POINT of VIEW

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Probable Cause to Arrest

The number of felony and misdemeanor arrests in 2019 was just over ten 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 single defect in the concept of probable cause: Nobody knows what it means. And that includes the members of the United States Supreme Court who, having given up trying to define it, simply say it's an "elusive" and "somewhat abstract concept."[2]

This imprecision is not, however, a problem that needs to be (or can) be corrected. This is because the existence of probable cause to arrest is ultimately a conclusion drawn by officers, based on an analysis of information that is usually disordered, incomplete, or conflicting. Plus the information often comes from sources whose reliability is unknown or dubious. So, unless probable cause happens to be an easy call, officers need to know how the courts determine the nature and significance of the various circumstances they cite.

As we discuss in this article, those circumstances can be helpfully divided into nine categories: description similarities, suspect's location, his reaction to seeing officers, suspicious conduct or activities, nervousness, lies and evasions, and possession of evidence. But before we discuss these factors, we will review the basics.

General Principles

PROBABLE CAUSE V. REASONABLE SUSPICION: While probable cause requires a "fair probability" or "substantial chance" that the suspect committed the crime under investigation, reasonable suspicion to detain or pat search may be based on information that is somewhat less compelling.[3]

POSSIBILITY OF AN INNOCENT EXPLANATION: It is immaterial that there might have been an innocent explanation for some or all of the circumstances upon which probable cause was based. As the California Supreme Court observed, "What is required is not the absence of innocent explanation, but the existence of specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[4]

CONSIDERING EXCULPATORY FACTS: If probable cause exists, officers are not required to conduct an additional investigation to determine if there were other facts that might undermine it.[5] Still, officers are "not free to disregard plainly exculpatory evidence, even if substantial inculpatory evidence (standing by itself) suggests that probable cause exists."[6]

ARREST "FOR INVESTIGATION": Despite what happens on TV, officers cannot arrest people "for investigation" of a crime or "on suspicion" in hopes that he will confess during interrogation or that the arrest will lead to incriminating information. This is because probable cause to arrest requires a reasonable belief that the suspect committed a crime—not that he might have done so. As the Supreme Court explained, "It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge."[7]

MISTAKES OF FACT: If probable cause was based in whole or in part on information that was subsequently determined to be false, the information may nevertheless be considered in determining the

[1] FBI, *Crime in the United States 2019*.
[2] *United States v. Cortez* (1981) 499 U.S. 411, 417 ["elusive"]; *United States v. Arvizu* (2002) 534 U.S. 255, 274 ["somewhat abstract"].
[3] See *Arizona v. Johnson* (2009) 555 U.S. 323, 330.
[4] *People v. Glaser* (1995) 11 Cal.4th 354, 373. Also see *District of Columbia v. Wesby* (2018) __ U.S. __ [138 S.Ct. 577, 588] ["probable cause does not require officers to rule out a suspect's innocent explanation for suspicious facts"].
[5] See *Hamilton v. City of San Diego* (1990) 217 Cal.App.3d 838, 845; *Gilmore v. City of Minneapolis* (8th Cir. 2016) 837 F.3d 827, 833 ["an officer need not conduct a 'mini-trial' before effectuating an arrest although he cannot avoid minimal further investigation if it would have exonerated the suspect"].
[6] *Goodwin v. Conway* (3rd Cir. 2016) 836 F.3d 321, 328. Also see *U.S. v. Pabon* (2nd Cir. 2017) 871 F.3d 164, 175.
[7] *Gerstein v. Pugh* (1975) 420 U.S. 103, 120, fn.2.

existence of probable cause if the officers reasonably believed it was true. Thus, in discussing this issue, the Supreme Court observed, "What is generally demanded of the many factual determinations that must regularly be made by agents of the government is not that they always be correct, but that they always reasonable."[8]

TRAINING AND EXPERIENCE: The courts will consider an officer's opinion as to the meaning or significance of the facts if the opinion appeared to be reasonable. As the Supreme Court explained, "The evidence must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."[9]

THE "OFFICIAL CHANNELS" RULE: Officers may arrest or detain a suspect based solely or mainly on information that was transmitted to the arresting officer via "official channels." This is because, as the Supreme Court pointed out, "effective law enforcement cannot be conducted unless police officers can act on directions and information transmitted by one officer to another and that officers, who must often act swiftly, cannot be expected to cross-examine their fellow officers about the foundation for the transmitted information."[10]

MULTIPLE INCRIMINATING EVIDENCE: The odds of having probable cause to arrest increase dramatically as the number of independent incriminating circumstances increase. This is because it tends to demonstrate it was not just a coincidence.[11] As the Court of Appeal observed, "When such remarkable coincidences coalesce, they are sufficient to warrant a prudent man in believing that the defendant has committed an offense." To put it another way, when it comes to probable cause, "the whole is greater than the sum of its parts."[12] We will now examine those parts.

Description Similarities

When the perpetrator of a crime was a stranger to the victim or a witness, probable cause will frequently be based, at least in part, on physical similarities between the perpetrator and the suspect, their clothing, and/or vehicles. And, of course, any similarity becomes much more significant if there was something distinct or unusual about it.[13]

PHYSICAL APPEARANCE: Each match or notable similarity between the perpetrator and the suspect is, of course, relevant; i.e., height, weight, build, age, race, hair color, facial hair.[14] But a "mere resemblance" to the perpetrator, or a resemblance to a vague physical description, will not suffice.[15]

CLOTHING: Similar or matching clothing or other attire is often an important factor, especially if the crime occurred so recently that it was unlikely that the perpetrator had time to change clothes.[16] And, as noted earlier, unusual or unique similarities are apt to be especially significant; e.g., red 49er baseball cap worn backwards,[17] bandage on left hand,[18] white straw hat.[19]

VEHICLE SIMILARITIES: If a vehicle was used in the commission of the crime, the physical similarities between it and the suspect's vehicle are often crucial. Some examples:

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[8] *Illinois v. Rodriguez* (1990) 497 U.S. 177, 185. Also see *U.S. v. Mariscal* (9th Cir. 2002) 285 F.3d 1127, 1131.
[9] *Illinois v. Gates* (1983) 462 U.S. 213, 232.
[10] *U.S. v. Hensley* (1985) 469 U.S. 221, 231.
[11] *Illinois v. Gates* (1983) 462 U.S. 213, 222, fn.7.
[12] *District of Columbia v. Wesby* (2018) __ U.S. __ [138 S.Ct. 577, 588]. Also see *Ker v. California* (1963) 374 U.S. 23, 36 ["To say that this coincidence of information was sufficient to support a reasonable belief of the officers that Ker was illegally in possession of marijuana is to indulge in understatement."].
[13] See *In re Brian A.* (1985) 173 Cal.App.3d 1168, 1174.
[14] See *People v. Lomax* (2010) 49 Cal.4th 530, 565; *U.S. v. Brooks* (9th Cir. 2010) 610 F.3d 1186, 1193.
[15] *Grant v. Long Beach* (9th Cir. 2002) 315 F.3d 1081, 1088. Also see *People v. Bates* (2013) 222 Cal.App.4th 60, 67 ["the race of an occupant, without more, does not satisfy the detention standard"]; *In re Carlos M.* (1990) 220 Cal.App.3d 372, 381-82 ["A vague description does not, standing alone, provide reasonable grounds to detain all persons falling within that description."]; *In re Dung T.* (1984) 160 Cal.App.3d 697, 713 ["The police had no detailed descriptions of the robbers other than their ages and nationalities."].
[16] See *People v. Carpenter* (1997) 15 Cal.4th 312, 364; *People v. Little* (2012) 206 Cal.App.4th 1364, 1370.
[17] *People v. Soun* (1995) 34 Cal.App.4th 1499, 1524-25.
[18] *People v. Joines* (1970) 11 Cal.App.3d 259, 264.
[19] *People v. Adams* (1985) 175 Cal.App.3d 855, 859, 861.

- Corresponding or similar license plate numbers.[20]
- A "cream, vinyl top over a cream colored vehicle."[21]
- A mag wheel on the right side.[22]
- Both vehicles were light colored compact station wagons.[23]
- Both vehicles were quite old.[24]

In many cases, there will be a discrepancy in the descriptions of the two vehicles. This is not surprising because "a witness observing a getaway vehicle may see some, but not all, letters and numbers" and errors "may be due to the excitement of the moment, failing eyesight, insufficient lighting, obscured license numbers, or some other factor."[25] So, unless the discrepancy was so significant that it undermined the validity of the witness's description, it is not apt to be a factor.[26]

The following are examples of discrepancies that, in light of the totality of circumstances, were not significant:

- Yellow 1959 Cadillac, partial license plate number XQC was described as a yellow 1958 or 1959 Cadillac with partial plate of OCX.[27]
- The license plate was 107AOQ, not 127AOQ.[28]
- Two-door car was described as a four-door.[29]
- White 1961 Chevrolet with four occupants was described as a white 1962 Chevrolet with three occupants.[30]
- A black-over-gold Cadillac was described as a light brown vehicle, possibly a Chevrolet.[31]

CORRESPONDING NUMBER OF PERPETRATORS AND SUSPECTS: If there were multiple perpetrators, and if the crime had just occurred, it is often significant that the number of suspects corresponded with the number of perpetrators. A discrepancy in the numbers may, however, be insignificant because "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."[32]

Suspect's Location

Probable cause to arrest is often based in part on the suspect's presence near a crime scene, on a logical escape route, or in a high-crime area. And this circumstance is increasingly important as officers are often able to pinpoint a suspect's location at a specific time via cell-site triangulation and GPS. (A example is found in the Recent Case report on *U.S. v. James* on page 20.)

Still, as we will now discuss, this circumstance will have little weight unless the arresting officer can provide a logical explanation—based on specific facts—as to why the suspect's whereabouts was suspicious.

NEAR CRIME SCENE: The relevance of a suspect's presence near the scene of a crime depends largely on (1) whether it was reasonable to believe that the suspect was present while the crime occurred or just before or after, and (2) whether there was circumstantial evidence of a link between the suspect to the crime. The following are examples of such circumstantial evidence:

- The suspect was spotted about ten minutes after an afternoon burglary occurred, and (1) he was the only pedestrian in the vicinity of a burglary, and (2) his explanation of why he was in the area was unbelievable.[33]

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[20] See *People v. Soun* (1995) 34 Cal.App.4th 1499, 1522; *People v. Watson* (1970) 12 Cal.App.3d 130, 134-135.
[21] *People v. Orozco* (1981) 114 Cal.App.3d 435, 440.
[22] *People v. Brooks* (1975) 51 Cal.App.3d 602, 606-7 [physical description of robber and getaway car substantially matched].
[23] *People v. Chandler* (1968) 262 Cal.App.2d 350 354.
[24] *People v. Flores* (1974) 12 Cal.3d 85.
[25] *U.S. v. Marxen* (6th Cir. 2005) 410 F.3d 326, 331, fn.5. Also see *U.S. v. Abdus-Price* (D.C. Cir 2008) 518 F.3d 926, 931
[26] *Williams v Superior Court* (1985) 168 Cal.App.3d 349, 361 ["officers should not be held to absolute accuracy of detail"].
[27] *People v. Watson* (1970) 12 Cal.App.3d 130, 134-35 ["OCX was the somewhat similar XQC"].
[28] *People v. Weston* (1981) 114 Cal.App.3d 764, 775, fn.5.
[29] *People v. Brooks* (1975) 51 Cal.App.3d 602, 605.
[30] *People v. Smith* (1970) 4 Cal.App.3d 41, 48.
[31] *People v. Rico* (1979) 97 Cal.App.3d 124, 132 ["both a Chevrolet and a Cadillac are large cars and General Motors' products and one might be mistaken for the other."].
[32] *People v. Coffee* (1980 107 Cal.App.3d 28, 33-34.
[33] *People v. Juarez* (1973) 35 Cal.App.3d 631, 635.

- A burglary in progress call at 3 A.M. Although no suspect or vehicle description was given, an officer stopped a car leaving the area because (1) the stop occurred less than two minutes after the initial broadcast, and (2) there were no other cars or pedestrians in the area.[34]
- Officers who had heard gunshots from less than a block away stopped a car leaving the area at a "relatively fast pace."[35]
- At about 12:45 A.M., officers detained a man two blocks from the scene of a murder that had just occurred, and the man matched the killer's description by age, race, height, build, and jacket.[36]

In shots-fired cases, it is relevant that the suspect was in the area soon after a ShotSpotter alert had been transmitted. While this circumstance will not warrant a detention or arrest, any additional fact may suffice; e.g., "accounts of cars leaving the scene and an individual running away from the shooting."[37]

ON A LOGICAL ESCAPE ROUTE: Officers may be able to predict a perpetrator's escape route based on their training, experience, and knowledge of traffic patterns in the area. If so, the suspect's presence on that route would be relevant if his distance from the crime scene and the elapsed time were consistent with flight by the perpetrator. Some examples:

- At about 4 A.M. two men robbed a gas station in Long Beach. 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."[38]
- At about 3 A.M., within minutes after a gas station was robbed in Santa Ana, an officer spotted a car "in the immediate vicinity"; it was the only car he saw and it was "traveling away from the scene of the crime on a likely escape route."[39]
- Shortly after a gang-related drive-by murder occurred, LAPD officers located the shooters' vehicle abandoned; they had reason to believe that the occupants had fled on foot. An officer assigned to a gang unit figured that the shooters would be returning 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.[40]

IN "HIGH CRIME" AREA: The term "high crime area" is commonly used to describe a neighborhood or beat in which criminal activity is prevalent. But because most people who live in or visit these areas do not commit crimes, a suspect's mere presence there is virtually irrelevant.[41] As the Court of Appeal observed in a drug case, "It is true, unfortunately, 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."[42]

Still, a suspect's presence in a high-crime area may become significant if officers or witnesses saw him engaging in conduct that was associated with the type of criminal activity that was prevalent.[43] As the court explained in *People v. Limon*, "While a person cannot be detained for mere presence in a high crime area without more, this setting is a factor that can lend meaning to the person's behavior."[44]

The following are examples of conduct that became suspicious in light of the nature of the crimes that were occurring in the area:

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[34] *People v. Conway* (1994) 25 Cal.App.4th 385, 390.
[35] *U.S. v. Bolden* (5th Cir. 2007) 508 F.3d 204, 206.
[36] *People v. Atmore* (1970) 13 Cal.App.3d 244, 246.
[37] *U.S. v Rickmon* (7th Cir. 2020) 952 F.3d 876, 882-83.
[38] *People v. Joines* (1970) 11 Cal.App.3d 259, 262-65.
[39] *People v. Anthony* (1970) 7 Cal.App.3d 751, 761.
[40] *People v. Superior Court (Price)* (1982) 137 Cal.App.3d 90, 96.
[41] *Maryland v. Buie* (1990) 494 U.S. 325, 334, fn.2; *Brown v. Texas* (1979) 443 U.S. 47, 52.
[42] *People v. Holloway* (1985) 176 Cal.App.3d 150, 155.
[43] See *People v. Limon* (1993) 17 Cal.App.4th 524, 532; *People v. Manis* (1969) 268 Cal.App.2d 653, 660.
[44] (1993) 17 Cal.App.4th 524, 532. Also see *People v. Garcia* (1981) 121 Cal.App.3d 239, 245.

- Late at night in an area with a high incidence of burglaries in which TV sets were stolen, officers saw three people parked in front of a darkened house, and there was an "electrical cord hanging from the trunk."[45]
- Because of the "lateness of the hour, the frequency of burglaries and thefts from vehicles in the area," the suspects' actions of driving a van in a circuitous route through the neighborhood" reasonably indicated to the officers that the occupants were "casing."[46]
- The location "was a specific building known to be the subject of an active territorial dispute between two gangs."[47]
- At 2:30 A.M., officers saw "three people in a car driving in a high crime area" and "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."[48]

In contrast, in *People v. Walker*[49] an officer testified that he had detained the suspect in an "open market for narcotic sales." But because the officer was looking for the perpetrator of a sexual battery, his presence in a high-drug area was not very important.

Suspect's Reaction to Seeing Officers

Not surprisingly, most criminals tend to get jumpy when they see an officer or a patrol car. So, when officers see someone reacting in this manner, they will often view it as a suspicious circumstance. And so do the courts. As the California Court of Appeal observed in *People v. Souza*, "But some reactions to police can be telltale. These reactions may suggest consciousness of guilt and may entitle police to investigate further."[50]

Still, the significance of this circumstance will depend on whether officers can explain (1) that there was reason to believe that the reaction was, in fact, a response to seeing an officer (not everyday jumpiness; and (2) that the reaction was sufficiently suspicious.

Proving recognition

As noted, officers must have had reason to believe the suspect's reaction was, in fact, a response to seeing them. As the Court of Appeal observed, "Absent a showing the citizen should reasonably know that those who are approaching are officers, no reasonable inference of criminal conduct may be drawn."[51]

In some cases, proof of recognition is based on direct evidence, as when one suspect yells to another, "Let's get out of here,"[52] "Run, it's the narcs,"[53] or "Jesus Christ, the cops."[54] In the absence of such a comical reaction, officers must rely on circumstantial evidence; e.g., marked police car, wearing a uniform.

In most cases, this issue arises when officers were in an undercover or unmarked car. For example, in *People v. Huntsman*[55] the court ruled that the defendant's flight from officers was not significant because they "were in plain clothes and were driving an unmarked car at night." Said the court, "The unmarked car served its intended purpose of disguising the law enforcement identifies of its occupants."

What about "semi-marked" cars that display some equipment or markings that most people—especially crooks—can spot in an instant? One court said these cars are "about an inconspicuous as three bull elephants in a backyard swimming pool."[56] Thus, in *U.S. v. Nash*[57] the court ruled that an officer's semi-marked car "clearly was identifiable as a police car. It was a dark blue Dodge equipped with several antennas and police lights on the rear shelf."

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[45] *People v. Schoennauer* (1980) 103 Cal.App.3d 398, 407.
[46] *People v. Remiro* (1979) 89 Cal.App.3d 809, 828.
[47] *U.S. v. Dortch* (8th Cir. 2017) 868 F.3d 674, 680.
[48] *U.S. v. Rice* (10th Cir. 2007) 483 F.3d 1079.
[49](2012) 210 Cal.App.4th 165.
[50] *People v. Flores* (2021) 60 Cal.App.5th 978, 981.
[51] *People v. Huntsman* (1984) 152 Cal.App.3d 1073, 1091.
[52] *People v. Wigginton* (1973) 35 Cal.App.3d 732, 736.
[53] *Pierson v. Superior Court* (1970) 8 Cal.App.3d 510, 516.
[54] *People v. Bigham* (1975) 49 Cal.App.3d 73, 78.
[55] (1984) 152 Cal.App.3d 1073, 1091.
[56] *Flores v. Superior Court* (1971) 17 Cal.App.3d 219, 224.
[57](7th Cir. 1989) 876 F.2d 1359, 1360.

Suspicious reactions

Assuming that officers reasonably believed that the suspect had recognized them, the significance of his reaction will depend on the extent to which it indicated alarm or fear. The following are fairly common:

FLIGHT: To run from officers is one of the strongest non-verbal admissions of guilt a suspect can make. "Headlong flight," said the Supreme Court, "is the consummate act of evasion; it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such."[58] Still, the Court has ruled that flight alone will not justify a detention or arrest. Instead, something more is required—and this requirement has become known as "flight plus."[59]

As the following examples demonstrate, the suspicious circumstances that will satisfy the "plus" requirement may consist of ordinary circumstantial evidence:

- Narcotics officers in an area known for "heavy narcotics trafficking" saw a man holding an opaque bag. The man looked in the officers' direction and immediately ran.[60]
- Late at night in a high crime area, the suspect was wearing gang colors, and when he looked in the officers' direction, he grabbed his waistband as if to "conceal some type of evidence or retrieve a weapon."[61]
- Two suspects were walking down a street at 3:30 A.M., and they were carrying backpacks "stuffed with [unknown] objects."[62]
- While conducting surveillance on a stolen Porsche, an officer saw a known car burglar walk up to the driver's side and reach down "as if to open the door." When the officer started walking toward him, the man "turned tail and ran."[63]

Also note that if officers had grounds to detain the suspect, his flight might convert their reasonable suspicion into probable cause, or provide grounds to arrest for obstructing in violation of Penal Code section 148.[64]

HIDING FROM OFFICERS: Like flight, a suspect's attempt to hide from officers—including "slouching, crouching, or any other arguably evasive movement"[65]—is a suspicious circumstance. Some examples:

- When an officer spotlighted a parked car, "two people in the front seat immediately bent down toward the floorboard."[66]
- At 10 P.M., two officers saw the suspect standing behind a car; when he saw them, he "goes around and ducks behind a car.[67]
- 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."[68]
- When officers spotlighted a car full of teenagers at 3:30 A.M., one of them "ducked down in the front seat and put his arm up over his head bringing his jacket with it trying to shield himself from the view of the officers."[69]

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[58] *Illinois v. Wardlow* (2000) 528 U.S. 119, 124.
[59] *Illinois v. Wardlow* (2000) 528 U.S. 119, 124. Also see *People v. Souza* (1994) 9 Cal.4th 224, 235-36.
[60] *Illinois v. Wardlow* (2000) 528 U.S. 119.
[61] *U.S. v. Guardado* (10th Cir. 2012) 699 F.3d 1220, 1225.
[62] *Crofoot v. Superior Court* (1981) 121 Cal.App.3d 717, 724.
[63] *People v. Superior Court (Quinn)* (1978) 83 Cal.App.3d 609, 615.
[64] See *Sibron v. New York* (1968) 392 U.S. 40, 66. Also see *People v. Allen* (1980) 109 Cal.App.3d 981, 987 ["The actions of appellant (running and hiding) caused a delay in the performance of Officer Barron's duty."]; *People v. Johnson* (1991) 231 Cal.App.3d 1, 13, fn.2 ["Given their right to forcibly detain, California precedent arguably would have allowed the officers to arrest for flight which unlawfully delayed the performance of their duties."].
[65] *U.S. v. Woodrum* (1st Cir. 2000) 202 F.3d 1, 7. Also see *Illinois v. Wardlow* (2000) 528 U.S. 119, 124 ["evasive behavior" is a "pertinent factor in determining reasonable suspicion"].
[66] *People v. Souza* (1994) 9 Cal.4th 224, 240. Also see *People v. Nonnette* (1990) 221 Cal.App.3d 659, 668.
[67] *People v. Flores* (2021) 60 Cal.App.5th 978, 986.
[68] *In re Michael S.* (1983) 141 Cal.App.3d 814, 816.
[69] *In re Jonathan M.* (1981) 117 Cal.App.3d 530, 535.

NERVOUSNESS: Although a suspect's nervousness when contacted or detained is relevant factor,[70] its significance usually depends on whether it was extreme or unusual; e.g., the suspect's "neck started to visibly throb,"[71] "visibly elevated heart rate, shallow breathing, and repetitive gesticulations, such as wiping his face and scratching his head,"[72] "his hands were shaking, his voice was cracking, he could not sit still, and his heart was beating so fast that [the officer] was able to see his chest jerk."[73]

In some cases, officers have inferred that a suspect was unusually nervous because he did not make eye contact with officers. While such a reaction is not irrelevant,[74] it is seldom significant.

FURTIVE GESTURES: The term "furtive gesture" refers to a movement of the suspect's hands or arms (and sometimes feet) that reasonably appeared to have been made in an attempt to hide, conceal, or discard something. While a furtive gesture is not a strong factor, it may become one if there were other indications that the suspect possessed a weapon or contraband. The following are some examples:

- Two men involved in a hand-to-hand exchange suddenly put their hands in their pocket.[75]
- Upon seeing the officers, a suspected drug seller made a quick "hand-to-mouth movement."[76]
- When officers ordered the suspect to put his hands outside the car window, he "reached back inside the car toward his waistband."[77]
- A passenger in a car stopped for a traffic violation "lifted himself up from the seat with both arms in his rear portion of his body behind his back, both arms went up and down rapidly."[78]
- During a car stop, the suspect kept his left hand hidden from the officer.[79]

Suspicious Activity

Officers sometimes see people doing things that, while not illegal, are somewhat suspicious. Although this is a relevant circumstance, the courts will not uphold an arrest or detention merely because the suspect's actions seemed "suspicious."[80] Instead, officers must explain exactly what the suspect did and why it appeared significant.[81]

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 the context of immediately preceding gunshots, it is highly suspicious."[82]

In addition to obviously suspicious activity, the following activities—which are somewhat ambiguous—are frequently noted by the courts, although they will seldom warrant a detention:

LATE NIGHT ACTIVITY: It is relevant that the suspicious activity occurred late at night or early in the morning if the activity was associated with crimes that typically occur when there are few potential witnesses and/or more opportunities to commit crimes; e.g., robberies, commercial burglaries, car burglaries.

CASING: Activities that are consistent with casing a location for a crime (e.g., burglary, robbery) will easily satisfy the "suspicious conduct" requirement. For example, in the landmark case of *Terry v. Ohio*,[83] an officer in Cleveland started watching two men in a shopping district who would peer into store windows, then confer. And they did this five of six

[70] See *Illinois v. Wardlow* (2000) 528 U.S. 119, 124 ["nervous, evasive behavior is a pertinent factor"].
[71] *People v. Rogers* (2009) 46 Cal.4th 1136, 1159.
[72] *U.S. v. Riley* (8th Cir. 2012) 684 F.3d 758, 763.
[73] *U.S. v. Williams* (10th Cir. 2005) 403 F.3d 1203, 1205.
[74] See *U.S. v. Montero-Camargo* (9th Cir. 2000) 208 F.3d 1122, 1136; *U.S. v. Andrade* (1st Cir. 2008) 551 F.3d 103, 107.
[75] *People v. Mims* (1992) 9 Cal.App.4th 1244, 1246.
[76] *People v. Johnson* (1991) 231 Cal.App.3d 1, 12.
[77] *U.S. v. Price* (D.C. Cir. 2005) 409 F.3d 436, 442.
[78] *People v. Clayton* (1970) 13 Cal.App.3d 335.
[79] *People v. Butler* (2003) 111 Cal.App.4th 150.
[80] See *Brown v. Texas* (1979) 443 U.S. 47, 52
[81] See *Brown v. Texas* (1979) 443 U.S. 47, 52
[82] *People v. Juarez* (1973) 35 Cal.App.3d 631, 636. Also see *Illinois v. Gates* (1983) 462 U.S. 213, 243, fn.13.
[83] (1968) 392 U.S. 1. Also see *U.S. v. Howard* (7th Cir. 2018) 883 F.3d 703, 708.

times. Having watched this for about ten minutes, the officer "suspected the two men of casing a job, a stick up." So he detained them and this resulted in the discovery of two guns. In ruling the suspect's conduct warranted a detention, the Court said:

> There is nothing unusual in two men standing together on a street corner, perhaps waiting for someone. Nor is there anything suspicious about people in such circumstances strolling up and down the street, singly or in pairs. But the story is quite different where, as here, two men hover about a street corner for an extended period of time, at the end of which it becomes apparent that they are not waiting for anyone or anything.

FAILURE TO STOP PROMPTLY: An excessive delay in stopping when lit up may indicate an attempt to buy time to hide or retrieve a weapon or contraband, or to decide whether to flee. For example, in *U.S. v. Hunnicut*, the court ruled that an officer who had stopped a possible DUI developed grounds to extend the detention to investigate possible drug trafficking because the driver "failed to stop promptly, which led the officer to wonder whether the occupants were stuffing things under the seats; and after the stop, the passengers repeatedly moved back and forth and leaned over."[84]

Similarly, in *U.S. v. Mason*,[85] the Fourth Circuit noted that the defendant "did not pull over promptly" but instead "engaged in a conversation with the passenger which indicated "they were deliberating on whether to comply with the blue lights or to flee."

EXCESSIVE ALERTNESS: Although there is nothing inherently suspicious about a person who is alert to his surroundings, excessive alertness is also characteristic of vigilant or frightened criminals. For example, the Court of Appeal observed that "those involved in the narcotics trade are a skittish group—literally hunted animals to whom everyone is an enemy until proven to the contrary.[86]

COUNTERSURVEILLANCE: Another common activity of vigilant criminals is countersurveillance, which generally consists of tactics that (1) make it difficult for officers to follow them; or (2) force officers to engage in conspicuous surveillance.[87] Here are some examples:

- The suspect would "drive slowly, then rapidly increase his speed, make U-turns in the middle of streets, slow down at green lights, and then accelerate through intersections when the lights turned yellow."[88]
- The suspect "pulled to the curb, allowing a surveillance unit to pass her vehicle. She drove to a residence after first going past it and making a U-turn."[89]
- The suspect "drove about the town, up and down side streets, making numerous U-turns, stopping, backing up, and finally arriving at the Ganesha Street property."[90]

TANDEM OR ERRATIC DRIVING: Depending on the nature of the crime under investigation, erratic driving or driving in tandem with another vehicle "may be indicative of criminal goings-on"; e.g., transporting drugs.[91]

HAND-TO-HAND EXCHANGES: Hand-to-hand exchanges in public places are common occurrences and are therefore not, in and of themselves, suspicious. But they can become suspicious in light of additional circumstances that were consistent with drug sales. Thus, the Court of Appeal pointed out:

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[84] (10th Cir. 1998) 135 F.3d 1345, 1349. Also see *U.S. v. Ludwig* (10th Cir. 2011) 641 F.3d 1243, 1248.
[85] (4th Cir. 2010) 628 F.3d 123.
[86] *Flores v. Superior Court* (1971) 17 Cal.App.3d 219, 223. Also see *People v. Green* (1994) 25 Cal.App.4th 1107, 1109, 1111
[87] See *People v. $497,590* (1997) 58 Cal.App.4th 145, 148; *People v. McNabb* (1991) 228 Cal.App.3d 462, 466 ["the conduct of suspect 3 was consistent with countersurveillance to make sure the police were not watching"]; *People v. Carvajal* (1988) 202 Cal.App.3d 487, 496 [defendant "drove his truck in a highly unusual, apparently evasive manner immediately following the retrieval of several large, heavy boxes from a storage facility"]; *U.S. v. Alaimalo* (9th Cir. 2002) 313 F.3d 1188, 1193 [defendant drove "by a circuitous route" which is "typical behavior of drug dealers who wish not to be followed"].
[88] *U.S. v. Hoyos* (9th Cir. 1989) 892 F.2d 1387, 1390.
[89] *People v. Rodriguez-Fernandez* (1991) 235 Cal.App.3d 543, 546.
[90] *People v. Campbell* (1981) 118 Cal.App.3d 588, 592.
[91] *U.S. v. Del Vizo* (9th Cir. 1990) 918 F.2d 821, 826. Also see *United States v. Sharpe* (1985) 470 U.S. 675, 682, fn.3.

> To the trained officer seeing someone pass a transparent bag containing a leafy substance to another and receive money in exchange is to be judged in the environment in which the transaction took place. Seeing that transaction take place in an area of known narcotics activity is a suspicious circumstance. Seeing the same transaction take place on the floor of a Chicago Grain Exchange would probably (and hopefully) be meaningless.[92]

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 be incriminating.

MATERIAL LIES: The most incriminating lie is one that pertains to a material issue of guilt. As the Court of Appeal observed, "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."[93]

LIES PERTAINING TO PERIPHERAL MATTERS: Although less incriminating than material lies, a false statement about a peripheral matter is a relevant circumstance; e.g., false DOB, address. Thus, in *People v. Burnett* the court said "the fact that the purported owner was using a name different from the name on the registration was another circumstances, not necessarily evidence of crime, but a proper subject of further inquiry or investigation.[95]

INCONSISTENT STATEMENTS: A suspect who is making up a story while being questioned will frequently give inconsistent or conflicting information, often because he forgot what he said earlier, or because he learned that his initial story did not fit with provable facts. Thus, in a murder case the California Supreme Court observed that a suspect's "patently inconsistent statements on 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."[96] Similarly, in *People v. Gravatt* the court ruled that officers had probable cause to arrest the defendant for possession of a stolen TV in the trunk of his car mainly because he initially claimed that the set belonged to his brother-in-law, but then said he won it in a crap game."[97]

TWO SUSPECTS, TWO STORIES: When two or more suspects are questioned separately, they will often give conflicting statements because they don't know what the other said. For example, in another stolen-TV-in-a-trunk case, the defendant said the TV belonged to a guy who wanted him to sell it, but his accomplice said it belonged to the defendant. The court said the whole thing sounded fishy.[98]

Inconsistent statements often happen when officers question the occupants of a stopped vehicle about where they are going and the purpose of the trip. Although these inconsistencies are not highly incriminating, they logically raise a suspicion that the trip involved something shady. For example, in *U.S. v. Guerrero* one of two suspected drug couriers said they were heading to Kansas City "to work construction," while the other said they were just visiting for the day. In ruling that the officers had sufficient grounds to detain the suspects further to resolve the issue, the court said that "differing renditions of their travel plans" was "most important to the overall evaluation."[99]

UNBELIEVABLE TALES: Although not a provable lie, the suspect's story might be suspicious because it didn't make sense, was implausible, or didn't fit the known facts. For example, in *People v. Cartwright* a suspected car thief told officers that the car belonged to someone else, but he did not know the person's last name. Said the court, "Any experienced officer

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[92] *Flores v. Superior Court* (1971) 17 Cal.App.3d 19, 223.
[93] *People v. Williams* (2000) 79 Cal.App.4th 1157, 1167. Also see *People v. Carrillo* (1995) 37 Cal.App.4th 1662, 1670.
[94] See *Florida v. Rodriguez* (1984) 469 U.S. 1, 6; *People v. Superior Court (Price)* (1982) 137 Cal.App.3d 90, 97.
[95] (1980) 107 Cal.App.3d 795, 798. Also see *U.S. v. Brown* (1st Cir. 2007) 500 F.3d 48, 57.
[96] *People v. Memro* (1995) 11 Cal.4th 786, 843.
[97] (1971) 22 Cal.App.3d 133, 137. Also see *People v. Westerfield* (2019) 6 C5 632, 658.
[98] *People v. Garcia* (1981) 121 Cal.App.3d 239, 246.
[99] (10th Cir. 2007) 472 F.3d 784, 788.

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 DMV records showed did not belong to it—would have entertained a robust suspicion the car was stolen."[100] Some other examples:

- During a traffic stop, a suspected drug trafficker said he was driving from New Jersey to San Jose to fix a computer server. It is "surely curious," said the court, that a company located in the heart of Silicon Valley was unable to find someone in the area who could fix it.[101]
- A burglary suspect told El Cerrito police that she was waiting for a friend, but she did not know her friend's name. She also said her friend would be arriving on BART from San Jose, but there were no BART stations in San Jose at that time.[102]
- An officer suspected that the fishing equipment a man was carrying was stolen. The officer asked him if his equipment was "any good." The man said, "No, they're just cheap old things." The officer, an avid fisherman, knew the equipment was top quality and very expensive.[103]
- 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," but that she did not know his last name, and she had just met him at the airport.[104]

Possession of Evidence

Probable cause to arrest is often based, at least in part, on the discovery of items in the suspect's possession that were used in the commission of the crime under investigation or which are commonly used in such crimes. Some examples:

- Inside the van of a man suspected of having just committed a cat burglary, officers found a furniture dolly, a stereo, a knife, screwdriver, flashlight, and gloves.[105]
- Murder suspect possessed bailing wire; bailing wire had been used to bind the victims.[106]
- A man who had solicited the murder of his estranged wife possessed a hand-drawn diagram of his wife's home and lighting system.[107]

Miscellaneous Circumstances

In addition to circumstances that are fairly obvious (e.g., witness identification, fingerprint or DNA match), the following are often important:

SUSPECT'S RAP SHEET: A suspect's criminal history is especially significant if he had been arrested or convicted of a crime that was similar to the one under investigation.[108]

SUSPECT'S PHYSICAL CONDITION: The fact that the suspect was injured, dirty, out-of-breath, sweating, or had soiled or torn clothing is suspicious if officers reasonably believed that the perpetrator would have been in such a condition.[109]

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 devastating. For example, in *People v. Spears*[110] the defendant, an employee of a Chili's restaurant in Cupertino, killed the manager shortly before the restaurant opened for business. When other employees arrived for work, he told them, "Dennis is in the office, 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 could have known he had been shot, not bludgeoned. Spears was convicted. POV

[100] *People v. Cartwright* (1999) 72 Cal.App.4th 1362, 1364.
[101] *U.S. v. Ludwig* (10th Cir. 2011) 641 F.3d 1243, 1249.
[102] *People v. Harris* (1980) 105 Cal.App.3d 204, 212-13.
[103] *People v. Warren* (1984) 152 Cal.App.3d 991, 997. POV
[104] *U.S. v. $42,500* (9th Cir. 2002) 283 F.3d 977, 981.
[105] *People v. Taylor* (1975) 46 Cal.App.3d 513, 518.
[106] *People v. Easley* (1983) 34 Cal.3d 858, 872.
[107] *People v. Miley* (1984) 158 Cal.App.3d 25, 35-36.
[108] See *People v. Aho* (1985) 166 Cal.App.3d 984, 992; *People v. Martin* (1973) 9 Cal.3d 687, 692.
[110] See *People v. Manis* (1969) 268 Cal.App.2d 653, 661.
[109] See *People v. Manis* (1969) 268 Cal.App.2d 653, 661; *People v. York* (1980) 108 Cal.App.3d 779, 785.
[110] (1991) 228 Cal.App.3d 1.

Plain View

The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable.[1]

Finding evidence of a crime often requires a lot of work and a little luck. But sometimes it only takes luck, like winning the lottery. For example, in *People v. Bagwell*[2] an officer in Alameda County had just arrested a murder suspect in the suspect's home when he happened to notice a trail of blood that was leading into a hallway. So he followed the trail and found the murder weapon—a butcher knife—covered in blood. While this example is rather melodramatic, officers frequently find evidence by happenstance. This commonly happens during knock and talks, detentions, and traffic stops. It also happens quite often that officers who are executing a warrant to search a home for certain evidence will find additional evidence or evidence of an entirely different crime.

In most cases, such evidence will not be suppressed because there is a well-established rule in Fourth Amendment law that officers do not need a warrant to seize evidence that is "in plain view." This rule is ordinarily easy to understand and apply. Even the words "plain view" seem to be saying "If you can see it, you can grab it." Of course it is not always that simple, but it's not very complicated either. As we will explain, evidence is deemed "in plain view"—and can be seized without a warrant—if the following circumstances existed:

(1) **Lawful vantage point**: The officers' initial viewing of the evidence must have been "lawful."

(2) **Probable cause**: Before seizing the evidence, officers must have had probable cause to believe it was, in fact, evidence of a crime.

(3) **Lawful access**: Officers must have had a legal right to enter the place in which the evidence was located.

If these three circumstances exist, an officer's act of observing the evidence does not constitute a "search" because no one can reasonably expect privacy in something that is so readily exposed. As the Supreme Court explained, "The rationale of the plain-view doctrine is that if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no 'search.'"[3] It is also based on "the desirability of sparing police the inconvenience and the risk—to themselves or to preservation of the evidence—of going to obtain a warrant."[4]

Lawful Vantage Point

An officer's observation of evidence is lawful if the officer did not violate the suspect's Fourth Amendment rights by getting into the position from which he saw it. Thus, the Supreme Court in *Horton v. California* observed, "It is an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed."[5]

Before we discuss the types of places from which an observation is apt to be legal, it should be noted that an observation does not become an unlawful search merely because an officer had to make some effort to see the evidence, so long as the effort was reasonably foreseeable. Thus, it is unimportant that officers could not initially see the evidence without using a common visual aid (such as a flashlight or binoculars), or without bending down or elevating themselves. As the D.C. Circuit explained, "That a policeman may have to crane his neck, or bend over, or squat does not render the [plain view] doctrine inapplicable, so long as what he saw would have been visible to any curious passerby."[6] Similarly, the

[1] *Payton v. New York* (1980) 445 U.S. 573, 587.
[2] (19974) 38 Cal.App.3d 127.
[3] *Minnesota v. Dickerson* (1993) 508 U.S. 366, 375. Also see *Texas v. Brown* (1983) 460 U.S. 730, 739.
[4] *Arizona v. Hicks* (1987) 480 U.S. 321, 327. Also see *Minnesota v. Dickerson* (1993) 508 U.S. 366, 375.
[5] (1990) 496 U.S. 128, 136. Also see *Guidi v. Superior Court* (1973) 10 Cal.3d 1, 6.
[6] *James v. U.S.* (D.C. Cir. 1969) 418 F.3d 1150, 1151.

California Court of Appeal ruled that an officer's act of looking over the suspect's five-foot fence "disclosed no more than what was in plain view."

In contrast, the courts have ruled that officers "searched" a high-rise apartment when they used high-power binoculars to look inside an apartment that was about 250 yards away,[7] or when the evidence was on private property that was almost blocked by foliage, and the officers "had to squeeze into a narrow area between the neighbor's garage and defendant's fence."[8]

OBSERVATIONS FROM PUBLIC PLACES: The most obvious example of a lawful vantage point is a place that was accessible to the general public. Thus, the Supreme Court pointed out that "the police may see what may be seen from a public vantage point where they have a right to be,"[9] and that officers "cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public."[10]

OBSERVATIONS DURING DETENTIONS AND ARRESTS: An observation of evidence in the possession of a suspect who had been detained or arrested is lawful if (1) the officers had sufficient grounds to detain or arrest the suspect, and (2) the detention or arrest was reasonable in its scope and intensity.[11] Thus, in *People v. Sandoval* the California Court of Appeal ruled that an officer, having made a lawful car stop, lawfully observed drugs and paraphernalia in the passenger compartment because "the officer clearly had a right to be in the position to have that view."[12]

EVIDENCE FELT DURING PAT SEARCH: Pursuant to the "plain feel" rule (a variation of the plain view rule), officers who feel evidence while conducting a pat search are deemed to be in a lawful vantage point if (1) they had grounds to conduct the search, and (2) the search was not excessive in its scope or intensity. In the words of the Supreme Court, a lawful pat search must "be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of a police officer."[13]

OBSERVATIONS WHILE EXECUTING SEARCH WARRANTS: Officers who are executing search warrants often find evidence that was not listed in the warrant. When this happens, the "lawful vantage point" requirement will be satisfied if the officers found the evidence while looking in places and things in which any of the evidence listed in the warrant might reasonably be found.

For example, in *Skelton v. Superior Court*[14] officers in La Palma were searching for a wedding ring and carving set which were taken in a burglary. While searching, they saw some watches and rings that matched the descriptions of items taken in some other burglaries. On appeal, the California Supreme Court ruled that the officers had observed these items from an lawful vantage point since "the warrant mandated a search for and seizure of several small and easily secreted items," any of which could have been found in places the listed evidence might be found.

In contrast, in *People v. Albritton*[15] narcotics officers in Bakersfield obtained a warrant to search the defendant's home for drugs and indicia. When a detective assigned to the auto theft detail learned about this, he decided to "go along for the ride" because the defendant was also a suspected car thief. When the officers arrived, the detective "immediately separated himself from the others" and went to the garage area where he checked the VIN numbers on several cars and learned that four of them were stolen. On appeal, the court ruled that the detective did not observe the VIN numbers from a lawful vantage point because none of the evidence listed in the warrant could reasonably have been found where VIN numbers are stamped.

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[7] *People v. Arno* (1979) 90 Cal.App.3d 505.
[8] *People v. Fly* (1973) 34 Cal.App.3d 665, 667.
[9] *Florida v. Riley* (1989) 488 U.S. 445, 449.
[10] *California v. Greenwood* (1988) 486 U.S. 35, 41.
[11] *United States v. Hensley* (1985) 469 U.S. 221, 235.
[12] See *People v. Sandoval* (1985) 164 Cal.App.3d 958, 963; *U.S. v. Yamba* (3rd Cir. 2007) 506 F.3d 251, 259.
[13] *Terry v. Ohio* (1968) 392 U.S. 1 29.
[14] (1969) 1 Cal.3d 144, 158.
[15] (1982) 138 Cal.App.3d 79.

OBSERVATIONS DURING WARRANTLESS ENTRIES: In a similar vein, officers who happen to observe evidence while inside a home by means of consent will be deemed to have observed it from a lawful vantage point if they saw it from a place that the consenting person expressly or impliedly authorized them to be. Similarly, if officers had lawfully entered a home because of exigent circumstances, their discovery of evidence will be deemed lawful if they had restricted their activities to those that were reasonably necessary to defuse the exigency.

For example, in *Arizona v. Hicks*[16] officers had entered Hicks's apartment without a warrant because someone there had fired a shot through the floor, injuring an occupant in the apartment below. While looking around, one of the officers noticed an expensive audio system which he thought might have been stolen because the apartment was otherwise "squalid." He was able to confirm his suspicion by picking up one of the components, locating the serial number, and running it through a police database. Although the Supreme Court ruled that the officer's entry into the apartment was lawful, it ruled that the serial number was not in plain view because he had no legitimate reason to pick up the component and look for the serial number.

OBSERVATIONS OF THINGS IN YARDS: A suspect's front yard might be deemed a lawful vantage point if officers (1) reasonably believed that the officers had implied consent to enter (e.g., they did not stray from normal access routes), (2) they did not engage in conduct that was beyond that which residents normally expect from visitors (e.g., bringing a drug-detecting K9 is not "expected"), and (3) the purpose of their entry was not solely to find evidence. In fact, officers must ordinarily "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave."[17]

OBSERVATIONS OF DATA DURING COMPUTER SEARCH: Officers who are executing a warrant to search a computer will usually find graphics or data that was not listed in the warrant. When this happens, their presence on the computer will be deemed a lawful vantage point if they had restricted their search to files in which any of the listed evidence might reasonably be found. And, as a practical matter, officers will frequently need to open all files because, as the Ninth Circuit pointed out, unless officers open every file they would have "no way of knowing which or how many illicit files there might be or where they might be stored."[18]

For example, if officers are searching for evidence of drug trafficking, and if they opened a file and found evidence of child pornography, that evidence will probably be admissible under the plain view rule; but officers may not look for more evidence of child pornography unless they obtained a second warrant that specifically authorizes such a search. As the Tenth Circuit explained, "Although officers do not have to stop executing a search warrant when they run across evidence outside the warrant's scope, they must nevertheless reasonably direct their search toward evidence specified in the warrant."[19]

Probable Cause to Seize

The second requirement for a plain view seizure is that the officers must have had probable cause to believe the item they spotted was, in fact, evidence of a crime. This type of probable cause—probable cause "to seize"—simply requires that there be a fair probability that item was, in fact, evidence of a crime. In discussing this level of proof, the Supreme Court has said "it does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical probability that incriminating evidence is involved is all that is required."[20] Such probable cause is often is based on direct observation, as when officers see an illegal weapon, readily identifiable drugs, or fruits or instrumentalities of a crime. Some examples:

- A suspected bank robber had a large amount of cash protruding from his wallet.[21]

[16] (1987) 480 U.S. 321.
[17] See *Collins v. Virginia* (2018) __ U.S. __ [138 S.Ct. 1663, 1671; *U.S. v. Perea-Rey* (9th Cir. 2012) 680 F.3d 1179, 1188.
[18] *U.S. v. Comprehensive Drug Testing, Inc.* (9th Cir. 2010) 621 F.3d 1162, 1171.
[19] *U.S. v. Loera* (10th Cir. 2019) 923 F.3d 907, 920. Also see *People v. Rangel* (2012) 206 Cal.App.4th 1310, 1317.
[20] *Texas v. Brown* (1983) 460 U.S. 730, 742.
[21] *U.S. v. Benoit* (10th Cir. 2013) 713 F.3d 1, 11.

- A burglary suspect possessed pillow cases filled with "large, bulky" items.[22]
- An officer seized bailing wire from the possession of a multiple-murder suspect because the officer was aware that bailing wire had been used to bind the victims.[23]
- An officer who was investigating a murder, seized "cut-off panty hose" because he knew that the murderer had worn a mask, and that cut-off panty hose are sometimes used as masks.[24]
- An officer who was investigating the murder of the suspect's estranged wife in her home seized a hand-drawn diagram of the home its lighting system.[25]

Probable cause to seize may also be based on how the object felt during a pat search; i.e., "plain feel." For example, in *People v. Lee*[26] an Oakland officer was pat searching a suspected drug dealer when he felt "a clump of small resilient objects" which he believed (correctly) were heroin-filled balloons. In ruling that the seizure of the balloons was lawful under the "plain feel" rule, the court said that "the officer recognized the feel of such balloons from at least 100 other occasions on which he had pat-searched people and felt what were later determined to be heroin-filled balloons. As he described it, the feel is unmistakable."

Note, however, that officers will not have probable cause to seize marijuana in a vehicle or other private place unless they reasonably believed it was possessed in violation of California law; e.g., over one ounce, possession by a person under 21.[27]

Lawful Access

Even if officers saw the evidence from a lawful vantage point and had probable cause to seize it, they may not do so if their entry infringed on the suspect's reasonable expectation of privacy. As the Supreme Court explained in *Horton v. California*, "Not only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself."[28] Or, as Justice Grodin observed in *People v. Superior Court (Spielman)*:

> Seeing something in plain view does not, of course, dispose, ipso facto, of the problem of crossing constitutionally protected thresholds. Those who thoughtlessly over-apply the plain view doctrine to every situation where there is a visual open view have not yet learned the simple lesson, long since mastered by old hands at the burlesque houses, "You can't touch everything you can see."[29]

The most common situations in which officers have lawful access to the evidence is that it was located in a public place or inside a vehicle. It may also be based on exigent circumstances such as an officer's reasonable belief that the evidence would be destroyed, hidden, or compromised if the officer waited for a warrant. For example, in *People v. Ortiz*[30] an officer happened to be walking by the open door of a hotel room when he saw a woman inside, and she was "counting out tinfoil bindles and placing them on a table." Having probable cause to believe that such bindles contained heroin, the officer walked inside, seized them, and arrested the woman.

In ruling that the officer had lawful access to the the hotel room and the bindles, the court pointed out that, because he was initially only three to six feet away from the woman, he reasonably believed that she had seen him, and it is "common knowledge that those who possess drugs often attempt to destroy the evidence when they are observed by law enforcement officers." Thus, the court concluded, "It was reasonable for [the officer] to believe the contraband he saw was in imminent danger of being destroyed." POV

[22] *People v. Vasquez* (1983) 138 Cal.App.3d 995, 999-1000.
[23] *People v. Easley* (1983) 34 Cal.3d 858, 872.
[24] *People v. Diaz* (1992) 3 Cal.4th 495, 563.
[25] *People v. Miley* (1984) 158 Cal.App.3d 25, 35-36.
[26] (1987) 194 Cal.App.3d 975.
[27] See *People v. Moore* (2021) 64 Cal.App.5th 291; Health & Saf. Code §§ 11357(a)(1); 11362.3.
[28] (1990) 496 U.S. 128, 137.
[29] (1980) 102 Cal.App.3d 342, 348, fn.1 (conc. opn. of Grodin, J.). Also see *People v. Robles* (2000) 23 Cal.4th 789, 801
[30] (1995) 32 Cal.App.4th 286.

Recent Cases

Lange v. California

(2021) __ U.S. __ [141 S.Ct. 2100]

Issue

Under what circumstances may officers pursue a fleeing suspect into a home if the suspect was wanted for a misdemeanor?

Facts

A CHP officer in Sonoma County noticed that the driver of a car that had just passed him was playing music extremely loud (with the windows rolled down) and was repeatedly honking his horn. Said the court, "It is fair to say that the driver was asking for attention." And he got it. But when the officer lit him up, he kept going for about 100 feet, then drove into the attached garage of a home. The driver was Arthur Lange, and the garage was his.

The officer walked into the garage and quickly determined the Lange might be DUI. So he administered some field sobriety tests, which Lange failed. He was arrested, and an analysis of his blood showed that it was three times over the limit.

Lange filed a motion to suppress the results of the field sobriety and chemical tests, claiming that the officer's entry into his garage was unlawful, and that the results of both tests were the fruit of that entry. When California courts denied the motion, he appealed to the U.S. Supreme Court.

Discussion

The issue was whether officers may pursue a fleeing suspect into his home (including the garage) if he was wanted only for a misdemeanor. The reason the Supreme Court took this case is that lower courts have often ruled that officers may *always* do so, regardless of the seriousness of the crime under investigation.

The Court rejected this idea, ruling that the legality of such entries depends on the same rule as any search based on exigent circumstances: the entry is lawful only if the need to arrest the suspect outweighed the intrusiveness of the entry. As the Court explained in *Illinois v. Lidster*: "In judging reasonableness, we look to the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."[1]

The Court in *Lange* did not, however, decide on whether the officer's intrusion into Lange's garage outweighed the need for an immediate entry. Instead, it sent the case back to the California courts to make that determination.

Comment

As a practical matter, the Court's ruling may have little effect. This is because, as Justice Kavanaugh observed in his concurring opinion, "Cases of fleeing misdemeanants will almost always also involve a recognized exigent circumstance—such as a risk of escape, destruction of evidence, or harm to others—that will still justify warrantless entry into a home." This is especially so when the crime under investigation was DUI since impaired drivers always present an immediate threat to other motorists.

Although Lange might not have presented such a threat (because he had parked in his garage), it seems likely the entry was lawful because the officer did not know that he lived in the house, plus any delay in arresting him would be used by him in court to challenge the accuracy of a subsequent blood-alcohol test. In addition, if the courts were to start ruling that officers could not pursue suspected DUI drivers into homes or garages, the result would be a dramatic increase in the number of such pursuits. As Chief Justice Roberts observed in his concurring opinion:

[1] (2004) 540 U.S. 419, 426. Also see *Illinois v. McArthur* (2001) 531 U.S. 326, 331 ["[W]e balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable."].

> Every hot pursuit implicates the government interest in ensuring compliance with law enforcement. Flight is a direct attempt to evade arrest and thereby frustrate our society's interest in having its laws obeyed. Disregarding an order to yield to law enforcement authority cannot be dismissed with a shrug of the shoulders simply because the underlying offense is regarded as "innocuous." Law enforcement is not a child's game with apprehension and conviction depending upon whether the officer or defendant is the fleetest of foot.

Caniglia v. Strom

(2021) __ U.S. __ [141 S.Ct. 1596]

Issue

Is there a "community caretaking" exception to the warrant requirement?

Facts

The wife of Edward Caniglia phoned the police in Cranston, Rhode Island and requested a welfare check on her husband who she feared was suicidal. She explained that she and her husband had gotten into a heated argument the night before and, at one point, he "retrieved a handgun from the bedroom, put it on the dining room table," and asked her to shoot him now "and get it over with." She left the home and spent the night at a hotel. The next morning, she tried to telephone Caniglia but he didn't answer. She called the police and asked for help.

When officers arrived, Caniglia was standing on the front porch and the officers explained to him why they had been called. Caniglia denied that he was suicidal but agreed to be taken by ambulance to a hospital for a psychiatric evaluation. Officers then entered his home without consent and retrieved his weapons.[2]

Caniglia later sued the officers on grounds that their warrantless entry into his garage was unlawful. In a pretrial proceeding, the district court granted the officers' motion for summary judgment. On appeal, the First Circuit affirmed on grounds that the officers' entry fell within the "community caretaking" exception to the warrant requirement. Caniglia appealed the ruling to the United States Supreme Court.

Discussion

In the not-too-distant past, many courts were frequently ruling that officers were permitted to make warrantless entries of homes, vehicles, and other places if they reasonably believed that an immediate entry was necessary to defuse a threat to a person or property that, while significant, did not qualify as an exigent circumstance. These became known as "community caretaking" searches because the officers' objective was to assist someone who needed immediate help on a problem that was not criminal in nature. This was not uncommon because, as the California Supreme Court previously observed, many people "do not know the names of their next-door neighbors" and therefore the "tasks that neighbors, friends or relatives may have performed in the past now fall to the police."[3] One such task is conducting welfare checks, as happened in *Caniglia*.

Although there was a sound basis for the First Circuit's ruling, the Supreme Court ruled that there is not now—nor has there ever been—a "community caretaking" exception. Instead, warrantless entries into homes based on any perceived emergency can be justified only if the situation fell within the traditional exigent circumstances exception. As the Court explained, the "recognition that police officers perform many civic tasks in modern society was just that—a recognition that these tasks exist, and not an open-ended license to perform them anywhere."

This does not mean that officers cannot act unless they reasonably believed there was an imminent threat to life or property. Instead, the Court explained that officers in these situations must balance the need for an immediate response against its intrusiveness. And because warrantless entries into homes are highly intrusive, they will be upheld only if the need was demonstrably significant. The Court did not, however, decide whether the officers' entry into Caniglia's home satisfied this requirement but, instead, ordered the Rhode Island courts to make that determination

[2] Note: It was unclear whether Mrs. Caniglia consented to the search, so the Court analyzed the facts as if she had not done so.
[3] *People v. Ray* (1999) 21 Cal.4th 464, 472 [disapproved on other grounds in *People v. Ovieda* (2019) 7 Cal.5th 1034, 1044.

Comment

The main thing to remember about these types of cases is that the officers' response must be "carefully limited to achieving the objective which justified the entry."[4] So, in many cases the most important circumstance is whether officers had considered—even for just a moment—whether there was a less intrusive means of resolving the issue.

The Court's decision, while important, will probably have little affect in California because the California Supreme Court had previously ruled that "community caretaking" is not an exception to the warrant requirement[5] and, therefore, officers must balance the need for an immediate action against its intrusiveness.

People v. Tousant

(2021) 64 Cal.App.5th 804

Issues

(1) Was the defendant's rented Camaro impounded and searched illegally? (2) Did an officer conduct an illegal search of his cellphone in the vehicle? (3) Did an officer "interrogate" the defendant in violation of *Miranda*?

Facts

This case involves one murder and two subsequent shootings—all gang related. It all began with the murder in Oakland of the defendant's son. Investigators believed that the perpetrators were members of a rival gang in Berkeley known as the Five Finga Mafia. And they figured that Tousant would retaliate.

About three months later, several members of the Berkeley gang were standing outside a house in the city when a white four-door car drove by, and the driver and a passenger fired several shots at them. One of men was wounded. A witness was able to get the license number of the car. It was registered to Tousant.

About five days later in Oakland, at about 4:30 A.M., a man was backing his car out his driveway when someone fired several shots at the vehicle. Although the man was not a member of the Five Finga Mafia, he shared his driveway with one. The victim told officers that he saw two men across the street when the shots were fired, and they drove off in a white, four-door car.

At the scene, officers noticed a red Chevrolet Camaro parked directly across the street from the victim's home. Officers suspected that the Camaro was involved in the shooting because it was blocking the driveway of a neighbor's home, it was unlocked, and the keys were in the ignition. When officers ran the plate they learned it was a rental. During a search of the car they found a loaded firearm magazine and a cellphone.

One of the investigators turned on the cellphone and used a computer application to identify the owner. It was Tousant. The investigator then sought and obtained a warrant to search the contents of the phone, and this resulted in the discovery of some circumstantial evidence that linked Tousant to the shooting.

About two weeks later, an OPD officer spotted a white four-door car parked with two people inside. One of men was Tousant. The officer ran the plate and learned it was wanted in connection with the Berkeley shooting. Berkeley officers arrived at the scene, arrested Tousant and searched the vehicle. Among other things, they found two firearms and some shell casings.

The next day, an OPD officer interviewed Tousant. Although he was in custody, the officer did not *Mirandize* him because he was in custody on the Berkeley case only—not the Oakland shooting. Tousant answered the officer's questions and made some statements that provided prosecutors with circumstantial evidence of Tousant's role in the Berkeley drive-by.

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[4] *People v. Ray* (1999) 21 Cal.4th 464, 472 [disapproved on other grounds in *People v. Ovieda* (2019) 7 Cal.5th 1034, 1044. Also see *Illinois v. McArthur* (2001) 531 U.S. 326, 331 ["the restraint at issue was tailored to that need"]; *McDonald v. United States* (1948) 335 U.S. 451, 459 [a "sense of proportion"].

[5] *People v. Ovieda* (2019) 7 Cal.5th 1034, 1053.

He was subsequently charged with that crime, plus possession of the loaded handgun magazine that was found in the Camaro. The court denied his motion to suppress the evidence found in the Camaro and his statements to the OPD officer. Tousant was convicted.

Discussion

Tousant argued that the evidence, including his admissions, should have been suppressed for the following reasons: (1) the handgun was found during an illegal search of his rented Camaro, (2) the OPD investigator who found the cellphone conducted an illegal search of it when she turned it on, and (3) his statements to the investigator were obtained in violation of *Miranda*.

Impoundment and search of the Camaro

Tousant argued that the firearm magazine and cellphone found in the Camaro during the search should have been suppressed because the officers did not have probable cause to believe that the Camaro was involved in the shooting. As the court explained, this argument was specious because the officers were aware of "the Camaro's proximity to the target of the shooting, bullet casings, and loaded magazine [inside the car], its arrival on the scene shortly before the shooting, its unfamiliarity to nearby residents, and the indications it was a rental car, which the driver hastily parked and fled." Consequently, the court affirmed the trial court's ruling that the search was lawful. (Note: It is almost certain that Tousant did not have standing to challenge the search because he had abandoned the Camaro at the scene. But because the court ruled the search was lawful, it did not need to address this issue.)

Search of Tousant's cellphone

As noted, an OPD officer seized the cellphone from the Camaro and later turned it on to identify its owner. Although the court ruled that the seizure of the phone was lawful, it concluded that the officer's act of turning it on to determine its owner and gain access to its contents constituted an illegal "search." Said the court, "Absent an emergency, a warrant is required to search the digital contents of a cellphone. By turning the cellphone on, using guesswork to determine its password, unlocking it, looking through the settings folder and viewing a photo, [the officer] violated Tousant's Fourth Amendment rights." But because the officers later obtained a warrant to search the phone based on evidence unrelated to the search, the court ruled the error was harmless.

Interview with Tousant

Two days after Tousant was arrested on the Berkeley shooting an OPD homicide investigator interviewed him to see if he had any more information about the murder of his son. As noted, Tousant's answers to the officer's questions provided prosecutors with circumstantial evidence of Tousant's role in the Berkeley drive-by.

Tousant argued that his responses should have been suppressed because the officer did not obtain a *Miranda* waiver. That's true, but waivers are not required unless officers asked questions that constituted "interrogation," which is defined as questions that are "reasonably likely to elicit an incriminating response."[6]

In ruling that the officer's questions did not constitute interrogation, the court pointed out that he "had no knowledge of Tousant's possible involvement in the Berkeley shooting. Nor did he have reason to know." Thus, the officer correctly determined that a waiver was unnecessary.

For these reasons, the court ruled that the evidence used against Tousant at trial was obtained lawfully, and it affirmed his conviction

U.S. v. Tuggle

(7th Cir. 2021) __ F.3d __ [2021 WL 2946100]

Issue

Under what circumstances must officers obtain a warrant to conduct surviellance via pole cameras?

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

Facts

In the course of a federal investigation into a large methamphetamine operation in Central Illinois, federal agents installed three pole cameras outside the home of Travis Tuggle, one of the suspects. The cameras covered only the front of Tuggle's home and an adjoining parking area, and they were in operation around the clock for 18 months. They were also equipped with "rudimentary lighting technology"[7] and the ability to "remotely zoom, pan, and tilt."

During the course of the operation, the cameras recorded "individuals arriving at Tuggle's home, carrying various items inside, and leaving only with smaller versions of those or sometimes nothing at all." Then, soon after each "drop," other people would arrive, "enter the home, and purportedly pay for and pick up methamphetamine." All told, the cameras recorded an estimated 100 suspected deliveries of over 20 kilograms of "highly pure methamphetamine."

Tuggle was charged with conspiracy to distribute at least 500 grams of methamphetamine. When his motion to suppress the evidence was denied, he pled guilty and was sentenced to 360 months in prison.

Discussion

It is generally accepted that a warrant is not required to install a pole camera outside a suspect's home (or any other place) if the camera recorded only places and things that passersby could have seen. Thus, the court in *Tuggle* summarily ruled that the surveillance of Tuggle's home did not constitute a search because the cameras captured only "the outside of his house and his driveway [which] were plainly visible to the public."

More importantly, the court addressed concerns that the extended use of pole cameras—even if they record only things in plain view—should be subject to more restrictive rules. Summarizing these concerns the D.C. Circuit observed that "prolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly [and], what he does not do." These types of information, said the court, "can each reveal more about a person than does any individual trip viewed in isolation."[8] But, as the court also observed, "No federal circuit court has found a Fourth Amendment search based on long-term use of pole cameras on public property to view plainly visible areas of a person's home."

The court acknowledged that the Supreme Court has "expressed concerns about surveillance that provides officers with a precise, comprehensive record of a person's public movements that reflects a wealth of detail about familial, political, professional, religious, and sexual associations."[9] But, said the court, the cameras in operation outside Tuggle's home "exposed no details about where Tuggle traveled, what businesses he frequented, with whom he interacted in public, or whose homes he visited."

Summarizing its ruling, the court said that the use of the cameras did not require a warrant because "the government used a commonplace technology, located where officers were lawfully entitled to be, and captured events observable to any ordinary passerby, and thus, "the government did not invade an expectation of privacy that society would be prepared to accept a reasonable."

Comment

The government in *Tuggle* had argued that warrants should not be required to conduct electronic surveillance if—as is almost always the case—officers could have seen it from anywhere in the vicinity; e.g., even if they were standing atop a telephone pole. While prosecutors have won some cases based on this logic, the court in *Tuggle* rejected it. Said the court, "To assume that the government would, or even could, allocate thousands of hours of labor and thousands of dollars to station agents atop three telephone poles to constantly view Tuggle's home for eighteen months defies the reasonable limits of human nature and finite resources."

[7] See *People v. Lieng* (2010) 190 Cal.App.4th 1213, 1228 [night vision technology "is no more 'intrusive' than binoculars or flashlights, and courts have routinely approved the use of flashlights and binoculars by law enforcement officials"].
[8] *U.S. v. Maynard* (D.C. Cir. 2010) 615 F.3d 544, 562.
[9] Quoting from *United States v. Jones* (2012) 565 U.S. 400, 415 (Sotomayor, J. concurring).

Finally, the court observed that "cameras are ubiquitous, found in the hands and pockets of virtually all Americans, on the doorbells and entrances of homes, and on the walls and ceilings of businesses." It is, therefore, arguable that people who step outside their homes can *never* expect privacy because these devices are so commonplace, like fire hydrants and squirrels. This will be one of the most important technological issues that the Supreme Court will be required to address.

U.S. v. James

(8th Cir. 2021) 3 F.4th 1102

Issues

(1) Did officers have probable cause for a warrant that authorized a cell tower dump to identify a serial robber? (2) Was the warrant reasonably particular?

Facts

Police in Twin Cities, Minnesota were investigating a series of eight armed robberies and attempted robberies of stores that had occurred over the course of several months. It soon became apparent that, based on similarities between all of the robberies, they were committed by the same person. For example, they all occurred near closing time, and the perpetrator would order the employees into a back room where he obtained money from a store safe. In addition, in each case the perpetrator carried a red and black duffel bag and wore a long hooded jacket, a dark hat, and a black face mask.

Because the stores' security cameras captured nothing that would help identify the perpetrator, investigators obtained a warrant that required cell tower operators to provide a list of all phones that transmitted signals to the towers nearest the stores within 90 minutes before and after each robbery. This is commonly known as a cell tower "dump,"[10] and its objective is to identify any devices that were near two or more stores when the robberies occurred.

It turned out there was one such phone, and it belonged to Martavis James. After James was arrested, officers conducted a search of his car and found, among other things, a bank-deposit bag (presumably a bag from one of the stores) and a red duffle bag like the one the perpetrator carried. As the result, James was charged in federal court with eight counts of robbery.

He filed a motion to suppress the evidence but it was denied. The case went to trial, and he was convicted.

Discussion

The issue on appeal was whether the affidavit in support of the warrant had established probable cause to believe that the dump would be productive. Specifically, James argued that the affidavit failed to establish a fair probability that (1) the robber carried a cellphone, and (2) that a search of all the phone numbers that had been dumped would result in the identification of the robber.

DID JAMES CARRY A CELLPHONE? Although the affiant could not be sure that James carried a cellphone when he committed the robberies, the court concluded this was a reasonable assumption. The Eighth Circuit recently reached the same conclusion when it observed in a drug trafficking case that "cell phones are now so widespread as to be ubiquitous. There is no reason to suspect that drug dealers are any less likely than regular people to have and use a cell phone."[11]

Consequently, the court ruled that, "even if nobody knew for sure whether the robber actually possessed a cell phone, the judges were not required to check their common sense at the door and ignore that fact that most people compulsively carry cell phones with them at all times."

LIKELIHOOD OF IDENTIFYING THE ROBBER? While it is quite possible that a cell tower dump will not be successful in identifying the perpetrator, the court pointed out that the Fourth Amendment requires only

[10] See *Carpenter v. United States* (2018) __ U.S. __ (138 S.Ct. 2206, 220) [a tower dump is "a download of information on all the devices that connected to a particular cell site during a particular interval"].
[11] *U.S. v. Eggerson* (8th Cir. 2021) __ F.3d __ [2021 WL 2303072].

that there be a "reasonable possibility."[12] And it ruled that the warrant in this case satisfied this test. Said the court, "The judges knew from the affidavits that the robberies were connected by a common modus operandi; that the robber likely carried a cell phone, even if he did not use it during the robberies; and that comparing the numbers from cellular-tower records could reveal his true identity."

WAS THE WARRANT REASONABLY PARTICULAR? A search warrant is invalid if it fails to place adequate restrictions on what items can be searched for and seized. In most cases, the issue is whether the warrant contained sufficient descriptions of the place to be searched and the evidence to be seized. As the Supreme Court explained, the description must be "particular," meaning it must contain sufficient detail so that officers can, with "reasonable effort," determine who or what is to be searched.[13]

In the case of cell tower dumps, this requirement may be satisfied if the warrant restricted the search so that it revealed only those cellphones that were near the scene when the crime occurred. And here, said the court, that requirement was satisfied because the warrants "were constrained—both geographically and temporally—to the robberies under investigation. As the court pointed out:

> Geographically, they covered only the cellular towers near each robbery. Temporally, the period was narrow and precise: only about 90 minutes, with exact time listed. Given these specific limitations, the warrants were sufficiently definite to eliminate any confusion about what the investigators could search.

For these reasons, the court ruled the warrants in this case were valid, and it affirmed James's conviction.

People v. Moore

(2021) 64 Cal.App.5th 291

Issue

Did an officer have probable cause to search a vehicle for marijuana?

Facts

While on patrol, a Sacramento police sergeant noticed a Jeep SUV that was parked on a curb, and saw that the front passenger seat was open, and that a man—later identified as Jemondre Moore—was standing outside the door leaning inside. Suspecting a drug deal, the sergeant stopped behind the Jeep, at which point Moore walked away but watched from a nearby park. As the sergeant approached the Jeep, he detected "a strong smell of fresh [i.e., unburnt] marijuana" and asked the driver "if there was anything illegal" in the vehicle? The driver responded, "Not that I know of," which was somewhat suspicious because he was essentially saying, "I might be carrying something illegal but, if so, I don't know anything about it."

When asked about the odor of marijuana, the driver said he keeps his marijuana in a glass mason jar but had recently smoked all of it. He then showed the sergeant a mason jar that contained some marijuana residue.

At this point, the sergeant noticed there was a backpack on the floorboard on the front passenger's side next to where Moore had been standing. Believing he had probable cause, he decided to search it and picked it up. Before he could start, Moore walked up to him and claimed the backpack was his, and that he didn't want the sergeant to search it.

Undeterred, the sergeant removed the contents and found a jar containing approximately one-quarter pound of marijuana, a loaded .40-caliber handgun, and digital scales. Moore was arrested and, when his motion to suppress the evidence was denied, he pled guilty to possession of a firearm by a convicted felon. He was sentenced to five years in prison.

Discussion

Although it is legal for adults to possess marijuana for recreational purposes under certain circumstances, probable cause to search for it cannot exist unless, in addition to proof of possession, there is proof that it was possessed illegally. Among other

[12] See *Florida v. Harris* (2013) 568 U.S. 237, 243.
[13] *Andresen v. Maryland* (1976) 427 U.S. 463, 480. Also see *U.S. v. Blakeney* (4th Cir. 2020) 949 F.3d 851, 861.

things, it is illegal to possess more than one ounce,[14] possess marijuana in a vehicle if it's in an "open" container,[15] and ingest marijuana while driving in a vehicle or riding in one.[16] Proof that a person was smoking marijuana in a vehicle is often based on the odor of "burnt" marijuana, as opposed to "fresh" (unsmoked) marijuana.[17]

As noted, the sergeant testified that he detected a strong odor of fresh marijuana from the Jeep. Although he did not see any fresh marijuana at the time, the court ruled that he had sufficient circumstantial evidence based on "the strong odor of fresh marijuana emanating from the Jeep," and the driver's "implausible explanation" that the odor came from previously-burnt marijuana. In addition to the odor, the court explained that the sergeant believed, based on his training and experience, that the odor "could not be accounted for by the empty mason jar [the driver] produced or from [the driver's] explanation that the smell was caused by the residual traces of recently burnt marijuana.

Although less important, the court took note of Moore's sudden decision to distance himself from the backpack, the driver's statement that he was merely "unaware" of any marijuana in the vehicle, that the incident occurred in a "high-crime area," and that the sergeant believed that Moore's conduct indicated "a potential drug transaction occurring in the Jeep."

Consequently, the court ruled the sergeant had probable cause to search

U.S. v. Guillen

(10th Cir. 2021) 995 F.3d 1095

Issues

(1) Did the defendant's father have authority to consent to a search of his son's bedroom? (2) Did agents violate *Miranda* by utilizing an illegal two-step interrogation procedure?

Facts

ATF agents in Albuquerque, New Mexico responded to a 911 call from a woman who said she had just found a bomb under her bed. It turned out that the bomb was an improvised explosive device (IED) consisting of a "pressure cooker sealed with white duct tape and filled with black powder, homemade napalm, and various types of shrapnel." The woman said she suspected that the perpetrator was her ex-boyfriend, 18-year old Ethan Guillen.

After defusing the device, ATF agents learned that Ethan lived with his father, so they went to the house and spoke with Mr. Guillen. Among other things, he told them he had recently purchased a pressure cooker for Ethan, but that it was missing. Also missing was Mr. Guillen's soldering iron which was similar in design to one that was used to trigger the device. Mr. Guillen consented to a search of the premises including Ethan's bedroom in which the agents found white duct tape that matched the tape on the device.

After the search was completed, agents interviewed Ethan in the kitchen and confronted him with the incriminating evidence. When asked if he built the device, he "hesitated, took a deep breath, and said: 'Yes, I made it.'" The agents then *Mirandized* him and he freely provided details on how he made the device.

Ethen was charged with possession of an unregistered destructive device and later filed a motion to suppress his confession and the evidence found in the home. When the motion was denied, he pled guilty.

Discussion

Ethan claimed that the warrantless search of his bedroom was unlawful because his father lacked the authority to consent, and that his pre- and post-waiver confessions should have been suppressed because they were obtained in violation of *Miranda*.

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[14] Health & Saf. Code § 11357(a).
[15] See Health & Saf. Code § 11362.3(a)(4). Also see *People v. Hall* (2020) 57 Cal.App.5th 946, 957.
[16] Health & Saf. Code § 11362.3(a)(7).
[17] See *People v. Waxler* (2014) 225 Cal.App.4th 712, 721; *U.S. v. Talley* (2020 N.D. Cal.) 467 F.Supp.3d 832, 835.

SEARCH OF ETHAN'S BEDROOM: It is settled that consent to search may be given by someone other than the suspect if officers reasonably believed that the consenting person had actual or apparent authority over the place or thing that was searched. In cases where a parent consented to a search of a minor's bedroom, the courts almost always rule that the parents had apparent authority because of their overriding duty to supervise their minor children. As the California Court of Appeal observed, "Given the legal rights and obligations of parents toward their minor children, common authority over the child's bedroom is inherent in the parental role."[18]

For these reasons, the court ruled that the search of Ethan's bedroom was lawful. Said the court, "Critical here is the parent-child relationship between Ethan and his father. When a child—even an adult child—lives in a parent's home, the parent is presumed to have actual authority to consent to a search of the entire home."

Nevertheless, Ethan argued that the presumption should not apply here because he "habitually" locked the door to his bedroom "to keep everyone out." The court responded that, while this circumstance "may shed light on Ethan's personality," it raises "no doubt about [Mr. Guillen's] control over his son's bedroom."

PRE-WAIVER CONFESSION: As noted, agents obtained Ethan's first confession ("Yes, I made it.") before they had obtained an express or implied *Miranda* waiver. Officers are not, however, required to obtain a waiver if the suspect was not "in custody." And in most cases, suspects who are interviewed in their homes are not in custody because they cannot reasonably believe that their freedom of action had been curtailed to the degree associated with a formal arrest.

Still, a noncustodial interview may become custodial if the nature of the officers' questions and the manner in which they were asked would have caused a reasonable person to believe that the officers had sufficient grounds to arrest them. And that, said the court, was what happened here.[19] For example, one of the agents told Ethan:

> We know that you purchased a pressure cooker and it's gone. We know that a soldering iron was used in this device, and your dad's soldering iron is missing. White [duct] tape, like was found on the device, is found in the backpack. And there's a table that looks like it has black powder burns, and there's burns and fuses on that table. [Edited]

Thus, the court concluded that "the accusatory nature of such questioning supports a conclusion that Ethan was in custody when he first confessed" and, therefore, his pre-waiver confession was suppressed.

POST-WAIVER CONFESSION: After Ethan confessed that he built the bomb, an agent *Mirandized* him and obtained a more detailed confession. On appeal, Ethan argued that his confession should have been suppressed because it was directly linked to the first one. While there was a link, the Supreme Court has ruled that if officers obtained an uncoerced statement from a suspect in violation of *Miranda*, but later obtained a second statement in full compliance, the second statement will not be suppressed unless they had deliberately violated *Miranda* to skirt its protections.

There is, however, an exception to this rule. A post-waiver statement will be suppressed if it was obtained by means of a "two step" interrogation procedure. The two-step was a tactic in which officers would begin by interrogating the suspect in custody without obtaining a *Miranda* waiver. Then, if he confessed or made a damaging admission, they would *then* seek a waiver. And in many cases, the suspect would waive his rights and repeat his incriminating statement because he will think (erroneously) that his pre-waiver statement could be used against him and, thus, he had nothing to lose by repeating it.

Applying these criteria to the facts in *Guillen*, the court ruled that the agents had not deliberately employed a two-step procedure because the pre-waiver interrogation consisted of a single question: "Did you

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[18] *In re D.C.* (2010) 188 Cal.App.4th 978, 985. Also see *In re Robert H.* (1978) 78 Cal.App.3d 894, 898.
[19] See *People v. Saldana* (2018) 19 Cal.App.5th 432, 458; *People v. Boyer* (1989) 48 Cal.3d 247, 272.

build it?" Thus, there was insufficient reason to believe that the agents had attempted to obtain a detailed confession or damaging admission they could use a few minutes later to convince Guillen that he had nothing to lose by making a full statement. Said the court, "Had the agents intended to obtain a damning confession first they would have asked about those incriminating details much earlier."

For these reasons, the court ruled that Ethan's detailed confession that he built the bomb was not obtained in violation of *Miranda* and, therefore, it affirmed his conviction

People v. Nunes

2021) 64 Cal.App.5th 1

Issue

Responding to a smoke investigation, did firefighters conduct an unlawful search when they opened a cabinet in a shed in the backyard?

Facts

At about 4:30 P.M., the Milpitas Fire Department received a 911 call from someone who said that the home of a neighbor, Joseph Nunes, was on fire; the caller said the "whole structure" was on fire with "fire coming from the house." When firefighters arrived, they saw no fire or smoke, but neighbors told them they had recently seen a plume of smoke coming from the backyard.

Having determined there was no one in the house, firefighters went into the backyard where they "smelled smoke" around the "entire backyard," but the odor was not coming from "an identifiable place." Also in the backyard in plain view was chemistry equipment ("test tubes," "flasks," and "beakers") and a "homemade rocket device" that "appeared burnt." They could not, however determine if "the device was the source of the smoke."

Their attention turned to an enclosed shed in the yard. Although "no smoke was coming from it," they entered "to make sure everything is clear." There was a metal cabinet in the shed which they opened and found some bottles that contained unidentified chemicals. They requested hazmat.

Based on these circumstances, officers obtained a warrant to search the shed, including the cabinet. It was not clear exactly what they found but it was probably a bomb because, as the result of the search, Nunes was charged with possession of an explosive and a destructive device. He filed a motion to suppress the evidence on grounds that the search was unlawful. W and, when the motion was denied, he pled no contest to "possessing an explosive and possessing a destructive device."

Discussion

The court acknowledged that "the smell of an unspecified kind of smoke, the source of which is not apparent, can justify further investigation and warrantless entry." But it ruled that the opening of the cabinet was unlawful because the situation "did not rise to the level of an *emergency* sufficient to bypass obtaining a search warrant for the contents of the cabinet which did not appear to be the source of the smell."

It therefore ruled that the opening of the cabinet was unlawful because the firefighters must have known there was nothing in the cabinet that could have been responsible for the plume of smoke that neighbors had reported to 911. Said the court, "Key to our decision is the principle that the justification for searching based on exigent circumstances ends when the emergency passes." And here, said the court, "the emergency which may have existed when fire personnel arrived on scene was no longer apparent when the [firefighters] opened the cabinet inside the shed." For this reason, it ruled that the destructive device should have been suppressed.

One of the three justices on the panel, Franklin Elia, dissented. He pointed out that the firefighters were "aware that something had recently ignited" in the backyard, and that it had produced a large plume of smoke," and they "reasonably suspected that explosive material was present after discovering a burnt homemade rocket device and chemistry equipment." Judge Elia concluded, "It was reasonable for the [firefighters] to believe that dangerous materials were being mishandled on the premises, and to act to protect live and property from that danger. POV

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