Investigative "Contacts"

Hey, how you doing? You mind if we talk? [1]

When officers have probable cause that a certain person committed a crime, they may, of course, arrest him. When they have only reasonable suspicion, they can detain him and try to *develop* probable cause. But when they have nothing but a hunch, they need to be creative. That's where investigative "contacts" come in.

Contacts are police-suspect encounters in which the suspect agrees to stop and answer some questions, maybe consent to a search.[2] Like detentions, the officers' objective is to confirm or dispel their suspicions. But unlike detentions, contacts are not classified as "seizures" under the Fourth Amendment.[3] This means there are no restrictions on when or how officers may contact a suspect.[4]

There is, however, a trade-off. Because officers cannot compel the suspect to do anything, they must seek his cooperation.[5] While a badge may provide some "psychological inducement,"[6] officers must rely mainly on their persuasive ability. Some officers are naturally good at this. Others find it difficult. Yet, it is well worth the effort to develop this ability because, without it, the only alternative in many cases is to do nothing.[7]

It will soon become apparent, however, that a winning personality and good "people skills" are not nearly as important as really understanding the law that governs investigative contacts. This is because there are now so many consistent rulings on the books that it is possible for officers to know exactly what they can and cannot do when contacting a suspect. While many of these rules are based on common sense, others are somewhat technical in nature. In any event, officers who know them will be better able to maintain the consensual character of their investigative contacts, at least until they develop grounds to detain or arrest.[8]

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[1] See *People* v. *Bouser* (1994) 26 Cal.App.4th 1280, 1282.

[2] See *People* v. *Franklin* (1987) 192 Cal.App.3d 935, 941 ["The basic premise behind consensual encounters is that a citizen may consent voluntarily to official intrusions upon interests protected by the Constitution."].

[3] See *Florida* v. *Royer* (1983) 460 U.S. 491, 498 ["If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed."]; *In re Manuel G.* (1997) 16 Cal.4th 805, 821 ["[Contacts] do not trigger Fourth Amendment scrutiny."]; *U.S.* v. *Werking* (10th Cir. 1990) 915 F.2d 1404, 1408 ["Because an individual is free to leave at any time during [a contact], he is not 'seized' within the meaning of the fourth amendment."].

[4] See *In re Manuel G.* (1997) 16 Cal.4th 805, 821 ["[Contacts] require no articulable suspicion"].

[5] See *Florida* v. *Royer* (1983) 460 U.S. 491, 497-8 ["The person approached need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way."]; *People* v. *Franklin* (1987) 192 Cal.App.3d 935, 941 ["The citizen participant in a consensual encounter may leave, refuse to answer questions or decline to act in the manner requested by the authorities."].

[6] See *U.S.* v. *Ayon-Meza* (9th Cir. 1999) 177 F.3d 1130, 1133 ["[W]e must recognize that there is an element of psychological inducement when a representative of the police . . . initiates a conversation."]; *INS* v. *Delgado* (1984) 466 U.S. 210, 216 ["most citizens will respond to a police request"]; *In re Kemonte H.* (1990) 223 Cal.App.3d 1507, 1512 ["Cooperative citizens may ordinarily feel they should respond when approached by an officer on the street"].

[7] See *U.S.* v. *Weaver* (4th Cir. 2002) 282 F.3d 302, 309 ["Without [the ability to contact suspects] law enforcement officials would be neutralized to the point of being ineffective."].

[8] **NOTE**: If a court rulee the encounter was a seizure, it will be deemed either a de facto detention or de facto arrest, depending on whether the circumstances were more consistent with a detention or arrest. And, like

"FREE TO TERMINATE"

It sounds like the title of an Arnold Schwarzenegger movie: *Free to Terminate!* But it's actually the name of the test the courts now apply in determining whether an encounter with a suspect was a contact or a seizure. Specifically, an encounter will be deemed a contact if a reasonable person in the suspect's position would have felt free to decline the officers' requests or otherwise terminate the encounter.[9] As the United States Supreme Court explained in *Florida* v. *Bostick*:

> So long as a reasonable person would feel free to disregard the police and go about his business, the encounter is consensual and no reasonable suspicion is required.[10]

Be careful not to confuse the "free to terminate" test with *Miranda's* "functional arrest" standard for determining whether a suspect was "in custody." Although both attempt to gauge the coercive pressures that existed during a police-suspect encounter, a functional arrest occurs only if the encounter was tantamount to an arrest, while virtually any restriction on the suspect's freedom will result in a Fourth Amendment seizure.[11]

Compare: "free to leave"

To understand the "free to terminate" test, it will be helpful to become acquainted with its predecessor: "free to leave." In applying this standard, the courts would determine whether a reasonable person in the suspect's position would have, at some point, believed that the officers would not have allowed him to walk away.[12] If so, the encounter would be deemed a seizure from that point on.

But what if the suspect was contacted at a place he did not *want* to leave, such as his workplace or at the front of a long line waiting to buy tickets to the Super Bowl? Or what if it occurred at a place he was unable to leave, such as inside a BART train speeding through the Trans-Bay Tube or on a jetliner at 35,000 feet? In these types of situations, the suspect would not feel free to leave even though the officers said nothing to indicate he was detained or under arrest.

This anomaly did not, however, trouble most courts because they understood that "free to leave" really meant freedom to break off contact with the officers, whether by walking away or by refusing to answer their questions.[13] For example, a suspect who was

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any other detention or arrest, it will be deemed unlawful unless there were grounds; i.e., reasonable suspicion or probable cause.

[9] See *Kaupp* v. *Texas* (2003) 538 U.S. 626, 629 [a seizure occurs when "the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business."]; *United States* v. *Drayton* (2002) 536 U.S. 194, 201 ["If a reasonable person would feel free to terminate the encounter, then he or she has not been seized."]; *U.S.* v. *Buchanon* (6th Cir. 1995) 72 F.3d 1217, 1224 ["The relevant constitutional query" is whether "a reasonable person would have felt free to end this encounter."].

[10] (1991) 501 U.S. 429, 434.

[11] See *U.S.* v. *Sullivan* (4th Cir. 1998) 138 F.3d 126, 131 ["The 'custody' that implicates the *Miranda* rule is conceptually distinct from a seizure implicating the Fourth Amendment. . . . Even though a routine traffic stop does not amount to a custodial detention of the motorists, it does constitute a 'seizure' with the meaning of the Fourth Amendment."]; *People* v. *Boyer* (1989) 48 Cal.3d 247, 271 ["'Custody' [under *Miranda*] means a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest."].

[12] See *Michigan* v. *Chesternut* (1988) 486 U.S. 567, 573; *INS* v. *Delgado* (1984) 466 U.S. 210, 215; *United States* v. *Mendenhall* (1980) 446 U.S. 544, 554; *Florida* v. *Royer* (1983) 460 U.S. 491; *Wilson* v. *Superior Court* (1983) 34 Cal.3d 777, 790.

[13] See *U.S.* v. *Wilson* (4th Cir. 1991) 953 F.2d 116, 122 ["The principle embodied by the phrase 'free to leave' means the ability to ignore the police *and* to walk away from them."]. ALSO SEE *Florida* v. *Royer* (1983) 460 U.S. 491, 498 ["free to leave" also means the ability to "decline to listen to the questions at all"].

technically not free to leave would, nevertheless, not be seized if it appeared he could have refused to answer the officers' questions.

The Florida Supreme Court was an exception. In *Bostick* v. *State*[14] it viewed "freedom to leave" as an absolute, inflexible requirement—not as a guiding principle. Accordingly, it ruled that an encounter with a passenger on a bus during a brief layover was a seizure because the passenger could not leave the bus without taking the risk that it would leave without him.

The case went to the United States Supreme Court which, not surprisingly, rejected such Florida's undiscerning approach. In *Florida* v. *Bostick,*[15] it said the Florida court had "erred in focusing on whether Bostick was 'free to leave' rather than on the principle that those words were intended to capture," namely, whether "a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." As the Court pointed out:

> When police attempt to question a person who is walking down the street or through an airport lobby, it makes sense to inquire whether a reasonable person would feel free to continue walking. But when the person is seated on a bus and has no desire to leave, the degree to which a reasonable person would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter.

It should be noted that some courts have interpreted *Bostick* to mean that the "free to terminate" test should be used in situations where the suspect did not want to leave, while the "free to leave" test should be used in all other cases.[16] This is incorrect. The Court said nothing that would support such a conclusion. On the contrary, it stated that the "free to terminate" test "applies to encounters that take place on a city street or in an airport lobby, and it applies equally to encounters on a bus."[17] Furthermore, there is no need to retain the "free to leave" test because freedom to terminate an encounter necessarily includes the freedom walk away. In other words, it is apparent that any suspect who reasonably believes he is not free to leave would also reasonably believe he is not free to terminate the encounter.

General principles

Before we discuss the various circumstances that are relevant in applying the "free to terminate" test, it is necessary to review the basic principles.

REASONABLE *INNOCENT* PERSON: In measuring the coercive affect of any circumstance, the courts view it through the eyes of a reasonable person who is *innocent* of the crime under investigation.[18] In the words of the Third Circuit, "[W]hat a guilty [suspect] would feel and how he would react are irrelevant to our analysis because the reasonable person test presupposes an *innocent* person."[19] This is important because a person who thinks he

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[14] (1989) 554 So.2d 1153, 1157.
[15] (1991) 501 U.S. 429.
[16] See, for example, *People* v. *Fisher* (1995) 38 Cal.App.4th 338, 343, fn.2; *U.S.* v. *Jerez* (7th Cir. 1997) 108 F.3d 684, 689-90.
[17] *Florida* v. *Bostick* (1991) 501 U.S. 429, 439-40.
[18] See *United States* v. *Drayton* (2002) 536 U.S. 194, 202 ["The reasonable person test is objective and presupposes an *innocent* person."]; *Florida* v. *Bostick* (1991) 501 U.S. 429, 438 ["[T]he 'reasonable person' test presupposes an *innocent* person."]; *People* v. *Cartwright* (1999) 72 Cal.App.4th 1362, 1373; *In re Kemonte H.* (1990) 223 Cal.App.3d 1507, 1512; *People* v. *Holloway* (1985) 176 Cal.App.3d 150, 156.
[19] *U.S.* v. *Kim* (3d Cir. 1994) 27 F.3d 947, 953.

has nothing to fear from officers will interpret their words and actions much differently than someone who is scared stiff.

"SHOULD" VS. "MUST": The test is whether a reasonable person would have believed he *must* stay or was otherwise *required* to cooperate with officers.[20] Thus, a seizure does not result merely because a reasonable person would have believed he *should* do these things.[21] As the Court of Appeal observed, "Cooperative citizens may ordinarily feel they should respond when approached by an officer on the street but this does not, by itself, mean that they do not have a right to leave if they so desire."[22]

TOTALITY: In applying the "free to terminate" test, the courts consider all the surrounding circumstances, not just those that might have appeared coercive to the suspect.[23]

OBJECTIVE CIRCUMSTANCES: The only circumstances that matter are those that can be seen or heard by the suspect. For this reason, the officers' thoughts, beliefs, and plans are irrelevant unless they were somehow communicated to the suspect.[24] As the court stated in *People* v. *Bennett*, "The mere fact [that the officer] *might* and *probably would* have stopped Bennett from leaving had he chosen to do so is legally irrelevant. *That* did not happen. And, of course, any uncommunicated subjective motivation entertained by [the officer] has no bearing on our analysis."[25]

For the same reason it is irrelevant that, unbeknownst to the suspect, the officer had requested backup or had notified his dispatcher that he was going to "detain" or "stop" someone. As the California Supreme Court observed in *In re Manuel G.*, "Even if [the officer] stated in his radio broadcast that he was making a pedestrian stop, that statement does not contradict [the officer's] testimony that the encounter remained consensual until the minor threatened him."[26]

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[20] See *People* v. *Spicer* (1984) 157 Cal.App.3d 213, 220 ["Implicit in the notion of a consensual encounter is a choice on the part of the citizen not to consent but to decline to listen to the questions at all and go on his way."].

[21] See *INS* v. *Delgado* (1984) 466 U.S. 210, 216 ["While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response."].

[22] *In re Kemonte H.* (1990) 223 Cal.App.3d 1507, 1512.

[23] See *Florida* v. *Bostick* (1991) 501 U.S. 429, 439 ["[A] court must consider all the circumstances surrounding the encounter"]; *Michigan* v. *Chesternut* (1988) 486 U.S. 567, 573; *In re Manuel G.* (1997) 16 Cal.4th 805, 821 ["This test assesses the coercive effect of police conduct as a whole, rather than emphasizing particular details of that conduct in isolation."]; *People* v. *Celis* (2004) 33 Cal.4th 667, 674 ["[T]here is no hard and fast line to distinguish permissible investigative detentions from impermissible de facto arrests."]; *U.S.* v. *Sandoval* (10th Cir. 1994) 29 F.3d 537, 540 ["That totality-of-the-circumstances approach means that no single factor dictates whether a seizure has occurred."].

[24] See *United States* v. *Mendenhall* (1980) 446 U.S. 544, 554, fn.6 ["[T]he subjective intention of the DEA agent in this case to detain the respondent, had she attempted to leave, is irrelevant except insofar as that may have been conveyed to the respondent."]; *In re Manuel G.* (1997) 16 Cal.4th 805, 821 ["The officer's uncommunicated state of mind [is] irrelevant in assessing whether a seizure triggering Fourth Amendment scrutiny has occurred."]; *People* v. *Franklin* (1987) 192 Cal.App.3d 935, 940 ["The officer's state of mind is not relevant for resolution of this question except insofar as his overt actions would communicate that state of mind."]; *People* v. *Bailey* (1985) 176 Cal.App.3d 402, 406 ["The officer's statement as to his state of mind at the time he turned on his emergency equipment, that the driver was not free to leave, is not relevant. His communication of that state of mind by energizing the signal to stop or to stay is relevant."].

[25] (1998) 68 Cal.App.4th 396, 402, fn.5.

[26] (1997) 16 Cal.4th 805, 823. ALSO SEE *U.S.* v. *Anderson* (10th Cir. 1997) 114 F.3d 1059, 1064. ["The fact that [the officer] may have already called for back-up because he intended to search the vehicle is irrelevant, unless he communicated that intent to [the suspect] in some way that made [the suspect] feel compelled to consent."].

SUSPECT'S BELIEFS: The courts are not interested in whether the suspect did or did not believe he could terminate the encounter.[27] Again, what matters is whether the objective circumstances would have supported such a belief. For example, an encounter does not become a seizure because the suspect testified that, based on his prior experience with officers, he would be arrested if he tried to leave.[28]

IF THE SUSPECT FLEES: This is one exception to the "free to terminate" rule: While a suspect who is fleeing from officers would not feel free to terminate the encounter (although he is trying desperately to do so), he is not seized until he is apprehended.[29] As a result, any evidence he discards while fleeing will not be suppressed on grounds that the officers lacked grounds to detain or arrest.[30] In addition, although the suspect's flight will not automatically provide officers with grounds to detain or arrest,[31] flight is such a highly suspicious circumstance that not much more is required; e.g. flight in a high drug area may provide grounds to detain.[32]

KEY INDICATORS

The main thing to remember about the law of investigative contacts is that everything depends on the officers' words and actions.[33] And because officers can usually choose what they say and do, they can usually control the outcome—*if* they know how certain words and actions are viewed by the courts.[34] Thus, in *People* v. *Profit* the court pointed out that the officer who had contacted the defendant had been "carefully schooled" in the

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[27] See *People* v. *Cartwright* (1999) 72 Cal.App.4th 1362, 1371 [the suspect's belief that the officer would have prevented her from leaving is immaterial]; *People* v. *Terrell* (1999) 69 Cal.App.4th 1246, 1254; *In re Manuel G.* (1997) 16 Cal.4th 805, 821; *People* v. *Castaneda* (1995) 35 Cal.App.4th 1222, 1227; *In re Christopher B.* (1990) 219 Cal.App.3d 455, 460; *U.S.* v. *Sanchez* (10th Cir. 1996) 89 F.3d 715, 718; *U.S.* v. *Thompson* (7th Cir. 1997) 106 F.3d 794, 798 ["That Thompson subjectively perceived [the officer's] actions as coercive does not render them objectively unreasonable"].

[28] See *U.S.* v. *Analla* (4th Cir. 1992) 975 F.2d 119, 124.

[29] See *California* v. *Hodari D.* (1991) 499 U.S. 621, 626; *People* v. *Castaneda* (1995) 35 Cal.App.4th 1222, 1227; *People* v. *Johnson* (1991) 231 Cal.App.3d 1, 11 ["[A] person [who reasonably believes] he is not free to leave is nevertheless not detained for Fourth Amendment purposes until he either submits to that show of authority or is physically seized by the officer."].

[30] See *California* v. *Hodari D.* (1991) 499 U.S. 621, 629; *People* v. *Arangure* (1991) 230 Cal.App.3d 1302, 1308.

[31] *Florida* v. *Bostick* (1991) 501 U.S. 429, 437 ["We have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure."].

[32] See *Illinois* v. *Wardlow* (2000) 528 U.S. 119, 124; *People* v. *Souza* (1994) 9 Cal.4th 224, 236, 239 *People* v. *Britton* (2001) 91 Cal.App.4th 1112, 1118.

[33] See *Ohio* v. *Robinette* (1996) 519 U.S. 33, 39 [Court noted "the fact-specific nature of the reasonableness inquiry"]; *Michigan* v. *Chesternut* (1988) 486 U.S. 567, 573 [the test for determining whether an encounter was a contact or detention "is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation"]; *U.S.* v. *Wilson* (4th Cir. 1991) 953 F.2d 116, 121 ["Whether a seizure occurred at all is an intensely fact-bound matter"]; *People* v. *Verin* (1990) 220 Cal.App.3d 551, 556 ["[T]here is no 'bright-line' distinction between a consensual encounter and a detention"]; *Ford* v. *Superior Court* (2001) 91 Cal.App.4th 112, 124; *U.S.* v. *Beck* (8th Cir. 1998) 140 F.3d 1129, 1135 ["There is no bright line between a consensual encounter and a [detention], rather the determination is a fact intensive one which turns upon the unique facts of each case."].

[34] See *Michigan* v. *Chesternut* (1988) 486 U.S. 567, 574 ["The test's objective standard—looking to the reasonable man's interpretation of the conduct in question—allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment."].

subject, and had a good working knowledge of "the judicially declared Do's and Don'ts of investigative contacts."[35]

What do these "carefully schooled" officers know? For one thing, they know that certain words and actions are so inherently coercive that they *alone* will result in a seizure. Drawing a handgun would probably top the list. But they also know that, in most cases, there is no single determining factor; that, instead, the outcome will probably depend on an analysis of a combination of marginally coercive circumstances.

Before we examine the circumstances, it is necessary to acknowledge something: Many of the things that officers may say and do without converting a contact into a seizure would probably cause most law-abiding citizens to believe they were neither free to leave nor free to terminate. To put it another way, the "free to terminate" test, as it is applied by the courts, does not always produce results that reflect "street reality."[36] One court went so far as to say the test's validity "may be the greatest legal fiction of the late 20th century."[37]

Some courts have attempted to blunt such criticism by suggesting that, even if the circumstances were somewhat coercive, a seizure does not result if the suspect would have believed he was merely the "subject of general suspicion"[38] or the "object of official scrutiny."[39] But it is doubtful that the average suspect will appreciate the subtle difference between being a detainee and an "object of official scrutiny." Thus, instead of tampering with the test, it might be better to concede that it simply represents a generally workable—but sometimes fallible—compromise between competing interests.

Now, to the central question: What words and conduct by officers are likely to result in a seizure?

Manner of engaging the suspect

In many cases, the most difficult part of contacting a suspect is getting him to stop, especially if he is inside a moving vehicle. This is because the usual methods of stopping a suspect constitute an assertion of police authority and, thus, result in a seizure.

COMMANDS TO STOP: A suspect is automatically seized the moment he complies with an officer's order to "freeze," "halt," "stay put," or other expression "indicating that compliance with the officer's request might be compelled."[40] As the Court of Appeal explained, "[W]hen an officer 'commands' a citizen to stop, this constitutes a detention because the citizen is no longer free to leave."[41]

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[35] (1986) 183 Cal.App.3d 849, 877.

[36] See *People* v. *Lopez* (1989) 212 Cal.App.3d 289, 291 ["Of course, in theory the citizen can refuse and simply walk away. Whether this is an accurate assessment of street reality is not for us to decide."].

[37] *People* v. *Spicer* (1984) 157 Cal.App.3d 213, 218. ALSO SEE *U.S.* v. *Weaver* (4th Cir. 2002) 282 F.3d 302, 311 [it the suspect had decided to walk off, it "may have created an awkward situation"].

[38] See *People* v. *Perez* (1989) 211 Cal.App.3d 1492, 1496; *People* v. *Bouser* (1994) 26 Cal.App.4th 1280, 1287 ["Bouser reasonably may have felt the subject of general suspicion at this time."].

[39] See *People* v. *Franklin* (1987) 192 Cal.App.3d 935, 940.

[40] *United States* v. *Mendenhall* (1980) 446 U.S. 544, 554. ALSO SEE *People* v. *Brown* (1990) 216 Cal.App.3d 1442, 1448 ["Stop"]; *People* v. *Verin* (1990) 220 Cal.App.3d 551, 557 ["Hold it. Police."]; *People* v. *Rodriguez* (1993) 21 Cal.App.4th 232, 238 ["Stay there."]; *People* v. *Foranyic* (1998) 64 Cal.App.4th 186, 188 ["Get off your bicycle, lay it down, and step away from it." [paraphrased]]; *People* v. *Roth* (1990) 219 Cal.App.3d 211, 215 ["Come over here. I want to talk to you."].

[41] *People* v. *Verin* (1990) 220 Cal.App.3d 551, 556. ALSO SEE *U.S.* v. *Winsor* (9th Cir. en banc 1988) 846 F.2d 1569, 1573, fn.3 ["compliance with a police command is not consent."].

REQUESTS TO STOP: Unlike commands, requests to stop communicate to the suspect, at least theoretically, that he is free to choose whether to comply. For instance, the courts have ruled the following requests did not result in a seizure:

- "Can I talk to you for a moment?"[42]
- "Gentlemen, may I speak with you just a minute."[43]
- "I am a federal narcotics agent. I would like to talk with you for a minute. You are not under arrest. I am not detaining you. You are free to leave and not speak to me if you don't want to."[44]

Even though an officer's words took the form of a request ("Can I . . . ?"), his manner and tone of voice can send the unmistakable message that he really has no choice. For example, in *U.S.* v. *Buchanon* a state trooper who had stopped to assist the occupants of a disabled vehicle started thinking that they might be transporting drugs, at which point he said, "Gentlemen, why don't you all come over here on the grass a second if you would please." Although this was technically phrased as a request, the court listened to a recording of the incident and concluded the trooper's tone of voice was "one of command."[45]

RED LIGHTS: Using a red light or siren to stop the suspect or get his attention is essentially a command to halt and therefore results in a seizure if the suspect complies.[46] As the Court of Appeal observed, "A reasonable person to whom the red light from a vehicle is directed would be expected to recognize the signal to stop or otherwise be available to the officer."[47] A seizure also results if an officer turns on a red light after stopping behind a parked car that was occupied.[48]

A red light is not, of course, a command to everyone who happens to see it. Instead, it affects only those people at whom it reasonably appeared to be directed.[49]

AMBER WARNING LIGHTS: Because amber warning lights are used mainly for the safety of approaching motorists, they have no bearing on whether the suspect was seized.[50]

WHITE SPOTLIGHTS, HIGH BEAMS: Using a white spotlight or high beams to get the suspect's attention is a relevant circumstance but will not, in and of itself, convert an

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[42] *People* v. *Bennett* (1998) 68 Cal.App.4th 396, 402. ALSO SSEE *U.S.* v. *Sanchez* (10th Cir. 1996) 89 F.3d 715, 718 ["[The officer's] request 'if they would come over so I wouldn't have to yell across the parking lot,' is not inherently coercive."].

[43] *U.S.* v. *McFarley* (4th Cir. 1993) 991 F.2d 1188, 1191.

[44] *People* v. *Profit* (1986) 183 Cal.App.3d 849, 877. ALSO SEE *Ford* v. *Superior Court* (2001) 91 Cal.App.4th 112, 128 ["Petitioner's cooperation was requested, not demanded"].

[45] (6th Cir. 1995) 72 F.3d 1217, 1220, fn.2. ALSO SEE "Officers' attitude, candor," below.

[46] See *Berkemer* v. *McCarty* (1984) 468 U.S. 420, 436 ["Certainly few motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so."]; *Brower* v. *County of Inyo* (1989) 489 U.S. 593, 597 ["flashing lights" constituted a "show of authority"]; *U.S.* v. *Ward* (9th Cir. 1973) 488 F.2d 162, 169 ["[W]hen four federal agents pull a motorist off the road by use of a siren there has been a seizure"]; *U.S.* v. *Swindle* (2nd Cir. 2005) 407 F.3d 562, 566 ["[A]ny reasonable driver would understand a flashing police light to be an order to pull over"].

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

[48] See *People* v. *Bailey* (1985) 176 Cal.App.3d 402.

[49] See *Lawrence* v. *United States* (1986) 509 A.2d 614, 616, fn.2 ["A pedestrian who notices a patrol wagon's emergency equipment ordinarily is not likely to know that an officer is signaling for a stop until the officer communicates in a more direct manner to the pedestrian that officer's intention to stop the pedestrian."]. **NOTE**: Even if the light was directed at the suspect, a detention does not result unless the suspect saw it and, as a result, stopped. See *U.S.* v. *Perez-Sosa* (8th Cir. 1998) 164 F.3d 1082, 1084 ["Although the trooper sought to stop Perez-Sosa through a show of authority, the trooper did not succeed, and Perez-Sosa was stopped by a different means—his own decision to refuel."].

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

encounter into a seizure. (This subject is discussed in the section "Officer-safety precautions" ("White spotlights, high beams"), below.)

PARKING BEHIND: A seizure does not result merely because officers stopped behind or alongside the suspect or his car.[51]

BLOCKING THE SUSPECT: A seizure usually results when officers stop the suspect by blocking his path or otherwise preventing him from proceeding.[52] For example, in *People* v. *Wilkins*[53] a San Jose police officer was driving through the parking lot of a convenience store when he noticed that two men in a parked station wagon had slid down in the seat as if to conceal themselves. Having decided to contact them, he "parked diagonally" behind the vehicle, effectively blocking it in. The officer soon learned that one of the men, Wilkins, was on searchable probation. So he searched him and found drugs. But the court ruled the search was unlawful because "the occupants of the station wagon were 'seized' when [the officer] stopped his marked patrol vehicle behind the parked station wagon in such a way that the exit of the parked station wagon was prevented."

In contrast, the courts have ruled that a seizure did not result when the officers' car only partially blocked the suspect's vehicle or would have merely hindered him from driving away.[54]

UNUSUAL INTEREST: A seizure may result if officer approached the suspect in a manner that demonstrated an unusual or strong interest in him. For example, in *People* v. *Jones*[55] an Oakland police officer decided to contact Jones and two other men who were standing on a street corner. The court described the manner in which the officer rolled up: "[He] pulled his patrol car to the wrong side of the road and parked diagonally against the traffic about 10 feet behind the group." The officer then addressed the men, saying something like, "Stop. Would you please stop," at which point he saw a baggie containing cocaine in Jones' pocket. In ruling that Jones was seized, the court noted both the

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[51] See *People* v. *Franklin*, (1987) 192 Cal.App.3d 935, 940 ["Certainly, an officer's parking behind an ordinary pedestrian reasonably would not be construed as a detention. No attempt is made to block the way."]; *People* v *Turner* (1994) 8 Cal.4th137, 180 ["[T]he fact that a police vehicle had *stopped* near defendant's vehicle would not communicate to a reasonable person that the officers intended to detain [the suspects]."]; *People* v. *Brueckner* (1990) 223 Cal.App.3d 1500, 1505 [officer parked "next to" suspect's car]; *People* v. *Juarez* (1973) 35 Cal.App.3d 631 [officer pulled patrol car alongside suspect]; *People* v. *Banks* (1990) 217 Cal.App.3d 1358, 1362 ["Nor was the act of stopping the police car behind defendant's car under the facts of this case a restraint on liberty"]; *U.S.* v. *Pajari* (8th Cir. 1983) 715 F.2d 1378 [no detention when officer "parked behind" suspect's car]; *U.S.* v. *Dockter* (8th Cir. 1995) 58 F.3d 1284, 1287 [officer merely "pulled his vehicle behind [the suspects'] parked car"].

[52] See *United States* v. *Drayton* (2002) 536 U.S. 194, 204 ["[The officer] left the aisle free so that respondents could exit."]; *People* v. *Arangure* (1991) 230 Cal.App.3d 1302, 1307 [the officer "did not obstruct appellant's movement"]; *U.S.* v. *Sanchez* (10th Cir. 1996) 89 F.3d 715, 718 [the officer "did not obstruct or block Mr. Sanchez's vehicle"]; *U.S.* v. *Dockter* (8th Cir. 1995) 58 F.3d 1284, 1287 [the officer "did not block appellants' vehicle or in any manner preclude them from leaving"]; *U.S.* v. *Flowers* (4th Cir. 1990) 912 F.2d 707, 711 ["The officers did not block the aisle or otherwise physically prevent Flowers from getting out of his seat or leaving the bus."].

[53] (1986) 186 Cal.App.3d 804.

[54] See *People* v. *Perez* (1989) 211 Cal.App.3d 1492, 1946 ["[T]he officer parked his patrol vehicle in front of defendant's vehicle and left room for defendant's car to leave."]; *U.S.* v. *Summers* (9th Cir. 2001) 268 F.3d 683, 687 [no detention because Summers' car "was parked and was only partially blocked."]; *U.S.* v. *Kim* (9th Cir. 1994) 25 F.3d 1426, 1431 [the officer only "partially blocked Kim's egress"]; *U.S.* v. *Analla* (4th Cir. 1992) 975 F.2d 119 [no detention occurred when officers parked their cars at 45 degree angles to the suspect's car, not blocking it in].

[55] (1991) 228 Cal.App.3d 519, 523. ALSO SEE *People* v. *Boyer* (1989) 48 Cal.3d 247, 268 ["The manner in which the police arrived at defendant's home, accosted him, and secured his 'consent' to accompany them suggested they did not intend to take 'no' for an answer."].

officer's apparent command and the manner in which he pulled up; i.e., he "arrived suddenly and parked his car in such a way as to obstruct traffic."

A seizure would probably not result, however, if the officer's interest was somewhat less acute. For example, in *In re Kemonte H.,*[56] two Oakland officers saw Kemonte leaning into a car in a neighborhood where drugs were commonly sold. Suspecting a sale, they "pulled the [patrol] car over, stopped the car approximately 15 to 20 feet away from Kemonte and walked toward him at a 'semi-quick' pace." In ruling the officers' actions did not convert the encounter into a seizure, the court said, "A reasonable person of Kemonte's age would not have felt restrained by two police officers approaching him on a public street. [A] reasonable person could only conclude that the officers wanted to talk to him."

OTHER MEANS OF ENGAGING THE SUSPECT: The following conduct is plainly not indicative of a seizure:

APPROACH, ASK QUESTIONS: A seizure does not result merely because an officer approached a suspect and asked some questions.[57]

WALKING WITH SUSPECT: An officer's act of walking alongside a suspect and asking questions as they go (a "walk and talk") will not result in a seizure so long as the suspect does not object.[58]

PULLING ALONGSIDE: If the suspect was walking on a sidewalk, a seizure does not result if officers in a patrol car pulled alongside and asked questions as the suspect continued walking.[59]

INCIDENTAL PHYSICAL CONTACT: While intentional physical contact with the suspect to get his attention is a relevant circumstance,[60] mere incidental touching—such as a shoulder tap—is considered insignificant.[61]

SUSPECT STOPS VOLUNTARILY: Criminals who see a patrol car behind them tend to get the jitters. So they will sometimes try to solve the problem by pulling into a parking lot or other place and stop, hoping the officers will keep going. Because the driver stopped voluntarily, an approach by officers would not constitute a seizure.[62]

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[56] (1990) 223 Cal.App.3d 1507.

[57] See *Florida* v. *Bostick* (1991) 501 U.S. 429, 434 ["Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free to disregard the police and go about his business."]; *People* v. *Bennett* (1998) 68 Cal.App.4th 396, 401-2 ["By now, it is generally understood that there is nothing in the Constitution which prevents a police officer from addressing questions to anyone on the streets."].

[58] See *U.S.* v. *Gray* (4th Cir. 1989) 883 F.2d 320, 323 ["[T]he agents never made any attempt to restrain Gray's movement, but instead walked with him as he moved through the airport towards the exit."].

[59] See *Michigan* v. *Chesternut* (1988) 486 U.S. 567, 575 ["While the very presence of a police car driving parallel to a running pedestrian could be somewhat intimidating, this kind of police presence does not, standing alone, constitute a seizure."]; *People* v. *Juarez* (1973) 35 Cal.App.3d 631 ["No illegally taints the initial conduct of [the officer] in pulling his police car alongside appellant to ask him questions as he was walking."].

[60] See *United States* v. *Mendenhall* (1980) 446 U.S. 544, 554 ["physical touching" is relevant].

[61] See *INS* v. *Delgado* (1984) (1984) 466 U.S. 210, 220 ["tapped on the shoulder"]; *Martinez* v. *Nygaard* (9th Cir. 1987) 831 F.2d 822, 826 ["shoulder tap"]' *State* v. *Reid* (1981) 276 S.E.2d 617, 621 ["Assuming the agent did tap the defendant on the shoulder at the outset to get his attention, he simultaneously said excuse me or something similar"].

[62] See *In re Frank V.* (1991) 233 Cal.App.3d 1232, 1237 [no detection because the suspect "voluntarily pulled over to the curb before the officers . . . displayed any gesture of authority, such as using overhead lights or a siren"].

Officer-safety precautions

A suspect who is being contacted may, of course, pose a threat to officers. This can create a dilemma because most of the usual officer-safety precautions will automatically transform an encounter into a seizure. For example, a seizure will result if officers drew their weapons on the suspect, handcuffed him, or conducted a pat search.[63] So might a flurry of backup activity. Still, precautions that are relatively unintrusive will ordinarily be permitted.

REMOVE HANDS FROM POCKETS: Officers who have contacted a suspect may, without converting the encounter into a seizure, *request* that he remove his hands from his pockets, or keep his hands in sight.[64]

STAY IN-GET OUT: If the suspect is inside a vehicle, officers may *request* that he step out side or stay inside.[65]

SPOTLIGHTS, HIGH BEAMS: A seizure does not result merely because officers utilized a white spotlight or high beams to illuminate the suspect, whether for officer safety or to get the suspect's attention.[66] For example, in *People* v. *Perez*[67] a San Jose police officer on night patrol noticed two men in a car parked in an unlit section of a motel parking lot known for drug sales. As he pulled up to the car, he turned on his high beams and a white spotlight to "get a better look at the occupants." He subsequently arrested the driver, Perez, for being under the influence of PCP. In rejecting Perez's argument that the officer had effectively detained him by illuminating his car, the court said, "While the use of high

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[63] See *In re Frank V.* (1991) 233 Cal.App.3d 1232, 1240, fn.3 ["Since Frank was physically restrained by the patdown, it constituted a detention."]; *People* v. *Rodriguez* (1993) 21 Cal.App.4th 232, 238 [suspect was patted down and told to sit on the curb]; *People* v. *Gallant* (1990) 225 Cal.App.3d 200, 207 [suspect was "ordered into the house at gunpoint" and pat searched]; *U.S.* v. *Chan-Jimenez* (9th Cir. 1997) 125 F.3d 1324, 1326 ["[The officer] kept his hand on his revolver—possibly a desirable safety measure, but one that also let [the suspect] know that there could be adverse consequences for any failure to submit to authority."]. ALSO SEE *United States* v. *Drayton* (2002) 536 U.S. 194, 205 ["The presence of a holstered firearm is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon."]. COMPARE *People* v. *Singer* (1990) 226 Cal.App.3d 23, 48 ["routine" pat search before consensually riding with the officers did not result in a seizure].

[64] See *People* v. *Franklin* (1987) 192 Cal.App.3d 935, 942 [the officer "asked, not ordered appellant to remove his hands. Such a request, an asking, reasonably cannot be construed as a show of authority sufficient to transform the encounter into a detention."]; *People* v. *Ross* (1990) 217 Cal.App.3d 879, 885 ["[W]hile waiting for her to produce identification, [the officer] 'asked' but did not demand that appellant remove her hands from her pockets."]. **NOTE**: If the suspect was a passenger in a vehicle that was stopped for a traffic violation, officers may *order* him to keep his hands in sight. See *In re Frank V.* (1991) 233 Cal.App.3d 1232, 1239 ["The order [to remove his hands from his pockets] did not turn the encounter into a detention."].

[65] See "Manner of engaging the suspect" ("Requests to stop"), above. **NOTE**: In *Maryland* v. *Wilson* (1997) 519 U.S. 408 the U.S. Supreme Court ruled that officers who are conducting traffic stops may *order* the passengers to exit. Because passengers are in a similar legal position as suspects who are being contacted inside a vehicle (neither is detainable), it is arguable that officers should also be able to *order* the suspects to exit without converting the encounter into a seizure. This is not a strong argument. *Wilson* was based largely on the fact that a command to a passenger is a minimal intrusion because he is already intruded upon by virtue of the stop. At pp. 413-4. In contrast, any nonconsensual intrusion upon the suspect would be unlawful.

[66] See *People* v. *Rico* (1979) 97 Cal.App.3d 124, 130 [no detention occurred as a result of "momentary use of the spotlight]; *People* v. *Brueckner* (1990) 223 Cal.App.3d 1500, 1505 ["The fact he shined his spotlight on the vehicle as he parked in the unlit area would not, by itself, lead a reasonable person to conclude he or she was not free to leave.].

[67] (1989) 211 Cal.App.3d 1492, 1496.

beams and spotlights might cause a reasonable person to feel himself the object of official scrutiny, such directed scrutiny does not amount to a detention."

Similarly, in *People* v. *Franklin*[68] a Ridgecrest officer on night patrol in a high crime area spotlighted Franklin who was walking on the sidewalk. He did this because, although the night was warm, Franklin was wearing a full-length camouflage jacket. When the officer stopped behind him, Franklin turned and walked toward the officer, asking repeatedly, "What's going on?" Because Franklin was sweaty and appeared "real jittery, hyper," the officer asked him to remove his hands from his pockets. As he did so, the officer saw blood on his hand0. This discovery led to Franklin's arrest for a murder that had just occurred in nearby motel room.

Franklin asked the court to suppress the officer's testimony about seeing blood on his hands because the officer's act of spotlighting him had transformed the encounter into an illegal de facto detention. The court refused, saying, "[T]he spotlighting of appellant alone fairly can be said not to represent a sufficient show of authority so that appellant did not feel free to leave."

BACKUP OFFICERS: The number of backup officers, their proximity to the suspect, and the manner in which they arrived and conducted themselves are all relevant.[69] For example, in *U.S.* v. *Washington* the court ruled the defendant was seized mainly because he was "confronted" by six officers who were, "around" him.[70] Similarly, in *U.S.* v. *Buchanon* the court ruled the defendant was detained because, among other things, "The number of officers that arrived [three], the swiftness with which they arrived, and the manner in which they arrived (all with pursuit lights flashing) would cause a reasonable person to feel intimidated or threatened by this type of police presence."[71]

On the other hand, in cases where the courts ruled the presence of backup did not covert an encounter into a seizure, the courts have noted that the backup officer was "posted in the background,"[72] was "out of sight,"[73] or was "four to five feet away."[74] In another case, the court pointed out that, although three officers at the scene, two of them "were little more than passive observers."[75]

Officers' attitude, candor

The courts often take note of the officers' general attitude and demeanor. This is not surprising since a hostile or aggressive manner can send an unmistakable message that the officers have reason to believe the suspect is guilty of something. As the California Court of Appeal observed:

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[68] (1987) 192 Cal.App.3d 935.

[69] See *In re Manuel G.* (1997) 16 Cal.4th 805, 821 [the "presence of several officers" is a factor]; *People* v. *Profit* (1986) 183 Cal.App.3d 849, 877 ["Here initially there were three defendants and only two officers. Only later did the third officer even the numbers. This does not constitute a show of force"]; *U.S.* v. *Yusuff* (7th Cir. 1996) 96 F.3d 982, 986 ["the officers stood several feet away from Yusuff"].

[70] (9th Cir. 2004) 387 F.3d 1060, 1068.

[71] (1995) (6th Cir. 1995) 72 F.3d 1217, 1224.

[72] *U.S.* v. *Kim* (9th Cir. 1994) 25 F.3d 1426, 1431, fn.3.

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

[74] *U.S.* v. *$25,000 U.S. Currency* (9th Cir. 1988) 853 F.2d 1501, 1504-5.

[75] *U.S.* v. *White* (8th Cir. 1996) 81 F.3d 775, 779.

> It is not the nature of the question or request made by the authorities, but rather the manner or mode in which it is put to the citizen that guides us in deciding whether compliance was voluntary or not.[76]

One way officers can help establish a conciliatory tone is by candidly explaining to the suspect why they want to talk with him; i.e., what they are trying to accomplish. This occurred in *U.S.* v. *Thompson*[77] where the court considered it significant that the officer "explained both what he was doing and why he was doing it."

Another factor is common courtesy. For example, in *Ford* v. *Superior Court*[78] the defendant agreed to accompany officers to the Oakland Police Department's homicide section for questioning about a murder that had occurred in his home. But because the lead investigator, Sgt. Ersie Joyner, was still at the scene, Ford had to wait in an interview room for several hours. When Joyner returned, he started off by apologizing for the delay. Although this was a small courtesy, it was one of the circumstances that indicated to the court that the encounter had remained consensual, at least until Ford started making inconsistent statements. Said the court, "Although petitioner was never told in so many words that he was not under arrest or that he was free to leave, that advice was implicit in the sergeant's apology for the time it was taking to interview other witnesses."

In contrast to *Thompson* and *Ford* is the often-cited case of *People* v. *Spicer.*[79] There, the defendant was a passenger in a car whose driver had been stopped for DUI. While one officer was administering the FST's to the driver, the other walked over to the Ms. Spicer and, without explaining the purpose of his request, asked to see her driver's license. As she was looking around for it, the officer saw a gun in her purse and arrested her. On appeal, the court ruled the gun should have been suppressed because the officer's blunt attitude toward Ms. Spicer had converted the encounter into an illegal de facto detention. Said the court, "It is especially pertinent to this case that the officer did not explain to Ms. Spicer his reason for requesting her driver's license."

What should the officer have done? According to the court, he should have explained to Ms. Spicer *why* he wanted to see her driver's license; i.e., that the driver might be arrested, in which case the car could be turned over to her if she was agreeable and was licensed. Said the court, "Had the officer made his purpose known to Ms. Spicer, it would have substantially lessened the probability his conduct could reasonably have appeared to her to be coercive."

"You're free to go"

The simplest way of communicating to the suspect that he is not being detained or arrested is to tell him he is free to leave. Though such an advisory is not required,[80] it is considered a "significant indicator of what the citizen reasonably believed."[81]

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[76] *People* v. *Franklin* (1987) 192 Cal.App.3d 935, 941. ALSO SEE *People* v. *Singer* (1990) 226 Cal.App.3d 23, 48 [the officers "seemed to act cordially"]; *U.S.* v. *White* (8th Cir. 1996) 81 F.3d 775, 779 ["[T]he tone of the entire exchange was cooperative."].

[77] (7th Cir. 1997) 106 F.3d 794.

[78] (2001) 91 Cal.App.4th 112, 128.

[79] (1984) 157 Cal.App.3d 213, 220.

[80] See *U.S.* v. *Sullivan* (4th Cir. 1998) 138 F.3d 126, 132 ["The mere fact that [the officer] did not affirmatively advise Sullivan that he could refuse to answer [the officer's] questions or that he was free to go did not transform the encounter into a custodial interrogation."]; *U.S.* v. *Anderson* (10th Cir. 1997) 114 F.3d 1059, 1064 ["While [the officer] did not specifically tell [the suspect] that he was free to leave, that is not required for an encounter to be consensual."]. ALSO SEE *Ohio* v. *Robinette* (1996) 519 U.S. 33, 39-40 ["[I]t would be unrealistic to require police officers to always inform detainees they are free to go before a consent to search may be deemed voluntary."].

For example, in *People* v. *Profit*[82] an officer who was attempting to contact the defendant at LAX told him, "you're not under arrest, I'm not detaining you, you're free to leave and not speak to me if you don't want to." In ruling the encounter was a contact at that point, the court noted, "[T]he delivery of such a warning weighs heavily in favor of finding voluntariness and consent."

CONDITIONAL FREEDOM: When giving a "free to go" advisory, officers must not place any conditions or restrictions on the suspect's freedom. This is because a suspect is either free to go or he's not; there is no middle ground.

For example, in one case the court ruled that a seizure resulted when an officer told the suspect that, although he was free to go, he "was going to call a canine unit to do a walk around [the suspect's] car." Said the court, "We do not believe a person in Finke's position, who had just been told that a canine unit was being called, would feel free to get behind the wheel and drive off."[83]

MIXED SIGNALS: A "free to go" advisory won't mean much if officers conducted themselves in a manner that reasonably indicated the suspect was not, in fact, free to leave; e.g., the officer used a "commanding tone of voice,"[84] the officer kept "leaning over and resting his arms on the driver's door."[85]

Investigative requests

To confirm or dispel their suspicions, officers who have contacted a suspect may do two things: (1) ask questions (discussed in the next section), and (2) make reasonable requests. The following requests are fairly common.

REQUESTS FOR ID: Officers will almost always ask the suspect to identify himself, preferably with a driver's license or other documentation. Like requests to stop, requests for ID will not convert an encounter into a seizure because a request, by its very nature, communicates to the suspect that he is not required to comply.[86] In the words of the United States Supreme Court:

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[81] *Morgan* v. *Woessner* (9th Cir. 1993) 997 F.2d 1244, 1253, fn.5, ALSO SEE *People* v. *Daugherty* (1996) 50 Cal.App.4th 275, 280 [officer "advised Daugherty she was not under arrest, she was free to go at any time, and she did not have to speak with him."]; *U.S.* v. *McFarley* (4th Cir. 1993) 991 F.2d 1188, 1192 ["On several occasions McFarley and Stitt were advised that they were not under arrest and were free to go where they wished"]; *U.S.* v. *Beck* (8th Cir. 1998) 140 F.3d 1129, 1134 ["After running his background checks, [the officer] promptly returned Beck's license and rental agreement, and informed Beck that he was free to leave."]. ALSO SEE *Berkemer* v. *McCarty* (1984) 468 U.S. 420, 436 ["Certainly few motorists would feel free [to] leave the scene of a traffic stop without being told they might do so."].

[82] (1986) 183 Cal.App.3d 849.

[83] *U.S.* v. *Finke* (7th Cir. 1996) 85 F.3d 1275, 1281. ALSO See *U.S.* v. *Beck* (8th Cir. 1998) 140 F.3d 1129, 1136-7 [canine unit en route]. COMPARE *People* v. *Daugherty* (1996) 50 Cal.App.4th 275, 284 [a "free to go" advisory was not conditional merely because the officer added, "but, in fact" he would like to ask her some questions].

[84] See *U.S.* v. *Elliott* (10th Cir. 1997) 107 F.3d 810, 814. ALSO SEE *U.S.* v. *Sandoval* (10th Cir. 1994) 29 F.3d 537, 541-2 [seizure resulted when, after the officer returned the suspect's driver's license the suspect asked, "That's it?" and the officer replied, "No, wait a minute."].

[85] See *U.S.* v. *McSwain* (10th Cir. 1994) 29 F.3d 558, 563.

[86] See *People* v. *Cartwright* (1999) 72 Cal.App.4th 1362, 1370 ["It is now well established that a mere request for identification does not transmogrify a contact into a Fourth Amendment seizure."]; *People* v. *Castaneda* (1995) 35 Cal.App.4th 1222, 1227 ["And the officer's requesting identification from him did not—by itself—escalate the encounter to a detention."]; *People* v. *Clark* (1989) 212 Cal.App.3d 1233, 1237 ["Requesting appellant to identify himself did not transform the encounter into a detention."]; *U.S.* v. *Slater* (8th Cir. 2005) 411 F.3d 1003, 1006 ["[N]umerous cases establish that Slater was not seized or detained merely because Officer Perry asked to see Slater's identification." Citations omitted.].

> [N]o seizure occurs when police ask . . . to examine the individual's identification—so long as the officers do not convey a message that compliance with their requests is required.[87]

A seizure may result, however, if the "request" was a weakly disguised command. As the Court of Appeal pointed out, "It is the mode or manner in which the request for identification is put to the citizen, and not the nature of the request that determines whether compliance was voluntary."[88]

Even if the suspect freely handed over his license or other identification, a seizure may result if officers retained it after looking it over.[89] This is mainly because the officer's failure to return the suspect's ID can be interpreted as an indication he was not free to leave. As the Tenth Circuit explained, "[W]hen law enforcement officials retain an individual's driver's license in the course of questioning him, that individual, as a general rule, will not reasonably feel free to terminate the encounter."[90]

For example, in *U.S.* v. *Chan-Jimenez*[91] an officer contacted a suspected drug smuggler whose truck was parked at the side of a road. At the officer's request, the suspect voluntarily handed over his driver's license and registration. Although the officer confirmed that the documents were "in order," he did not return them. Instead, he obtained the suspect's consent to search the trunk which, as it turned out, contained 245 pounds of marijuana. But the court ordered it suppressed because the officer had inadvertently converted the encounter into a seizure when, by holding on to the ID, he "manifested an intent to restrain Chan-Jiminez's freedom." As the court pointed out, "Chan-Jiminez could not lawfully drive away without the documentation."

WARRANT CHECKS: Running a warrant check on a suspect or requesting information on him from DMV will not single-handedly transform the encounter into a seizure. It is, however, a relevant circumstance, especially if the process cannot be completed quickly. As the Court of Appeal explained , "[C]ommencing a warrant check does not constitute a

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[87] *Florida* v. *Bostick* (1991) 501 U.S. 429, 437.

[88] *People* v. *Ross* (1990) 217 Cal.App.3d 879, 884-5.

[89] See *People* v. *Bouser* (1994) 26 Cal.App.4th 1280, 1286 ["Defendant was, in fact, *unable* to leave [without his ID]." Quoting from *State* v. *Painter* (1984) 296 Ore. 422]. COMPARE *Florida* v. *Royer* (1983) 460 U.S. 491 504 ["[B]y returning his ticket and driver's license, and informing him that he was free to go if he so desired, the officers might have obviated any claim that the encounter was anything but a consensual matter from start to finish."]; *United States* v. *Mendenhall* (1980) 446 U.S. 544, 558 [defendant's "ticket and identification were returned to her before she was asked to accompany the officers."]; *U.S.* v. *Sullivan* (4th Cir. 1998) 138 F.3d 126, 133 ["[The officer] did not question Sullivan until after he had returned Sullivan's license and registration, thus ending the traffic stop and affording Sullivan the right to depart."]; *People* v. *Daugherty* (1996) 50 Cal.App.4th 275, 285 ["[The officer] did not retain Daugherty's airline ticket or her bags."]; *People* v. *Profit* (1986) 183 Cal.App.3d 849, 877 ["Agent Wood did not take possession of Profit's briefcase or the three airline tickets."]; *U.S.* v. *Werking* (10th Cir. 1990) 915 F.2d 1404, 1409 ["Before [the officer] asked Werking any further questions, he returned Werking's driver's license and registration papers and gave him the contact sheet."]; *U.S.* v. *Lockett* (3rd Cir. 2005) 406 F.3d 207, 211 ["They did not retain Lockett's papers or identification."].

[90] *U.S.* v. *Lambert* (10th Cir. 1995) 46 F.3d 1064, 1068. ALSO SEE *U.S.* v. *Sandoval* (10th Cir. 1994) 29 F.3d 537, 540 ["no reasonable person would feel free to leave without such documentation"].

[91] (9th Cir. 1997) 125 F.3d 1324.

seizure per se but *detaining* a person without cause until a warrant check is completed is illegal."[92]

To prevent the contact from becoming a de facto detention, officers should do two things: (1) obtain the suspect's consent to wait for the results and, if there will be a delay, confirm that he is still willing to wait; and (2) promptly return his ID.

In addition, unless the suspect expressly consents, officers must not take his ID back to the patrol car to run the check.[93] (The reasons are discussed in "Requests for ID," above.) For example, in ruling that an encounter was not a seizure, the court in *U.S.* v. *Analla*[94] noted that the officer "did not take the license into his squad car, but instead stood beside the car, near where Analla was standing, and used his walkie-talkie."

FIELD INTERVIEW CARDS: While there is not much law on the subject, it seems apparent that officers will not transform an encounter into a seizure by merely asking the suspect if he would provide them with the information they need to complete a field interview card. As with warrant checks, however, the suspect must voluntarily consent, and the officers must be diligent.[95]

CONSENT TO SEARCH: Officers who have contacted a suspect will frequently seek his consent to search for something, usually drugs or weapons. Such a request will not convert the encounter into a seizure unless the officers pressured the suspect into consenting, or if the "request" was essentially a "command," or if the officers persisted in seeking consent after the suspect initially refused.[96]

For example, in *U.S.* v. *Wilson*[97] a DEA agent approached Wilson at National Airport in Washington, D.C. and asked to speak with him. Wilson was cooperative at first, but when the agent asked if he would consent to a search of his coat, he angrily refused and began walking away. The agent trailed behind him, repeatedly asking why he would not consent. As they stepped outside the terminal, Wilson bolted but was quickly apprehended. Agents then searched his coat and found 110 grams of cocaine base which was subsequently suppressed because, said the court, "[T]he persistence of [the agent] would clearly convey to a reasonable person that he was not 'free to leave' the questioning by the police."

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[92] (1994) 26 Cal.App.4th 1280, 1286. ALSO SEE *Barber* v. *Superior Court* (1973) 30 Cal.App.3d 326, 330 ["Officers are not at liberty to stop, intrude upon and detain individuals they happen to come upon to determine if there are warrants outstanding against him."].

[93] See *People* v. *Bouser* (1994) 26 Cal.App.4th 1280, 1287 [officer ran the warrant check based on ID information obtained from the suspect, not ID documents]; *People* v. *Bennett* (1998) 68 Cal.App.4th 396, 402 ["When asked whether he would mind waiting in the back of the police car while [the officer] ran him for warrants, Bennett again agreed and, according to the testimony, was 'very cooperative.'"].

[94] (4th Cir. 1992) 975 F.2d 119, 124.

[95] See *People* v. *Harness* (1983) 139 Cal.App.3d 226, 230 ["All that is required [to complete a field interrogation card] is identification and description of the detainee (which may be taken from the driver's license and visually observed), the location and time of the stop, and the interviewee's explanation of what he was doing."].

[96] See *Florida* v. *Bostick* (1991) 501 U.S. 429, 435 [officers must not "convey a message that compliance with their requests is required."]; *U.S.* v. *Beck* (8th Cir. 1998) 140 F.3d 1129, 1135-6 [officers told the suspect that if he refused consent, they would "have a canine unit conduct a drug sniff"]; *U.S.* v. *Washington* (9th Cir. 2004) 387 F.3d 1060, 1069 [after requesting consent, the officer repeatedly warned the suspect that he was arrestable]; *U.S.* v. *$25,000 U.S. Currency* (9th Cir. 1988) 853 F.2d 1501, 1505 ["The request to search the bag is not a seizure within the fourth amendment."].

[97] (4th Cir. 1991) 953 F.2d 116. ALSO SEE *INS* v. *Delgado* (1984) 466 U.S. 210, 216-7 [seizure results "if the person refuses to answer and the police [persist]."].

Note that while officers are not required to inform suspects that they have the right to refuse consent,[98] it is circumstance that is often noted.[99]

CONSENT TO TRANSPORT: Officers may ask the suspect to accompany them to the police station for questioning or fingerprinting, to appear in a lineup, or for some other investigative purpose. Again, such a request will not convert the encounter into a seizure, but the suspect's consent must have been voluntary. As the Court of Appeal observed, "The Fourth Amendment does not prevent a person from agreeing to accompany officers to the police station and remain there for interrogation."[100]

For example, in *In re Gilbert R.,*[101] LAPD detectives went to Gilbert's home in Fontana to question him about an ADW. When they arrived, they asked Gilbert if he would go with them to the Hollenbeck station for the interview. Both Gilbert and his mother consented. During the questioning at the station, Gilbert confessed. He later contended that the detectives' request had transformed the encounter into a seizure. The court disagreed, pointing out that a reasonable person in Gilbert's position "would have believed that he or she did not have to accompany the detectives."

In contrast, in *People* v. *Boyer*[102] several officers went to Boyer's home to question him about a murder. Two of them covered the rear while the others went to the front door and knocked. Boyer responded by running out the back door. The officers ordered him to "freeze," and later obtained his consent to accompany them to the police station for an interview, during which he made an incriminating statement. But the court suppressed it because the "manner in which the police arrived at defendant's home, accosted him, and secured his 'consent' to accompany them suggested they did not intend to take 'no' for an answer."

Keep in mind that, even if the suspect consents, the encounter will become a seizure if something happened en route or at the station that materially changed its character. This would occur, for example, if the suspect was handcuffed, if officers accused him of committing the crime, or if they implied there was evidence he had done so. The following circumstances are also relevant: whether the suspect was required to sit in the

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[98] See *United States* v. *Drayton* (2002) 536 U.S. 194, 206 ["The Court has rejected in specific terms the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search."]; *Schneckloth* v. *Bustamonte* (1973) 412 U.S. 218, 227 ["While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as a sine qua non of an effective consent."]; *Ohio* v. *Robinette* (1996) 519 U.S. 33, 39-40; *People* v. *James* (1977) 19 Cal.3d 99, 116 [a suspect who is asked to consent "will reasonably infer he has the option of withholding that consent if he chooses."]; *People* v. *Monterroso* (2004) 34 Cal.4th 743, 758.

[99] See *Florida* v. *Bostick* (1991) 501 U.S. 429, 437; *U.S.* v. *Thompson* (7th Cir. 1997) 106 F.3d 794, 798 ["[T]he trooper told Thompson that she did not have to sign the consent to search form."].

[100] *Ford* v. *Superior Court* (2001) 91 Cal.App.4th 112, 125. ALSO SEE *In re Gilbert R.* (1994) 25 Cal.App.4th 1121, 1125 ["In a thoroughly motley array of circumstances, appellate courts have held that when a person agrees to accompany the police to a station for interrogation or some other purpose, the Fourth Amendment is not violated."]; *People* v. *Singer* (1990) 226 Cal.App.3d 23, 48 [the officers "seemed to act cordially, used no force or threats, and [the suspect], in addition to consenting to go [to the station] said he welcomes the partial ride home."]; *United States* v. *Mendenhall* (1980) 446 U.S. 544, 557-8 ["[R]espondent was not told that she had to go to the [police] office, but was simply asked if she would accompany the officers."]. COMPARE *People* v. *Boyer* (1989) 48 Cal.3d 247, 268 ["The manner in which officers arrived at defendant's house, accosted him, and secured his 'consent' to accompany them [to the police station for questioning] suggested they did not intend to take 'no' for an answer."].

[101] (1994) 25 Cal.App.4th 1121.

[102] (1989) 48 Cal.3d 247, 268. **NOTE**: As the result of the court's decision in *Boyer*, a new trial was held and Boyer was, again, convicted and sentenced to death. The California Supreme Court recently affirmed the conviction and sentence. See *People* v. *Boyer* (2006) __ Cal.4th __ [2006 WL 1277669]. The issues pertaining to *Boyer II* are different than those in *Boyer I*.

caged back seat of a patrol car, whether the suspect knew that he was being interviewed in a locked room, whether the interview was prolonged, and whether the suspect was reminded he could leave at any time.[103]

Questioning the suspect

In most cases, officers who have contacted a suspect will attempt to confirm or dispel their suspicions by asking questions. As the Court of Appeal pointed out, "When circumstances demand immediate investigation by the police, the most useful, most available tool for such investigation is general on-the-scene questioning."[104] While questioning per se will not convert a contact into a seizure,[105] it can be pivotal, depending on the nature of the questions and the manner in which they were asked.[106]

OFFICER'S ATTITUDE: The officers' manner, attitude, and tone of voice are all relevant in determining whether the suspect reasonably believed he was required to answer their questions.[107] For example, when this issue has arisen on appeal, the courts have noted the following:

- The officer "spoke in a polite, conversational tone."[108]
- The officer's questions were "brief, flip."[109]
- The officer's "tone of voice was inquisitive rather than coercive."[110]
- The conversation was "nonaccusatory, routine and brief."[111]
- "[A]t no time did [the officers] raise their voices."[112]
- The officers "were non-threatening in their appearance and demeanor."[113]

PRESSURING THE SUSPECT: A contact will certainly become a seizure if the officers persisted in questioning the suspect made it clear he wanted to discontinue the interview. For example, in *Morgan* v. *Woessner*[114] the court ruled that baseball star Joe Morgan was unlawfully seized at LAX when an LAPD narcotics officer continued to ask questions after Morgan had "indicated in no uncertain terms that he did not want to be bothered." Said

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[103] See *Green* v. *Superior Court* (1985) 40 Cal.3d 126, 136 [suspect was kept waiting in hours in an interview room; not a seizure, but "close"; *Ford* v. *Superior Court* (2001) 91 Cal.App.4th 112, 118, 127-8 [murder suspect was kept waiting in interview room for seven hours before he was questioned; not a seizure but the circumstances were unusual in that the suspect "deliberately chose a stance of eager cooperation in hopes of persuading the police of his innocence."].

[104] *People* v. *Manis* (1969) 268 Cal.App.2d 653, 665.

[105] See *Muehler* v. *Mena* (2005) 544 U.S. 93, __ ["We have held repeatedly that mere questioning does not constitute a seizure."]; *People* v. *Castaneda* (1995) 35 Cal.App.4th 1222, 1227 ["Castaneda was not detained simply because an officer approached him and began talking to him."].

[106] See *People* v. *Lopez* (1989) 212 Cal.App.3d 289, 293, fn.2 ["We think both form and content are important."]; *In re Frank V.* (1991) 233 Cal.App.3d 1232, 1239 ["Both the nature and the manner must be examined."].

[107] See *INS* v. *Delgado* (1984) 466 U.S. 210, 220-1 ["The manner in which respondents were questioned could hardly result in a reasonable fear that respondents were not free to continue working or to move about the factory."]; *People* v. *Franklin* (1987) 192 Cal.App.3d 935, 941; *U.S.* v. *Beck* (8th Cir. 1998) 140 F.3d 1129, 1135 [seizure may result when the questioning is "intimidating, threatening or coercive"].

[108] *People* v. *Bennett* (1998) 68 Cal.App.4th 396, 402. ALSO SEE *People* v. *Epperson* (1986) 187 Cal.App.3d 115, 120 ["There was nothing in the officer's attitude or the nature of the inquiry" that indicated the suspect was not free to leave."]; *U.S.* v. *Kim* (3rd Cir. 1994) 27 F.3d 947, 953 [the officer's tone was "polite and conversational."].

[109] *People* v. *Lopez* (1989) 212 Cal.App.3d 289, 293.

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

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

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

[113] *U.S.* v. *Flowers* (4th Cir. 1990) 912 F.2d 707, 711.

[114] (9th Cir. 1993) 997 F.2d 1244, 1253, fn.5.

the court, "[The officer's] insistence that Morgan answer his questions may have indicated to Morgan that his cooperation was compelled."

TRYING TO GET A STRAIGHT ANSWER: Suspects who have agreed to answer an officer's questions will sometimes give answers that are nonresponsive, unintelligible, vague, or bewildering. This is frequently a ploy by which the suspect tries to appear cooperative while providing officers with no substantial information. In any event, when this happens the only way officers can get a straight answer is by being persistent. Unlike pressure, however, mere perseverance should not convert the encounter into a seizure so long as the suspect continues to maintain the posture of a cooperating citizen.

For example, in *United States* v. *Sullivan*[115] a U.S. Parks police officer asked a contacted suspect, Sullivan, "if he had anything illegal in [his] vehicle." Sullivan hesitated, then said, "illegal?" The officer repeated the question. This time, Sullivan "turned his head forward and looked straight ahead." The officer persisted, telling Sullivan that "if he had anything illegal in the vehicle, it's better to tell me now." Still no response. The officer repeated the question, at least twice. Eventually, Sullivan admitted, "I have a gun." As a result, he was convicted of being a felon in possession of a firearm. On appeal, Sullivan contended that the officer's persistent questioning converted the contact into a seizure. The court disagreed, noting, "[T]he repetition of questions, interspersed with coaxing, was prompted solely because Sullivan had not responded. They encouraged an answer, but did not demand one."

THREATS: Questioning is not consensual if it resulted from an officer's threat; e.g., *You'll be arrested if you don't talk to us*, or, *A refusal to answer will be interpreted as an admission of guilt.*[116]

MIRANDA WARNINGS: Because *Miranda* warnings are typically given when a suspect has been arrested, an officer's act of *Mirandizing* the suspect is an indication the encounter is no longer consensual. (This is another reason to avoid gratuitous *Miranda* warnings.) For example, in *People* v. *Boyer*[117] the California Supreme Court said that the officer's act of *Mirandizing* the defendant was "an indication that the officers themselves believed the situation might be tantamount to custody."

ACCUSATORY QUESTIONS: There is a big difference between investigative and accusatory questions. And it's a difference that virtually anyone can detect, especially crooks. As the name suggests, accusatory questions are those that are phrased in a manner that communicates to the suspect that the officers are convinced he is guilty and that their objective is to obtain a confession or admission. While this type of questioning is appropriate in police interview rooms, it is strictly prohibited during contacts because, as the Court of Appeal observed,

> [Q]uestions of a sufficiently accusatory nature may by themselves be cause to view an encounter as a nonconsensual detention...[T]he degree of suspicion expressed by the police is an important factor in determining whether a consensual encounter has ripened into a detention.[118]

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[115] (4th Cir. 1998) 138 F.3d 126. COMPARE *People* v. *Warren* (1984) 152 Cal.App.3d 991, 997 [persistent questioning but not investigatory, and the suspect did not object].

[116] See *Parrish* v. *Civil Service Commission* (1967) 66 Cal.2d 260, 270-5 [threat to terminate welfare benefits]; *U.S.* v. *Ocheltree* (9th Cir. 1980) 622 F.2d 992, 994; *Crofoot* v. *Superior Court* (1981) 121 Cal.App.3d 717.

[117] (1989) 48 Cal.3d 247, 268.

[118] *People* v. *Lopez* (1989) 212 Cal.App.3d 289, 293. ALSO SEE *Florida* v. *Royer* (1983) 460 U.S. 491, 502 ["[The officers] informed him they were narcotics agents and had reason to believe that he was carrying illegal drugs."]; *People* v. *Boyer* (1989) 48 Cal.3d 247, 268 [defendant "was subjected to more than an hour of directly accusatory questioning, in which [an officer] repeatedly told him—falsely—that the police knew

For example, in *Wilson* v. *Superior Court*[119] LAPD narcotics officers at LAX received information that comedian Flip Wilson was a passenger on a flight due to land from Florida, and that he was transporting drugs. The information was not, however, sufficiently reliable to support a detention. In any event, when one of the officers spotted Wilson leaving the plane, he approached him and, according to the officer's testimony, "I advised Mr. Wilson that I was conducting a narcotics investigation, and that we had received information that he would be arriving today from Florida carrying a lot of drugs." At the officer's request, Wilson consented to a search of his bags. The search netted some cocaine and hash oil.

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

In contrast to accusatory questions, investigative inquiries convey the message that officers are merely exploring the possibility that the suspect might have committed a crime. In other words, while such questioning is "potentially incriminating," it is also potentially exonerating.[120]

An example is found in *U.S.* v. *Kim*[121] where a DEA agent approached two suspected drug dealers in an Amtrak train and greeted them with, "You guys don't have drugs in your luggage today, do you?" One of the men, Kim, consented to a search of his luggage which contained methamphetamine.

In rejecting Kim's argument that the agent's question reasonably indicated he was not free to terminate the encounter, the court noted that "[t]he tone of the question in no way implied that [the agent] accused or believed that Kim had drugs in his possession; it was merely an inquiry." POV

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he was the killer."]; *Morgan* v. *Woessner* (9th Cir. 1993) 997 F.2d 1244, 1254; *U.S.* v. *Washington* (9th Cir. 2004) 387 F.3d 1060, 1069 [suspect detained when officers told him he was "arrestable"]; *U.S.* v. *Gonzales* (5th Cir. 1996) 79 F.3d 413, 420 ["There is one troubling element: the officers informed Gonzales that the car he was driving was suspected of being used to transport drugs. This may have pushed the encounter, which was initially consensual, to being a [detention]."]. COMPARE *People* v. *Profit* (1986) 183 Cal.App.3d 849, 865 ["[The officer] made no statement that he had information that the defendants were carrying drugs."]; *People* v. *Daugherty* (1996) 50 Cal.App.4th 275, 285 ["[The officer] did not accuse Daugherty of transporting narcotics"].

[119] (1983) 34 Cal.3d 777.

[120] See *Florida* v. *Bostick* (1991) 501 U.S. 429, 439 [a seizure does not result merely because officers ask "potentially incriminating questions."]; *People* v. *Daugherty* (1996) 50 Cal.App.4th 275, 285 ["[The officer] did not directly accuse Daugherty of transporting narcotics, which may have been sufficient to convert the encounter into a detention."]; *U.S.* v. *Kim* (3rd Cir. 1994) 27 F.3d 947, 953 ["[P]otentially incriminating questions are permissible."].

[121] *U.S.* v. *Kim* (3rd Cir. 1994) 27 F.3d 947, 953.