Probable Cause to Arrest

In 2012, the number of people arrested in the U.S. for felonies and misdemeanors was around 12.2 million.[1]

That's a lot of arrests. And all of them were made by officers who thought they had probable cause. Some were mistaken.

While some false arrests are inexcusable, most are made in good faith as the result of a slight defect in the concept of probable cause: Nobody really knows what it means. In fact, even the United States Supreme Court described it as something that is both "elusive" and "abstract,"[2] two words that would ordinarily be used to describe such unintelligible concepts as the meaning of life and Einstein's Theory of Relativity. But unlike philosophers and physicists who have years (or lifetimes) to ponder the questions before them, officers must often reach their conclusions on-the-spot, and may have to do so based on information that is disordered, incomplete, or conflicting. Plus their information often comes from sources whose motives and reliability are unknown or questionable.[3]

So unless probable cause happens to be an easy call, or unless officers have the luxury of conducting further investigation or waiting for an arrest warrant, they must try to make the correct decision based on whatever information is at hand and whatever inferences and conclusions they can draw from it.[4] This necessarily requires an understanding of the basic principles of probable cause and how to determine the reliability of the various sources of information. Both of these subjects were covered in articles in the Spring-Summer 2014 *Point of View*, both of which can be downloaded at le.alcoda.org.

In this article, we will focus on probable cause to arrest and the related subject of reasonable suspicion to detain. (We will cover probable cause to search in the Winter 2015 edition.) At first glance, this subject might seem simple because most of the relevant circumstances pertaining are fairly obvious. But it can be a challenge to keep track of—and especially recall—every major and minor incriminating circumstance that comes to light in the course of an investigation, whether it's a short investigation by a patrol officer on the street or a lengthy investigation by teams of detectives. And recalling incriminating circumstances is crucial because, as we discussed in the Spring-Summer edition, with each additional piece of incriminating evidence that an officer can testify to, the odds of having probable cause and reasonable suspicion increase *exponentially*.

To illustrate, if probable cause could be tallied on a court-approved scorecard, and if an officer who carried one around saw a pedestrian who matched the general description of the perpetrator of a robbery that had just occurred down the street, he would give the suspect a PC score of, say, two: one point for resembling the robber and a second point for being near the crime scene shortly after the holdup. But he would also give the suspect a bonus point because the combination of the two independent circumstances is, in effect, an additional incriminating circumstance in that it constitutes a "coincidence of information."[5] And if there were a third or fourth independent incriminating circumstance, the score starts climbing through the roof. In other words, when it comes to probable cause, the whole is much greater than the sum of its parts.

Another advantage of being able to catalogue the relevant circumstances is that it becomes easier to present the facts logically and persuasively in a declaration of probable cause, an arrest warrant affidavit, in testimony at a suppression hearing, or during an internal affairs investigation.

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[1] Source: *Crime in the United States 2012*, FBI.

[2] *United States v. Arvizu* (2002) 534 U.S. 255, 274 ["abstract"]; *United States v. Cortez* (1981) 499 U.S. 411, 417 ["elusive"].

[3] **NOTE**: Contrary to what happens on TV, officers cannot arrest people "for investigation" of a crime or "on suspicion." This is because probable cause requires a fair probability that a person actually committed a crime—not that he *might* have done so. See *Papachristou v. City of Jacksonville* (1972) 405 U.S. 156, 169 ["Arresting a person on suspicion, like arresting a person for investigation, is foreign to our system"].

[4] See *U.S. v. Edwards* (5th Cir. 1978) 577 F.2d 883, 895; *Jackson v. U.S.* (D.C. Cir. 1962) 302 F.2d 194, 197.

[5] *Ker v. California* (1963) 374 U.S. 23, 36.

One other thing: Most of these circumstances we will cover are relevant in establishing both probable cause to arrest and reasonable suspicion to detain. The only difference is that probable cause requires information of higher quality and quantity than reasonable suspicion. Again, this subject was covered at length in the Spring-Summer edition.

Description Similarities

When a witness sees the perpetrator of a crime but does not know him, probable cause will frequently be based, at least in part, on physical similarities between the perpetrator and suspect, their clothing, or their vehicles. And, of course, any similarity becomes much more significant if there was something unique or unusual about it; e.g., a distinctive tatoo or scar.[6] As the Court of Appeal observed, "Uniqueness of the points of comparison must also be considered in testing whether the description would be inapplicable to a great many others."[7]

PHYSICAL APPEARANCE: Each individual physical similarity between the perpetrator and suspect—height, weight, build, age, race, hair color—has little significance. In other words, neither a "mere resemblance" to the perpetrator nor a resemblance to a "vague" physical description will carry much weight, even for an investigative detention.[8] Instead, what matters—and it matters a lot— is the *number* of independent corresponding characteristics.[9]

CLOTHING: Similar or matching clothing or other attire is highly relevant especially if the crime occurred so recently that it was unlikely that the perpetrator had time to change clothes.[10] And, of course, multiple similarities in the clothing and the manner in which they were worn are also important; e.g., red 49er baseball cap worn backwards.[11]

VEHICLE SIMILARITIES: If a vehicle was used in the commission of the crime, each similarity between the perpetrator's and suspect's vehicles is necessarily significant; e.g., similar license plate numbers,[12] both vehicles were very old,[13] both were light colored compact station wagons.[14] And these similarities become even more important if there was some additional independent reason to connect the vehicle to the crime; e.g., an occupant resembled the perpetrator, the car was spotted near the crime scene, the occupants acted in a suspicious manner.[15]

CORRESPONDING NUMBER OF PEOPLE: If there were two or more perpetrators, it is significant that officers detained a group of suspects shortly after the crime was committed and the number of suspects corresponded with the number of perpetrators.[16]

DISCREPANCIES: The courts understand that witnesses may inadvertently provide officers with descriptions of perpetrators and vehicles that are not entirely accurate. Thus, officers may make allowances for the types of errors they have come to expect.[17] As the Court of Appeal observed, "Crime

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[6] See *People v. Flores* (1974) 12 Cal.3d 85, 92 ["distinctive" hat]; *People v. Carpenter* (1997) 15 Cal.4th 312, 364 [corresponding shoeprint]; *People v. Orozco* (1981) 114 Cal.App.3d 435, 440 [unusual color of car].

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

[8] See *In re Carlos M.* (1990) 220 Cal.App.3d 372, 381-82; *In re Dung T.* (1984) 160 Cal.App.3d 697, 713; *People v. Walker* (2012) 210 Cal.App.4th 165, 182; *Grant v. Long Beach* (9th Cir. 2002) 315 F.3d 1081, 1088 ["mere resemblance to a general description"].

[9] See *People v. Fields* (1984) 159 Cal.App.3d 555, 564; *In re Brian A.* (1985) 173 Cal.App.3d 1168, 1174.

[10] See *Chambers v. Maroney* (1970) 399 U.S. 42, 46 [corresponding green sweater]; *People v. Fields* (1984) 159 Cal.App.3d 555, 564 [corresponding jogging pants]; *People v. Hagen* (1970) 6 Cal.App.3d 35, 41 [corresponding three-quarter length coat].

[11] *People v. Soun* (1995) 34 Cal.App.4th 1499, 1524-25. Also see *People v. Adams* (1985) 175 Cal.App.3d 55, 859, 861 [white straw hat, dark pants, light shirt"]; *People v. Little* (2012) 206 Cal.App.4th 1364, 1370 [male wore a white shirt; female wore a green dress"]; *In re Brian A.* (1985) 173 Cal.App.3d 1168, 1174 [jacket with "shiny red hood" and soccer-style bag with double handles]; *People v. Joines* (1970) 11 Cal.App.3d 259, 264 [bandage on the left hand].

[12] *People v. Soun* (1995) 34 Cal.App.4th 1499, 1522; *People v. Watson* (1970) 12 Cal.App.3d 130, 134-135.

[13] *People v. Flores* (1974) 12 Cal.3d 85.

[14] *People v. Chandler* (1968) 262 Cal.App.2d 350, 354.

[15] See *People v. Leath* (2013) 217 Cal.App.4th 344, 354; *People v. Little* (2012) 206 Cal.App.4th 1364, 1373; *In re Dung T.* (1984) 160 Cal.App.3d 697, 713.

[16] See *Chambers v. Maroney* (1970) 399 U.S. 42, 46; *People v. Soun* (1995) 34 Cal.App.4th 1499, 1518; *People v. Joines* (1970) 11 Cal.App.3d 259, 263; *In re Brian A.* (1985) 173 Cal.App.3d 1168, 1174; *In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1092.

[17] See *Hill v. California* (1971) 401 U.S. 797, 803, fn.6; *Dawkins v. Los Angeles* (1978) 22 Cal.3d 126, 133; *People v. Arias* (1996) 13 Cal.4th 92, 169; *People v. Price* (1991) 1 Cal.4th 324, 410-11.

victims often have limited opportunity for observation; their reports may be hurried, perhaps garbled by fright or shock."[18] For example, the following discrepancies in vehicle descriptions were considered insignificant:

- The perpetrator's license plate number 127AOQ was reported as 107AOQ.[19]
- Yellow 1959 Cadillac, license number XQC 335 was described as a yellow 1958 or 1959 Cadillac with partial plate of OCX.[20]
- Tan over brown 1970 Oldsmobile, license 276AFB, was described as a 1965 Oldsmobile or Pontiac, license 276ABA.[21]
- A black-over-gold Cadillac was described as a light brown vehicle, possibly a Chevrolet.[22]

Three other things about discrepancies: First, the courts are not so forgiving when the error was made by an officer instead of a witness. As the Court of Appeal explained, "While officers should not be held to absolute accuracy of detail in remembering the numerous crime dispatches broadcast over police radio . . . [a]n investigative detention premised upon an officer's materially distorted recollection of the true suspect description is [unlawful]."[23]

Second, if the crime had just occurred, and if officers detained a group of suspects, the fact that the number of people in the group was larger or smaller than the number of perpetrators is not considered a significant discrepancy. This is because, as the California Court of Appeal observed in a robbery case, "it is a matter of common knowledge that holdup gangs often operate in varying numbers and combinations, and the victim of a robbery does not always see all of the participants."[24] Third, even if witnesses did not see a getaway car, officers may usually infer that one was used. Thus, if the suspect was in a vehicle when he was detained or arrested, the fact that witnesses did not see a vehicle will not ordinarily constitute a discrepancy.[25]

Suspect's Location

While probable cause may often be based largely on a suspect's presence in a certain house, car, or other private place, officers may not ordinarily arrest or detain a person merely because he was present in a place that was open to the public.[26] Still, the suspect's presence at a public location is often highly relevant.[27] And it may become critical if there was some independent circumstantial evidence of his involvement in a crime, such as a similar physical, clothing, or vehicle description, or any of the various suspicious circumstances we will discuss later. Also note that if the suspect's presence in a certain location was incriminating, it is significant that there were few, if any, other people in the area because, for example, it was late at night or early in the morning.[28]

NEAR THE CRIME SCENE: A suspect's presence at or near the scene of a crime—whether before, during, or just after the crime occurred—is of course a relevant circumstance. And, thanks to modern technology, this circumstance is becoming increasingly important as officers are often able to determine the suspect's whereabouts at a particular time by means of GPS tracking or cell tower triangulation.[29]

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[18] *People v. Smith* (1970) 4 Cal.App.3d 41, 48.
[19] *People v. Weston* (1981) 114 Cal.App.3d 764, 775, fn.5. Also see *U.S. v. Marxen* (6th Cir. 2005) 410 F.3d 326, 331, fn.5.
[20] *People v. Watson* (1970) 12 Cal.App.3d 130, 134-35.
[21] *People v. Jones* (1981) 126 Cal.App.3d 308, 313-14.
[22] *People v. Rico* (1979) 97 Cal.App.3d 124, 132.
[23] See *Williams v. Superior Court* (1985) 168 Cal.App.3d 349, 361.
[24] *People v. Coffee* (1980) 107 Cal.App.3d 28, 33-34. Also see *People v. Chandler* (1968) 262 Cal.App.2d 350, 354.
[25] See *People v. Anthony* (1970) 7 Cal.App.3d 751, 761; *People v. Overten* (1994) 28 Cal.App.4th 1497, 1505; *People v. Joines* (1970) 11 Cal.App.3d 259, 263.
[26] See *Brown v. Texas* (1979) 443 U.S. 47, 52; *Ybarra v. Illinois* (1979) 444 U.S. 85, 91.
[27] See *Illinois v. Wardlow* (2000) 528 U.S. 119, 124 ["officers are not required to ignore the relevant characteristics of a location"].
[28] See *People v. Anthony* (1970) 7 Cal.App.3d 751, 761; *People v. Conway* (1994) 25 Cal.App.4th 385, 390.
[29] See *United States v. Jones* (2012) __U.S. __ [132 S.Ct. 945, 947; *In re Application of the U.S.* (S.D.N.Y. 2006) 460 F.Supp.2d 448, 452 ["Where the government obtains information from multiple towers simultaneously, it often can triangulate the caller's precise location and movements by comparing the strength, angle, and timing of the cell phone's signal measured from each of the sites."]; *In re Application of the U.S.* (3rd Cir. 2010) 620 F.3d 304, 308 [data included "which of the tower's 'faces' carried a given call at its beginning and end"]), or by GPS technology if equipment has been upgraded to the Enhanced 911 standards."]; *In re Application of the U.S.* (3rd Cir. 2010) 620 F.3d 304, 311 [the Government noted that "much more precise location information is available when global positioning system ('GPS') technology is installed in a cell phone"].

ON ACTUAL ESCAPE ROUTE: If a witness reported that he saw the perpetrator flee on a certain street, it would be of major importance that officers saw the suspect on that street or on an artery at a time and distance consistent with flight by the perpetrator.[30]

ON A LOGICAL ESCAPE ROUTE: Officers may be able to predict a perpetrator's escape route based on their knowledge of traffic patterns in the area. If so, it would be significant that the suspect was traveling along a logical escape route if his distance from the crime scene and the elapsed time were consistent with flight by the perpetrator. Examples:

- At about 4 A.M., two men robbed a gas station in Long Beach. Two officers "proceeded to a nearby intersection, a vantage point which permitted them to survey the street leading from the crime scene to a freeway entrance, a logical escape route." A few minutes later, they saw two men in a car; the men fit the description of the robbers. No other cars were in the area; the suspects were "excessively attentive to the officers."[31]
- Shortly after a gang-related drive-by murder, LAPD officers found the shooters' car abandoned, and they reasonably believed the occupants had fled on foot. An officer assigned to a gang unit figured the shooters would be heading to their own neighborhood "by a route which avoided the territories of rival and hostile gangs," and he knew their "most logical route." Along that route, he detained several young men who were wearing the colors of the perpetrators' gang.[32]
- At about 8 P.M., two men robbed a motel in Coronado, an island in San Diego Bay with only two bridges leading in and out. Police dispatch transmitted a very general description of the suspects but no vehicle description. Within minutes, an officer at one of the bridges saw a car occupied by two men who matched the general description. Two other men in the car ducked down when the officer started following them.[33]

HIGH CRIME AREA: A suspect's presence in a "high crime area" is virtually irrelevant.[34] "It is true, unfortunately," said the Court of Appeal, "that today it may be fairly said that our entire nation is a high crime area where narcotic activity is prevalent. Therefore, such factors, standing alone, are not sufficient to justify interference with an otherwise innocent-appearing citizen."[35] It is, however, a circumstance that may become relevant in light of other circumstances,[36] especially if officers or witnesses saw the suspect engage in conduct that is associated with the type of criminal activity that is prevalent in the area.

For example, in *In re Michael S.*[37] the court upheld the detention of a suspected auto burglar mainly because he was in an area in which officers had received "many complaints" of vehicle tampering, and the officers saw him "secreted or standing between two parked cars, looking first into one and then into the other as if examining them." (As for hand-to-hand transactions in high crime areas, see "Suspicious Activity" (High crime area), below.)

INSIDE A PERIMETER: A suspect's presence inside a police perimeter is significant, especially if the perimeter was fairly tight and was set up quickly after the crime occurred. For example, in *People v. Rivera*[38] the court ruled that an officer had probable cause to arrest two men suspected of having just broken into an ATM because, among other things, he "knew that 10 surveillance units and at least 10 other patrol cars, with their lights flashing, had formed a perimeter to contain the suspects."

Reaction to Seeing Officers

Even if they are not doing anything illegal at the moment, criminals tend to become nervous when they see an officer or patrol car. So officers naturally

[30] See *In re Louis F.* (1978) 85 Cal.App.3d 611; *U.S. v. Jones* (8th Cir. 2008) 535 F.3d 886.
[31] *People v. Joines* (1970) 11 Cal.App.3d 59, 62-65.
[32] *People v. Superior Court (Price)* (1982) 137 Cal.App.3d 90, 96.
[33] *People v. Overten* (1994) 28 Cal.App.4th 1497, 1505.
[34] See *Maryland v. Buie* (1990) 494 U.S. 325, 334, fn.2; *Illinois v. Wardlow* (2000) 528 U.S. 119, 124.
[35] *People v. Holloway* (1985) 176 Cal.App.3d 150, 155.
[36] See *Illinois v. Wardlow* (2000) 528 U.S. 119, 124; *People v. Souza* (1994) 9 Cal.4th 224, 240.
[37] (1983) 141 Cal.App.3d 814.
[38] (1992) 8 Cal.App.4th 1000, 1009-10.

view this as a suspicious circumstance. And so do the courts—but with two qualifications: First, the officers must have had reason to believe the suspect had seen and recognized them. Second, the nature of the reaction must have been sufficiently suspicious.

Proving recognition

As noted, a suspect's reaction to seeing officers can be deemed suspicious only if it reasonably appeared he had recognized them as officers. As the Court of Appeal explained, "Absent a showing the citizen should reasonably know that those who are approaching are law enforcement officers, no reasonable inference of criminal conduct may be drawn."[39]

In most cases, this requirement is easily satisfied if (1) the reaction occurred immediately after the suspect looked in the officers' direction; and (2) the officers were in a marked patrol car or were wearing a standard uniform or other clearly identifiable departmental attire. But if the officers were in plain clothes or in an unmarked car, the relevance of the suspect's reaction will depend on whether there was some circumstantial evidence of recognition. Thus, in *People v. Huntsman*[40] the court ruled that the defendant's flight from officers was not incriminating because the officers "were in plain clothes and were driving an unmarked car at night."

In addition to marked cars, there are semi-marked vehicles; i.e., vehicles with enough exposed police equipment or other markings that most people—especially criminals—will easily spot them. As the Court of Appeal put it, some of these cars are "about as inconspicuous as three bull elephants in a backyard swimming pool."[41] Still, when this issue arises at a hearing on a motion to suppress evidence, officers must be able to prove that they reasonably believed the defendant had identified them or their car. This might be accomplished by describing in detail the various police markings and equipment that were readily visible. Thus, in *U.S. v. Nash* the court ruled that an officer's vehicle was clearly identifiable mainly because it was "a dark blue Dodge equipped with several antennae and police lights on the rear shelf."[42]

Suspicious reactions

Assuming that the officers reasonably believed the suspect had recognized them, the significance of his reaction will depend on the extent to which it indicated alarm or fear.[43] The following reactions are especially noteworthy.

FLIGHT: Running from an officer is one of the strongest nonverbal admissions of guilt a person can make. In the words of the Supreme Court, flight is "the consummate act of evasion; it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such."[44] Nevertheless, the Court ruled that flight will not *automatically* establish grounds to detain. Instead, there must have been least one additional suspicious circumstance; i.e., "flight *plus*."[45] For example, the courts have ruled that the following additional circumstances were sufficient to establish grounds to detain:

- Flight in a high-crime area.[46]
- Flight in the early morning hours.[47]
- Flight from near a crime scene.[48]
- Flight after having been observed hiding.[49]
- Flight after making a hand-to-hand transaction in high-drug area.[50]
- Flight after making a gesture as if to retrieve a weapon or discard evidence.[51]
- Flight plus matching a general description of a wanted suspect.[52]

[39] *People v. Huntsman* (1984) 152 Cal.App.3d 1073, 1091.
[40] (1984) 152 Cal.App.3d 1073.
[41] *Flores v. Superior Court* (1971) 17 Cal.App.3d 119, 224.
[42] (7th Cir. 1989) 876 F.2d 1359, 1360.
[43] See *People v. Dickey* (1994) 21 Cal.App.4th 952, 956, fn.2.
[44] *Illinois v. Wardlow* (2000) 528 U.S. 119, 124.
[45] *People v. Souza* (1994) 9 Cal.4th 224, 235-36.
[46] *Illinois v. Wardlow* (2000) 528 U.S. 119, 124; *People v. Magee* (2011) 194 Cal.App.4th 178, 191, fn.12.
[47] *Crofoot v. Superior Court* (1981) 121 Cal.App.3d 717, 724; *People v. Superior Court (Johnson)* (1971) 15 Cal.App.3d 146.
[48] *People v. Souza* (1994) 9 Cal.4th 224, 235-36.
[49] *People v. Superior Court (Johnson)* (1971) 15 Cal.App.3d 146; *Sibron v. New York* (1968) 392 U.S. 40, 67.
[50] *People v. McGriff* (1990) 217 Cal.App.3d 1140, 1144; *People v. Mims* (1992) 9 Cal.App.4th 1244, 1250.
[51] *People v. Souza* (1994) 9 Cal.4th 224, 240; *People v. Johnson* (1991) 231 Cal.App.3d 10, 12.
[52] *People v. Rodriguez* (2012) 207 Cal.App.4th 1540, 1544; *In re Rafael V.* (1982) 132 Cal.App.3d 977, 982-83.

Note that if officers already have grounds to detain the suspect, his flight may convert reasonable suspicion into probable cause to arrest, or at least provide grounds to arrest him for obstructing an officer in the performance of his duties.[53]

ATTEMPTING TO HIDE FROM OFFICERS: Like flight, a person's attempt to hide from officers—including "slouching, crouching, or any other arguably evasive movement"[54]—is a highly suspicious circumstance.[55] Here are some examples:

- Upon seeing the officers, a young man standing between two parked cars in an alley "stepped behind a large dumpster and then continued to move around it in such a fashion that he blocked himself from the officers' view."[56]
- Officers saw the suspect hide behind a fence and peer out toward the street.[57]
- When their parked car was spotlighted by an officer, two people in the front seat "immediately bent down toward the floorboard."[58]

ATTEMPTING TO AVOID OFFICERS: Although not as suspicious as an obvious attempt to hide, it is relevant that, upon observing officers, the suspect attempted to avoid them by, for example, walking away or quickly changing direction. As the Third Circuit observed, although walking away from officers "hardly amounts to headlong flight," it is "a factor that can be considered in the totality of the circumstances."[59] Some examples:

- Suspects "suddenly changed course" and "increased their pace" as the officers' vehicle came into view.[60]
- Suspects split up."[61]
- At 4 A.M., as officers arrived at a business in which a silent burglary alarm had been triggered, a man standing next to the business walked away.[62]
- As a murder suspect drove up to his girlfriend's house and started to pull into the driveway, he saw that sheriff's deputies were there, at which point he backed up and drove off. [63]
- When a driver saw a patrol car late at night, he "accelerated his vehicle and made two quick turns and an abrupt stop, hurriedly dousing his auto lights."[64]
- When a man who was suspected of selling drugs to a passing motorist saw an officer, he "abruptly withdrew from the [buyer's] car window" and the driver of the car drove off.[65]

WARNING TO ACCOMPLICE: If two or more suspects were standing together when one of them apparently spotted an officer, his immediate warning to the other is considered highly suspicious; e.g., "Jesus Christ, the cops,"[66] "Oh shit. Don't say anything,"[67] "Police!"[68] "Rollers!"[69] "The man is across the street."[70] Exclamations such as these naturally become even more suspicious if there was an immediate avoidance response; e.g., "Let's get out of here,"[71] "Bobby, Bobby, run, it's the narcs."[72]

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[53] See Pen. Code § 148; *People v. Allen* (1980) 109 Cal.App.3d 981, 987; *People v. Johnson* (1991) 231 Cal.App.3d 1, 13, fn.2; *People v. Mendoza* (1986) 176 Cal.App.3d 1127, 1131.
[54] *U.S. v. Woodrum* (1st Cir. 2000) 202 F.3d 1, 7.
[55] See *Illinois v. Wardlow* (2000) 528 U.S. 119, 124 ["evasive behavior" is a "pertinent factor in determining reasonable suspicion"].
[56] *In re Michael S.* (1983) 141 Cal.App.3d 814, 816.
[57] *U.S. v. Thompson* (D.C. Cir. 2000) 234 F.3d 725, 729.
[58] *People v. Souza* (1994) 240. Also see *People v. Overten* (1994) 28 Cal.App.4th 1497, 1504.
[59] *U.S. v. Valentine* (3rd Cir. 2000) 232 F.3d 350, 357.
[60] *U.S. v. Briggs* (10th Cir. 2013) 720 F.3d 1281, 1286; *People v. Manis* (1969) 268 Cal.App.2d 653, 660.
[61] See *People v. Boissard* (1992) 5 Cal.App.4th 972, 975; *People v. Profit* (1986) 183 Cal.App.3d 849, 882; *People v. Divito* (1984) 152 Cal.App.3d 1, 13; *In re Stephen L.* (1984) 162 Cal.App.3d 257, 260; *People v. Brown* (1990) 216 Cal.App.3d 1442, 1450.
[62] *People v. Lloyd* (1992) 4 Cal.App.4th 724, 734.
[63] *People v. Turnage* (1975) 45 Cal.App.3d 201, 205.
[64] *In re Eduardo G.* (1980) 108 Cal.App.3d 745, 754.
[65] *U.S. v. Lopez-Garcia* (11th Cir. 2009) 565 F.3d 1306, 1314. Also see *Flores v. Superior Court* (1971) 17 Cal.App.3d 219, 224.
[66] *People v. Bigham* (1975) 49 Cal.App.3d 73, 78. Also see *U.S. v. Mays* (6th Cir.2011) 643 F.3d 537, 543.
[67] *People v. Vasquez* (1983) 138 Cal.App.3d 995, 999.
[68] *People v. Mims* (1992) 9 Cal.App.4th 1244, 1250. Also see *Sanderson v. Superior Court* (1980) 105 Cal.App.3d 264, 271 ["Cops!"].
[69] *People v. Lee* (1987) 194 Cal.App.3d 975, 980.
[70] *People v. Wigginton* (1973) 35 Cal.App.3d 732, 736.
[71] *Florida v. Rodriguez* (1984) 469 U.S. 1, 3.
[72] *Pierson v. Superior Court* (1970) 8 Cal.App.3d 510, 516.

SUDDEN REACH: Any sudden—almost instinctive—reaching into a pocket or other container or place upon seeing an officer is highly suspicious because of the possibility that the suspect is reaching for a weapon or disposable evidence. The following are examples that have been noted by the courts:

- When a suspected drug dealer saw a patrol car, he suddenly put his hand inside his jacket.[73]
- The suspect "put his hands in his pockets and started 'digging' in them."[74]
- The suspect made "a sudden gesture with his right hand to his left T-shirt pocket."[75]
- "Just after [the officer] started the search around defendant's waistband, defendant abruptly grabbed for his outside upper jacket pocket."[76]
- The suspect "reached towards the front of his pants several times."[77]
- The suspect "shoved his hand into his right trouser pocket quite rapidly."[78]

ATTEMPT TO HIDE, CONCEAL, OR DISCARD: An apparent attempt to hide an unknown object upon seeing an officer is certainly suspicious because it is usually reasonable to infer that the item was a weapon, contraband, or other evidence of a crime.[79] Although such an attempt is especially relevant if officers could see that there was, in fact, an object of some sort that the suspect was attempting to conceal, the important thing is that the suspect's actions were reasonably interpreted as such.

The following are examples of actions that reasonably indicated the suspect was attempting to hide, conceal, or discard something:

- As officers approached a car they had stopped, they saw the driver "pushing a white box under the front seat."[80]
- The officers saw appellant "reach into the back of his waistband and secrete in his hands an object which he had retrieved."[81]
- Upon seeing officers, the suspect "threw a small plastic bag onto the ground."[82]
- The suspect "was holding his hands clasped together in front of a bulge in the waistband in the middle of his waist."[83]
- After officers lit up the car, the backseat passenger started moving around and looked back several times at the patrol car.[84]
- Upon seeing the officers, the suspect quickly made a "hand-to-mouth movement, as though secreting drugs."[85]
- A suspected drug dealer sitting inside his car kept his left hand hidden from the officer who had detained him.[86]
- As the suspect was looking in her purse for ID, she "attempted to obstruct [the officer's] view."[87]

EXTREME ATTENTION TO OFFICERS: A person's extreme or unusual attention to officers may be noteworthy, especially if accompanied by some physical response and if officers could provide detailed testimony as to what the suspect did and why it appeared suspicious. Here are some examples:

- Defendant was "constantly checking the [rear view] mirrors and talking on his mobile phone as he looked back at the unmarked car behind them."[88]

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[73] *People v. Lee* (1987) 194 Cal.App.3d 975, 983. Also see *People v. Flores* (1979) 100 Cal.App.3d 221, 226.
[74] *U.S. v. Mays* (6th Cir. 2011) 643 F.3d 537, 543.
[75] *People v. McLean* (1970) 6 Cal.App.3d 300, 306.
[76] *People v. Atmore* (1970) 13 Cal.App.3d 244, 246.
[77] *People v. Lopez* (2004) 119 Cal.App.4th 132, 134.
[78] *People v. Ochoa* (1970) 9 Cal.App.3d 500, 502. Also see *People v. Gonzales* (1989) 216 Cal.App.3d 1185, 1189.
[79] See *People v. Miller* (1976) 60 Cal.App.3d 849, 854 [it was reasonable for the officer to conclude "that defendant feared discovery of the book or notebook because it contained or would lead to incriminating evidence"].
[80] *People v. Superior Court (Vega)* (1969) 272 Cal.App.2d 383, 387.
[81] *In re John C.* (1978) 80 Cal.App.3d 814, 819.
[82] *U.S. v. Stigler* (8th Cir. 2009) 574 F.3d 1008, 1009.
[83] *People v. Superior Court (Brown)* (1980) 111 Cal.App.3d 948, 956.
[84] *People v. Hunter* (2005) 133 Cal.App.4th 371, 379, fn.5.
[85] *People v. Johnson* (1991) 231 Cal.App.3d 1, 12.
[86] *People v. Butler* (2003) 111 Cal.App.4th 150.
[87] *U.S. v. Burnette* (9th Cir. 1983) 698 F.2d 1038, 1048.
[88] *U.S. v. Sloan* (7th Cir. 2011) 636 F.3d 845, 850.

- Upon seeing a police car, the suspect "did not give it the passing glance of the upright, law abiding citizen. His eyes were glued on that car."[89]
- The suspect "appeared to be startled by [the officer], had a 'look of fear in his eyes' and then quickly looked away."[90]
- All six suspects inside a moving vehicle turned to look at an officer as they drove past him.[91]

Instead of paying inordinate attention to officers, a suspect will sometimes pretend that he didn't see them. This, too, can be relevant, especially if officers can explain why it appeared to be a ploy. For example, in *U.S. v. Arvizu* the Supreme Court ruled it was somewhat suspicious that a driver, as he passed a patrol car, "appeared stiff and his posture very rigid. He did not look at [the officer] and seemed to be trying to pretend that [the officer] was not there."[92]

Suspicious Activities

Officers sometimes see people doing things that, although not illegal, are suspicious or at least consistent with criminal activity.[93] While such conduct will seldom constitute probable cause to arrest, it is frequently sufficient for a detention.[94] However, the extent to which an activity can reasonably be deemed "suspicious" will often depend on the officer's training and experience and the setting in which it occurred; e.g., the time of day or night, the location, and anything else that adds color or meaning to it. As the Court of Appeal observed, "Running down a street is in itself indistinguishable from the action of a citizen engaged in a program of physical fitness. Viewed in context of immediately preceding gunshots, it is highly suspicious."[95]

EXCESSIVE ALERTNESS: Before, during, and after committing a crime, people instinctively tend to look around a lot to see if anyone is watching. This is especially true of robbers, burglars, and people who sell or buy drugs on the street. As the Court of Appeal noted, "Those involved in the narcotics trade are a skittish group—literally hunted animals to whom everyone is an enemy until proven to the contrary."[96] Here are some examples of suspicious alertness:

- As a suspected drug purchaser left a drug house, he quickly looked "side to side."[97]
- A suspected drug dealer "scouted the area before entering the apartment."[98]
- A suspected drug dealer "loitered about and looked furtively in all directions."[99]
- A suspected burglar "alighted from the vehicle and looked around apprehensively for quite some period of time."[100]
- Two men leaving a jewelry store (after robbing it) kept looking back at the store.[101]

COUNTERSURVEILLANCE: Another common and suspicious activity of paranoic or merely vigilant criminals is countersurveillance walking or driving, which generally consists of tactics that make it difficult for officers to follow them or at least force the officers to engage in conspicuous surveillance. Here are some examples of countersurveillance driving by suspected drug traffickers:

- Suspect began "weaving in and out of traffic at a high rate of speed in an apparent attempt to evade surveillance."[102]
- Suspect went to two houses "which the officers associated with drugs, and drove in and out of the parking lots of those buildings several times."[103]

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[89] *Flores v. Superior Court* (1971) 17 Cal.App.3d 219, 224.
[90] *People v. Fields* (1984) 159 Cal.App.3d 555, 564.
[91] *People v. Soun* (1995) 34 Cal.App.4th 1499, 1513.
[92] (2002) 534 U.S. 266, 270.
[93] *In re Elisabeth H.* (1971) 20 Cal.App.3d 323, 327.
[94] See *People v. Souza* (1994) 9 Cal.4th 224, 233.
[95] *People v. Juarez* (1973) 35 Cal.App.3d 631, 636.
[96] *Flores v. Superior Court* (1971) 17 Cal.App.3d 219, 223.
[97] *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1577.
[98] *People v. Carrillo* (1995) 37 Cal.App.4th 1662, 1668.
[99] *People v. Moore* (1970) 13 Cal.App.3d 424, 431.
[100] *People v. Dolliver* (1986) 181 Cal.App.3d 49.
[101] *People v. Green* (1994) 25 Cal.App.4th 1107, 1109, 1111.
[102] *U.S. v. Fiasche* (7th Cir. 2008) 520 F.3d 694, 695. Also see *United States v. Sharpe* (1985) 470 U.S. 675, 682, fn.3.
[103] *U.S. v. Johnson* (8th Cir. 1995) 64 F.3d 1120, 1125.

- Suspect would "make U-turns in the middle of streets, slow down at green lights, and then accelerate through intersections when the lights turned yellow."[104]
- Suspect "pulled to the curb, allowing a surveillance unit to pass [then] drove to a residence after first going past it and making a U-turn."[105]
- Suspect drove "up and down side streets, making numerous U-turns, stopping, backing up, and finally arriving at the Ganesha Street property."[106]

LATE NIGHT ACTIVITY: Some crimes are typically committed late at night when there are usually fewer potential witnesses; e.g., robberies, commercial burglaries. Consequently, the time of night in which an activity occurred can add meaning to it. Examples:

- 11:40 P.M.: Officer saw three people inside a car parked "in front of a darkened home" in a neighborhood in which two to three burglaries had been occurring each week.[107]
- Midnight: Officer saw two occupied cars parked behind the sheriff's warehouse; there were no homes or places of business in the area.[108]
- Midnight: On a dark and secluded road, an officer saw an occupied pickup truck "nosed into the driveway of a fenced construction storage area," and there was a big box in the back of the truck.[109]
- 12:15 A.M.: Officers saw two men "peering" into the window of a closed radio shop"; when the men saw the officers, they started to walk away.[110]
- 2:30 A.M.: Officers saw "three people in a car driving around a high crime area" and "the car proceeded along two residential blocks, slowing intermittently in a manner that an observing officer thought consistent with preparing for a burglary or drive-by shooting."[111]
- 2:35 A.M.: Officer saw a man "exiting from darkened private property where valuable merchandise was located."[112]
- 3:30 A.M.: Two men who were walking in a business area started running when they saw a patrol car approaching.[113]

CASING: Conduct that is indicative of casing a location for a crime (typically robbery or burglary) is, of course, highly suspicious. In fact, such conduct resulted in one of the most important cases in criminal law: *Terry v. Ohio*.[114] In *Terry*, an officer noticed two men standing together in downtown Cleveland, Ohio at about 2:30 P.M. As the officer watched, he noticed one of the men walk over to a nearby store and look in the window. The man then "rejoined his companion at the corner, and the two conferred briefly. Then the second man went through the same series of motions." The two men "repeated this ritual alternately between five and six times apiece—in all, roughly a dozen trips." At this point, the officer detained the men because, as he testified, he suspected they were "casing a job, a stick-up" and that he "considered it his duty" to investigate. The U.S. Supreme Court agreed that the men's conduct warranted a detention.

HAND-TO-HAND EXCHANGES: Hand-to-hand exchanges are common occurrences and are therefore not, in and of themselves, suspicious.[115] But they can easily become so depending on a combination of surrounding circumstances, such as:

NATURE OF ITEM EXCHANGED: The object of the exchange looked like illegal drugs; e.g., "two small, thin, white, filterless cigarettes."[116]

PACKAGING OF ITEM EXCHANGED: The object was packaged in a manner consistent with drug packaging; e.g., a baggie,[117] a "flat waxed paper package of the size and appearance used for the sale of marijuana in small quantities."[118]

LOCATION OF TRANSACTION: The transaction occurred in an area where street sales of drugs, stolen property, or weapons commonly occur.[119]

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[104] *U.S. v. Hoyos* (9th Cir. 1989) 892 F.2d 1387, 1390.
[105] *People v. Rodriguez-Fernandez* (1991) 235 Cal.App.3d 543, 546.
[106] *People v. Campbell* (1981) 118 Cal.App.3d 588, 592.
[107] **[NOTE**: Multiple footnotes follow] *People v. Schoennauer* (1980) 103 Cal.App.3d 398, 407. [108] *People v. Lovejoy* (1970) 12 Cal.App.3d 883, 886. [109] *U.S. v. Mattarolo* (9th Cir. 1999) 191 F.3d 1982. [110] *People v. Koelzer* (1963) 222 Cal.App.2d 20. [111] *U.S. v. Rice* (10th Cir. 2007) 483 F.3d 1079. [112] *People v. Allen* (1975) 50 Cal.App.3d 896, 901. [113] *Crofoot v. Superior Court* (1981) 121 Cal.App.3d 717, 724. [114] (1968) 392 U.S. 1, 6.
[115] See *Cunha v. Superior Court* (1970) 2 Cal.3d 352, 357; *People v. Jones* (1991) 228 Cal.App.3d 519, 524.
[116] *People v. Stanfill* (1985) 170 Cal.App.3d 420, 423.
[117] See *People v. Mims* (1992) 9 Cal.App.4th 1244, 1248; *U.S. v. Bustos-Torres* (8th Cir. 2005) 396 F.3d 935, 945.
[118] See *In re Frederick B.* (1987) 192 Cal.App.3d 79, 86; *Flores v. Superior Court* (1971) 17 Cal.App.3d 219, 223.
[119] See *People v. Limon* (1993) 17 Cal.App.4th 524, 532; *In re Frederick B.* (1987) 192 Cal.App.3d 79, 86.

MONEY EXCHANGE: The suspected buyer gave money to the suspected seller.[120]

FURTIVENESS: The parties acted in a manner indicating they did not want to be seen; e.g., seller "looked about furtively,"[121] seller "walked over to an apparent hiding place before and after the exchange,"[122] the buyer hid the object of the transaction in a cigarette case which he then placed in his pocket,"[123] when the parties saw an approaching police car "their conversation ceased and their hands went into their pockets very rapidly."[124]

PANICKY REACTION TO OFFICERS: Upon observing the officers, one or both of the suspects displayed signs of panic. This subject was covered in the section "Reaction to Seeing Officers," above.

MULTIPLE EXCHANGES: The apparent seller engaged in several such transactions with various buyers.[125]

PRIOR ARRESTS: The seller or buyer had prior arrests for selling or possessing contraband.[126]

ADVANCING ON OFFICERS: A suspect's act of quickly approaching officers who are about to contact or detain him is a suspicious (and worrisome) response. Thus, in *People v. Hubbard* the following testimony by an officer established reasonable suspicion for a pat search: "Like I said, all three suspects alighted from the vehicle almost simultaneously. They all got out on us."[127] Similarly, *U.S. v. Mattarolo,* the court upheld a pat search because "[t]he defendant's swift approach caused the officer to get out of his squad car quickly so as not to be trapped with the means of protecting himself consequently limited."[128]

"UNUSUAL" ACTIVITY: A detention may be based, at least in part, on activity that is "so unusual, so far removed from everyday experience that it cries out for investigation," even if "there is no specific crime to which it seems to relate."[129]

Nervousness

Although a suspect's nervousness upon being contacted or detained is a relevant factor,[130] its significance usually depends on whether it was extreme or unusual.[131] The following fall into that category:

- The suspect's "neck started to visibly throb."[132]
- "[V]isibly elevated heart rate, shallow breathing, and repetitive gesticulations, such as wiping his face and scratching his head."[133]
- "[P]erspiring and shaking."[134]
- "[P]erspiring, swallowing and breathing heavily, and constantly moving his feet or fingers."[135]

Although less significant, the following indications of nervousness have been noted: suspect looked "shocked,"[136] suspect appeared "nervous and anxious to leave the area,"[137] and suspect appeared nervous and was hesitant in answering questions.[138] Much less significant—but not irrelevant[139]—is a suspect's failure to make eye contact with officers.[140]

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[120] *People v. Garrett* (1972) 29 Cal.App.3d 535, 538.
[121] *U.S. v. Tobin* (11th Cir. 1991) 923 F.2d 1506, 1510.
[122] *People v. Limon* (1993) 17 Cal.App.4th 524, 532. Also see *People v. Maltz* (1971) 14 Cal.App.3d 381, 392.
[123] *People v. Guajardo* (1994) 23 Cal.App.4th 1738, 1743.
[124] *People v. Handy* (1971) 16 Cal.App.3d 858, 860.
[125] See *People v. Maltz* (1971) 14 Cal.App.3d 381, 393.
[126] *People v. Guajardo* (1994) 23 Cal.App.4th 1738, 1743.
[127] (1970) 9 Cal.App.3d 827, 830.
[128] (9th Cir. 1999) 191 F.3d 1082, 1087.
[129] *People v. Foranyic* (1998) 64 Cal.App.4th 186, 190.
[130] See *Illinois v. Wardlow* (2000) 528 U.S. 119, 124 ["nervous, evasive behavior is a pertinent factor"].
[131] See *U.S. v. White* (8th Cir. 1989) 890 F.2d 1413, 1418; *U.S. v. Wood* (10th Cir. 1997) 106 F.3d 942, 948.
[132] *People v. Rogers* (2009) 46 Cal.4th 1136, 1159.
[133] *U.S. v. Riley* (8th Cir. 2012) 684 F.3d 758, 763.
[134] *People v. Methey* (1991) 227 Cal.App.3d 349, 358.
[135] *U.S. v. Bloomfield* (8th Cir. 1994) 40 F.3d 910, 913.
[136] *People v. Garcia* (1981) 121 Cal.App.3d 239, 245. Also see *U.S. v. Davis* (3rd Cir. 2013) 726 F.3d 434, 440.
[137] *People v. Guajardo* (1994) 23 Cal.App.4th 1738, 1743.
[138] *People v. Russell* (2000) 81 Cal.App.4th 96, 103.
[139] See *U.S. v. Montero-Camargo* (9th Cir. 2000) 208 F.3d 1122, 1136; *Nicacio v. INS* (9th Cir. 1986) 797 F.2d 700, 704.
[140] See *People v. Valenzuela* (1994) 28 Cal.App.4th 817, 828; *U.S. v. Mallides* (9th Cir. 1973) 473 F.2d 859, 861, fn.4; *U.S. v. Brown* (7th Cir. 1999) 188 F.3d 860, 865.

Lies and Evasions

When a suspect lies, evades a question, gives conflicting statements or tells an unbelievable story it is ordinarily reasonable to infer that the truth would incriminate him. Consequently, the following are all suspicious circumstances:

MATERIAL LIES: The most incriminating lie is one that pertains to a material issue of guilt.[142] Said the court in *People v. Williams,* "Deliberately false statements to the police about matters that are within a suspect's knowledge and materially relate to his or her guilt or innocence have long been considered cogent evidence of consciousness of guilt, for they suggest there is no honest explanation for incriminating circumstances."[143] In fact, when a suspect lies about a material matter, the jury at his trial may be instructed that such an act may properly be deemed a demonstration of guilt.[144]

LIES ABOUT PERIPHERAL ISSUES: Although less indicative of guilt than a lie about a material issue, lies about peripheral issues, such as the following, may also be viewed as incriminating:

- Suspect lied about his name, address, or DOB.[145]
- Suspect lied about his travel plans, destination, or point of origin.[146]
- Suspect lied that he wasn't carrying ID.[147]
- Suspect lied that he didn't have a key to his trunk.[148]
- Suspect lied that he didn't own a car that was registered to him.[149]
- Suspect lied that he and the murder victim were not married.[150]
- Suspect lied when he said he didn't know his accomplice.[151]

SUSPECT GIVES INCONSISTENT STATEMENT: A suspect who is making up a story while being questioned will frequently give conflicting information, often because he forgot what he said earlier or because he learned that his old story did not fit with the known facts. This is an especially significant circumstance if the conflict pertained to a material issue. For example, in *People v. Memro* the California Supreme Court pointed out that "patently inconsistent statements to such a vital matter as the whereabouts of [the murder victim] near the time he vanished had no discernible innocent meaning and strongly indicated consciousness of guilt."[152]

SUSPECTS GIVE CONFLICTING STORIES: When two or more suspects are being questioned separately, they will often give conflicting stories because they do not know what the other had said. For example, in a stolen property case, *People v. Garcia,* one suspect said the stolen TV he was carrying belonged to some dude, but his companion said it belonged to the suspect. The court said it sounded fishy.[153]

Inconsistencies often frequently occur when officers stop a car and briefly question the occupants separately about where they came from, where they were going and why. Although these inconsistencies will not necessarily establish grounds to arrest or prolong the detention, they may naturally generate some suspicion. For example, in *U.S. v. Guerrero*[154] one of two suspected drug couriers said they had come to Kansas City "to work construction," while the other said they were just visiting for the day. In ruling that the officers had grounds to detain the pair further, the court said that their "differing renditions of their travel plans" was "most important to the overall evaluation."

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[141] *People v. Carrillo* (1995) 37 Cal.App.4th 1662, 1670.
[142] See *People v. Osslo* (1958) 50 Cal.2d 75, 93.
[143] (2000) 79 Cal.App.4th 1157, 1167.
[144] See CALCRIM No. 362 (Spring 2013 ed.).
[145] See *Florida v. Rodriguez* (1984) 469 US 1, 6; *People v. Turner* (1994) 8 Cal.4th 137, 186.
[146] See *People v. Suennen* (1980) 114 Cal.App.3d 192, 199; *People v. Juarez* (1973) 35 Cal.App.3d 631, 635.
[147] See *People v. Daugherty* (1996) 50 Cal.App.4th 275, 286; *People v. Loudermilk* (1987) 195 Cal.App.3d 996, 1005.
[148] See *People v. Hunter* (2005) 133 Cal.App.4th 371, 379, fn.5. ALSO SEE *In re Lennies H.* (2005) 126 Cal.App.4th 1232, 1238.
[149] See *People v. Carrillo* (1995) 37 Cal.App.4th 1662, 1668-71.
[150] See *U.S. v. Raymond Wong* (9th Cir. 2003) 334 F.3d 831.
[151] See *U.S. v. Holzman* (9th Cir. 1989) 871 F.2d 1496, 1503. Also see *U.S. v. Ayon-Meza* (9th Cir. 1999) 177 F.3d 1130, 1133.
[152] (1995) 11 Cal.4th 786, 843. Also see *People v. Gravatt* (1971) 22 Cal.App.3d 133, 137 [suspect claimed at first that item belonged to his brother-in-law, then said he won it in a crap game]; *People v. Shandloff* (1985) 170 Cal.App.3d 372, 382.
[153] (1981) 121 Cal.App.3d 239, 246.
[154] (10th Cir.2007) 472 F.3d 784, 788. Also see *U.S. v. Gill* (8th Cir. 2008) 513 F.3d 836, 844-45.

INDEPENDENT WITNESS GAVE DIFFERENT STORY: Officers might reasonably believe that a suspect was lying if his statement was in material conflict with that of an independent witness who appeared to be believable. Some examples:

- The suspect denied reports of several witnesses who had told officers they had seen him arguing with a woman who was later raped and killed.[155]
- A murder suspect told officers that he left home at 8 A.M. (*after* his employer had been killed), but his mother said he left well *before* then.[156]
- A man suspected of having murdered a woman told officers that the woman had only been missing a week or so, but the woman's mother said her daughter had been missing 3-4 weeks.[157]

UNBELIEVABLE STORIES: Although not a provable lie, the suspect's story may generate suspicion because it didn't make sense, or because it didn't fit with the known facts.[158]

- A suspected drug dealer who was stopped for a traffic violation said he was driving from New Jersey to San Jose to fix a computer server for a company. "Yet if this were true," said the court, "it was surely curious that the San Jose company would be willing to wait for Mr. Ludwig to drive cross-country."[159] Plus there are lots of people in San Jose (of all places) who can fix a server.
- A man who was found inside the locked apartment of a robbery suspect claimed he was not the suspect, but he couldn't explain his presence there.[160]
- A suspected car thief said the car belonged to a friend, but he didn't know his friend's last name.[161]
- When questioned by DEA agents at San Diego International Airport, a woman who was carrying $42,500 in cash inside a bag told them she had obtained the bag from a man named "Samuel," a man she had just met at the airport and whose last name she didn't know.[162]
- A burglary suspect told officers she was waiting for a friend, but she didn't know her friend's name; plus she said her friend would be arriving on a BART train from San Jose, but there are no BART stations in San Jose (at least until 2017).[163]
- A suspected rapist claimed he had been jogging, but he wasn't perspiring or breathing hard, nor did he have a rapid pulse.[164]

AMBIGUOUS ANSWERS: Even though a suspect technically answered the officer's questions, his answers may be suspicious because they were ambiguous or bewildering.[165]

- Suspect "gave vague and evasive answers regarding his identity."[166]
- Suspect gave an "unsatisfactory explanation" for being where he was detained.
- Suspects could not explain what they were doing in a residential area at 1:30 A.M.[167]
- Suspect gave "vague or conflicting answers to simple questions about his itinerary."[168]
- Suspect gave "vague" description of her travel plans and she "could not remember the flight details"

WITHHOLDING INFORMATION: A suspect's act of withholding material information from officers is a suspicious circumstance; e.g., murder suspect withheld information about his relationship with the victim.[169]

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[155] *People v. Davis* (1981) 29 Cal. 3d 814, 823.
[156] *People v. Spears* (1991) 228 Cal.App.3d 1.
[157] *People v. Rogers* (2009) 46 Cal.4th 1136, 1159.
[158] See *People v. Memro* (1995) 11 Cal.4th 786, 843; *In re Richard T.* (1978) 79 Cal.App.3d 382, 388.
[159] *U.S. v. Ludwig* (10th Cir. 2011) 641 F.3d 1243, 1249.
[160] *Hill v. California* (1971) 401 U.S. 797, 803, fn.8.
[161] *People v. Cartwright* (1999) 72 Cal.App.4th 1362, 1364 ["Any experienced officer hearing this frequently used but almost literally incredible tale—provided by a driver who had no identification, no proof of registration, and a car with tabs which Department of Motor Vehicles records showed did not belong to it—would have entertained a robust suspicion the car was stolen."].
[162] *U.S. v. $42,500* (9th Cir. 2002) 283 F.3d 977, 981.
[163] *People v. Harris* (1980) 105 Cal.App.3d 204, 212-13.
[164] *People v. Fields* (1984) 159 Cal.App.3d 555, 564.
[165] See *U.S. v. Holzman* (9th Cir. 1989) 871 F.2d 1496, 1504 [suspect "gave evasive responses to simple questions"].
[166] *People v. Adams* (1985) 175 Cal.App.3d 855, 861.
[167] *People v. Hart* (1999) 74 Cal.App.4th 479, 493.
[168] *U.S. v. Riley* (8th Cir. 2012) 684 F.3d 758, 763. Also see *U.S. v. Torres-Ramos* (6th Cir. 2008) 536 F3 542, 552.
[169] *U.S. v. Wong* (9th Cir, 2003) 334 F.3d 831, 836.

KNOWING TOO MUCH: A favorite of mystery writers for generations, a suspect's act of providing officers with information that could only have been known by the perpetrator is so devastating that scores of fictional murderers, upon realizing their error, have felt compelled to immediately confess. Although he did not immediately do so, the defendant in *People v. Spears* was caught in exactly such a trap.[170] Spears, an employee of a Chili's restaurant in Cupertino, shot and killed the manager in the manager's office shortly before the restaurant was to open for the day. When other employees arrived for work and Spears "discovered" the manager's body, he exclaimed, "He's been shot!" The manager had, in fact, been shot—three times to the head—but the damage to his skull was so extensive that only the killer would have known he had been shot, not bludgeoned. Spears was convicted.

Possession of Evidence

Another classic indication of guilt is that the suspect possessed the fruits or instrumentalities of the crime under investigation. But this one is a little more complicated because there are actually two independent legal issues: (1) Was the evidence "incriminating"? (2) Did the suspect actually "possess" it?

Types of incriminating evidence

There are essentially two types of incriminating evidence that a suspect may possess: contraband and circumstantial evidence of guilt. "Contraband" is anything that is illegal to possess, e.g., stolen property, child pornography, certain drugs, and illegal weapons.[171] Possession of contraband automatically results in probable cause.

The other type of incriminating evidence, circumstantial evidence of guilt, is any evidence in the suspect's possession that tends to—but does not directly—establish probable cause. The following are examples of circumstantial evidence of guilt:

- A suspected burglar possessed burglar tools.[172]
- A suspected drug dealer possessed a "bundle of small plastic baggies,"[173] or a "big stack or wad of bills."[174]
- A murder suspect possessed bailing wire; bailing wire had been used to bind the victims.[175]
- A murder suspect possessed "cut-off panty hose"; officers knew the murderers had worn masks and that cut-off panty hose are often used as masks.[176]
- A man who had solicited the murder of his estranged wife possessed a hand-drawn diagram of his wife's home and lighting system.[177]
- A robbery suspect possessed a handcuff key; the victim had been handcuffed.[178]
- A suspected car thief possessed a car with missing or improperly attached license plates, indications of VIN plate tampering, switched plates, a broken side window, or evidence of ignition tampering.[179]

Types of "possession"

In addition to having probable cause to believe the evidence is incriminating, officers must be able to establish probable cause to believe the suspect "possessed" it. There are types of possession: actual and constructive. Actual possession occurs if the evidence "is in the defendant's immediate possession or control."[180] Examples include evidence in the suspect's pockets or evidence that officers saw him discard or try to hide.[181]

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[170] (1991) 228 Cal.App.3d 1.
[171] See *U.S. v. Harrell* (9th Cir. 2008) 530 F.3d 1051, 1057.
[172] See *People v. Koelzer* (1963) 222 Cal.App.2d 20, 25; *People v. Stokes* (1990) 224 Cal.App.3d 715, 721; *People v. Mack* (1977) 66 Cal.App.3d 839, 859; *People v. Taylor* (1975) 46 Cal.App.3d 513, 518.
[173] *People v. Nonnette* (1990) 221 Cal.App.3d 659, 666.
[174] *People v. Brueckner* (1990) 223 Cal.App.3d 1500, 1505.
[175] *People v. Easley* (1983) 34 Cal.3d 858, 872.
[176] *People v. Hill* (1974) 12 Cal.3d 731, 763.
[177] *People v. Miley* (1984) 158 Cal.App.3d 25, 35-36.
[178] *Horton v. California* (1990) 496 U.S. 128, 130-1, 142.
[179] See *People v. James* (1969) 1 Cal.App.3d 645, 648-49; *People v. Russell* (2000) 81 Cal.App.4th 96, 103.
[180] *In re Daniel G.* (2004) 120 Cal.App.4th 824, 831.
[181] See *People v. Martino* (1985) 166 Cal.App.3d 777, 790; *Frazzini v. Superior Court* (1970) 7 Cal.App.3d 1005, 1016.

In contrast, constructive possession exists if, although officers did not see the suspect physically possess the item, there was sufficient circumstantial evidence that he had sole or joint control over it.[182] In the words of the Court of Appeal:

> Constructive possession means the object is not in the defendant's physical possession, but the defendant knowingly exercises control or the right to control the object.[183]

The question, then, is what constitutes sufficient circumstantial evidence of sole or joint control? The following circumstances are frequently cited by the courts:

CONTRABAND IN SUSPECT'S RESIDENCE: It is usually reasonable to infer that a suspect had control over contraband or other evidence in common areas of his home and in rooms over which he had joint or exclusive control; e.g., the kitchen,[184] in a light fixture,[185] in a bedroom.[186]

CONTRABAND IN A VEHICLE: The driver and all passengers in a vehicle are usually considered to be in control of items to which they had immediate access or which were in plain view; e.g., on the floorboard,[187] behind an armrest,[188] on a tape deck,[189] behind the back seat.[190]

COMPANION IN POSSESSION: When officers have probable cause to believe a person possesses contraband, they may also have probable cause to arrest his companion for possession if there were facts that reasonably indicated they were acting in concert.[191]

INDICIA: A suspect's control over a certain place or thing may be established by the presence of documents or other indicia linking him to the location; e.g., rent receipts, utility bills, driver's license.[192]

Other Relevant Circumstances

Apart from circumstances that are too obvious to require discussion (e.g., confessions, fingerprint match,[193] DNA hit,[194] showup or lineup ID[195]), the following circumstances are frequently cited in establishing probable cause and reasonable suspicion:

SUSPECT'S PHYSICAL CONDITION: The fact that the suspect was injured, dirty, out-of-breath, sweating, or had torn clothing is highly suspicious if officers reasonably believed that the perpetrator would have been in such a condition.[196]

SUSPECT'S RAP SHEET: While it is somewhat significant that the suspect had been arrested or convicted in the past, it is highly significant that the crime was similar to the one under investigation.[197]

GANG CLOTHING: Depending on the nature of the crime, it may be relevant that the suspect was wearing clothing that is associated with a street gang.[198]

ELECTRONIC COMMUNICATION RECORDS: More and more, electronic communications records are providing officers with important information that establishes or helps to establish probable cause. Examples include phone numbers dialed and the length of the calls, cell site contact information (e.g., near scene of the crime when the crime occurred), date and time that a certain computer accessed a certain internet site, the identity of the sender and receiver of an email and when the communication occurred, the IP address assigned to a particular computer.[199] POV

[182] See *Maryland v. Pringle* (2003) 540 U.S. 366, 372; *People v. Montero* (2007) 155 Cal.App.4th 1170, 1176.
[183] *In re Daniel G.* (2004) 120 Cal.App.4th 824, 831.
[184] See *Ker v. California* (1963) 374 U.S. 23, 36-37.
[185] See *People v. Magana* (1979) 95 Cal.App.3d 453, 464.
[186] See *People v. Gabriel* (1986) 188 Cal.App.3d 1261, 1265-66; *Frazzini v. Superior Court* (1979) 7 Cal.App.3d 1005, 1016.
[187] See *In re James M.* (1977) 72 Cal.App.3d 133, 137-38; *People v. Schoennauer* (1980) 103 Cal.App.3d 398, 410.
[188] See *Maryland v. Pringle* (2003) 540 U.S. 366, 372-73.
[189] See *People v. Newman* (1971) 5 Cal.3d 48, 53.
[190] See *Rideout v. Superior Court* (1967) 67 Cal.2d 471, 473-75; *People v. Hill* (1974) 12 Cal.3d 731, 749.
[191] See *People v. Vermouth* (1971) 20 Cal.App.3d 746, 756; *People v. Fourshey* (1974) 38 Cal.App.3d 426, 430.
[192] See *People v. Nicolaus* (1991) 54 Cal.3d 551, 575; *People v. Williams* (1992) 3 Cal.App.4th 1535.
[193] See *People v. Anderson* (1983) 149 Cal.App.3d 1161, 1165.
[194] See *People v. Arevalo* (2014) 225 Cal.App.4th 612; *People v. Nelson* (2008) 43 Cal.4th 1242, 1257-60.
[195] See *People v. Price* (1991) 1 Cal.4th 324, 410.
[196] See *People v. Manis* (1969) 268 Cal.App.2d 653, 661; *People v. Kaurish* (1990) 52 Cal.3d 648, 676.
[197] See *Brinegar v. United States* (1949) 338 U.S. 160, 172; *People v. Lim* (2000) 85 Cal.App.4th 1289, 1298.
[198] See *U.S. v. Guardado* (10th Cir. 2012) 699 F.3d 1220, 1223.
[199] See *People v. Andrino* (1989) 210 Cal.App.3d 1395, 1401.