 1282, fn.2; *Franks* v. *Delaware* (1978) 438 US 154; *People* v. *Maestas* (1988) 204 Cal.App.3d 1208, 1216. Consequently, there is no need to apply the good faith rule. See *People* v. *Maestas* (1988) 204 Cal.App.3d 1208, 1216. The defense might, however, attack the warrant by filing a motion to traverse the affidavit. See *Franks* v. *Delaware* (1978) 438 US 154; *People* v. *Maestas* (1988) 204 Cal.App.3d 1208, 1216.

[37] See *People* v. *Brown* (1989) 210 Cal.App.3d 849, 857; *People* v. *Ingham* (1992) 5 Cal.App.4th 326, 334-5 ["(T)he good faith exception is inapplicable where, as here, the search warrant is based on illegally seized evidence."]; *U.S.* v. *Vasey* (1987) (9th Cir. 1987) 834 F.2d 782, 789 [good faith rule not applicable when the officer "conducted an illegal warrantless search and presented tainted evidence obtained in this search to a magistrate in an effort to obtain a search warrant."]; *U.S.* v. *O'Neal* (8th Cir. 1994) 17 F.3d 239, 243 ["If clearly illegal police behavior can be sanitized by the issuance of a search warrant, then there will be no deterrence, and the protective aims of the exclusionary rule will be severely impaired if not eliminated."].

[38] NOTE: If probable cause remained after the false and illegally-obtained information was deleted from the affidavit, the warrant is valid. See *U.S.* v. *Vasey* (1987) (9th Cir. 1987) 834 F.2d 782, 788 ["The mere inclusion of tainted evidence in an affidavit does not, by itself, taint the warrant or the evidence seized pursuant to the warrant. A reviewing court should excise the tainted evidence and determine whether the remaining, untainted evidence would provide a neutral magistrate with probable cause to issue a warrant."]. Consequently, there is no need to apply the good faith rule. *U.S.* v. *Reed* (9th Cir. 1989) 15 F.3d 928, 933; *U.S.* v. *Reilly* (2nd Cir. 1996) 76 F.3d 1271, 1282, fn.2; *Franks* v. *Delaware* (1978) 438 US 154; *People* v. *Maestas* (1988) 204 Cal.App.3d 1208, 1216 ["Unlike a *Franks* hearing, a good faith hearing under *Leon* starts out with an affidavit previously found not to establish probable cause"].

[39] See *U.S.* v. *Vasey* (1987) (9th Cir. 1987) 834 F.2d 782, 789 ["(T)he magistrate's consideration of the evidence does not sanitize the taint of the illegal warrantless search."]; *U.S.* v. *Wanless* (9th Cir. 1989) 882 F.2d 1459, 1466-7 ["(B)ecause the search warrant was issued in part on the basis of evidence obtained from an illegal search of the vehicles, the 'good faith' exception does not apply."].

[40] (1994) 7 Cal.4th 614, 631.

[41] See *People* v. *Washington* (1982) 131 Cal.App.3d 434, 438-9; *People* v. *Barbarick* (1985) 168 Cal.App.3d 731, 739;.

[42] See *People* v. *Spence* (2003) __ Cal.App.4th __; *People* v. *Downing* (1995) 33 Cal.App.4th 1641, 1657 ["(W)here the police department has knowledge in flaws in a record or data base system, it would not seem 'objectively reasonable' to rely solely on it without taking additional steps to ensure its accuracy."].

For example, in *People* v. *Spence*[43] officers who suspected Spence of using narcotics searched his home after determining that his name was on a list of searchable probationers. The list, which was prepared by their local probation department, was formatted so that the notations "01" or "search" appeared after the names of probationers who were subject to a search condition. Although judges sometimes restrict probation searches to drugs, stolen property, or other things, the list did not show whether such a restriction applies.

Unbeknownst to the officers, the terms of Spence's probation authorized warrantless searches for stolen property only. When they arrived at the house, they confirmed with Spence that he was "searchable," but they did not recall asking him whether the court had put any limitations on the scope of the search. During the search, officers found paraphernalia and a small amount of meth. This resulted in the revocation of Spence's probation.

On appeal, the court rejected the argument that the good faith rule ought to apply because, even if the probation department was not functioning as an adjunct to the law enforcement team, it was not reasonable for the officers to rely on a list that obviously did not include limitations on the nature of the search that could be conducted. Said the court:

> That error was compounded by law enforcement agencies' failures to recognize that the condensed search information cannot be adequate or complete, and that the single word or pair of digits must be supplemented by means such as examining the probation order before a search is conducted.[44]

STANDING

Evidence that was obtained unlawfully is, nevertheless, admissible in most cases if the person whose rights were violated was someone other than the defendant. This is known as the "standing" rule, which essentially says that a defendant may challenge a search or seizure only if he was the person who was searched or seized.[45] For example, if an officer conducts an illegal pat search of a suspect and discovers evidence that incriminates the suspect's brother, the brother will not have standing to challenge the search because the officers did not violate *his* right to be free of unreasonable searches.

Standing is not, however, limited to situations in which the defendant was physically searched or seized. He will also have standing if he had a reasonable expectation of privacy in the place or thing that the officers searched.[46] What is a reasonable expectation of privacy? That is the question we will now examine.

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[43] (2003) __ Cal.App.4th __.

[44] ALSO SEE *People* v. *Downing* (1995) 33 Cal.App.4th 1641, 1657 ["(W)here the police department has knowledge in flaws in a record or data base system, it would not seem 'objectively reasonable' to rely solely on it without taking additional steps to ensure its accuracy."].

[45] See *United States* v. *Leon* (1984) 468 US 897, 910 ["Standing to invoke the [exclusionary] rule has thus been limited to cases in which the prosecution seeks to use the fruits of an illegal search or seizure against the victim of police misconduct."]; *United States* v. *Payner* (1980) 447 US 727, 731; *In re Tyrell J.* (1994) 8 Cal.4th 68, 89 ["(O)ne must *first* have a reasonable expectation of privacy *before* there can be a Fourth Amendment violation."]. NOTE: The United States Supreme Court has said it does not particularly like the term "standing," and that it would like to see it replaced by the phrase "reasonable expectation of privacy." See *Rakas* v. *Illinois* (1978) 439 US 128. So far, however, the term "standing" is alive and well. Commenting on this, the Court of Appeal has noted, "[T]he term ['standing'] has demonstrated a vampiric persistence, and if the United States Supreme Court cannot drive a stake through its heart, we doubt that we can." *People* v. *Cartwright* (1999) 72 Cal.App. 4th 1362, 1368, fn.8. Even Justice O'Connor has continued to use the term. See *United States* v. *Karo* (1984) 468 US 705, 725 [conc. opn. O'Connor, J.].

[46] *Rakas* v. *Illinois* (1978) 439 US 128; *People* v. *Hernandez* (1988) 199 Cal.App.3d 1192, 1189 ["An illegal search or seizure violates the federal constitutional rights only of those who have a legitimate expectation of privacy in the invaded place or thing."]. NOTE: Standing Theories Rejected: "TARGET" THEORY: Standing does not result merely because the prosecution seeks to use the challenged evidence against the defendant.

Ownership, possession, control

A defendant will usually have standing if he owned, lawfully possessed, or controlled the place or thing that was searched or seized.[47] For example, the owner of a house or car will ordinarily have standing to challenge a search of it.[48]

Standing based on ownership, possession, or control is not, however, automatic. As the U.S. Supreme Court explained, "While property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated, property rights are neither the beginning nor the end of this Court's inquiry."[49] For example, a defendant who possessed a balloon containing heroin will not have standing to challenge its seizure unless he also took reasonable measures to protect it from being discovered.

See *Rakas* v. *Illinois* (1978) 439 US 128, 134, 134 ["A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed."]; *People* v. *Madrid* (1992) 7 Cal.App.4th 1888, 1897; *People* v. *Root* (1985) 172 Cal.App.3d 774, 777. "ESSENTIAL ELEMENT OF OFFENSE" THEORY: Standing does not result merely because the crime for which the defendant was charged required the prosecution to prove the defendant was in possession of the property which was searched or seized. See *United States* v. *Salvucci* (1980) 448 US 83, 90 ["(A) prosecutor may simultaneously maintain that a defendant criminally possessed the seized good, but was not subject to a Fourth Amendment deprivation without legal contradiction."]; *Rawlings* v. *Kentucky* (1980) 448 US 98, 105. CO-CONSPIRATOR THEORY: A defendant will not be deemed to have standing to seek the suppression of evidence merely because the evidence was obtained during the search of the person or property of the defendant's co-conspirator. See *United States* v. *Padilla* (1993) 508 US 77; *United States* v. *Leon* (1984) 468 US 897, 910; *Alderman* v. *United States* (1969) 394 US 165, 171-2; *People* v. *Workman* (1989) 209 Cal.App.3d 687, 696.

[47] See *Rakas* v. *Illinois* (1978) 439 US 128, 143, fn.12.

[48] See *Jones* v. *United States* (1960) 362 US 257; *Rakas* v. *Illinois* (1978) 439 US 128, 141-3.

[49] *United States* v. *Salvucci* (1980) 448 US 83, 91.

Legitimately on the premises

A defendant will not have standing to challenge a search of a home, car, or other place merely because he was present when the search occurred.[50] Presence is, however, a relevant circumstance in determining whether he had a reasonable expectation of privacy.

HOUSEGUESTS: Whether a houseguest has standing to challenge a search of the house depends on whether he was merely a "casual visitor" or something more. A casual visitor will not have standing to contest a search of any place or thing in the house except his own belongings.[51] This is because a casual visitor, although legitimately on the premises, has no ownership interest in the residence, and no right to exclude others or otherwise exercise control of the premises.

In contrast, an overnight houseguest will have standing to challenge a search of areas and things to which he was given temporary possession and control (such as his bedroom and chest of drawers[52]), but not other rooms and property.[52]

BORROWED CARS: A person who has been given temporary possession of a car by its owner will generally have standing to challenge a search of the vehicle. According to the Court of Appeal, "A person who has the owner's permission to use a vehicle and is exercising control over it has a legitimate expectation of privacy in it."[53]

CAR PASSENGERS: A person who was merely a passenger in a car that was under the control of another will probably not have standing to challenge a search of the passenger compartment, trunk, or any container in which he lacks an ownership or possessory interest.[54] A passenger will, however, have standing to challenge the lawfulness of the car stop because the passenger's "personal liberty and freedom of travel are intruded upon by [an unlawful stop]."[55]

Standing relinquished

A defendant who owns, possesses, or controls the place or thing that was searched or seized may, by his words or actions, expressly or impliedly relinquish a reasonable expectation of privacy as to that place or thing. This typically occurs as follows.

ABANDONMENT: A defendant will usually lack standing to challenge the admissibility of evidence if he abandoned it under circumstances that made it unreasonable to expect it would remain private. For example, a defendant relinquishes standing when, at the conclusion of a pursuit, he runs off, leaving the evidence inside.[56] Standing has also been relinquished when the defendant left clothing in a friend's car;[57] left drugs in a paper bag

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[50] See *Rakas* v. *Illinois* (1978) 439 US 128, 141-148; *Minnesota* v. *Carter* (1998) 525 US 83, 90.
[51] See *Rakas* v. *Illinois* (1978) 439 US 128, 142-3, fn.12; *People* v. *Cowan* (1994) 31 Cal.App.4th 795; *People* v. *Koury* (1989) 214 Cal.App.3d 676, 687;; *People* v. *Jackson* (1992) 7 Cal.App.4th 1367, 1370; *U.S.* v. *Twilley* (9th Cir. 2000) 222 F.3d 1092, 1095; *People* v. *Dimitrov* (1995) 33 Cal.App.4th 18, 27-8; *People* v. *Ooley* (1985) 169 Cal.App.3d 197, 203; *People* v. *Ayala* (2000) 24 Cal.4th 243, 279 ["Occasional presence on the premises as a mere guest or invitee is insufficient to confer such an expectation."].
[52] See *People* v. *Welch* (1999) 20 Cal.4th 701, 748 [search of backyard of a home in which the defendant was a guest].
[53] *People* v. *Leonard* (1987) 197 Cal.App.3d 235, 239.
[54] See *Rakas* v. *Illinois* (1978) 439 US 128, 148-9; *People* v. *Jackson* (1992) 7 Cal.App.4th 1367, 1370.
[55] See *People* v. *Grant* (1990) 217 Cal.App.3d 1451, 1458.
[56] See *United States v. Edwards* (5th Cir.1971) 441 F.2d 749 ["Defendant's right to Fourth Amendment protection came to an end when he abandoned his car to the police, on a public highway, with engine running, keys in the ignition, lights on, and fled on foot. At that point defendant could have no reasonable expectation of privacy with respect to his automobile."].
[57] See *People* v. *Clark* (1993) 5 Cal.4th 950, 979; *Rawlings* v. *Kentucky* (1980) 448 US 98, 105.

in the grass about 10 feet away to give himself "deniability";[58] checked out of his hotel room leaving the evidence behind;[59] and left the evidence in a curbside garbage can.[60]

DISCLAIMER: A defendant may also relinquish standing by denying to officers that he owned, possessed, or controlled the place or thing that was searched or seized.[61]

For example, in *People* v. *Dasilva*[62] the court ruled the defendant lacked standing to challenge the search of a suitcase located in the trunk of a car because, although he had consented to a search of the trunk's contents, he denied knowing anything about the suitcase. Similarly, in *People* v. *Vasquez*[63] the court ruled the defendants did not have standing to challenge the search of pillowcases filled with stolen property because the defendants, after putting the pillowcases on the ground when they saw the officers approaching, claimed they had just found them in some bushes.

On the other hand, a defendant may retain standing if he merely denied owning the place or thing that was searched or seized (as opposed to denying ownership, possession, and control). This is because a person may sometimes have a reasonable expectation of privacy in property he does not own. As the U.S. Court of Appeals explained, "Because an assertion of ownership is not, by itself, dispositive of the right to claim the protection of the fourth amendment, it follows that a disclaimer of ownership, while indeed strong indication that a defendant does not expect the article to be free from government intrusion, is not necessarily the hallmark for deciding the substance of a fourth amendment claim."[64]

DISCLOSURE: If the defendant informed officers that contraband or evidence was now located in a certain container he owned or controlled, he will have given up any expectation of privacy as to such contraband or evidence.[65]

DESTRUCTION: The owner of a home or business damaged by fire, explosion, or some other cause may not have a reasonable expectation of privacy in the structure if the extent of the destruction was such that no reasonable privacy interest remained.[66]

PLAIN VIEW: A defendant may lack standing to challenge the seizure of evidence that was in the plain view of officers. For example, a person will have relinquished a reasonable expectation of privacy in the drug stash atop his kitchen table if he gave officers consent to enter the residence and be in a place from which they could see it.[67]

PROBATION SEARCH CONDITIONS: An adult or juvenile defendant's act of consenting to certain warrantless searches as a condition of probation may constitute relinquishment of standing to challenge the search.[68]

[For examples of standing, see the appendix at the end of this article.]

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[58] See *In re Baraka H.* (1992) 6 Cal.App.4th 1039, 1045-7; *People* v. *Shaw* (2002) 97 Cal.App.4th 833, 839.
[59] See *Abel* v. *United States* (1960) 362 US 217, 241; *People* v. *Ingram* (1981) 122 Cal.App.3d 673, 680.
[60] See *California* v. *Greenwood* (1988) 486 US 35, 39-41.
[61] See *People* v. *Dees* (1990) 221 Cal.App.3d 588, 594; *People* v. *Allen* (1993) 17 Cal.App.4th 1214, 1221-2; *People* v. *Oldham* (2000) 81 Cal.App. 4th 1, 15; *People* v. *Stanislawski* (1986) 180 Cal.App.3d 748, 756-7; *In re Baraka H.* (1992) 6 Cal.App.4th 1039, 1047; *People* v. *Nelson* (1985) 166 Cal.App.3d 1209, 1214; *People* v. *Dimitrov* (1995) 33 Cal.App.4th 18, 27-8; *People* v. *Mendoza* (1986) 176 Cal.App.3d 1127, 1133; *U.S.* v. *Peters* (6th Cir. 1999) 194 F.3d 692, 696.
[62] (1989) 207 Cal.App.3d 43.
[63] (1983) 138 Cal.App.3d 995.
[64] *U.S.* v. *Hawkins* (11th Cir. 1982) 681 F.2d 1343, 1346. ALSO SEE *People* v. *Dees* (1990) 221 Cal.App.3d 588, 594-5 ["(A) total disclaimer of any interest in the area or item searched at the time of the search . . . will preclude a successful challenge to the legality of that search."].
[65] See *People* v. *Haugland* (1981) 115 Cal.App.3d 248, 257 ["Here, when the officers opened Haugland's briefcase, they were not *'searching'* for anything; they *knew* it contained a loaded gun . . . . Haugland gave up any reasonable expectation of privacy when he told the officers the briefcase contained a loaded gun."].
[66] See *Michigan* v. *Clifford* (1984) 464 US 287, 292.
[67] See *Thompson* v. *Louisiana* (1984) 469 US 17, 22; *People* v. *Justin* (1983) 140 Cal.App.3d 729, 740.
[68] See *In re Tyrell J.* (1994) 8 Cal.4th 68, 83-5, 89; *People* v. *Viers* (1991) 1 Cal.App.4th 990, 993; *In re Binh L.* (1992) 5 Cal.App.4th 194, 205.

ATTENUATION

Even if the defendant has standing, evidence that can be traced to an officer's misconduct may be admissible if the link between the misconduct and the evidence has been sufficiently weakened or attenuated. To put it another way, the evidence will be admissible if it was obtained "by means sufficiently distinguishable to be purged of the primary taint," but not if it was obtained "by exploitation of that illegality."[69]

To determine whether attenuation has occurred, the first step is to classify the evidence as either "primary" or "derivative."

Primary evidence

The courts classify evidence as "primary" if the connection between it and the police misconduct was clear and direct. In other words, evidence is primary if there was a swift and predictable progression from the officers' misconduct to its discovery. Some examples:

- Evidence discovered during a search incident to an unlawful arrest.
- Evidence discovered during an unlawful search of a home, car, or person.
- Evidence obtained during a booking search resulting from an illegal arrest.
- Evidence obtained during an involuntary consent search.

If evidence is deemed "primary," it will be suppressed. This is because the close relationship between it and the misconduct demonstrates that exploitation has occurred.[70] In the words of the California Supreme Court, "Once the challenged police conduct is shown to be unlawful, the primary evidence is automatically subject to exclusion."[71]

Derivative evidence

Evidence is derivative if the illegal search or seizure generated an act, situation, or information that potentially—but not inevitably—resulted in the discovery of the evidence.[72] In other words, evidence is derivative if, although obtained as the result of

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[69] See *United States* v. *Leon* (1984) 468 US 897, 911 ["(T)he connection between police misconduct and evidence of crime may be sufficiently attenuated to permit the use of that evidence at trial . . ."]; *Murray* v. *United States* (1988) 487 US 533, 537 [evidence will not be suppressed if the connection between it and the unlawful conduct "becomes so attenuated as to dissipate the taint."]; *Wong Sun* v. *United States* (1963) 371 US 471, 488; *United States* v. *Wade* (1967) 388 US 218, 241; *People* v. *Ramsey* (1969) 272 Cal.App.2d 302, 312 ["(E)vidence ultimately derived from illegally obtained evidence is nevertheless admissible if its connection with the illegally obtained evidence has become so attenuated as to dissipate the taint."].

[70] See *Segura* v. *United States* (1984) 468 US 796, 804 ["Evidence obtained as a direct result of an unconstitutional search or seizure is plainly subject to exclusion."]; *United States* v. *Leon* (1984) 468 US 897, 911, fn.7; *Murray* v. *United States* (1988) 487 US 533, 536-7; *Dunaway* v. *New York* (1979) 442 US 200, 217-8 ["Where there is a close causal connection between the illegal seizure and the confession, not only is exclusion of the evidence more likely to deter similar police misconduct in the future, but use of the evidence is more likely to compromise the integrity of the courts."]; *People* v. *Harris* (1975) 15 Cal.3d 384, 392 ["(T)he identification of shoes and currency, so incriminating to defendant, following the [illegal] transportation detention [and must therefore be suppressed]"]; *People* v. *Teresinski* (1982) 30 Cal.3d 822, 832 ["Having found defendant's detention illegal, it necessarily follows that the physical evidence found in the automobile as the result of this detention is inadmissible."]. NOTE: If evidence is suppressed, officers will not even be permitted to give testimony that such evidence was found. See *Murray* v. *United States* (1988) 487 US 533, 536 [primary evidence includes "evidence of tangible materials seized during an unlawful search, and testimony concerning knowledge acquired during an unlawful search."].

[71] *People* v. *Williams* (1988) 45 Cal.3d 1268, 1299.

[72] See *Murray* v. *United States* (1988) 487 US 533, 536-7 [evidence is "derivative" if it was "the product of the primary evidence, or [was] otherwise acquired as an indirect result of the unlawful search"]; *People* v. *Williams* (1988) 45 Cal.3d 1268, 1299 ["(Suppressible) evidence includes not only what was seized in the course of the unlawful conduct itself—the so-called 'primary' evidence—but also what was subsequently

police misconduct, its discovery depended somewhat on chance or happenstance. Some examples:

ABANDONED EVIDENCE: Illegal detention of defendant resulted in his abandonment of evidence that was discovered by officers.[73]

BOOKING PHOTO: Illegal arrest resulted in booking photo that was later used in a photo lineup in which the defendant was identified.

EVIDENCE FROM CONSENT SEARCH: Illegal detention or arrest of defendant led to a consent search that resulted in the discovery of evidence.[74]

Note that evidence is not deemed derivative merely because there was a connection between it and the Constitutional violation. A rule that would require suppression under such circumstances—a so-called "but for" rule—has been consistently rejected by the United States Supreme Court. As it noted in *United States* v. *Leon*, "[W]e have declined to adopt a per se or 'but for' rule that would render inadmissible any evidence that came to light through a chain of causation that began with an illegal arrest."[75]

Instead, derivative evidence may be suppressed only if it bears "a sufficiently close relationship to the underlying illegality."[76] Conversely, derivative evidence is admissible if the link between it and the police misconduct was sufficiently weakened or attenuated.[77] As the Ninth Circuit put it:

> [A]t some point, even in the event of a direct and unbroken causal chain, the relationship between the unlawful search or seizure and the challenged evidence becomes sufficiently weak to dissipate any taint resulting from the original illegality.[78]

To prove that the link between police misconduct and derivative evidence has been attenuated, officers and prosecutors must rely on circumstantial evidence.[79] What

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obtained through the information gained by the police in the course of such conduct—the so-called 'derivative' or 'secondary' evidence."].

[73] See *People* v. *Verin* (1990) 220 Cal.App.3d 551; *People* v. *Lee* (1986) 186 Cal.App.3d 743, 751.

[74] See *People* v. *Poole* (1986) 182 Cal.App.3d 1004; *People* v. *Brown* (1989) 210 Cal.App.3d 849, 857.

[75] (1984) 468 US 897, 910-11. ALSO SEE *Wong Sun* v. *United States* (1963) 371 US 471, 487-8; *Segura* v. *United States* (1984) 468 US 796, 815; *United States* v. *Ceccolini* (1978) 435 US 268, 274 ["The issue cannot be decided on the basis of causation in the logical sense alone"]; *Brown* v. *Illinois* (1975) 422 US 590, 603; *New York* v. *Harris* (1990) 495 US 14, 17; *People* v. *Neely* (1999) 70 Cal.App.4th 767, 786; *People* v. *Sims* (1993) 5 Cal.4th 405, 445; *People* v. *Williams* (1988) 45 Cal.3d 1268, 1300; *People* v. *Eastmon* (1976) 61 Cal.App.3d 646, 653 ["(E)vidence is not rendered inadmissible against a defendant merely because there is a relationship between the evidence and some prior illegal police activity"]; *People* v. *Gonzalez* (1998) 64 Cal.App.4th 432, 440; *Mann* v. *Superior Court* (1970) 3 Cal.3d 1, 8; *People* v. *Williams* (1977) 68 Cal.App.3d 36, 45 [court describes as "ludicrous" the assertion that if the defendant had not been in illegal custody he could have disposed of the evidence before it was seized by the police].

[76] *New York* v. *Harris* (1990) 495 US 14, 19; *Segura* v. *United States* (1984) 468 US 796, 804.

[77] See *Wong Sun* v. *United States* (1963) 371 US 471, 484, 487; *United States* v. *Leon* (1984) 468 US 897, 911 ["(T)he connection between police misconduct and evidence of crime may be sufficiently attenuated to permit the use of that evidence at trial . . ."]; *People* v. *Williams* (1988) 45 Cal.3d 1268, 1299 ["Once the challenged police conduct is shown to be unlawful, the primary evidence is automatically subject to exclusion."].

[78] *U.S.* v. *Smith* (9th Cir. 1998) 155 F.3d 1051, 1060.

[79] See *People* v. *Thomas* (1980) 112 Cal.App.3d 980, 986 ["Of course what constitutes 'exploitation' on the one hand and what fact or facts will lead a court to say that the taint has become attenuated, cannot be determined by pressing a button: the answer depends on reason and precedent."]. NOTE: A defendant who seeks the suppression of derivative evidence bears the burden of making a prima facie showing that the evidence was tainted by the illegal police conduct. If this burden is met, the prosecution has the burden of demonstrating that the taint has been attenuated. See *Kaupp* v. *Texas* (2003) __ US __ ["Demonstrating such purgation is, of course, a function of circumstantial evidence, with the burden of persuasion on the state."]; *People* v. *Mayfield* (1997) 14 Cal.4th 668, 760; *People* v. *Cella* (1983) 139 Cal.App.3d 391, 400; *People* v. *Neely* (1999) 70 Cal.App.4th 767, 785

circumstances are important? There are mainly two: (1) the purpose and flagrancy of the officers' misconduct, (2) the existence of an independent intervening act.[80]

Purpose and flagrancy of misconduct

Derivative evidence is likely to be deemed "tainted" if it was obtained by officers who intentionally or recklessly disregarded the law—especially if their purpose was to obtain the evidence that was seized.[81] As the Court of Appeal observed, "Examination of cases where a defendant's statements or other evidence are held admissible due to attenuation reveals that such evidence is typically the product of *happenstance*, but not the *desired* result of official misconduct."[82]

For example, in *Brown* v. *Illinois* officers arrested Brown without probable cause for the purpose of questioning him about a murder. In rejecting the argument that Brown's confession later that day was not the fruit of the illegal arrest, the Court noted, "The illegality here had the quality of purposefulness. The impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives."[83]

Even if the officers did not know exactly what evidence they would find, attenuation is unlikely if the motive for their unlawful conduct was to obtain evidence of some sort. As the court said in *People* v. *Neely*:

> [A]n illegal act by a peace officer may yield *unexpected* evidence subject to exclusion. Illegal entry into a bordello may reveal a narcotics laboratory, or beating

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[80] NOTE: There is a third relevant circumstance: the time lapse between the illegal search or seizure and the discovery of evidence. A short time lapse may indicate a more direct relationship between the two, and is therefore an indication that the evidence may have been tainted. But the Court of Appeal has pointed out that time lapse is an "ambiguous" circumstance because it "can cut both ways," and that it is "the least determinative factor." See *People* v. *Gonzalez* (1998) 64 Cal.App.4th 432, 443; *People* v. *Neely* (1999) 70 Cal.App.4th 767, 786 ["It is wrong to conclude that if the road were uninterrupted, its length was immaterial."]. Although a longer time lapse may indicate a less direct relationship, it is usually not sufficient to attenuate in the absence of some intervening independent act. See *People* v. *Boyer* (1989) 48 Cal.3d 247, 269 ["(D)efendant's statement occurred less than four hours after he left his home under police escort, and less than two hours after the commencement of [interrogation]."]; *People* v. *Beardslee* (1991) 53 Cal.3d 68, 109. Time lapse examples: See *Kaupp* v. *Texas* (2003) __ US __ ["(No) substantial time passed between Kaupp's removal from his home in handcuffs and his confession after only 10 or 15 minutes of interrogation."]; *Brown* v. *Illinois* (1975) 422 US 590, 604 ["Brown's first statement was separated from his illegal arrest by less than two hours"]; *Wong Sun* v. *United States* (1963) 371 US 471, 486 [statement made in defendant's home after he had been unlawfully arrested there]; *People* v. *Gonzalez* (1998) 64 Cal.App.4th 432, 447 ["Defendant's confession was separated from his illegal arrest by as little as three and a half hours and by as much as five and a half hours beginning at 1:30 in the morning. Both time periods fall within the range that suggests the confession did not result from an intervening independent acts of free will."]; *People* v. *Beardslee* (1991) 53 Cal.3d 68, 109 [11-year time lapse].

[81] See *People* v. *Rodriguez* (1993) 21 Cal.App.4th 232, 241 [court described as "clear example of exploitation of the illegality" when officers ID'd a suspect by means of a photograph of the suspect they took during an illegal detention conducted for the purpose of placing the photo in a "gang book"]; *Wong Sun* v. *United States* (1963) 371 US 471, 486 ["Six or seven officers had broken the door and followed on Toy's heels into the bedroom where his wife and child were sleeping."]; *Rawlings* v. *Kentucky* (1980) 448 US 98, 110 ["(T)he conduct of the police here does not rise to the level of conscious or flagrant misconduct requiring prophylactic exclusion of petitioner's statements."]; *United States* v. *Leon* (1984) 468 US 897, 911 ["(A)n assessment of the flagrancy of the police misconduct constitutes an important step in the calculus."]; *People* v. *Gonzalez* (1998) 64 Cal.App.4th 432, 447 ["The most damning factor is the utter lack of probable cause for defendant's arrest and the very clear indication its purpose was to take defendant into custody and see what might turn up."];*United States* v. *Ceccolini* (1978) 435 US 268, 279-80; *People* v. *Boyer* (1989) 48 Cal.3d 247, 269 [interrogation was described as flagrantly illegal]; *People* v. *Coe* (1991) 228 Cal.App.3d 526, 532; *People* v. *Superior Court (Sosa)* (1982) 31 Cal.3d 883, 894; *People* v. *Poole* (1986) 182 Cal.App.3d 1004, 1015; *People* v. *Beardslee* (1991) 53 Cal.3d 68, 111; *People* v. *Henderson* (1990) 220 Cal.App.3d 1632, 1651.

[82] *Lozoya* v. *Superior Court* (1987) 189 Cal.App.3d 1332, 1345. ALSO SEE *People* v. *Aylwin* (1973) 31 Cal.App.3d 826, 839.

[83] (1975) 422 US 590, 604.

a rape suspect may yield a confession to murder, all quite unexpectedly. But in such examples, there is present an intention *to get something*.[84]

For example, in *People* v. *Rodriguez*[85] an officer illegally detained a suspected gang member named Rodriguez for the purpose of taking his photo for use in the department's "gang book." Three days later, Rodriguez shot and killed a rival gang member, and the photo was used to identify him. Although the shooting occurred after the illegal detention, the court ruled the photo was tainted because it was "obtained deliberately for use in future criminal investigations, and the connection between it and the identification of Rodriguez was not happenstance. This is a clear example of 'exploitation of the illegality,' and requires suppression of the gang photograph."

In contrast, in *People* v. *McInnis*[86] the defendant robbed a liquor store. One month later, he was arrested on a weapons charge and a booking photo was taken. The photo was later used in a photo lineup in which the liquor store clerk identified McInnis as the robber. Although the court ruled the arrest on the weapon's charge was unlawful, it also ruled the arrest did not taint the subsequent ID because the connection between the two was "pure happenstance."

Independent intervening acts

If the officers' misconduct was not purposeful or flagrant, the key factor in most cases is whether something happened after their unlawful act that effectively broke the link between it and the discovery of the evidence. As the Court of Appeal explained:

> Where an event occurs between the proscribed law enforcement conduct and the proffered evidence which breaks the causal chain linking the illegality and evidence in such a way that the evidence is not in fact obtained by exploitation of that illegality the taint from the evidence is removed."[87]

Such an event is known as an "independent intervening act." While the courts have not said exactly what circumstances are required for an act to qualify as independent and intervening, there seem to be three:

(1) It occurred after the officers' unlawful act but before the evidence was discovered.

(2) It did not occur as a matter of course as the result of the officers' misconduct.

(3) It was a significant contributing factor in the discovery of the evidence.

The following are the most common types of independent intervening acts.

COMMITTING A NEW CRIME: A defendant's act of committing a new crime after the officer's misconduct will usually be deemed an independent intervening act when there is a direct relationship between the new crime and the discovery of the evidence. In the words of the Court of Appeal, "The commission of a new crime by the defendant will

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[84] (1999) 70 Cal.App.4th 767, 789. ALSO SEE *People* v. *Johnson* (1969) 70 Cal.2d 541, 549 ["(W)here the acts intervening between the defendant's confession and the unlawful search have in fact been induced by the authorities' exploitation of the unlawful search, and where the confession was in fact induced by the authorities' exploitation of those intervening acts . . . the confession is the fruit of the unlawful search."].

[85] (1993) 21 Cal.App.4th 232.

[86] (1972) 6 Cal.3d 821.

[87] *People* v. *Reagan* (1982) 128 Cal.App.3d 92, 96. ALSO SEE *United States* v. *Crews* (1980) 445 US 463, 471 [the test is whether "the chain of causation proceeding from the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the 'taint' imposed upon that evidence by the original illegality."]; *People* v. *Gonzalez* (1998) 64 Cal.App.4th 432, 444 ["Intervening circumstances can be anything the court deems sufficient to break the causal chain"]. NOTE: In *People* v. *Sims* (1993) 5 Cal.4th 405, 445 the California Supreme Court indicated that the existence of an independent intervening act is essential." But it's subsequent decisions have undermined this view. See *People* v. *Storm* (2002) 28 Cal.4th 1007, 1031.

ordinarily be an intervening independent act of the defendant's free will which purges the primary taint of prior police misconduct."[88]

For example, in *People* v. *Coe*[89] officers who were executing a search warrant in Coe's home seized tools they believed had been used in some burglaries. A court, however, ruled the search warrant was invalid and ordered the tools returned to the Coe. Before doing so, however, officers marked and photographed the tools. About two years later, some of the marked tools started turning up inside businesses that had been burglarized, apparently left behind by the burglars. As the result, officers obtained a warrant to search Coe's home, and the search netted evidence linking him to the burglaries. Although the evidence would not have been discovered if the officers had not conducted the unlawful search two years earlier, the court ruled it was admissible because Coe's commission of the new crimes constituted independent intervening acts.

Similarly, in *People* v. *Caratti,*[90] a narcotics officer knowingly conducted an illegal covert search of Caratti's car. Although he found drugs in the car, he knew the search was "dirty" so he did not arrest Caratti. Instead, he arranged to have an informant introduce him to Caratti as someone who wanted to purchase drugs. After the introduction was made, Caratti sold drugs to the officer. Caratti argued that the drugs he sold to the officer should be suppressed as the fruit of the illegal search of his car. The court disagreed, stating:

> [Caratti's] decision to sell [drugs] to Detective Anderson was an independent intervening act which attenuated the connection between the seizure of the contraband in his car and his subsequent illegal conduct. The voluntary commission of an offense subsequent to illegal police conduct is sufficient to dissipate the taint caused by the original police misconduct.

CONSENTING TO A SEARCH: A suspect's decision to consent to a search may be deemed tainted if the officers' illegal conduct created a coercive environment that they exploited to obtain consent. On the other hand, consent may be deemed an independent intervening act if it was given freely; i.e., it was unaffected by the illegality.[91] As the California Supreme Court explained:

> The defendant's consent may constitute such a sufficiently distinguishable means if it is not induced by compulsion, intimidation, oppressive circumstances, or other similar factors . . . .[92]

For example, in *Mann* v. *Superior Court*[93] officers obtained information that a marijuana party was in progress inside a certain house. When they arrived, they looked through a window and confirmed the report. They then knocked on the door and, in response, someone yelled, "Come in." So they came in and seized the evidence in plain view.

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[88] *People* v. *Coe* (1991) 228 Cal.App.3d 526, 531. ALSO SEE *People* v. *Beuer* (2000) 77 Cal.App. 4th 1433, 1439; *People* v. *Eastmon* (1976) 61 Cal.App.3d 646, 653-4; *People* v. *Prendez* (1971) 15 Cal.App.3d 486, 489 ["Appellant's act in fleeing is analogous to the commission of an offense subsequent to the police conduct said to be illegal—which subsequent offense then dissipates the taint caused by the police's original misconduct."]; *In re Robert D.* (1979) 95 Cal.App.3d 767, 772 ["The subsequent illegal acts dissipated any taint caused by the unauthorized police action in activating the red light and siren."]; *People* v. *Baker* (1970) 12 Cal.App.3d 826, 843.

[89] (1991) 228 Cal.App.3d 526.

[90] (1980) 103 Cal.App.3d 847.

[91] See *People* v. *Sanchez* (1981) 116 Cal.App.3d 720, 729 ["(T)he taint of prior improper conduct can be attenuated. That attenuation can result from a subsequent voluntary consent to search."]; *People* v. *Sesslin* (1968) 68 Cal.2d 418, 430; *U.S.* v. *Ramos* (8th Cir. 1994) 42 F.3d 1160, 1164[during illegal (but not flagrantly illegal) detention officer's warning that suspect did not have to consent and suspect's signing consent form broke the chain of causation].

[92] *Mann* v. *Superior Court* (1970) 3 Cal.3d 1, 8.

[93] (1970) 3 Cal.3d 1.

On appeal, the California Supreme Court assumed for the sake of argument that the officers' act of looking through the window constituted an illegal search. But because the person who said "Come in" didn't know the officers had looked inside, their search could not have affected his decision to admit them. As the court explained, the occupant's consent to enter cannot be the fruit of a prior illegal search "if it is not induced by compulsion, intimidation, oppressive circumstances, or other similar factors." Accordingly, the court ruled the consent was not the fruit of the illegal search because "the only event which induced consent to the officers' entry was the sound of knocking at the door."

On the other hand, if officers obtained a suspect's consent by exploiting their illegal conduct, the consent will be neither independent nor intervening. This would likely occur if the officers' illegal conduct created a coercive situation that they exploited to obtain consent.[94] For example, in *People* v. *Poole*[95] officers went to Poole's apartment to question him about a drug sale that had just occurred. When a man opened the door, the officers rushed inside, obtained Poole's consent to search, and discovered drugs and paraphernalia. In rejecting the argument that Poole's consent was independent of the officers' illegal entry, the court noted that the officers' misconduct was not only purposeful, it created a coercive situation that made it impossible "to infer that Poole's response was sufficiently an act of free will to purge the primary taint of the unlawful invasion."

CONFESSING: Like the decision to consent, a suspect's decision to confess or make a statement is an independent intervening act if was "sufficiently an act of free will" to purge the taint.[96] What circumstances are relevant in making this determination? The following are considered important:

SUSPECT'S KNOWLEDGE OF VIOLATION: If the suspect was unaware that officers had violated his Constitutional rights, his decision to make a statement must have been an independent intervening act. For example, in *People* v. *Macioce*[97] the defendant contended that the incriminating statement she gave to San Jose police officers was the fruit of the officers' prior unlawful search of her apartment. Assuming the entry was unlawful, the court said it didn't matter because "nothing in the record before us shows that Macioce was made aware of the search of her apartment before she gave her statement."

SPONTANEOUS STATEMENT: A statement is apt to constitute an independent intervening act if it was made spontaneously, meaning it was not made in response to an officer's words or conduct.[98] As the U.S. Supreme Court noted in *Rawlings* v.

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[94] See *People* v. *Valenzuela* (1994) 28 Cal.App.4th 817, 832-3; *People* v. *Sesslin* (1968) 68 Cal.2d 418, 430; *U.S.* v. *Twilley* (9th Cir. 2000) 222 F.3d 1092, 1097.

[95] (1986) 182 Cal.App.3d 1004.

[96] See *Brown* v. *Illinois* (1975) 422 US 590, 602-3; *Kaupp* v. *Texas* (2003) ___ US ___; *Oregon* v. *Elstad* (1985) 470 US 298, 306; *Florida* v. *Royer* (1983) 460 US 491, 501; *People* v. *Boyer* (1989) 48 Cal.3d 247, 269 ["The issue is whether intervening events break the causal connection between the illegal detention and the incriminating statement so that the statement is sufficiently an act of free will to purge the primary taint."]; *Rawlings* v. *Kentucky* (1980) 448 US 98, 106 ["Even given such a constitutional violation, however, exclusion of petitioner's admissions would not be necessary unless his statements were the result of his illegal detention."]; *People* v. *DeVaughn* (1977) 18 Cal.3d 889, 898; *People* v. *Beardslee* (1991) 53 Cal.3d 68, 108; *People* v. *Rich* (1988) 45 Cal.3d 1036, 1081 ["The fact that defendant, soon after consulting his attorney, told [the officer] he still wished to talk to him clearly constitutes an intervening independent act by the defendant and purges any taint from the initial suppressed confession."].

[97] (1987) 197 Cal.App.3d 262. ALSO SEE: *People* v. *Richards* (1977) 72 Cal.App.3d 510, 514 ["An illegal arrest, alone, is utterly irrelevant. All that matters is whether the illegal arrest resulted in tainted evidence."].

[98] See *Brown* v. *Illinois* (1975) 422 US 590, 603-4; *Wong Sun* v. *United States* (1963) 371 US 471, 486; *Taylor* v. *Alabama* (1982) 457 US 687, 690-4; *People* v. *DeVaughn* (1977) 18 Cal.3d 889, 899-90; *People* v. *Campa* (1984) 36 Cal.3d 870; *People* v. *Rich* (1988) 45 Cal.3d 1036, 1079; *People* v. *Poole* (1986) 182

Kentucky, "Here, where petitioner's admissions were apparently spontaneous reactions to the discovery of his drugs in Cox's purse, we have little doubt that this factor weighs heavily in favor of a finding that petitioner acted of free will unaffected by the initial illegality."[99] On the other hand, a suspect's decision to confess is not an independent intervening act if it was the fruit of the officer's misconduct; e.g., suspect confessed to having a rock of cocaine in his pocket within seconds after the officer told him he was going to pat search him, and the pat search would have been unlawful.[100]

MIRANDA WAIVER: A suspect's decision to waive his *Miranda* rights before making the statement is an "important factor," but does not automatically render his subsequent statement an independent intervening act.[101]

"CAT'S OUT OF THE BAG": It has been argued that if a suspect makes an incriminating statement about a crime as the result of an illegal search or seizure, any subsequent statement concerning that crime is necessarily tainted because his decision to incriminate himself must have been based, at least in part, on his knowledge that he had already "let the cat out of the bag." Although this may be a relevant circumstance, it will not automatically result in a finding that the second statement was tainted.[102]

DISCOVERY THROUGH INDEPENDENT INVESTIGATION: When, as the result of chance or happenstance, an officer' illegal conduct during the investigation of one crime yields evidence pertaining to another crime, the evidence will ordinarily be admissible.[103] For example, in *People* v. *Gonzalez*[104] West Covina police arrested Gonzalez without probable cause for robbing a liquor store. As it turned out, officers from Monterey Park wanted to question him about a robbery-shooting they were investigating. So when they learned he was in custody in West Covina, they went there to interview him. After waiving his *Miranda* rights, Gonzalez confessed.

In ruling the confession was not the fruit of the illegal arrest in West Covina, the court noted the Monterey Park officers had no role whatsoever in the arrest. Said the court, "This is not a case in which one police department attempts to make an end run around the Fourth Amendment by creating a 'don't ask-don't tell' strategy in which one unit illegally arrests suspects and another unit interrogates them deliberately unaware of the circumstances of the arrest."

Cal.App.3d 1004, 1015; *People* v. *Sims* (1993) 5 Cal.4th 405, 446; *People* v. *Reagan* (1982) 128 Cal.App.3d 92, 99.

[99] (1980) 448 US 98, 108.

[100] See *People* v. *Medina* (2003) __ Cal.App.4th __.

[101] See *Brown* v. *Illinois* (1975) 422 US 590, 602-3; *Kaupp* v. *Texas* (2003) __ US __; *Dunaway* v. *New York* (1979) 442 US 200, 217-9; *Rawlings* v. *Kentucky* (1980) 448 US 98, 107; *Taylor* v. *Alabama* (1982) 457 US 687, 690; *People* v. *DeVaughn* (1977) 18 Cal.3d 889, 898; *People* v. *Poole* (1986) 182 Cal.App.3d 1004, 1014; *People* v. *Gonzalez* (1998) 64 Cal.App.4th 432, 423 ["*Miranda* warnings are relevant to the question of whether a confession should be suppressed on Fourth Amendment grounds only to the extent they are evidence the confession was an act of free will on the part of the defendant sufficient to purge the primary taint of the unlawful arrest."].

[102] See *Oregon* v. *Elstad* (1985) 470 US 298, 311-4; *People* v. *Beardslee* (1991) 53 Cal.3d 68-109 ["It is true that defendant's knowledge that he had already confessed . . . gave him a false sense that he had nothing to lose in talking to the California authorities. This might have played a role in defendant's decision to speak. . . . At most, however, this suggests that 'but for' the illegality, defendant would not have confessed in California. [But] that is not the test."].

[103] See *Lockridge* v. *Superior Court* (1970) 3 Cal.3d 166, 170 ["(I)t was pure happenstance that during an investigation of other crimes, the police came across the gun taken in the Peace robbery."]; *Lozoya* v. *Superior Court* (1987) 189 Cal.App.3d 1332, 1345; *People* v. *McInnis* (1972) 6 Cal.3d 821, 825 ["(T)he illegal arrest was in no way related to the crime with which defendant was ultimately charged. Indeed, two independent agencies were involved"].

[104] (1998) 64 Cal.App.4th 432.

Similarly, in *People* v. *Thierry*[105] the defendant was arrested by LAPD officers for robbing Rashawn Tony. The detective assigned to the case then photographed Thierry and showed the photo to Tony who said Thierry was not the robber. On a hunch, the detective decided to show the photo to some other people who had been robbed in the same area as Tony. Two of the victims positively ID'd Thierry.

Assuming for the sake of argument that probable cause to arrest Thierry for the Tony robbery did not exist, the court ruled the taint from the arrest was sufficiently dissipated when the photo was used to investigate the separate robberies. Although Tony and the others were all robbed in the same neighborhood, Thierry was arrested solely for the Tony robbery, and the detective's decision to show the photos to the other victims was made after the arrest. Said the court, "Only when law enforcement makes illegal arrests for the sole or primary purpose of obtaining photographs they can use in ongoing or future investigations is there a constitutional justification to bar use of those photographs in identifying the perpetrators of crimes."

Lastly, in *People* v. *Griffin*[106] LAPD officers went to the home of Ellen Collins to look for a runaway juvenile. While there, they arrested one of the occupants of the house, Griffin, for possession of barbiturates. A few days later, the officers learned that the barbiturates had been stolen two weeks earlier in an armed robbery of a drug store in El Segundo. So they sent a copy of Griffin's booking photo to El Segundo police who used it in photo lineup. The victims positively ID'd him.

Although the court ruled that Griffin's arrest on the drug charge was unlawful, it also ruled the booking photo and the ID's resulting from the photo lineup were admissible because the taint from the illegal arrest was sufficiently attenuated. Said the court:

> [I]t was pure happenstance that during an investigation of other crimes, the police came across the controlled substances taken in the El Segundo robbery. Police were not looking for evidence in the robbery at the time they went to or entered the Collins' residence, indeed, they were unaware of the existence of the robbery.

LAUNCHING AN INVESTIGATION: Officers will sometimes decide to investigate a suspect after having discovered incriminating evidence during a search of his home, car, or other property. If the search was unlawful, the suspect may claim the decision to conduct the investigation was tainted by the illegal search and, therefore, any evidence discovered during the course of the investigation was the fruit of the illegal search.

The courts have ruled, however, that the subsequent investigation and any evidence obtained as the result is not the fruit of the illegal search if it merely provided officers with the "impetus" for the investigation. In other words, the illegal search set the investigation in motion, as opposed to providing a direct link to the evidence itself.[107] As the court explained in *People* v. *Thomas*:

> [W]here illegal police conduct merely suggests that a particular person should be investigated, a legally conducted investigation is then undertaken and, in the course thereof, probable cause to make an arrest or secure a search warrant is

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[105] (1998) 64 Cal.App.4th 176.

[106] (1976) 59 Cal.App.3d 532.

[107] See *U.S.* v. *Smith* (9th Cir. 1998) 155 F.3d 1051, 1061 ["(I)t is not sufficient in demonstrating taint that an unlawful wiretap may have been a factor in the decision to target a specific defendant, or that an illegal search uncovers the alleged perpetrator's identity, and therefore directs attention to a particular suspect."]; *U.S.* v. *Davis* (9th Cir. 2003) 332 F.3d 1163, 1171 ["All that Davis need show is that the [illegally] seized shotgun tended significantly to direct the investigation toward the specific evidence sought to be suppressed."]; *U.S.* v. *Cales* (9th Cir. 1974) 493 F.2d 1215, 1215-6 ["The district court must seek to discover what kind of direction and impetus the illegal wiretap gave to the Cales investigation: did anything seized illegally, or any leads gained from the illegal activity, tend significantly to direct the investigation toward the specific evidence sought to be suppressed?"].

obtained through the independent acts of the suspect and others, the taint is dissipated.[108]

For example, in *U.S.* v. *Smith*[109] the defendant, a top official with a publicly-traded software design firm, left a voicemail message with a fellow employee, Bravo, warning her that the price of the company's stock was going to plummet as the result of revised sales figures. He also said he had already sold all of his shares, and that he was going to "short sell"; i.e., sell shares he would produce later after the price dropped.[110] The stock dropped 38% and, as the result, Smith averted a $150,000 loss and netted $50,000 on the short sale. For some reason, another company employee accessed Bravo's voicemail, copied Smith's message, and turned it over to the SEC. As the result, the SEC launched an 18-month probe in which SEC and FBI agents conducted "substantial additional investigation," including interviewing 15 people and subpoenaing hundreds of documents. Smith was subsequently convicted of insider trading.

Under federal law at the time, the employee's accessing the voicemail was an unlawful "wiretap" and, as the result, the tape was suppressed.[111] So Smith contended that all the evidence obtained as the result of the subsequent investigation must also be suppressed as the fruit of the illegal wiretap. The court disagreed, noting that the wiretap was merely the impetus for the investigation—it did not lead to any particular evidence. Said the court:

> [U]nder Ninth Circuit precedent, the baseline inquiry in evaluating taint is not whether an unlawful search was the "impetus" for the investigation or whether there exists an unbroken "causal chain" between the search and the incriminating evidence; rather, courts must determine whether anything seized illegally, or any leads gained from illegal activity, tended significantly to direct the investigation toward the specific evidence sought to be suppressed.

Consequently, because the joint SEC-FBI investigation was the source of the "lion's share" of the evidence, the court ruled it was not tainted by the wiretap.

Similarly, in *U.S.* v. *Carsello*[112] IRS agents in Chicago decided to investigate Carsello for income tax evasion after receiving documents from Chicago police that had been discovered during a search of Carsello's home. During the course of their investigation, IRS agents interviewed nearly 50 people and lawfully seized an assortment of incriminating financial records pertaining to Carsello. As the result, Carsello was convicted of tax fraud. Although it turned out the search by Chicago police was illegal, the court ruled the evidence obtained by the IRS was admissible because the link between it and the illegal search was "tenuous."

ILLEGAL SEARCH LEADS TO WITNESS: Officers who are investigating a suspect will sometimes learn the identity of a person who later becomes a witness for the prosecution. If the officers were able to identify and locate the witness as the result of an illegal search or seizure of the defendant, he may contend that the witness's testimony must be suppressed because it was the fruit of the illegal search or seizure.

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[108] (1980) 112 Cal.App.3d 980, 986.

[109] (9th Cir. 1998) 155 F.3d 1051. ALSO SEE *Fogg* v. *Superior Court* (1971) 21 Cal.App.3d 1, 7 ["(I)t does not seem to be the law that the prosecution cannot proceed with legally obtained prints, simply because an illegally obtained set first revealed the defendant as a suspect."].

[110] Re "short selling," the court explained: "Short selling is a device whereby the speculator sells stock which he does not own, anticipating that the price will decline and that he will thereby be enabled to 'cover,' or make delivery of the stock sold, by purchasing it at the lesser price. If the decline materializes, the short seller realizes as a profit the differential between the sales price and the lower purchase or covering price." Louis Loss & Joel Seligman, *Fundamentals of Securities Regulation* 699 (3d ed.1988) (quoting Stock Exchange Practices, Report of Comm. on Banking & Currency, S.Rep. No. 1455, 73d Cong., 2d Sess. 50-51 (1934)) (internal quotation marks omitted).

[111] See 18 USC §2515.

[112] (7th Cir. 1978) 578 F.2d 199.

It is settled, however, that a witness's testimony is not the fruit of a prior illegal search or seizure unless the link between it and the illegal conduct was "closer, more direct" than the link required to suppress physical evidence.[113] In determining whether such a direct link exists the courts consider such things as the extent to which the witness freely agreed to testify, the time lapse between the illegal conduct and the officers' discovery of the witness, the time lapse between the contact with the witness and the witness's testimony at trial, whether the witness's identity was known to officers before the illegal conduct, and whether officers engaged in the illegal conduct for the purpose of obtaining names of potential witnesses.[114]

IN-COURT ID: A defendant will sometimes argue that an eyewitness to a crime should be prohibited from identifying him in court if the witness had previously ID'd him during a lineup or showup that was so impermissibly suggestive as to give rise to a very substantial likelihood of *irreparable* misidentification.[115] Again, these arguments will be rejected if the prosecution can prove the in-court ID would be independent of the lineup or showup.[116]

In determining whether an in-court ID was independent, the courts consider the following: whether the witness had a good opportunity to see the perpetrator during the commission of the crime; the extent to which the witness's attention was directed at the perpetrator; the accuracy of the witness's prior description of the perpetrator to officers or others; the level of certainty demonstrated by the witness at the pre-trial ID; the length of time between the crime and the ID; and whether the witness correctly or incorrectly identified the defendant or another person at a previous lineup or showup.[117]

TERMINATION OF THE ILLEGALITY: The taint from an illegal detention or arrest ordinarily disappears when the evidence was discovered after the suspect was released or when the illegality was effectively terminated. The following are examples:

RELEASE FROM CUSTODY: The suspect was unlawfully detained or arrested but the evidence or statement was legally obtained from him after he had been released.[118]

RAMEY VIOLATION LEADS TO EVIDENCE: Under the so-called *Ramey-Payton* rule,[119] officers may not enter a suspect's home for the purpose of arresting him unless they have an arrest warrant or consent, or there were exigent circumstances. If officers violate *Ramey-Payton*, any statements the arrestee made inside his house and evidence discovered during a search of the arrestee or his home incident to the arrest will be suppressed as the primary fruit of the violation.[120] But because a *Ramey-*

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[113] See *United States* v. *Ceccolini* (1978) 435 US 268, 274, 278.

[114] See *United States* v. *Ceccolini* (1978) 435 US 268, 276-280; *People* v. *Teresinski* (1992) 30 Cal.3d 822, 835, 838; *People* v. *Superior Court (Negoescu)* (1982) 131 Cal.App.3d 429, 433; *People* v. *Schweitzer* (1982) 138 Cal.App.3d 204, 207; *People* v. *Williams* (1988) 44 Cal.3d 883, 918-9. COMPARE: *People* v. *Superior Court (Sosa)* (1982) 31 Cal.3d 883, 894.

[115] See *Simmons* v. *United States* (1968) 390 US 377, 384; *People* v. *Arias* (1996) 13 Cal.4th 92, 168; *People* v. *Rodriguez* (1977) 68 Cal.App.3d 874, 881.

[116] See *United States* v. *Crews* (1980) 445 US 463; *People* v. *Teresinski* (1982) 30 Cal.3d 822, 833-5; *People* v. *Rodriguez* (1993) 21 Cal.App.4th 232, 241.

[117] See *People* v. *Arias* (1996) 13 Cal.4th 92, 168-70; *People* v. *Nguyen* (1994) 23 Cal.App.4th 32, 38-9; *People* v. *Greene* (1973) 34 Cal.App.3d 622, 647; *People* v. *Brown* (1969) 273 Cal.App.2d 109, 112-3; *People* v. *Harpool* (1984) 155 Cal.App.3d 877, 886; *People* v. *Mosher* (1969) 1 Cal.3d 379, 396; *People* v. *Posten* (1980) 108 Cal.App.3d 633, 647; *People* v. *Sanchez* (1982) 131 Cal.App.3d 718, 730-1; *People* v. *Reagan* (1982) 128 Cal.App.3d 92, 101; *People* v. *Cooks* (1983) 141 Cal.App.3d 224, 306; *People* v. *Harris* (1971) 18 Cal.App.3d 1, 6; *People* v. *Thierry* (1998) 64 Cal.App.4th 176, 185-5.

[118] See *Wong Sun* v. *United States* (1963) 371 US 471, 491; *People* v. *Storm* (2002) 28 Cal.4th 1007; *People* v. *Inman* (1986) 186 Cal.App.3d 1137, 1144; *U.S.* v. *Hines* (9th Cir. 1992) 963 F.2d 255, 257; *U.S.* v. *Coleman* (9th Cir. 2000) 208 F.3d 786, 790-1. COMPARE *People* v. *Gonzalez* (1998) 64 Cal.App.4th 432, 447 [suspect "remained in police custody and police company from the time of his arrest to the time he confessed."].

[119] See *People* v. *Ramey* (1976) 16 Cal.3d 263; *Payton* v. *New York* (1980) 445 US 573.

[120] See *New York* v. *Harris* (1990) 495 US 14, 20; *In re Reginald B.* (1977) 71 Cal.App.3d 398, 404.

Payton violation ends when the officers and the suspect leave the premises, evidence obtained from the suspect's possession outside the home and statements he made later at the police station will be deemed independent of the *Ramey-Payton* violation.[121]

FINGERPRINTS AND PHOTOGRAPHS: Fingerprints and photographs obtained while the suspect was being held unlawfully are "primary" evidence as to the crime for which he was arrested and will, therefore, be suppressed.[122] But if the suspect is later lawfully arrested, a new photo or set of prints will be deemed untainted even though they were used to connect the suspect to crime for which he was unlawfully arrested.[123]

INEVITABLE DISCOVERY

Under the "inevitable discovery" rule, evidence and statements obtained unlawfully are admissible if they would have been acquired inevitably by lawful means.[124] As the U.S. Supreme Court explained:

> [I]f the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury. . . ."[125]

To date, the inevitable discovery rule has been applied only when all of the following circumstances existed:

(1) INVESTIGATION UNDERWAY: The investigation was underway when the illegal conduct occurred.

(2) INVESTIGATION PROGRESSING: The investigation was progressing; i.e., it had not stalled.

(3) DISCOVERY REASONABLY LIKELY: There was a reasonably strong probability that the illegally-seized evidence would have been discovered.[126] Note that the

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[121] See *New York* v. *Harris* (1990) 495 US 14, 18-9; *People* v. *Marquez* (1992) 1 Cal.4th 553, 569 ["(The *Ramey* violation) would require suppression solely of evidence obtained from searching the home at the time of the arrest."]; *In re Reginald B.* (1977) 71 Cal.App.3d 398, 404; *People* v. *Trudell* (1985) 173 Cal.App.3d 1221, 1231.

[122] See *Hayes* v. *Florida* (1985) 470 US 811, 813; *Davis* v. *Mississippi* (1969) 394 US 721.

[123] See *People* v. *Solomon* (1969) 1 Cal.App.3d 907, 910 ["However, the prints of Solomon's fingers which were matched with the prints on the victim's car at trial were taken from Solomon at the jail after he had been bound over for trial at the preliminary hearing and arraigned."]; *People* v. *Fitzgerald* (1972) 29 Cal.App.3d 296, 315 [after illegal arrest, fingerprints were legally obtained when defendant was arraigned on new charges for which probable cause existed]. ALSO SEE *Virgle* v. *Superior Court* (2002) 100 Cal.App.4th 572 [defendant may be ordered to submit to fingerprinting if lawfully in custody]; *People* v. *Rosales* (1984) 153 Cal.App.3d 353, 366 ["(T)he trial court must independently determine whether there is probable cause to believe the defendant committed the charged offense before it may order him to submit to fingerprinting."]; *Fogg* v. *Superior Court* (1971) 21 Cal.App.3d 1, 7. NOTE: There is a presumption that fingerprints on file with a law enforcement agency from a previous arrest were obtained lawfully. See *People* v. *Reserva* (1969) 2 Cal.App.3d 151, 155-6.

[124] See *Murray* v. *United States* (1988) 487 US 533, 539 ["The inevitable discovery doctrine is in reality an extrapolation from the independent source doctrine: Since the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered."]; *People* v. *Carpenter* (1999) 21 Cal.4th 1016, 1040; *People* v. *Robles* (2000) 23 Cal.4th 789, 800; *People* v. *Lamas* (1991) 229 Cal.App.3d 560, 568-9; *People* v. *Rosales* (1987) 192 Cal.App.3d 759, 769 ["The inevitability of the lawful discovery removes the taint of illegality that otherwise would attach to the evidence, and leaves no exclusionary rule barrier to its admission."]; *People* v. *Gesner* (1988) 202 Cal.App.3d 581, 592; *People* v. *Tye* (1984) 160 Cal.App.3d 796, 800 ["The inevitable discovery exception allows admission of evidence where the court finds that challenged evidence would have been eventually secured through legal means regardless of improper official conduct."]; *People* v. *Superior Court (Tunch)* (1978) 80 Cal.App.3d 665, 673; *People* v. *Bennett* (1998) 17 Cal.4th 373, 393-5 [conc. opn. of Brown, J.]; *U.S.* v. *Smith* (9th Cir. 1998) 155 F.3d 1051, 1060, fn.16 ["The inevitable discovery exception serves to permit evidence that, in spite of the unlawful search, inevitably would have been discovered by lawful means."].

[125] *Nix* v. *Williams* (1984) 467 US 431, 444, 447.

> prosecution is not required to prove the evidence would have been discovered "without question" or "certainly."[127] Instead, it must prove—by a preponderance of the evidence[128]—only that there was a reasonably strong probability[129] that the evidence would have been discovered "in the normal course of a lawfully conducted investigation,"[130] or that it "would have been ultimately revealed by usual and commonplace police investigative procedures"[131]

In determining whether a reasonably strong probability existed, the courts often note the scope of the investigation. If it was intensive there would obviously be a greater likelihood that officers would have pursued every plausible lead. For example, in ruling that evidence in a multiple-murder investigation would have been discovered inevitably, the court in *People* v. *Boyer* pointed out, "Lacking a ready suspect for two brutal homicides, the police were pursuing a broad-based investigation of every person who might possibly be involved."[132]

Even if these requirements are met, the courts will not apply the inevitable discovery rule if officers illegally searched a home without a warrant, figuring that because they had probable cause they would have inevitably obtained a warrant.[133] As the court said in *U.S.* v. *Griffin*, "[P]olice who believe they have probable cause to search cannot enter a home without a warrant merely because they plan subsequently to get one."[134]

Examples

The following are examples of how the inevitable discovery rule has been applied:

DISCOVERY OF HIT-AND-RUN VEHICLE INEVITABLE: Because witnesses saw the license number of a fatal hit-and-run vehicle, it was inevitable that officers would have eventually observed the damage to the car even though the car was discovered unlawfully. It was not, however, inevitable that officers would have tracked down the car so quickly they would have seen raindrops on the car indicating it had been recently driven. Consequently, testimony about the damage was admissible, but testimony about the raindrops was not.[135]

DISCOVERY OF BODY INEVITABLE: Members of a search party in a rural area were only a short distance from the body of a murder victim they were seeking, and would therefore have inevitably discovered it. Thus, it was immaterial that the body was

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[126] See *People* v. *Ramsey* (1969) 272 Cal.App.2d 302, 314; *People* v. *Rippberger* (1991) 231 Cal.App.3d 1667, 1690; *Hernandez* v. *Superior Court* (1980) 110 Cal.App.3d 355, 364; *People* v. *Rich* (1988) 45 Cal.3d 1036, 1079-80; *People* v. *Rosales* (1987) 192 Cal.App.3d 759, 769. COMPARE: *People* v. *Gordon* (1978) 84 Cal.App.3d 913, 926; *People* v. *Chapman* (1990) 224 Cal.App.3d 253, 260.

[127] See *People* v. *Superior Court (Tunch)* (1978) 80 Cal.App.3d 665, 680-1.

[128] See *Nix* v. *Williams* (1984) 467 US 431, 444; *People* v. *Carpenter* (1999) 21 Cal. 4th 1016, 1040.

[129] See *People* v. *Superior Court (Tunch)* (1978) 80 Cal.App.3d 665, 680-1 ["Nowhere in the many definitive authorities does it appear that the police with 'certainty' would have obtained the evidence from an independent source. Instead the rule's requirement is that it would have been discovered in the normal course of a lawfully conducted investigation. The test is not one of certainty, but rather of a reasonably strong probability."]; *Hernandez* v. *Superior Court* (1980) 110 Cal.App.3d 355, 364; *People* v. *Tye* (1984) 160 Cal.App.3d 796, 800; *In re Javier A.* (1984) 159 Cal.App.3d 913, 927.

[130] See *Lockridge* v. *Superior Court* (1970) 3 Cal.3d 166, 170.

[131] See *People* v. *Boyer* (1989) 48 Cal.3d 247, 279, fn.21; *People* v. *Ramsey* (1969) 272 Cal.App.2d 302, 313.

[132] (1989) 48 Cal.3d 247, 278. ALSO SEE *People* v. *Carpenter* (1999) 21 Cal. 4th 1016, 1040.

[133] See *People* v. *Robles* (2000) 23 Cal.4th 789, 801 [court rejects the argument that "evidence obtained during the warrantless search and seizure [of the defendant's garage] was admissible under the inevitable discovery doctrine because a warrant could have been obtained for the garage based upon the initial plain view sighting of the [stolen] car therein, had the police officers thought to have done so."].

[134] (6th Cir. 1974) 502 F.2d 959, 961. COMPARE *People* v. *Rich* (1988) 45 Cal.3d 1036, 1080.

[135] See *People* v. *Superior Court (Tunch)* (1978) 80 Cal.App.3d 665.

actually discovered by officers as the result of their questioning of the defendant in violation of the Sixth Amendment.[136]

DISCOVERY OF BODY, DRUGS AND WEAPON INEVITABLE: CHP officers would have inevitably discovered drugs and a weapon inside a car driven by a man they had just arrested because, (1) they would have inevitably have attempted to awaken the passenger who was reclining on the passenger seat; and (2) they would have discovered he was dead; and (3) from the front seat, they would have seen the other evidence in plain view.[137]

DISCOVERY OF MURDERER'S CLOTHING INEVITABLE: Officers obtained a murder suspect's consent to search his workplace. During the search, they found coveralls with traces of the victim's blood. Although the suspect's consent was invalid because he was being illegally detained at the time, the coveralls were admissible because police technicians were already at the workplace, and they would have inevitably discovered them.[138]

DISCOVERY OF DEFENDANT'S FINGERPRINTS INEVITABLE: Because officers lifted fingerprints from a pickup truck used in a drive-by shooting, and because they had information that the defendant was involved in the shooting, it was "inconceivable that a match-up would not have been made." It was, therefore, immaterial that the prints of the defendant that were used to make the match-up were obtained unlawfully.[139]

DISCOVERY OF PROSECUTION WITNESS INEVITABLE: While being interrogated, a multiple-murder suspect told officers he had ordered glasses from a certain optometrist. Although the interrogation was conducted in violation of *Miranda*, the glasses would have been inevitably discovered because, (1) the suspect's parents had already given them the name of the optometrist, and (2) the officers had previously questioned an employee of the optometrist but were "dissatisfied" with the information they had received and had "decided to return [to the optometrist's office] to investigate further."[140]

INDEPENDENT SOURCE RULE

The independent source rule is similar to inevitable discovery except as follows: While the inevitable discovery rule is applied when there is a reasonably strong probability that officers *would have* discovered the evidence by lawful means, the independent source rule is applied when the evidence was actually discovered through a

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[136] *Nix* v. *Williams* (1984) 467 US 431. ALSO SEE *People* v. *Foster* (1980) 102 Cal.App.3d 882, 888-9 [although exigent circumstances did not justify officers' entry into a garage, it was inevitable that a dead body located in the garage would have been found and the victim's wife questioned "given the offensive smell which permeated" the area and the likelihood that the coroner would have been notified and "would have been obliged by law to investigate the death."]; *People* v. *Macioce* (1987) 197 Cal.App.3d 262, 275 ["(W)e have no doubt that the body of [the murder victim] inevitably would have been discovered. The corpse was beginning to smell, and eventually would have attracted the attention of the neighbors. Ultimately the coroner would have been called by someone, and he would have been obliged by law to investigate the death."]; *People* v. *Boyer* (1989) 48 Cal.3d 247, 277, fn.18.

[137] *People* v. *Kraft* (2000) 23 Cal.4th 978, 1040. ALSO SEE *People* v. *Siripongs* (1988) 45 Cal.3d 548, 569 ["At the time the blood was drawn, defendant was the prime suspect in [a] double murder. A blood sample would inevitably have been drawn and would have disclosed the identical information . . . ."]; *People* v. *Clark* (1993) 5 Cal.4th 950, 993.

[138] *Green* v. *Superior Court* (1985) 40 Cal.3d 126.

[139] *People* v. *Rosales* (1987) 192 Cal.App.3d 759.

[140] *People* v. *Carpenter* (1999) 21 Cal. 4th 1016, 1040. ALSO SEE *People* v. *Boyer* (1989) 48 Cal.3d 247, 278 [officers would have inevitably learned of a prosecution witness because a woman who was cooperating with police knew of the witness and the witness's involvement in the case]; *People* v. *Rippberger* (1991) 231 Cal.App.3d 1667, 1690 ["It seems certain that the police would have identified and located Miller as a potential witness without the use of the information gained from the challenged interviews with appellants."]; *People* v. *Williams* (1988) 45 Cal.3d 1268, 1303; *In re Javier A.* (1984) 159 Cal.App.3d 913, 927.

combination of legal and illegal police conduct, but the evidence and information obtained unlawfully was superfluous. In other words, if prosecutors can prove the officers' misconduct contributed nothing that affected the ultimate seizure of the evidence, the seizure will be deemed "independent" of the illegal search and, therefore, the evidence will be admissible.[141] As the Court of Appeal explained in *People* v. *Neely*, "A 'fruit' may be admitted if there was an independent source for it; it would have been found anyway." [142]

To date, the independent source rule has been limited to the following situations.

Independent search warrants

If a warrant was based on information that was obtained as the result of police misconduct, it is invalid and any evidence obtained during the search will be suppressed. But if the warrant merely contained some illegally-obtained information, the warrant will be valid if the information played no role in the issuance of the warrant.

To prove that a warrant was, in fact, independent of prior police misconduct, it is necessary to prove two things:

(1) PROBABLE CAUSE REMAINS: It must be shown that probable cause to search remained after the illegally-obtained information was deleted from the affidavit. In other words, the illegally-obtained information was not necessary to establish probable cause.

(2) WARRANT WOULD HAVE BEEN SOUGHT: It must be proven that the officers' decision to seek the warrant was not influenced by any information obtained as the result of the illegal search or seizure.[143]

For example, in *Murray* v. *United States*[144] FBI and DEA agents lawfully stopped two vehicles that had just been driven out of a warehouse linked to a marijuana operation. When marijuana was discovered in the vehicles, the agents decided to seek a warrant to search the warehouse. But because they were unsure whether any accomplices were inside, they went back to the warehouse, forcibly entered, and conducted a protective sweep. The premises were vacant except for a large amount of marijuana in plain view.

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[141] See *In re Javier A.* (1984) 159 Cal.App.3d 913, 926; *People* v. *Weiss* (1999) 20 Cal.4th 1073; *People* v. *Lamas* (1991) 229 Cal.App.3d 560, 568; *People* v. *Tye* (1984) 160 Cal.App.3d 796, 800; *Murray* v. *United States* (1988) 487 US 533, 539; *U.S.* v. *Smith* (9th Cir. 1998) 155 F.3d 1051, 1060, fn.16 ["The independent source exception operates to admit evidence that is actually found by legal means through sources unrelated to the illegal search."]. NOTE: In discussing the difference between Independent Source and Inevitable Discovery, the U.S. Supreme Court has noted, "The inevitable discovery doctrine is in reality an extrapolation from the independent source doctrine: Since the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered."]. *Murray* v. *United States* (1988) 487 US 533, 539.

[142] (1999) 70 Cal.App.4th 767, 785.

[143] See *Murray* v. *United States* (1988) 487 US 533, 542 ["The ultimate question is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here."]; *Segura* v. *United States* (1984) 468 US 796, 814 ["None of the information on which the warrant was secured was derived from or related in any way to the initial entry into petitioners' apartment"]; *In re Javier A.* (1984) 159 Cal.App.3d 913, 926; *People* v. *Weiss* (1999) 20 Cal.4th 1073; *People* v. *Lamas* (1991) 229 Cal.App.3d 560, 568; *People* v. *Tye* (1984) 160 Cal.App.3d 796, 800; *U.S.* v. *Smith* (9th Cir. 1998) 155 F.3d 1051, 1060, fn.16; *U.S.* v. *Reed* (9th Cir. 1994) 15 F.3d 928, 933; *People* v. *Aylwin* (1973) 31 Cal.App.3d 826, 834-6; *People* v. *Bennett* (1998) 17 Cal.4th 373, 389, fn.4, 391; *People* v. *Koch* (1989) 209 Cal.App.3d 770, 786; *People* v. *Angulo* (1988) 199 Cal.App.3d 370, 375; *People* v. *Torres* (1992) 6 Cal.App.4th 1324, 1334; *People* v. *Gesner* (1988) 202 Cal.App.3d 581, 589. NOTE: It is not necessary for the prosecution to prove the magistrate would have issued the warrant if the illegally-obtained evidence had not been included in the affidavit. In other words, if probable cause remained after the information was removed, it is presumed the magistrate would have issued the warrant. See *People* v. *Weiss* (1999) 20 Cal.4th 1073.

[144] (1988) 487 US 533. ALSO SEE *People* v. *Baker* (1970) 12 Cal.App.3d 826, 843 [grounds to pat search remained despite previous illegal search].

About eight hours later, the warrant was issued. During the subsequent search, the agents seized 270 bales of marijuana.

The U.S. Supreme Court noted that the Court of Appeals, in ruling the warrant was independent of the illegal entry, had said, "[T]he discovery of the contraband in plain view was totally irrelevant to the later securing of a warrant and the successful search that ensued." If this was true, said the Supreme Court, it would provide "emphatic support" for application of the independent source rule. Accordingly, it sent the case back to the District Court to make a factual determination.

Witness's testimony

Defendants will sometimes contend that the in-court testimony of a prosecution witness must be suppressed if the witness was discovered as the result of an unlawful search or seizure of the defendant. If, however, prosecutors can prove the witness's in-court testimony would be independent of the officers' misconduct, the testimony will be deemed an independent source.[145] As the California Supreme Court explained:

> [I]f the witness, relying upon his memory of the crime, is able to identify the defendant based upon his physical appearance, the testimony of the witness rests upon an adequate independent basis . . . [146]

For example, in *People* v. *Teresinski*[147] an officer, after stopping the defendant's car without sufficient cause, saw a gun and money in the passenger compartment. The officer quickly determined that the money had just been taken in the robbery of a nearby 7-Eleven store. The gun and money were, of course, ordered suppressed as the primary fruit of the illegal car stop.

Teresinski also argued that the clerk he had robbed should have been prohibited from testifying against him because his testimony would also be the fruit of the car stop. The California Supreme Court, however, ruled the clerk's testimony was admissible under the independent source rule because, (1) the clerk's identity was already known to the police, and (2) the clerk's in-court identification of Tereskinski was based on his independent memory of the robber.

MIRANDA SUPPRESSION

If officers obtain a statement from a suspect in violation of *Miranda*, the statement cannot be used in the prosecution's case-in-chief because it is the direct product of the violation.[148] But what about physical evidence that is obtained as the result of a *Miranda* violation? For example, what if a murder suspect, while being questioned in violation of *Miranda*, told officers where he buried his victim's body? Will the body be suppressed as the fruit of the *Miranda* violation?

The answer would be yes if *Miranda* violations were deemed Constitutional violations. But *Miranda* is merely "based" on the Constitution (the Fifth Amendment)—

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[145] See *United States* v. *Crews* (1980) 445 US 463, 473 ["(T)he victim's capacity to identify her assailant in court neither resulted from nor was biased by the unlawful police conduct committed long after she had developed that capacity."]; *In re Dung T.* (1984) 160 Cal.App.3d 697, 717-8 ["Clearly if the in-court identification was independent of the [illegal] lineup identification, the in-court identification would be admissible"]; *Gilbert* v. *California* (1967) 388 US 263, 272 ["The admission of the in-court identifications without first determining that they were not tainted by the illegal lineup but were of independent origin was constitutional error."]; *People* v. *Rodriguez* (1993) 21 Cal.App.4th 232, 241 ["(The in-court identifications) are admissible because they were based on the witnesses' independent recollections of the crime."]; *People* v. *Reagan* (1982) 128 Cal.App.3d 92, 101-2; *People* v. *Williams* (1988) 44 Cal.3d 883, 918-9.

[146] *People* v. *Tereskinski* (1982) 30 Cal.3d 822, 834.

[147] (1982) 30 Cal.3d 822, 834.

[148] See *Miranda* v. *Arizona* (1966) 384 US 436, 476-7; *Oregon* v. *Elstad* (1985) 470 US 298, 317; *People* v. *Aguilera* (1996) 51 Cal.App.4th 1151, 1161; *People* v. *Esqueda* (1993) 17 Cal.App.4th 1450, 1481; *People* v. *Bradford* (1997) 14 Cal.4th 1005, 1039; *People* v. *Lujan* (2001) 92 Cal.App.4th 1389, 1403.

it is not mandated by it.[149] Thus, so long as the *Miranda* violation was not so egregious as to render the statement involuntary, the evidence will not be suppressed.

For example, the following should not be suppressed:

PHYSICAL EVIDENCE: Evidence derived from a non-coercive *Miranda* violation; e.g., suspect's statement provided probable cause for a warrant to search his home.[150]

IDENTITY OF WITNESS: Testimony of a prosecution witness is admissible where officers learned the witness's identity during non-coercive questioning of the defendant in violation of *Miranda*.[151]

SUBSEQUENT STATEMENTS: A voluntary statement by the suspect taken in full compliance with *Miranda* following a *Miranda* violation.[152] This is true even if the suspect admitted the crime or otherwise "let the cat out of the bag" when he made the statement in violation of *Miranda*.[153]

STATEMENT FOR IMPEACHMENT: A statement obtained in violation of Miranda may be used to impeach the defendant if he testifies at his trial.[154]

STATEMENT USED TO OBTAIN SEARCH WARRANT: A warrant to search the suspect's home was based on information obtained during noncoercive questioning of the suspect in violation of *Miranda*.[155]

WATCH FOR NEW DEVELOPMENT: On April 21, 2003 the United States Supreme Court granted review in *U.S.* v. *Patane* [155 L.Ed.2d 664] in which the Court is expected to rule that its decision in *Dickerson* v. *United States* (2000) 530 US 428 did not elevate *Miranda* to Constitutional status.

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[149] See *Dickerson* v. *United States* (2000) 530 US 428, 440; *Oregon* v. *Elstad* (1985) 470 US 298, 306-9; *People* v. *Lujan* (2001) 92 Cal.App.4th 1389, 1409 ["*Dickerson* makes it clear that the fruit of the poisonous tree doctrine does not apply in the *Miranda* context when the subsequent statement follows a proper warning and waiver and is voluntary given the holding in *Elstad*."]; *People* v. *Brewer* (2000) 81 Cal.App.4th 442, 454, fn.8 ["(Per *Dickerson*) the fruit of the poisonous tree doctrine . . . does not apply in cases involving noncoercive violations of *Miranda*"].

[150] See *People* v. *Brewer* (2000) 81 Cal.App.4th 442, 454, fn.8; *People* v. *Whitfield* (1996) 46 Cal.App.4th 947, 955.

[151] See *Michigan* v. *Tucker* (1974) 417 US 433, 450-2; *United States* v. *Ceccolini* (1978) 435 US 268; *United States* v. *Leon* (1984) 468 US 897, 911 ["(A) witness' testimony may be admitted even when his identity was discovered in an unconstitutional search."].

[152] See *Oregon* v. *Elstad* (1985) 470 US 298, 309; *Michigan* v. *Harvey* (1990) 494 US 344, 351 ["We have never prevented use by the prosecution of relevant voluntary statements by a defendant, particularly when the violations alleged by a defendant relate only to procedural safeguards that are not themselves rights protected by the Constitution, but are instead measures designed to ensure that constitutional rights are protected."]; *People* v. *Wash* (1993) 6 Cal.4th 215, 240-1; *People* v. *Bradford* (1997) 14 Cal.4th 1005, 1033, 1039; *People* v. *Sims* (1993) 5 Cal.4th 405, 445; *People* v. *Montano* (1991) 226 Cal.App.3d 914, 932-3; *People* v. *Lewis* (1990) 50 Cal.3d 262, 275; *People* v. *Rich* (1988) 45 Cal.3d 1036, 1080-1; *People* v. *Torres* (1989) 213 Cal.App.3d 1248, 1253-7; *People* v. *Harris* (1989) 211 Cal.App.3d 640, 649-50; *People* v. *Gastile* (1988) 205 Cal.App.3d 1376, 1384-6; *People* v. *Samayoa* (1997) 15 Cal.4th 795, 831; *People* v. *Brewer* (2000) 81 Cal.App.4th 442, 454; *People* v. *Thongvilay* (1998) 62 Cal.App. 4th 71; *U.S.* v. *Garvin* (9th Cir. 2001) 258 F.3d 951, 956-8; *People* v. *Lujan* (2001) 92 Cal.App.4th 1389, 1406-9.

[153] See *Oregon* v. *Elstad* (1985) 470 US 298, 309; *People* v. *Storm* (2002) 28 Cal.4th 1007, 1029 ["But it does not follow that the *fruits* of an otherwise voluntary statement are invariably tainted and inadmissible."].

[154] See *Harris* v. *New York* (1971) 401 US 222, 226; *People* v. *May* (1988) 44 Cal.3d 309; *People* v. *Macias* (1997) 16 Cal.4th 739, 755-6; *People* v. *Lanfrey* (1988) 204 Cal.App.3d 491, 509-10; *People* v. *Duncan* (1988) 204 Cal.App.3d 613, 617-22; *People* v. *Kimble* (1988) 201 Cal.App.3d 726, 730-1; *People* v. *Wyatt* (1989) 215 Cal.App.3d 255, 257-8; *People* v. *Aguilar* (1990) 218 Cal.App.3d 1556, 1567-8; *People* v. *Baker* (1990) 220 Cal.App.3d 574, 576-9; *People* v. *Markham* (1989) 49 Cal.3d 63, 68. NOTE: Re use of CALJIC 2.03 when defendant is impeached with un*Mirandized* statement that was false or misleading, see *People* v. *Williams* (2000) 79 Cal.App.4th 1157, 1164-6.

[155] See *People* v. *Brewer* (2000) 81 Cal.App.4th 442, 454; *U.S.* v. *Patterson* (9th Cir. 1987) 812 F.2d 1188, 1193; *U.S.* v. *Lemon* (9th Cir. 1977) 550 F.2d 467, 473.

Appendix

Standing Examples

Homes & businesses: Standing existed

- Search of condominium or apartment that the defendant was permitted to use by the owner. See *Jones* v. *United States* (1960) 362 US 257; *Rakas* v. *Illinois* (1978) 439 US 128, 141-3; *People* v. *Henderson* (1990) 220 Cal.App.3d 1632; *People* v. *Hamilton* (1985) 168 Cal.App.3d 1058, 1065.
- Search of a home in which the defendant was babysitting. See *People* v. *Moreno* (1992) 2 Cal.App.4th 577, 584-8.
- Search of the desk and files in the office of a state hospital physician. See *O'Connor* v. *Ortega* (1987) 480 US 709, 718. ALSO SEE: *Mancusi* v. *DeForte* (1968) 392 US 364, 369; *Vega-Rodriguez* v. *Puerto Rico Telephone Co.* (1st Cir. 1997) 110 F.3d 174, 179 ["(*O'Connor* v. *Ortega* (1987) 480 US 709, 717) recognized that operational realities of the workplace, such as actual office practices, procedures, or regulations, frequently may undermine employees' privacy expectations. The four dissenting Justices shared this belief, and subsequent case law confirms it."].
- Search of the home of a man who shot an officer in the residence. *Mincey* v. *Arizona* (1978) 437 US 385, 391 [Court indicated that a person who commits a crime in his home does not automatically forfeit any expectation of privacy in his residence].
- Occupant of residence had standing to seek suppression of evidence based on knock-notice violation though he was not home at the time. See *People* v. *Hoag* (2000) 83 Cal.App.4th 1198, 1206.
- Search of a union official's office he shared with others where officers seized papers owned by the union but in the official's lawful possession. See *Mancusi* v. *DeForte* (1968) 392 US 364,368-9.

Homes & businesses: No standing

- Entry or search of a home in which defendant was a casual visitor. See *Minnesota* v. *Carter* (1998) 525 US 83, 91; *People* v. *Cowan* (1994) 31 Cal.App.4th 795; *People* v. *Dimitrov* (1995) 33 Cal.App.4th 18, 27-8; *People* v. *Ooley* (1985) 169 Cal.App.3d 197, 203; *People* v. *Jackson* (1990) 218 Cal.App.3d 1493, 1502; *People* v. *Ayala* (2000) 24 Cal.4th 243, 279 ["Occasional presence on the premises as a mere guest or invitee is insufficient to confer such an expectation."].
- Entry into a home in which the defendant was committing a robbery. See *People* v. *Kane* (1984) 150 Cal.App.3d 523, 529.
- Search of hotel room which defendant paid for with a stolen credit card and, when confronted, said she had no money to pay for the room. See *People* v. *Satz* (1998) 61 Cal.App.4th 322.
- Search of motel guest registration records. *U.S.* v. *Cormier* (9th Cir. 2000) 220 F.3d 1103, 1108.
- Search of backyard of a home in which the defendant was a guest. See *People* v. *Welch* (1999) 20 Cal.4th 701, 748.
- Search of storage room rented by the defendants' grandmother; although defendants had a right to access the storage room they did not store any property there. *U.S.* v. *Sarkisian* (9th Cir. 1999) 197 F.3d 966.
- Search of a bedroom in a home in which the defendant was an overnight guest in another bedroom. *People* v. *Hernandez* (1988) 199 Cal.App.3d 1182, 11889-90.

[1] Cars: Standing existed

- Search of a car the defendant borrowed from the owner. See *People* v. *Leonard* (1987) 197 Cal.App.3d 235, 239; *People* v. *Carvajal* (1988) 202 Cal.App.3d 487, 495; *U.S.* v. *Twilley* (9th Cir. 2000) 222 F.3d 1092, 1095 [standing existed to challenge a search of a car when defendant was a passenger even though the car was rented by a third person car for defendant's wife].
- Car stop of vehicle in which the defendant was a driver or passenger. See *People* v. *Lionberger* (1986) 185 Cal.App.3d Supp.1. NOTE: Although *Lionberger* has been occasionally cited, its analysis was improper under current law. Citing only out-of-state cases, it determined that the passengers were detained because the traffic stop intruded on their liberty. This test is contrary to the ruling in *Florida* v. *Bostick* (1991) 501 US 429, 436 ["(T)he mere fact that Bostick did not feel free to leave the bus does not mean that the police seized him."]. ALSO SEE: *People* v. *Cartwright* (1999) 72 Cal.App.4th 1362, 1371.

Cars: No standing

- Search of a car in which the defendant was merely a passenger. See *Rakas* v. *Illinois* (1978) 439 US 128; *People* v. *Jackson* (1992) 7 Cal.App.4th 1367, 1370; *U.S.* v. *Twilley* (9th Cir. 2000) 222 F.3d 1092, 1095 [no standing to challenge search of car when third person rented the car for defendant's wife].
- Search of a car the defendant had stolen. See *People* v. *Melnyk* (1992) 4 Cal.App.4th 1532, 1533; *People* v. *Shepherd* (1994) 23 Cal.App.4th 825.

[1] Personal property: Standing existed

- Search of the defendant's locked luggage that he brought with him to a friend's home that was searched pursuant to a warrant. *People* v. *Koury* (1989) 214 Cal.App.3d 676, 691 ["The containers here were a closed pouch, a locked briefcase and a locked suitcase. Such evidence, coupled with the factors he was

legitimately present in the residence and was present during the search, is sufficient to show Hernandez had a legitimate expectation of privacy in those containers."].

- Search of defendant's gym bag in bedroom in which he was an overnight guest. *U.S.* v. *Davis* (9th Cir. 2003) 332 F.3d 1163, 1168.

Personal property: No standing

- Search of box containing drugs that had been lawfully opened by U.S. Customs, resealed, and delivered to the defendant. *Illinois* v. *Andreas* (1983) 463 US 765, 771 ["It is obvious that the privacy interest in the contents of a container diminishes with respect to a container that law enforcement authorities have already lawfully opened and found to contain illicit drugs. No protected privacy interest remains in contraband in a container once government officials lawfully have opened that container and identified its contents as illegal."].
- Search of a cardboard box that was being used by the defendant on public property as a temporary shelter. See *People* v. *Thomas* (1995) 38 Cal.App.4th 1331, 1334-5.
- Observation by officers of the address and return address of mail in the suspect's post office box (a.k.a. "mail cover"). See *U.S.* v. *Hinton* (9th Cir. 2000) 222 F.3d 664, 674 [A "mail cover" is a term of art within the postal system by which a nonconsensual record is made of any data appearing on the outside cover of any letter or package. Although Post Office regulations require reasonable grounds and compliance with a certain procedure for obtaining mail cover authorization, a failure to comply does not render the information inadmissible because there is no reasonable expectation of privacy as to such information.].
- Person who writes and sends a letter to another. See *U.S.* v. *Tolliver* (5th Cir. 1995) 61 F.3d 1189, 1197; *U.S.* v. *King* (6th Cir. 1995) 55 F.3d 1193.