

# Probable Cause Information: Proving it's reliable

*"Any rookie officer knows that uncorroborated, unknown tipsters cannot provide probable cause for an arrest or search warrant."*<sup>1</sup>

Probable cause is, of course, built on information. But not just any information. There must be reason to believe it is accurate, or at least "reasonably trustworthy."<sup>2</sup> Reliable information is also necessary to establish reasonable suspicion to detain or pat search a suspect, but the required showing is less, maybe much less, than that for probable cause.<sup>3</sup>

The question, then, is how can officers determine whether their information is sufficiently reliable? As we will explain, it depends mainly on the nature of the source.<sup>4</sup> This is because some sources are considered so inherently trustworthy that any information they furnish will automatically be deemed reliable if it was based on their personal knowledge.

On the other hand, if the source was a police informant or other "denizen of the underworld,"<sup>5</sup> officers will be required to prove that there is reason to trust him; or, if he is a hopeless flake, that there is reason to believe that this particular information is accurate.

## OFFICERS AND POLICE RECORDS

The courts presume that law enforcement officers are reliable sources if their information was based on something they saw or heard.<sup>6</sup> In the words of the California Court of Appeal, "A police officer is presumptively reliable in the official communication of matters within his direct knowledge."<sup>7</sup>

**OFFICERS WHO DISSEMINATE INFORMATION:** Officers are also presumptively reliable *transmitters* of information. Thus, information from a crime victim or a reliable informant that is transmitted from one officer to another remains reliable for the purpose of determining the existence of probable cause.<sup>8</sup> As the court explained in *Mueller v. Department of Motor Vehicles*, "[O]ne police officer who has received a report from a citizen-informant of a crime's commission, and who has passed the information on to a brother officer in the crime's investigation, will be deemed to have reliably done so."<sup>9</sup>

**POLICE RECORDS:** The presumption of reliability also covers information that is routinely gathered and maintained by law enforcement agencies and other arms of the government.<sup>10</sup> For example, offic-

<sup>1</sup> *Higgason v. Superior Court* (1985) 170 Cal.App.3d 929, 952 (conc. opn. of Crosby, J.).

<sup>2</sup> See *Beck v. Ohio* (1964) 379 U.S. 89, 91.

<sup>3</sup> See *Alabama v. White* (1990) 496 U.S. 325, 330 ["[R]easonable suspicion can arise from information that is less reliable than that required to show probable cause."].

<sup>4</sup> See *U.S. v. Hauk* (10<sup>th</sup> Cir. 2005) 412 F.3d 1179, 1188 ["Information is only as good as its source."].

<sup>5</sup> See *On Lee v. United States* (1952) 343 U.S. 747, 756.

<sup>6</sup> See *United States v. Ventresca* (1965) 380 U.S. 102, 111 ["Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number."]; *People v. Hill* (1974) 12 Cal.3d 731, 761 [the officers are "presumed to be reliable"]; *People v. Superior Court (Bingham)* (1979) 91 Cal.App.3d 463, 472 ["Law enforcement officers, working together on a case, are reasonably 'presumed to be reliable'"]; *U.S. v. Angulo-Lopez* (9<sup>th</sup> Cir. 1986) 791 F.2d 1394, 1397 ["[P]olice officers may be presumed reliable."].

<sup>7</sup> *People v. Superior Court (Brown)* (1975) 49 Cal.App.3d 160, 167.

<sup>8</sup> See *People v. Hogan* (1969) 71 Cal.2d 888, 891 ["Reliable information furnishing probable cause for an arrest does not lose its reliability when it is transmitted through official channels to arresting officers."]; *People v. Superior Court (Bingham)* (1979) 91 Cal.App.3d 463, 472; *People v. Senkir* (1972) 26 Cal.App.3d 411.

<sup>9</sup> (1985) 163 Cal.App.3d 681, 686.

<sup>10</sup> See *People v. Reserva* (1969) 2 Cal.App.3d 151, 156-7 [fingerprint records]; *People v. Aho* (1985) 166 Cal.App.3d 984, 992 [rap sheet]; *People v. Kershaw* (1983) 147 Cal.App.3d 750, 760 [rap sheet]; *People v. Sanchez* (1972) 24 Cal.App.3d 664, 676 [rap sheet]; *People v. Childress* (1979) 99 Cal.App.3d 36, 41 [rap sheet]; *People v. Zepeda* (1980) 102 Cal.App.3d 1, 5 [information in police reports]; *People v. Cleland* (1990) 225 Cal.App.3d 388, 390-1 [PG&E records]; *People v. Rooney* (1985) 175 Cal.App.3d 634, 648 [telephone records]; *People v. Andrino* (1989) 210 Cal.App.3d 1395, 1400 [phone trap information]; *People v. Hill* (1970) 3 Cal.App.3d 294, 298 [military records]; *U.S. v. McDonald* (5<sup>th</sup> Cir. 1979) 606 F.2d 552, 554 [NCIC printouts].

ers may rely on fingerprint records, rap sheets, and other information stored in databases maintained by the National Crime Information Center (NCIC), the California Department of Justice, probation and parole offices, and the DMV.

## CITIZEN INFORMANTS

The courts will presume that information from a “citizen informant” is reliable if it was based on his personal knowledge.<sup>11</sup> As explained in *People v. Lombera*, “[A] citizen informant is presumptively reliable even though reliability has not previously been tested.”<sup>12</sup> The question, then, is when will a person be deemed a citizen informant?

Before answering that question, we must point out that it will not happen merely because an officer labeled him a “citizen informant” in an affidavit or while testifying in court. Instead, the law requires that officers set forth the facts upon which their belief was based so that a judge can make the determination. The California Supreme Court called attention to this requirement in *People v. Smith* when it said, “The designation ‘citizen informant’ is just as conclusionary as the designation ‘reliable informant.’ In either case the conclusion must be supported by facts stated in the affidavit.”<sup>13</sup>

Although there are technically no hard-and-fast rules, as a practical matter a person will ordinarily be deemed a citizen informant only if the following circumstances existed:

- (1) **Victim or witness:** The person was the victim of the crime under investigation or a witness.
- (2) **Identity known:** Officers knew his identity.
- (3) **Information appears reliable:** There was no reason to disbelieve him.

### Crime victim or witness

Most citizen informants are crime victims or eyewitnesses who simply reported their observations to officers. In the words of the California Supreme Court:

[I]t may be stated as a general proposition that private citizens who are witnesses to or victims of a criminal act, absent some circumstance that would cast doubt upon their information, should be considered reliable.<sup>14</sup>

Or, as the court observed in *People v. Kershaw*, “The prototypical citizen informant is a victim reporting a crime that happened to him or a witness who personally observed the crime.”<sup>15</sup>

**EXAMPLES:** The following are examples of people who have been deemed citizen informants:

- a rape victim<sup>16</sup>
- a telephone company installer who reported seeing drugs inside a residence<sup>17</sup>
- a motel housekeeper who reported seeing drugs in a motel room<sup>18</sup>
- a woman who reported that her parents possessed drugs<sup>19</sup>
- a person who reported seeing drug activity in the neighborhood<sup>20</sup>

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<sup>11</sup> See *People v. Hill* (1974) 12 Cal.3d 731, 761 [citizen informant “is presumptively reliable” even though his reliability “has not previously been tested”]; *People v. Kershaw* (1983) 147 Cal.App.3d 750, 754 [“[C]itizen informants, in contrast to criminal informants, are assumed to supply reliable information.”]; *People v. Paris* (1975) 48 Cal.App.3d 766, 773 [the tip “was obviously based on his personal observations”]; *People v. Schulle* (1975) 51 Cal.App.3d 809, 814 [“[I]f Kimberly Simmons is deemed to be a citizen-informant she is presumptively reliable.”].

<sup>12</sup> (1989) 210 Cal.App.3d 29, 32.

<sup>13</sup> *People v. Smith* (1976) 17 Cal.3d 845, 851.

<sup>14</sup> *People v. Ramey* (1976) 16 Cal.3d 263, 269. ALSO SEE *People v. Herdan* (1974) 42 Cal.App.3d 300, 305 [citizen informants “usually, but not always” are people who “unexpectedly” witnessed a crime or were the victim]; *Mueller v. DMV* (1985) 163 Cal.App.3d 681, 685 [“A report to a police officer, by a citizen-informant who has witnessed a crime’s commission, will ordinarily be supportive of probable cause for an arrest.”]; *People v. Paris* (1975) 48 Cal.App.3d 766, 773 [Martin, as a witness to a crime, was presumptively reliable as a citizen-informant.”].

<sup>15</sup> (1983) 147 Cal.App.3d 750, 754.

<sup>16</sup> *People v. Rigsby* (1971) 18 Cal.App.3d 38, 42.

<sup>17</sup> *People v. Paris* (1975) 48 Cal.App.3d 766, 773-4.

<sup>18</sup> *Krauss v. Superior Court* (1971) 5 Cal.3d 418, 421-2.

<sup>19</sup> *People v. Schulle* (1975) 51 Cal.App.3d 809, 815.

<sup>20</sup> *People v. Terrones* (1989) 212 Cal.App.3d 139, 147-9.

- the manager of a bowling alley who notified officers that he saw a gun in the defendant's locker<sup>21</sup>
- a bartender who reported that a customer was carrying a gun<sup>22</sup>

**WITNESSES WHO ARE NOT EYEWITNESSES:** A person who was not an eyewitness, but who provided officers with information concerning a crime, may be deemed a citizen informant if it reasonably appeared that he furnished the information for honorable reasons, not for some personal advantage. The following are examples:

- an employee of a rent-a-car company who reported that a rented vehicle was overdue<sup>23</sup>
- an insurance company investigator who told officers about some of the things he had learned in the course of his investigation into a suspicious fire<sup>24</sup>
- a civil engineer who said he had worked on a machine after the defendant claimed it had been destroyed in a fire<sup>25</sup>
- a store security officer who furnished employment information about a suspect<sup>26</sup>
- a woman who told officers that her son had reported seeing a fellow student with a handgun<sup>27</sup>

## Identity known

In most cases, a person will be deemed a citizen informant only if officers knew his identity.<sup>28</sup> There are three reasons for this. First, the reliability of anonymous sources is unknown. "Without knowing the identity of the source," said the Court of Appeal, "the police cannot even determine whether he or she is a criminal, a drug addict, a 'stoolie' or an otherwise inherently unreliable individual."<sup>29</sup> Second, officers seldom know how anonymous sources obtained their information, which means it might have been based on nothing more than rumor or speculation.<sup>30</sup> Third, sources who have been identified are less likely to furnish information they know is false.<sup>31</sup>

**EXPOSURE TO IDENTIFICATION:** If the person spoke face-to-face with officers but, because of the need for quick action, they did not stop to identify him, he may nevertheless be deemed a citizen informant because he exposed himself to identification; i.e., he did not know that the officers would not ID him before acting on his tip.<sup>32</sup> This occurred in *U.S. v. Thompson* in which the court noted, "The informant in this case subjected himself to ready identification by the police when he approached them in his car; the police need only have asked for his identification or simply noted the license plate on his car."<sup>33</sup>

<sup>21</sup> *People v. Baker* (1970) 12 Cal.App.3d 826, 841.

<sup>22</sup> *People v. Duren* (1973) 9 Cal.3d 218, 239.

<sup>23</sup> *U.S. v. Dorais* (9<sup>th</sup> Cir. 2001) 241 F.3d 1124, 1130.

<sup>24</sup> *People v. Superior Court (Bingham)* (1979) 91 Cal.App.3d 463, 472.

<sup>25</sup> *People v. Superior Court (Bingham)* (1979) 91 Cal.App.3d 463, 472.

<sup>26</sup> *People v. Jordan* (1984) 155 Cal.App.3d 769, 779-80.

<sup>27</sup> *People v. Joseph G.* (1995) 32 Cal.App.4<sup>th</sup> 1735.

<sup>28</sup> See *People v. Ramey* (1976) 16 Cal.3d 263, 269 ["[T]he rule presupposes that the police be aware of the identity of the person"].

<sup>29</sup> *People v. Kershaw* (1983) 147 Cal.App.3d 750, 755.

<sup>30</sup> *People v. Kershaw* (1983) 147 Cal.App.3d 750, 757 ["[T]he police and the magistrate cannot possibly know how the [anonymous] informant obtained the information."].

<sup>31</sup> See *People v. Brueckner* (1990) 223 Cal.App.3d 1500, 1504-5 ["Reliability is indicated where the informer's identity is known to the police, as the informer exposes himself or herself to potential liability for malicious prosecution or false reporting."]; *People v. McFadin* (1982) 127 Cal.App.3d 751, 766-7 [the reliability of an untested informant may be bolstered when the informant was "in a position where he would have reason to believe that a false report would probably be readily disclosed."]; *People v. Hogan* (1969) 71 Cal.2d 888, 891 ["[A citizen informant] may be exposing himself to an action for malicious prosecution if he makes unfounded charges"]; *U.S. v. Elmore* (2<sup>nd</sup> Cir. 2007) 482 F.3d 172, 182 ["Mazza gave the police enough information about herself to allow them to identify her and track her down later to hold her accountable if her tip proved false."].

<sup>32</sup> See *Florida v. J.L.* (2000) 529 U.S. 266, 276 ["If an informant places his anonymity at risk, a court can consider this factor in weighing the reliability of the tip." conc. opn. of Kennedy, J.]; *People v. Superior Court (Meyer)* (1981) 118 Cal.App.3d 579, 584 ["When the informant approached the officer, he had no way of knowing that the officer would elect to begin the pursuit without waiting to record the identity of the informant."]; *People v. Coulombe* (2000) 86 Cal.App.4<sup>th</sup> 52, 58 ["The citizens who supplied the information subjected themselves to scrutiny and the risk of losing their anonymity by directly approaching the police officers rather than calling in their information."]; *U.S. v. Holmes* (D.C. Cir. 2004) 360 F.3d 1339, 1344 ["[E]ither officer could easily have asked [the witness] for identification."].

<sup>33</sup> (D.C. Cir. 2000) 234 F.3d 725, 729.

**Information appears reliable**

A person will not be deemed a citizen informant if officers had reason to doubt his reliability or the accuracy of his information.<sup>34</sup> Consequently, the following circumstances are relevant in determining whether a source qualifies:

**INCONSISTENT INFORMATION:** A person who furnished inconsistent or conflicting information will not necessarily be deemed unreliable if the information pertained to a peripheral issue.<sup>35</sup> But if it pertained to something significant, there will be problems.

For example, in *Gillian v. City of San Marino*<sup>36</sup> officers arrested a high school basketball coach based on an allegation by a former student that he had sexually harassed her. Although the student would ordinarily have been viewed as a citizen informant, the court ruled she did not measure up because, among other things, some of her allegations “were inconsistent in the details provided.”

**VAGUENESS:** A person is not apt to be deemed a citizen informant if, under the circumstances, he should have been able to provide solid information, but did not do so. This was another reason the woman in *Gillian* did not qualify. As the court pointed out, “Some of the accusations were generalized and not specific as to time, date, or other details, including claims of touching in the gym. Other accusations concerning more specific events lacked sufficient detail.”<sup>37</sup>

**CORROBORATION:** A person will ordinarily be considered sufficiently reliable if the officers, upon arrival, saw or heard something that was consistent with his report.<sup>38</sup>

**OFFICERS ATTEMPTED TO GAUGE RELIABILITY:** It is also relevant that the officers utilized interview techniques or other means of detecting deception. For example, in *John v. City of El Monte*, where a ten-year old girl accused her teacher of sexually molesting her, the officer tested her reliability by, for example, inserting false or exaggerated facts into her descriptions of the incident. This helped bolster her reliability because, as the court noted, “each time she would correct [him] and would stay consistent with her original description.”<sup>39</sup>

**NOT CRIMINALLY INVOLVED:** A person who provides information about a crime will not qualify as a citizen informant if he was implicated in that crime; e.g., a drug buyer who identified his supplier, or a burglar who identified his fence.<sup>40</sup> A person with a criminal history may, however, be a citizen informant if his information pertained to a crime in which he was not implicated, and the other requirements were met.<sup>41</sup>

**UNDER THE INFLUENCE:** A person may be deemed a citizen informant even though he was under the influence of drugs when he spoke with officers.<sup>42</sup>

**TRACK RECORD:** The fact that the citizen furnished accurate information in the past is an indication he is reliable.<sup>43</sup>

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<sup>34</sup> See *People v. Ramey* (1976) 16 Cal.3d 263, 269 [reliability depends on the absence of “some circumstance that would cast doubt upon their information, should be considered reliable.”].

<sup>35</sup> See *Peng v. Hu* (9<sup>th</sup> Cir. 2003) 335 F.3d 970, 979 [“[I]nconsistencies in incidental facts [are] to be expected where different people are called upon to remember startling events.”].

<sup>36</sup> (2007) 147 Cal.App.4<sup>th</sup> 1033.

<sup>37</sup> At p. 1045. Quote edited. ALSO SEE *People v. Mardian* (1975) 47 Cal.App.3d 16, 33 [“Such details would permit the magistrate to draw the reasonable conclusion that [the citizen’s] report was of real substance”].

<sup>38</sup> See *Haynie v. County of Los Angeles* (9<sup>th</sup> Cir. 2003) 339 F.3d 1071, 1076 [the suspects failed to yield when the officer activated his lights and siren]; *People v. Boissard* (1992) 5 Cal.App.4<sup>th</sup> 972, 979.

<sup>39</sup> (9<sup>th</sup> Cir. 2007) 505 F.3d 907.

<sup>40</sup> See *People v. Ramey* (1976) 16 Cal.3d 263, 269 [citizen informants are “innocent of criminal involvement”]; *People v. Smith* (1976) 17 Cal.3d 845, 852; *People v. Gray* (1976) 63 Cal.App.3d 282, 287-8 [court notes “the absence of anything in the affidavit which tends to connect [the informant] with the illegal narcotics activity going on in Gray’s apartment.”].

<sup>41</sup> See *People v. Schulle* (1975) 51 Cal.App.3d 809, 815 [“Miss Simmons’ admission to [the officer] that she has smoked marijuana, although an admission of criminal activity, does not establish as a matter of law that she was a person criminally involved or disposed”]; *People v. Hill* (1974) 12 Cal.3d 731, 761; *People v. Lomera* (1989) 210 Cal.App.3d 29, 33.

<sup>42</sup> See *People v. Superior Court (Haflich)* (1986) 180 Cal.App.3d 759, 767 [“Police officers should not be required to ignore reports of ongoing violent criminal activity merely because the informant is under the influence.”].

<sup>43</sup> See *People v. Ramey* (1976) 16 Cal.3d 263, 269 [“there was evidence that he had dealt with the Sacramento police on other occasions without raising doubts as to his trustworthiness”].



## ANONYMOUS 911 CALLERS

With the proliferation of cell phones, more and more people are calling 911 to report suspicious circumstances and crimes in progress, especially drunk and reckless driving. But, for obvious reasons, many callers won't identify themselves,<sup>44</sup> which means they cannot qualify as citizen informants. As the U.S. Supreme Court observed, "[A]n anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity."<sup>45</sup>

Although this means that an uncorroborated tip from an anonymous caller cannot establish probable cause for an arrest, there are now cases in which such information was found to justify car stops and detentions.

### Circumstantial evidence of reliability

Information from an anonymous caller may establish reasonable suspicion if there was some circumstantial evidence of his reliability. "Even though anonymous," said the court in *People v. Coulombe*, "a tip from an unidentified citizen may have other features giving it sufficient reliability."<sup>46</sup>

What circumstances are considered relevant? As we will now explain, they generally fall into the following categories: (1) whether the caller phoned 911, (2) the amount of detail he furnished, (3) his demeanor, and (4) whether there was at least some minimal corroboration of the tip.

**CALLING 911:** The fact that the caller phoned 911 (as opposed to a non-emergency number) is an indication that he is reliable because most people know that 911 calls are recorded,<sup>47</sup> and that the callers' phone numbers (and maybe their addresses) are automatically transmitted to the operators.<sup>48</sup> Thus, the Ninth Circuit said that "merely calling 911 and having a recorded telephone conversation risks the possibility that police could trace the call or identify the caller by his voice."<sup>49</sup>

For example, in *U.S. v. Copening* the court ruled that a 911 caller was sufficiently reliable to justify a car stop because, "though the caller declined to provide his name, he called 911 from an unblocked telephone number. The caller should have expected that 911 dispatch tracks incoming calls and that the originating phone number could be used to investigate the caller's identity."<sup>50</sup>

**FURNISHING DETAILS:** Another indication of a caller's reliability is that he provided the 911 operator with detailed information, especially specifics about what he saw or heard.<sup>51</sup> Although it is, of course, possible that these details are bogus, it happens so rarely that the courts consider specificity a relevant circumstance. As the court pointed out in *United States v. Wheat*, there is only a "slight" risk that the caller's report "could be a complete work of fiction, created by some malicious prankster to cause trouble for another motorist."<sup>52</sup>

<sup>44</sup> See *People v. Dolly* (2007) 40 Cal.4th 458, 464 ["residents, also fearful of the consequences, may not always wish to identify themselves"]; *U.S. v. Holloway* (11th Cir. 2002) 290 F.3d 1331, 1339 ["[S]ome callers, particularly neighbors, may be understandably reticent to give identifying information for fear of retaliation or danger. Thus, the fact that a 911 caller chooses to remain anonymous may have little bearing on the veracity of the caller."].

<sup>45</sup> *Florida v. J.L.* (2000) 529 U.S. 266, 270. ALSO SEE *Illinois v. Gates* (1983) 462 U.S. 213, 227 ["[T]he veracity of persons supplying anonymous tips is by hypothesis largely unknown, and unknowable."].

<sup>46</sup> (2000) 86 Cal.App.4th 52, 59. ALSO SEE *Florida v. J.L.* (2000) 529 U.S. 266, 275 (conc. opn. of Kennedy, J.) [while a call "might be anonymous in some sense," it may have "certain other features" that may provide sufficient reliability for a detention].

<sup>47</sup> See *People v. Dolly* (2007) 40 Cal.4th 458, 471 ["The call was recorded, eliminating the possibility of after-the-fact police fabrication and allowing after-the-fact review (albeit limited) of the caller's sincerity."].

<sup>48</sup> See *People v. Lindsey* (2007) 148 Cal.App.4th 1390, 1398 ["It is unlikely that a caller would phone in a 'hoax' when police can travel to the person's home after receiving only a [911] hang-up call."]; *People v. Dolly* (2007) 40 Cal.4th 458, 467 [a 911 caller "risks the possibility that the police could trace the call or identify the caller by his voice."]; *Wisconsin v. Williams* (Wisc. 2001) 623 N.W.2d 106, 115 ["The recording [of 911 calls] adds to the reliability of the tip in a number of ways."].

<sup>49</sup> *U.S. v. Terry-Crespo* (9th Cir. 2004) 356 F.3d 1170, 1176.

<sup>50</sup> (10th Cir. 2007) 506 F.3d 1241, 1247.

<sup>51</sup> See *People v. Dolly* (2007) 40 Cal.4th 458, 467 [the caller provided "an accurate and complete description of the perpetrator and his location"]; *U.S. v. Wheat* (8th Cir. 2001) 278 F.3d 722, 732 ["[T]he caller identified the color and make of the vehicle, named the first three letters of its license plate, and gave its location and direction."]; *Lowry v. Gutierrez* (2005) 129 Cal.App.4th 926, 939 [a tip's reliability "depends on its detail"]; *U.S. v. Copening* (10th Cir. 2007) 506 F.3d 1241, 1247 ["[T]he caller's detailed description of the QuikTrip events and the individuals involved, as well as their vehicle and its tag number, further bolstered the tip's reliability."].

<sup>52</sup> (8th Cir. 2001) 278 F.3d 722, 735. ALSO SEE *People v. Wells* (2006) 38 Cal.4th 1078, 1084.

(In addition to furnishing details about the crime and where it occurred, the caller must have furnished a sufficiently detailed description of the perpetrator or his vehicle so that officers could be reasonably certain they were detaining the right person.<sup>53</sup>)

**GIVING HIS WHEREABOUTS:** It is relevant that the caller told the operator where he was presently located, or that he furnished information from which his whereabouts might have been determined.<sup>54</sup>

**DEMEANOR:** Although the caller's demeanor is highly subjective, it is a valid consideration because emergency operators, as a result of their training and experience, are especially able to detect dissembling and deception.<sup>55</sup> Similarly, if the caller was reporting an emergency, it would be relevant that he sounded excited.<sup>56</sup>

**MULTIPLE CALLS:** It is relevant that the caller made subsequent calls to provide officers with additional information,<sup>57</sup> or that other callers reported the same or similar information. Also see "Untested police informants" (Multiple independent tips), below.

**CORROBORATION:** A caller would probably be deemed sufficiently reliable if the responding officers, upon their arrival, saw or heard something that was consistent with the caller's tip.<sup>58</sup> Also see "Untested police informants" (Corroboration), below.

**NEED FOR IMMEDIATE ACTION:** Technically, the seriousness of the crime has no bearing on the caller's reliability. But if reliability is a close question, the courts are apt to uphold a detention if the crime posed an imminent threat to a person or property, such as DUI or brandishing.<sup>59</sup> Thus, in *People v. Wells* the California Supreme Court observed, "[A] citizen's tip may itself create a reasonable suspicion sufficient to justify a temporary vehicle stop or detention, especially if the circumstances are deemed exigent by reason of possible reckless driving or similar threats to public safety."<sup>60</sup>

### **Transmitting reliability information to officers**

If the responding officers locate a suspect, the question arises: Can they stop him if they saw nothing that gave them independent grounds for a detention? In other words, can they detain him based solely on information from the caller?

Although this is a developing area of the law, it appears they may if either of the following occurred: (1) the operator had informed the officers of the relevant circumstances (discussed above) and they determined that this information was sufficient, or (2) the operator notified the officers by radio code or other means that the operator had determined that the caller satisfied the reliability requirements.

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<sup>53</sup> See *Lowry v. Gutierrez* (2005) 129 Cal.App.4<sup>th</sup> 926, 938 ["the report must contain a sufficient quantity of information to allow the responding officer to be certain she is stopping the 'right' suspect"]; *U.S. v. Copening* (10<sup>th</sup> Cir. 2007) 506 F.3d 1241, 1247 ["[T]he detailed nature of the tip significantly circumscribed the number of people police could have stopped in reliance on it."].

<sup>54</sup> See *People v. Pinckny* (2001) 729 N.Y.S.2d 830, 835 ["[T]he present caller's connection to an apartment on a specific floor at a specific address still made the caller potentially identifiable which provides greater accountability than a mere anonymous informant who had no fear of ever being identified or located."].

<sup>55</sup> *People v. Dolly* (2007) 40 Cal.4<sup>th</sup> 458, 467, fn.2.

<sup>56</sup> See *U.S. v. Terry-Crespo* (9<sup>th</sup> Cir. 2004) 356 F.3d 1170, 1176 [the caller was "laboring under the stress of recent excitement"]; *U.S. v. Joy* (7<sup>th</sup> Cir. 1999) 192 F.3d 761, 766 ["[A] person is unlikely to fabricate lies (which presumably takes some deliberate reflection) while his mind is preoccupied with the stress of an exciting event."]; *U.S. v. Nelson* (3d Cir. 2002) 284 F.3d 472.

<sup>57</sup> See *People v. Dolly* (2007) 40 Cal.4<sup>th</sup> 458, 468 ["The tip's reliability was further enhanced by the tipster-victim's second call to 911"].

<sup>58</sup> See *U.S. v. Elmore* (2<sup>nd</sup> Cir. 2007) 482 F.3d 172, 181 [a "lesser degree of corroboration" may suffice when the caller is not "completely anonymous"].

<sup>59</sup> See *Florida v. J.L.* (2000) 529 U.S. 266, 273-4 ["We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk."]; *U.S. v. Nelson* (3d Cir. 2002) 284 F.3d 472, 483 ["[I]n determining whether there is reasonable suspicion, [the courts] may take into account reports of an active threat, including the presence and use of dangerous weapons."]; *People v. Profit* (1986) 183 Cal.App.3d 849, 883 ["Nor can we ignore the seriousness of the offense involved, which is a highly determinative factor in any evaluation of police conduct."]; *U.S. v. Holloway* (11<sup>th</sup> Cir. 2002) 290 F.3d 1331, 1339 ["[W]hen an emergency is reported by an anonymous caller, the need for immediate action may outweigh the need to verify the reliability of the caller."]; *U.S. v. Wheat* (8<sup>th</sup> Cir. 2001) 278 F.3d 722, 732, fn.8 ["The rationale for allowing less rigorous corroboration of tips alleging erratic driving is that the imminent danger present in this context is substantially greater (and more difficult to thwart by less intrusive means) than the danger posted by a person in possession of a concealed handgun."].

<sup>60</sup> (2006) 38 Cal.4<sup>th</sup> 1078, 1083.

The first option might be impractical because it would probably take too much time. While the second option is better, it appears that it can be utilized only if the operator had received training in making Fourth Amendment reliability determinations.<sup>61</sup> For example, in *U.S. v. Colon*<sup>62</sup> the court ruled that a 911 operator's knowledge that a caller appeared to be reliable could not be imputed to the responding officers because, said the court, "the record here contains no evidence of whether or how 911 operator training is directed in any way to developing that ability, and thus contains nothing from which to conclude that the operator taking the call was capable of determining whether reasonable suspicion for the stop and frisk existed."

## TESTED INFORMANTS

Most of the information that officers use to establish probable cause and reasonable suspicion comes from police informants. In fact, the U.S. Court of Appeals has pointed out that "[w]ithout informants, law enforcement authorities would be unable to penetrate and destroy organized crime syndicates, drug trafficking cartels, bank frauds, telephone solicitation scams, public corruption, terrorist gangs, money launderers, espionage rings, and the likes."<sup>63</sup>

The problem is that informants tend to be shift, which is one reason they are called snitches, stoolies, scumbags, and much worse.<sup>64</sup> As the U.S. Supreme Court observed, "The use of informers, accessories, accomplices, false friends, or any of the other be-

trays which are 'dirty business' may raise serious questions of credibility."<sup>65</sup> Or, as the Ninth Circuit summed it up, "By definition, criminal informants are cut from untrustworthy cloth."<sup>66</sup>

Consequently, information from informants is deemed "suspect on its face,"<sup>67</sup> which means it cannot be considered in determining the existence of probable cause unless officers can, (1) prove there is reason to believe it is accurate (which is discussed below in the section on untested informants), or (2) prove that the informant has a good history or "track record" for providing accurate information to officers. Informants who fall into this category are known as "tested informants," "confidential reliable informants," or just "CRIs"; and they will be considered reliable if their information was based on their personal knowledge. "If the informant has provided accurate information on past occasions," said the Court of Appeal, "he may be presumed trustworthy on subsequent occasions."<sup>69</sup>

The question, then, is how can officers prove that an informant is "tested?" Before getting into the specifics, we should point out that, like proving a person qualifies as a citizen informant, the courts require facts—not opinions or conclusions. For example, an informant does not become "tested" merely because an officer said he was "credible" or "trustworthy." In fact, judges may assume that officers who resort to baseless conclusions do not understand the fundamentals of probable cause. This occurred in a search warrant case in which the

<sup>61</sup> See *Lowry v. Gutierrez* (2005) 129 Cal.App.4th 926, 941 [court notes the importance of "training patrol officers, 911 operators and police dispatchers"]; *U.S. v. Cutchin* (D.C. Cir. 1992) 956 F.2d 1216, 1217 [if the 911 caller appears to be reliable, "a dispatcher may alert other officers by radio, who may then rely on the report, even though they cannot vouch for it."]. **NOTE:** Because the operator may be required to testify at a suppression hearing, he or she should write a brief report explaining the basis for his determination.

<sup>62</sup> (2d Cir. 2001) 250 F.3d 130, 138.

<sup>63</sup> *U.S. v. Bernal-Obeso* (9th Cir. 1993) 989 F.3d 331, 335.

<sup>64</sup> See *People v. Schulle* (1975) 51 Cal.App.3d 809, 814-5 ["[E]xperienced stool pigeons or persons criminally involved or disposed are not regarded as citizen-informants because they are generally motivated by something other than good citizenship."]; *U.S. v. Brown* (1st Cir. 2007) 500 F.3d 48, 54 [use of informants "entails a risk that police action may be predicated on malicious or unfounded reports"]; *People v. Brunner* (1973) 32 Cal.App.3d 908, 913 ["It is a fact of life that the quality of veracity and honor among thieves and murderers leaves something to be desired."].

<sup>65</sup> *On Lee v. United States* (1952) 343 U.S. 747, 757.

<sup>66</sup> *U.S. v. Bernal-Obeso* (9th Cir. 1993) 989 F.2d 331, 333. Edited.

<sup>67</sup> See *People v. Lopez* (1985) 173 Cal.App.3d 125, 134.

<sup>68</sup> See *Adams v. Williams* (1972) 407 U.S. 143 ["[W]e believe [the officer] acted justifiably in responding to his informant's tip. The informant was known to him personally and had provided him with information in the past."]; *People v. Love* (1970) 8 Cal.App.3d 23, 27 ["Probable cause for an arrest may consist of information obtained from an undisclosed informer of known reliability."]; *U.S. v. Elmore* (2nd Cir. 2007) 482 F.3d 172, 181 ["Where the informant is known from past practice to be reliable, no corroboration will be required to support reasonable suspicion."].

<sup>69</sup> *People v. Terrones* (1989) 212 Cal.App.3d 139, 146.

Court of Appeal commented that “[t]he entire affidavit is infected [with conclusions] beginning with its bald description of the informant as a ‘confidential reliable informant.’”<sup>70</sup>

**NUMBER OF ACCURATE REPORTS:** To determine whether an informant qualifies as “tested,” the first thing that judges need to know is the number or approximate number of times he furnished accurate information. For this reason, it will not suffice to say that an informant furnished information “many times” or “on numerous occasions” because judges have no way of knowing what these terms mean.<sup>71</sup>

There is, however, no minimum number. In fact, a court could find that an informant is tested if he had provided accurate information just once, and had never furnished false information. As the court explained in *People v. Gray*:

Just where along the line an untested informant becomes a reliable one is not subject to rigid standards and given numbers. While one past incident showing reliability is not sufficient to *compel* a magistrate to accept the reported observations of an informant as true, he does not abuse his discretion if he arrives at that conclusion.<sup>72</sup>

**WHY ACCURATE:** Officers must also explain how they determined that the information provided by the informant in the past was accurate. Here, too, the courts need specifics. For example, in *Rodriguez v. Superior Court* an officer claimed that his informant was reliable because his tips had been “corroborated with various sources and that information has been found to be factual.” This explanation was inadequate, said the court, because “[t]here is

nothing to indicate how the information was corroborated nor how it was shown to be factual; no reference is made to previous search warrants issued on the basis of information supplied by the informant, evidence seized pursuant to those warrants, or arrests and convictions resulting from those seizures.”<sup>73</sup>

Similarly, officers cannot establish an informant’s track record by saying that his tips led to “ongoing investigations,” police surveillance, or some other ambiguous achievement. Claims such as these are insufficient because they do not logically lead to the conclusion that the accuracy of the information had been verified. For the same reason, the fact that the informant made a successful controlled buy from a suspect will not establish his reliability unless the informant was the person who furnished the tip that the suspect was selling drugs.<sup>74</sup>

One circumstance that strongly indicates an informant’s tip had been proven reliable is that it led to one or more convictions. But convictions are not required. As the California Supreme Court pointed out, “It is sufficient that the prior information was accurate or was of such substance as to cause a reasonable person to conclude that it is reliable.”<sup>75</sup> Thus, an informant’s reliability may also be established if it resulted in one or more holding orders, indictments, arrests, or productive search warrants.<sup>76</sup>

For example, in *People v. Mayer* the court ruled that an informant was tested because he had “given information to the affiant in excess of ten times over the last two years resulting in the issuance of search warrants, the seizure of controlled substances and the arrest of numerous suspects.”<sup>77</sup>

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<sup>70</sup> *People v. Superior Court (McCaffery)* (1979) 94 Cal.App.3d 367, 374. Edited.

<sup>71</sup> See *Rodriguez v. Superior Court* (1988) 199 Cal.App.3d 1453, 1464 [“[T]he affiant vaguely refers to ‘numerous occasions’ on which the informant has provided [information].”].

<sup>72</sup> (1976) 63 Cal.App.3d 282, 288. Quote edited. Emphasis added.

<sup>73</sup> (1988) 199 Cal.App.3d 1453, 1464. ALSO SEE *People v. Hansborough* (1988) 199 Cal.App.3d 579, 584 [“It would have been the better practice for the affiant to have stated the details surrounding the informant’s reliability in a more factual fashion.”].

<sup>74</sup> See *People v. Mason* (1982) 132 Cal.App.3d 594, 599 [“On each of those five occasions McNeil bought a controlled substance. But there is no evidence he ever provided any information to the police. Therefore, there is nothing in the affidavit to establish the reliability and credibility of McNeil as an informant.”]; *People v. Cedeno* (1963) 218 Cal.App.2d 213, 222.

<sup>75</sup> *People v. Dumas* (1973) 9 Cal.3d 871, 876.

<sup>76</sup> See *People v. Superior Court (Johnson)* (1972) 6 Cal.3d 704, 714 [“[T]he fact that he had previously given information which led to the arrest of a forgery suspect is additional justification for regarding him as a reliable informant.”]; *People v. Neusom* (1977) 76 Cal.App.3d 534, 537-8 [previous tips “had resulted in the arrest of nine persons and recovery of a large quantity of heroin and on each occasion an arrest resulted”].

<sup>77</sup> (1987) 188 Cal.App.3d 1101, 1117.



**INCLUDING NEGATIVE INFORMATION:** Officers must notify the court if, despite the informant's good track record, there was reason to believe his latest information was unreliable; e.g., he had reason to fabricate evidence against the suspect. As the California Supreme Court explained in *People v. Kurland*, "[W]hen the affiant knows or should know of specific facts which bear adversely on the informant's probable accuracy in the particular case, those facts must be disclosed."<sup>78</sup>

Officers need not, however, disclose information that merely indicates the informant's reliability is questionable if they make it clear he is untested.<sup>79</sup> Quoting again from *Kurland*:

[I]n most cases, the issue of possible unreliability is adequately presented to the magistrate when the affidavit reveals that the affiant's source of information is not a citizen-informant but a garden-variety police tipster. In such circumstances, predictable details of the informer's criminal past will usually be cumulative and therefore immaterial.<sup>80</sup>

**WITHHOLDING DETAILS:** Officers may, of course, withhold details that would reveal or tend to reveal the informant's identity. As the court observed in *United States v. Taylor*, "[A]n informant's reliability need not invariably be demonstrated through a detailed narration of the information previously furnished to law enforcement—for example, by listing the number or names of persons arrested or convicted as a consequence of the informant's prior assistance."<sup>81</sup>

## UNTESTED INFORMANTS

As the name implies, "untested" informants are tipsters who have no track record for providing accurate information. This may be because they had never furnished information before, or because their tips had been proven erroneous. In either case, their information is virtually worthless unless officers can prove there is sufficient reason to believe otherwise. How can they accomplish this?

In the past, it could be a formidable task because, over the years, the courts had created a "complex superstructure"<sup>82</sup> of requirements which resulted in an "excessively technical dissection of informant's tips."<sup>83</sup> But that changed in 1983 when the Supreme Court in *Illinois v. Gates* dismantled this superstructure and ruled that, from now on, the reliability of information from untested informants would be based on a "practical, common-sense" analysis.<sup>84</sup> As the First Circuit recently observed, "[A]ll that the law requires is that, when all the pertinent considerations are weighed, the information reasonably appears to be reliable."<sup>85</sup>

### Corroboration

The most effective way of proving that information furnished by an untested informant is probably accurate is to prove that some of it is true. This is known as "corroboration" and, as the Court explained in *Gates*, it is based on a simple but logical premise: "Because an informant is right about some things, he is more probably right about other facts."<sup>86</sup>

<sup>78</sup> (1980) 28 Cal.3d 376, 395.

<sup>79</sup> See *People v. Lopez* (1985) 173 Cal.App.3d 125, 134 ["[T]he magistrate was put on notice in the statement of probable cause that the informant was in the sheriff's custody. This fact alone was sufficient to warn the magistrate that a typical citizen-informant situation was not at hand."]; *People v. Webb* (1993) 6 Cal.4th 494, 522 ["[W]e deem it unrealistic to require that a warrant affidavit include an informant's detailed drug and psychiatric history, or every past act that can be considered unlawful or dishonest."]; *People v. Mayer* (1987) 188 Cal.App.3d 1101, 1122 ["[T]he magistrate was well aware the informant was not a citizen-informant, but was instead an experienced informant motivated by something other than good citizenship."]; *People v. Gallo* (1981) 127 Cal.App.3d 828, 841 [because the informant was a "garden-variety police tipster," there was "no reasonable probability that the details of his criminal record would have [mattered]."]; *U.S. v. Stropes* (8th Cir. 2004) 387 F.3d 766, 772 [omission of untested police informant's criminal history and his previous lies to officers was not material because judges "understand that criminal suspects often have criminal records and frequently are uncooperative or untruthful before they eventually cooperate and provide truthful admissions."].

<sup>80</sup> (1980) 28 Cal.3d 376, 394.

<sup>81</sup> (1st Cir. 1993) 985 F.2d 3, 5-6. ALSO SEE *Swanson v. Superior Court* (1989) 211 Cal.App.3d 594, 599 ["Even though an informant is not named, sufficient information must be given in the written affidavit to establish that the information given by the informant is reliable. This may necessitate limiting the details which might reveal identity."].

<sup>82</sup> See *Illinois v. Gates* (1983) 462 U.S. 213, 235.

<sup>83</sup> See *Massachusetts v. Upton* (1984) 466 U.S. 727, 732.

<sup>84</sup> *Illinois v. Gates* (1983) 462 U.S. 213, 238.

<sup>85</sup> *U.S. v. Brown* (1st Cir. 2007) 500 F.3d 48, 55.

<sup>86</sup> (1983) 462 U.S. 213, 244.

As we approach this subject, it will be helpful to distinguish between “guilty” and “innocent” corroborated information. “Guilty” information is information that directly links the suspect to the commission of a crime. For example, if the informant said that the suspect is selling drugs, officers could corroborate it by having the informant make a controlled buy, or by having him phone the suspect and engage him in a recorded conversation about his drug business.<sup>87</sup>

But if officers are able to corroborate guilty information they will usually have established probable cause themselves, in which case the informant’s tip becomes irrelevant.<sup>88</sup>

In contrast, “innocent” information is loosely defined as information pertaining to matters that are peripheral or incidental to the suspect’s actual criminal activities. Examples might include his typical preparations for committing the crime, his purchase of certain materials or substances, the kinds of weapons he uses, the names of his accomplices, and his record for committing the same or similar crimes.

It should be noted that, in the past, some courts in California and elsewhere would rule that the corroboration of “innocent” information could never establish the accuracy of an informant’s tip.<sup>89</sup> But in *Illinois v. Gates*, the United States Supreme Court flatly rejected this approach, pointing out that “the relevant inquiry is not whether particular conduct is ‘innocent’ or ‘guilty,’” but whether the nature of the corroborated information logically leads to the conclusion that the informant’s “guilty” information is “probably right.”<sup>90</sup> As the California Supreme Court explained this rule:

Such corroboration need not itself amount to reasonable cause to arrest; its only purpose is to provide the element of reliability missing when the police have had no prior experience with the informant. Accordingly, it is enough if it gives the officers reasonable grounds to believe the informant is telling the truth, for in this type of case the issue is not whether the information obtained by the officers emanated from a reliable source, but whether the officers could reasonably rely upon that information under the circumstances.<sup>91</sup>

The question, then, is what type of “innocent” information, when corroborated, tends to prove the rest of the tip is accurate? Although they frequently overlap, there are essentially three types: (1) “inside” information, (2) “predictive” information, and (3) “suspicious” information.

**VERIFYING “INSIDE” INFORMATION:** “Inside” information is essentially any information that would probably be possessed only by people who were privy to the suspect’s criminal activities, such as accomplices, collaborators, or trusted associates. Thus, if the informant furnished some inside information, and if officers were able to prove that some of it was accurate, they might reasonably conclude that the informant knows what he is talking about.

For example, in *Massachusetts v. Upton*<sup>92</sup> an unidentified woman phoned the Yarmouth Police Department and reported the following: (1) Upton lives in a motor home at a certain location; (2) the motor home is “full of stolen stuff”; (3) the stolen property includes jewelry, silver, and gold; (4) Upton bought the stolen property from Ricky Kelleher; and (5) Upton was getting nervous because officers had just “raided” Kelleher’s motel room.

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<sup>87</sup> See, for example, *People v. Rothen* (1988) 203 Cal.App.3d 684, 689 [“[W]e have a CI with personal knowledge of [the suspect’s] activities, and a corroborative monitored telephone conversation.”]; *People v. McFadin* (1982) 127 Cal.App.3d 751, 763, fn.3 [during monitored phone call, the suspect told the informant that he had a pound of marijuana which he would sell for \$485].

<sup>88</sup> See *People v. Kershaw* (1983) 147 Cal.App.3d 750, 759 [“In this situation it may be more accurate to say that the informer’s statement corroborated the police investigation rather than the other way around.”].

<sup>89</sup> See *People v. Lissauer* (1985) 169 Cal.App.3d 413, 422 [“Prior to passage of Proposition 8, the corroboration required to support an untested informant under California law had to relate to criminal activity. Information which merely related to the suspect generally was insufficient to supply probable cause.”].

<sup>90</sup> (1983) 462 U.S. 213, 239, 245, fn.13.

<sup>91</sup> *People v. Lara* (1967) 67 Cal.2d 365, 374-5. ALSO SEE *People v. Levine* (1984) 152 Cal.App.3d 1058, 1065 [Corroboration is not limited to a given form but includes within its ambit any facts, sources, and circumstances which reasonably tend to offer independent support for information claimed to be true.”].

<sup>92</sup> (1984) 466 U.S. 727. ALSO SEE *People v. Glenos* (1992) 7 Cal.App.4<sup>th</sup> 1201, 1207 [after the informant claimed that the suspect was manufacturing methamphetamine, officers learned that the suspect had purchased meth precursors under false name”].

Officers then confirmed that Upton lived in the motor home; that the caller's description of the stolen property "tallied with the items taken in recent burglaries"; and that officers had recently executed a warrant on Ricky Kelleher's motel room. Although this was all technically "innocent" information, the Supreme Court ruled this corroboration was adequate because "[t]he informant's story and the surrounding [corroborated] facts possessed an internal coherence that gave weight to the whole."

Similarly, in *People v. Lara*<sup>93</sup> LAPD officers found the body of a man named Mitchell in a ditch. His hands were tied behind his back, and he had been shot twice with a shotgun. A few hours later, officers found Mitchell's car abandoned about two miles away. There was blood on the steering column.

Two days later, an informant told investigators that, shortly before the murder, Mitchell was driving a car in which the informant and two other men, Lara and Alvarez, were passengers. About two hours after Mitchell dropped the informant off, Alvarez notified him that he and Lara had each shot Mitchell after tying him up. The coroner determined that Mitchell had been killed between the time he had dropped the informant off and the time Alvarez told the informant about the shooting.

In ruling that this corroboration was satisfactory, the California Supreme Court said, "Viewed together, these independently established facts justified the officers in placing reliance on [the informant's] information for the limited purpose [of establishing probable cause]."

Here are some other examples of "innocent" information that was deemed sufficiently corroborated:

- the informant told officers they would find stolen computer equipment inside Costello's home, that Costello had obtained the equipment while burglarizing two schools and a business which the informant identified, and that Costello broke in by using a pipe wrench. Among other things, officers confirmed that the three locations had been recently burglarized, that computer equipment had been stolen, and that a pipe wrench had been used to gain entry<sup>94</sup>
- the informant knew where stolen oil field equipment had been stored<sup>95</sup>
- the informant knew that the suspect was a parole violator, and that warrants for his arrest had been issued<sup>96</sup>
- the informant "had independent information as to a crime detail not reported by the news media, i.e., that the murder victim was black"<sup>97</sup>
- the informant said he saw "Delaware, Lackawanna and Western Railroad" bonds in the defendant's possession. Officers confirmed that 33 such bonds had been stolen two months earlier<sup>98</sup>

Keep in mind that, while the corroboration of "inside" information is significant, the corroboration of information that is easily obtainable or commonly known proves nothing.<sup>99</sup> For example, an informant would not be deemed reliable merely because he knew the suspect's physical description, where he lived, where he worked, and the type of car he drove. As the court observed in *Higgason v. Superior Court*, "The courts take a dim view of the significance of such pedestrian facts."<sup>100</sup> Similarly, the United States Supreme Court explained:

<sup>93</sup> (1967) 67 Cal.2d 365.

<sup>94</sup> *People v. Costello* (1988) 204 Cal.App.3d 431.

<sup>95</sup> *People v. Superior Court (Williams)* (1978) 77 Cal.App.3d 69, 75.

<sup>96</sup> *U.S. v. Hauk* (10<sup>th</sup> Cir. 2005) 412 F.3d 1179, 1191.

<sup>97</sup> *People v. McCarter* (1981) 117 Cal.App.3d 894, 902.

<sup>98</sup> *People v. Dumas* (1973) 9 Cal.3d 871, 876.

<sup>99</sup> See *Alabama v. White* (1990) 496 U.S. 325, 332 ["Anyone could have 'predicted' [that a certain make of car would be in front of a certain building] because it was a condition presumably existing at the time of the call."]; *People v. Jordan* (2004) 121 Cal.App.4<sup>th</sup> 544, 564 [corroboration of the suspect's clothing "did not strengthen the weak inference that because the informant knew about the appearance of a person (information readily observable by the public), the informant also had knowledge of the concealed criminal activity alleged."]; *People v. Lissauer* (1985) 169 Cal.App.3d 413, 423 [the informant's information "was such as could be acquired by any casual observer"]; *U.S. v. Soto-Cervantes* (10<sup>th</sup> Cir. 1998) 138 F.3d 1319, 1323 ["The verification of facts readily observable to anyone on the street, without more, is insufficient"]; *Bailey v. Superior Court* (1992) 11 Cal.App.4<sup>th</sup> 1107, 1112 ["Independent police investigation merely confirmed that Ms. Bailey lived at the address in question."].

<sup>100</sup> (1985) 170 Cal.App.3d 929, 940.

An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity.<sup>101</sup>

**CONFIRMING PREDICTIONS:** Another indication that an informant is an insider is his ability to accurately predict where the suspect will be going or what he will be doing in connection with his criminal activities.<sup>102</sup> "The ability to predict an individual's future actions," said the Court of Appeal, "indicates the informant has some familiarity with that individual's affairs."<sup>103</sup> This occurred in *Alabama v. White* in which the Supreme Court said, "What was important was the caller's ability to predict [White's] *future behavior*, because it demonstrated inside information—a special familiarity with [her] affairs."<sup>104</sup>

The facts in *Gates* provide a good illustration. It started with an anonymous letter that was sent to the Police Department in Bloomingdale, Illinois. The writer claimed that Lance and Sue Gates were local drug dealers, and that they obtained their drugs in Florida. Included in the letter was a description of a typical drug run: Sue drives the family car to Florida; Lance flies. After the car is "loaded up with drugs," Lance drives it back to Bloomingdale. The informant also said that Sue would be leaving for Florida immediately, and that Lance would be flying down "in a few days." Here's what happened then:

- Two days after officers received the letter, they learned that a person identified as "L. Gates" had boarded a flight from Chicago to Florida.
- When Gates arrived in Florida, he entered a motel room registered to his wife.
- The next day, the couple drove back to Chicago in the family car.

On appeal, the United States Supreme Court ruled that this corroboration provided the officers with probable cause because, said the Court, "It is enough that there was a fair probability that the writer of the anonymous letter had obtained his entire story either from the Gates or someone they trusted. And corroboration of major portions of the letter's predictions provides just this probability."

Similarly, in *Draper v. United States*<sup>105</sup> an informant told a narcotics officer in Denver that Draper had recently moved into town, and that he was "peddling narcotics to several addicts." Three days later, the informant told the officer that Draper had just left for Chicago to buy heroin, that he had taken the train, that he would be returning by train within the next two days, and that he would be carrying a tan zipper bag. He also described the clothing Draper was wearing when he left, and he added that Draper usually "walked real fast."

Two days later, an officer in Denver noticed that a man who had arrived on the train from Chicago had "the exact physical attributes" and clothing described by the informant, that he was carrying a tan zipper bag, and he was walking "fast." So the officer arrested him and, during a search incident to the arrest, found heroin.

In ruling that the officer had probable cause, the United States Supreme Court pointed out:

[The officer] had personally verified every facet of the information given him by [the informant] except whether [Draper] had accomplished his mission and had the three ounces of heroin on his person or in his bag. And surely, with every other bit of information being thus personally verified, [the officer] had reasonable grounds to believe that the remaining unverified bit of information—that Draper would have the heroin with him—was likewise true.

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<sup>101</sup> *Florida v. J.L.* (2000) 529 U.S. 266, 272.

<sup>102</sup> See *U.S. v. Hawk* (10<sup>th</sup> Cir. 2005) 412 F.3d 1179, 1189 ["Predictive information is defined broadly as knowledge that the informant could not acquire from any source but the suspect, whether directly or indirectly, providing reason to believe that the informant has 'inside' information"]; *People v. Rivera* (2007) \_\_ Cal.App.4<sup>th</sup> \_\_ [2007 WL 2874855] [officers confirmed that arrestee would be at certain location]; *U.S. v. Brack* (7<sup>th</sup> Cir. 1999) 188 F.3d 748, 756 [confirmed details "related to future actions of third parties," which demonstrated the likelihood that the informant obtained his information from the suspects "or from someone they trusted"]; *U.S. v. Graham* (6<sup>th</sup> Cir. 2007) 483 F.3d 431, 439.

<sup>103</sup> *People v. Jordan* (2004) 121 Cal.App.4<sup>th</sup> 544, 559.

<sup>104</sup> (1990) 496 U.S. 325, 332.

<sup>105</sup> (1959) 358 U.S. 307.



**SUSPICIOUS ACTIVITY:** Officers may also reasonably believe that an informant is reliable if they saw the suspect engage in activities that, while “innocent” on the surface, were consistent with the informant’s allegation—or at least sufficiently consistent to generate the necessary level of suspicion.<sup>106</sup> Thus, in *Gates*, the Court pointed out that the suspect’s “seemingly innocent activity became suspicious in the light of the initial tip.”<sup>107</sup>

For example, in *United States v. Landis*<sup>108</sup> an untested informant told officers that Lee Clark was a physician in Chico, and that he “did not work but derived his income from selling ‘speed.’” He also said that he had seen “several strange chemicals” inside Clark’s house, and that Clark’s son had told him that his father was manufacturing methamphetamine in the basement.

Among other things, officers confirmed that Clark was a physician, but that he “apparently did not practice”; his listed place of business was his home “at which there was no visible evidence of a medical practice”; and he had recently made several phone calls to suppliers of chemicals that were “apparently unrelated to medical practice.” This corroboration, said the court, “would have been an acceptable basis for a probable cause determination.”

Similarly, in *People v. Sotelo*<sup>109</sup> an informant told officers that Vito and Esther Sotelo are selling heroin from their home in Los Angeles, that there is a lot of foot traffic in and out of the house, and that the buyers often inject heroin in an adjoining garage. Later that day, an officer checked outside the garage and found “balloon fragments, many of which were knotted in the end.” Other officers saw “numerous”

people going in and out of the house. They detained one of them, saw needle marks, and noticed that his eyes were pinpointed and that his voice was slow and slurred. Not surprisingly, the court ruled that this corroboration was sufficient.

### Detailed information

Although not as formidable as corroboration, an informant’s ability to provide officers with detailed information is relevant, especially if the details pertain to the suspect’s criminal activities.<sup>110</sup> The theory here, or so it appears, is that informants are seldom so imaginative and crafty that they can invent a story that is both plausible and detailed. Thus, in *People v. Kershaw*, the court pointed out:

What [the informant] supplied was more akin to a full scenario naming the cast of characters, the castle at Elsinore and the modus operandi of the crimes. This raises an inference, at least, that the [informant] was speaking from personal knowledge.<sup>111</sup>

For example, in *People v. Rosales*<sup>112</sup> a man riding in the back of a pickup truck shot and killed a woman who was standing outside a house in South Gate. There were three other men in the truck. Officers suspected they were all members of the Elm Street Gang because the victim was the girlfriend of a rival gang member; and that, earlier that evening, the two gangs had fought. A few hours later, CHP officers spotted the truck and arrested the driver who was identified as Rodriguez.

The next day, a woman phoned the police department and said she had witnessed the shooting from inside the house. Although she refused to identify

<sup>106</sup> See *People v. Jordan* (2004) 121 Cal.App.4th 544, 558 [“Where police officers follow up an anonymous tip and observe suspicious behavior, the totality of the circumstances may generate a reasonable suspicion that justifies a [detention].”]; *People v. Costello* (1988) 204 Cal.App.3d 431, 446 [“Even observations of seemingly innocent activity suffice alone, as corroboration, if the anonymous tip casts the activity in a suspicious light.”]; *People v. Ramirez* (1996) 41 Cal.App.4th 1608, 1616 [court looks for “probative indications of criminal activity along the lines suggested by the informant”].

<sup>107</sup> (1983) 462 U.S. 213, 245, fn.13.

<sup>108</sup> (9th Cir. 1984) 726 F.2d 540.

<sup>109</sup> (1971) 18 Cal.App.3d 9.

<sup>110</sup> See *Illinois v. Gates* (1983) 462 U.S. 213, 234 [“[An informant’s] explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand, entitles his tip to greater weight than might otherwise be the case.”]; *U.S. v. Brown* (1st Cir. 2007) 500 F.3d 48, 55 [“[A] tip that describes the criminal activity in detail is more likely to be reliable.”]; *People v. Rivera* (2007) 156 Cal.App.4th 60, 66 [“Some information is so detailed as to be self-verifying.”]; *U.S. v. Barnard* (1st Cir. 2002) 299 F.3d 90, 93 [“The credibility of a informant is enhanced to the extent he has provided information that indicates first-hand knowledge.”]; *U.S. v. Hauk* (10th Cir. 2005) 412 F.3d 1179, 1191 [“[T]he information is highly detailed, reporting the presence of drugs ‘in the ceiling, hall closet by the bedroom, night stand next to the bed’”].

<sup>111</sup> (1983) 147 Cal.App.3d 750, 758.

<sup>112</sup> (1987) 192 Cal.App.3d 759.

herself, she provided several details, including the following: The men in the truck were members of the Elm Street Gang; the shooter was known as “Big Tudy”; two of the others were Rodriguez (the man who had been arrested) and Mayfield; Big Tudy lives on Iowa Street, and he is getting ready to flee to Texas.

Officers knew that Rosales was known as Big Tudy, that he was a member of the Elm Street Gang, and that he had fled to Texas several years ago when he was wanted for robbery. So they arrested him, took his fingerprints, and matched them with some latent prints found in the truck.

Rosales contended that his booking fingerprints should have been suppressed because the officers lacked probable cause to arrest him, but the court disagreed, saying:

[T]he anonymous telephone caller possessed a wealth of specific information about the shooting. She knew the identity of the respective gangs involved and of their enmity, how the shooting occurred, and when it occurred; she recognized the shooter (Rosales) and one of his accomplices (Mayfield); she knew that each was a member of the Elm Street gang; and she knew where Rosales lived. Finally, she knew that Rosales was planning to flee to Texas.

### Other circumstantial evidence of reliability

**MULTIPLE INDEPENDENT TIPS:** If a second untested informant furnished the same information, officers

may reasonably believe that both of them are reliable if it appeared the informants obtained their information independently.<sup>113</sup> Thus, in *United States v. Nielsen* the court noted that “the veracity of [the informants] is buttressed by the similarity of their accounts.”<sup>114</sup>

**UNWITTING INFORMANTS:** Information obtained from a person who did not know he was talking to an undercover officer may be deemed reliable if it was apparently based on his personal knowledge, and there was no reason to believe it was false.<sup>115</sup>

**STATEMENTS AGAINST PENAL INTEREST:** Information from an informant that implicates the suspect in a crime may be deemed reliable if, (1) the information also implicated the informant, and (2) the informant knew he was making the statement to an officer or to someone who might disclose the information to officers.<sup>116</sup> But an informant’s statement is not “against penal interest” if it places major responsibility for the crime on others.<sup>117</sup>

**SWORN TESTIMONY BY INFORMANT:** Finally, if officers are seeking a search warrant, the accuracy of the informant’s tip may be established, or at least bolstered, by having the informant appear before the issuing judge in chambers, swear to the truthfulness of his information, and submit to questioning by the judge, prosecutor, or investigating officer.<sup>118</sup> The theory here is that because judges routinely determine the credibility of witnesses in court, they may do the same with informants in chambers. POV

<sup>113</sup> See *People v. Balassy* (1973) 30 Cal.App.3d 614, 621 [“[O]ne ‘unreliable’ informer’s statements may be corroborated by those of another, if they were interviewed independently, at a different time and place.”]; *People v. Terrones* (1989) 212 Cal.App.3d 139, 147; *People v. Coulombe* (2000) 86 Cal.App.4th 52, 58 [“Here we have not one, but two independent tips.”]; *U.S. v. Landis* (9th Cir. 1984) 726 F.2d 540, 543 [“Interlocking tips from different confidential informants enhance the credibility of each.”]; *People v. Hirsch* (1977) 71 Cal.App.3d 987, 991, fn.1 [“The totality of information coming from a number of independent sources, may be sufficient even though no single item meets the test of reliability. If the smoke is heavy enough, the deduction of a fire becomes reasonable.”].

<sup>114</sup> (9th Cir. 2004) 371 F.3d 574, 580.

<sup>115</sup> See *People v. Aho* (1985) 166 Cal.App.3d 984, 991 [“These statements by Russell must be presumed reliable since they were unwittingly made to an undercover police officer.”]; *People v. Hutchins* (1979) 100 Cal.App.3d 406, 412 [“Wynn supplied the information to Deputy Carpenter believing him to be a narcotic trafficker.”]; *People v. Fleming* (1981) 29 Cal.3d 698, 708.

<sup>116</sup> See *United States v. Harris* (1971) 403 U.S. 573, 583; Evid. Code § 1230; *People v. Christopher R.* (1989) 216 Cal.App.3d 901, 904; *People v. Cooks* (1983) 141 Cal.App.3d 224, 295; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 335.

<sup>117</sup> See *People v. Campa* (1984) 36 Cal.3d 870, 882; *People v. Larry C.* (1982) 134 Cal.App.3d 62, 69; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 327-342 [“Clearly the least reliable circumstance [in determining whether a statement was ‘against penal interest’] is one in which the declarant has been arrested and attempts to improve his situation with the police by deflecting criminal responsibility onto others.”].

<sup>118</sup> See Pen. Code §§ 1526(a), 1526(b)(1), 1528(a), 1529, 1534, 1537; *Skelton v. Superior Court* (1969) 1 Cal.3d 144, 153; *People v. Goldberg* (1984) 161 Cal.App.3d 170, 183; *People v. Peck* (1974) 38 Cal.App.3d 993, 999; *People v. Campa* (1984) 36 Cal.3d 870, 884; *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 526 [one advantage of having a judge hear the witness’s own words is that the judge will hear “all the inflections, intonations and pauses that add meaning to bare words.”].