POINT of VIEW

A publication of the Alameda County District Attorney's Office

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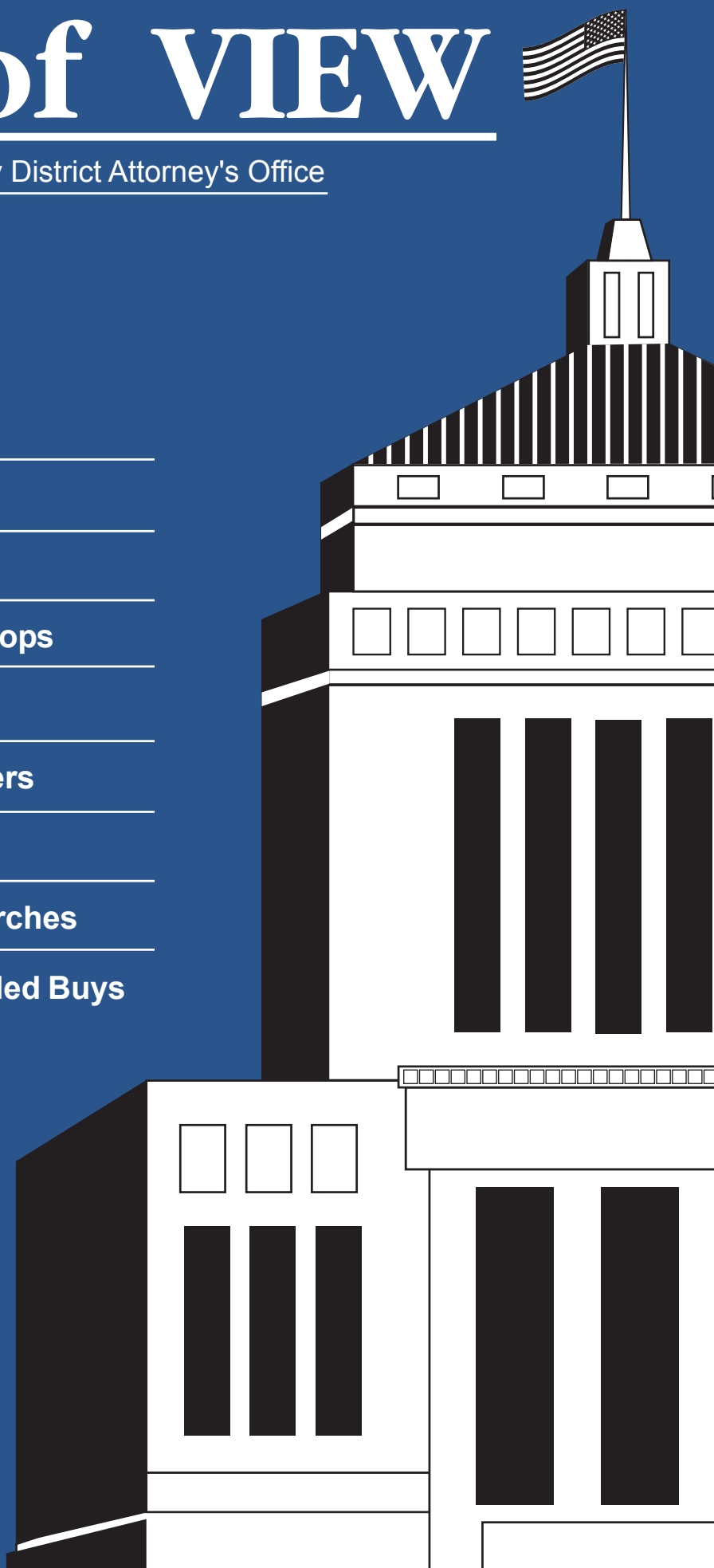

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This edition of Point of View
is dedicated to the memory of
Deputy Brian Ishmael
of the El Dorado County Sheriff's Office
who was killed in the line of duty
on October 23, 2019

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Special Needs Detentions

Special law enforcement concerns will sometimes justify detentions without reasonable suspicion.

Illinois v. Lidster[1]

Since 1968, every seizure of a person by officers was classified by the courts as either an arrest or investigative detention.[2] Over time, however, the courts began to recognize a third type that has become known as a "special needs" detention. These are stops that serve a public interest *other than* the need to determine if the detainee had committed a crime or was otherwise arrestable.

The reason for the change was that the role of law enforcement officers in the community had grown over the years to include a variety of services that had little or nothing to do with criminal investigations. As the First Circuit observed, police officers are "expected to aid those in distress, combat actual hazards, prevent potential hazards from materializing, and provide an infinite variety of services to preserve and protect community safety."[3] As another court put it:

> If we were to insist upon suspicion of activity amounting to a criminal or civil infraction to meet the [detention] standard, we would be overlooking the police officer's legitimate role as a public servant to assist those in distress and to maintain and foster public safety.[4]

In a more recent development, the courts no longer invalidate detentions based on special needs merely because the officers also had a law enforcement interest in talking to the person. Instead, these detentions will be upheld if the existence of an investigative interest was of secondary importance to the officer. We will discuss this later in this article.

One other thing before we begin: The requirements for conducting special needs detentions may sound similar to those for conducting searches based on exigent circumstances. They are. This is because the primary objective of both types of searches is to address threats to health, safety, and sometimes property. But because searches are much more intrusive than temporary detentions, the rules pertaining to special needs detentions are somewhat less strict.

When Permitted

Like searches based on exigent circumstances, special needs detentions are permitted if the need for the police response outweighed its intrusiveness. "[I]n judging reasonableness," said the Supreme Court, "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."[5] Or, as the Fourth Circuit put it, "As the likelihood, urgency, and magnitude of a threat increase, so does the justification for and scope of police preventive action."[6]

Weight of the public interest

To determine the seriousness of a threat that resulted in a special needs detention, the courts will ordinarily consider three things: (1) the magnitude of the harm to a public or law enforcement interest at stake, (2) the likelihood that the detention would eliminate or alleviate the problem, and (3) whether there were less intrusive alternatives that were readily available.

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[1] (2004) 540 U.S. 419, 424. Edited.
[2] See *Terry v. Ohio* (1968) 392 U.S. 1
[3] *U.S. v. Rodriguez-Morales* (1st Cir. 1991) 929 F.2d 780, 784-85.
[4] *State v. Pinkham* (Me. 1989) 565 A.2d 318, 319.
[5] *Illinois v. Lidster* (2004) 540 U.S. 419, 427. Also see *Illinois v. McArthur* (2001) 531 U.S. 326, 331; *People v. Glaser* (1995) 11 Cal.4th 354, 365 ["we balance the extent of the intrusion against the government interests justifying it"].
[6] *Mora v. City of Gaithersburg* (4th Cir. 2008) 519 F.3d 216, 224.

MAGNITUDE OF POTENTIAL HARM: The most important circumstance in determining the need for a stop is the magnitude of the harm that might result if officers failed to act. Consequently, special needs detentions are summarily invalidated if the public interest was relatively insignificant. As one court put it, "[W]e neither want not authorize police to seize people or premises to remedy what might be characterized as minor irritants."[7]

For example, in *U.S. v. Dunbar* the court faulted an officer for detaining a motorist merely because he appeared to be lost. Said the court, the "policy of the Fourth Amendment is to minimize governmental confrontations with the individual," but that policy is not served if the courts permit officers to detain people "simply for the well-intentioned purpose of providing directions."[8] Similarly, the California Court of Appeal said that officers may not "go around promiscuously bothering citizens," although they may take actions that were "reasonably consistent" with their "overall duties of protecting life and property and aiding the public in maintaining lives of relative serenity and tranquility."[9]

Note that to determine the magnitude of a threat, the courts examine the circumstances as they would have appeared to a reasonably well-trained officer.[10]

PROOF OF EFFECTIVENESS: As noted, the weight of the need to detain a person will also depend on the likelihood that the detention would succeed in its objective; i.e., that it would be "a sufficiently productive mechanism" to justify the intrusion.[11]

ALTERNATIVES: The need to conduct a special needs detention would necessarily be reduced if the officer knew of a less intrusive and readily available way of resolving the problem. For example, in *People v. Spencer*[12] officers stopped a car to determine if the driver knew the whereabouts of a friend who was a fugitive. This objective, said the court, did not warrant a detention because "there was no genuine need for so immediate and intrusive an action as pulling over defendant's freely moving vehicle."

In contrast, the Ninth Circuit in *U.S. v. Ward*[13] ruled that a car stop of a person who lived with several fugitives was lawful even though the officers knew the person's name and address. This was because the officers wanted to talk with him about his roommates, and it would have been foolish (and dangerous) to do so in the vicinity of those very roommates.

Note that the existence of a less intrusive alternative will not invalidate a detention unless the officers were negligent in failing to recognize and implement it. As the Supreme Court put it, "The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize and pursue it."[14]

Intrusiveness of the detention

After determining the magnitude of the potential threat and whether the stop would effectively alleviate that threat, the courts will assess the intrusiveness of the stop so as to make sure it was outweighed by the need to detain the person. In other words, did the officers overreact to the threat? As the Supreme Court explained, "[T]he manner in which the seizure was conducted is as vital a part of the inquiry as whether it was warranted at all."[15] Or, as the Ninth Circuit put it, "the reasonableness of a detention depends not only on *if* it is made, but also on *how* it is carried out."[16]

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[7] (N.Y.App. 2002) 774 N.E.2d 738, 741.
[8] (D.Conn. 1979) 470 F.Supp. 704, 708. Also see *Stevens v. Rose* (9th Cir. 2002) 298 F.3d 880, 884.
[9] *Batts v. Superior Court* (1972) 23 Cal.App.3d 435, 439.
[10] See *United States v. Cortez* (1981) 449 U.S. 411, 418; *People v. Ledesma* (2003) 106 Cal.App.4th 857, 866.
[11] *Delaware v. Prouse* (1979) 440 U.S. 648, 659.
[12] (N.Y.App. 1995) 646 N.E.2d 785.
[13] (9th Cir. 1973) 488 F.2d 162, 164.
[14] *United States v. Sharpe* (1985) 470 U.S. 675, 687.
[15] *United States v. Place* (1983) 462 U.S. 696, 707-708.
[16] *Meredith v. Erath* (9th Cir. 2003) 342 F.3d 1057, 1062.

To assess the intrusiveness of a detention, the courts will ordinarily consider (1) the manner in which the detainee was stopped, (2) whether officers utilized officer-safety precautions,[17] (3) the length of the detention,[18] and (4) whether it was conducted in a place and in a manner that would have caused embarrassment or unusual anxiety.[19] Especially important is the manner in which the officers conducted themselves. For example, the courts will consider whether they addressed the detainee as if he were a suspect or merely someone from whom they were seeking assistance,[20] and whether the officers "explained the purpose of the contact."[21]

As a practical matter, a special needs detention is not apt to be viewed as excessively intrusive if it was brief and the officers did only those things that were reasonably necessary to accomplish their objective. That is because brief and efficient detentions are viewed by the courts as "minimally" intrusive.[22] For example, in ruling that detentions were relatively nonintrusive, the courts have noted that "the restraint at issue was tailored to that need, being limited in time and scope,"[23] and the stop "entailed only a brief detention, requiring no more than a response to a question or two and possible production of a document."[24]

Having examined the procedure for determining whether a special needs detention was justified, we will now look at the most common special needs that are cited by officers. As we will explain, there are mainly three types: threats to people, threats to a legitimate law enforcement interest, and noncriminal detentions on school grounds.

Threats to People

Of all the circumstances that will warrant a special needs detention, the one with the greatest magnitude is an imminent threat to a person's health or safety. In discussing these types of detentions—commonly known as "special needs" detentions—the Montana Supreme Court observed, "[T]he majority of jurisdictions that have adopted the community caretaker doctrine have determined that a peace officer has a duty to investigate situations in which a citizen may be in peril or need some type of assistance from an officer."[25]

The following are examples of situations in which such threats have been given significant weight.

Sick or injured person

Whether officers may detain a person who they believe may be sick or injured will, of course, depend on "the nature and level of distress exhibited."[26] If may also depend on circumstantial evidence of such distress, such as the following:

- The victim of an assault who had just left the scene was detained to determine if he needed medical attention.[27]
- Upon arrival at the scene of a reporting shooting, witnesses told officers that someone fired shots at a 1995 Isuzu Rodeo 4x4 with tinted windows, and that someone in the Isuzu had been shot. When officers spotted the Isuzu. they detained the occupants.[28]
- An officer noticed that the driver of a car that was stopped at a red light had his head "resting on the window" and his eyes "appeared to be

[17] See *In re K.J.* (2018) 18 Cal.App.5th 1123, 1132; *People v. Hannah* (1996) 51 Cal.App.4th 1335, 1344.
[18] See *People v. Glaser* (1995) 11 Cal.4th 354, 366.
[19] See *People v. Dominguez* (1987) 194 Cal.App.3d 1315, 1318; *People v. Matelski* (2000) 82 Cal.App.4th 837, 850.
[20] See *People v. Hannah* (1996) 51 Cal.App.4th 1335, 1344.
[21] *People v. Matelski* (2000) 82 Cal.App.4th 837, 849-50.
[22] See *Illinois v. Lidster* (2004) 540 U.S. 419, 425.
[23] *Illinois v. McArthur* (2001) 531 U.S. 326, 331.
[24] *Ingersoll v. Palmer* (1987) 43 Cal.3d 1321, 1333.
[25] *State v. Lovegren* (Mont. 2002) 51 P.2d 471, 4474. Citations omitted.
[26] *Corbin v. State* (Tex. App. 2002) 85 S.W.3d 272, 277. Also see *U.S. v. Gallegos* (10th Cir. 1997) 114 F.3d 1024, 1029.
[27] *Metzker v. State* (Alaska App. 1990) 797 P.2d 1219, 1222.
[28] *People v. Hernandez* (N.Y. App. 1998) 679 N.Y.S.2d 790.

closed, and the officer believed that there was "something physically or mentally wrong" with him. Said the court, "The operation of a motor vehicle by a driver disabled for any reason, be it a disability that is statutorily prohibited or not, is manifestly a serious event and the need for swift action is clear beyond cavil."[29]

- At 3 A.M., the driver of a car "stopped or slowed considerably five times within approximately 90 seconds" and eventually pulled to the side of the road. "Considering the totality of circumstances," said the court, it was reasonable for the officer to conclude, among other things, that "something was wrong" with the driver or his vehicle.[30]
- Responding to a report that a man in a field was "unconscious in a half-sitting, half-slumped-over position," officers found the man on the ground in the field and detained him "so that the fire department personnel could examine him."[31]

In contrast, the California Court of Appeal ruled that a community caretaking detention was unwarranted merely because the detainee was "walking with an unsteady gait and sweating" and "stumbled." Such symptoms, said the court, demonstrated "a low level of distress."[32]

Warn of danger

A special needs detention may also be warranted if it was reasonably necessary to notify the person of a dangerous condition or prevent him from entering a dangerous area. Examples:

- An officer stopped a car at 2 A.M. in a parking lot to warn the driver that his lights were off. Said the court, the officer was "not required to wait until appellant actually drove upon a public street to stop appellant."[33]
- An officer stopped a motorcyclist who was about to enter a rural area containing marijuana fields that officers were about to raid.[34]
- Although the defendant was not speeding, a park ranger signaled him to stop because his speed "posed a danger to campers" since there were parked vehicles that obstructed the view of campers in the area.[35]
- Officers were patrolling a high-crime neighborhood at about 7:40 P.M. when they saw a 17-year old girl leaning against a storefront in a "huddled position." Thinking she was a runaway, the officers detained her, and subsequently discovered she was armed with a handgun.[36]

Missing person

A special needs detention may also be warranted if officers reasonably believed that the detainee had been reported missing, especially if the person was very young or old. Thus, the New Jersey Supreme Court ruled that a car stop was warranted because, per NCIC, a possible occupant of the vehicle was an "endangered missing person."[37]

Mental health issues

A detention may also be necessary if officers reasonably believed that the detainee was so mentally unstable as to constitute a threat to himself or others. Some examples:

- The detainee "was possibly intoxicated and was observed exiting and reentering a vehicle that was parked on a dead-end street."[38]
- Detainee was walking down the street at 1 A.M. "crying and talking really loudly or shouting," "his hands were over his face," he appeared "unsteady on his feet."[39]

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[29] *People v. Bellomo* (1984) 157 Cal.App.3d 193, 197.
[30] *State v. Bakewell* (Neb. 2007) 730 N.W.2d 335, 339. Also see *State v. Reinhart* (S.D. 2000) 617 N.W.2d 842.
[31] *U.S. v. Garner* (10th Cir. 2005) 416 F.3d 1208.
[32] *People v. Madrid* (2008) 168 Cal.App.4th 1050, 1060.
[33] *People v. Ellis* (1993) 14 Cal.App.4th 1198, 1202.
[34] *People v. Williams* (2007) 156 Cal.App.4th 949, 959.
[35] *State v. Moore* (Iowa 2000) 609 N.W.2d 502, 503.
[36] *In re Kelsey C.R.* (Wis. 2001) 626 N.W.2d 777, 788-89.
[37] *State v. Diloreto* (N.J. 2004) 850 A.2d 1226.
[38] *Winters v. Adams* (8th Cir. 2001) 254 F.3d 758, 760.
[39] *Gallegos v. City of Colorado Springs* (10th Cir. 1997) 114 F.3d 1024.

- The detainee had reportedly taken "some pills," and was "agitated," "physically aggressive," and "confused, stating that he did not know where he was."[40]
- The detainee went "ballistic," screaming and banging her head on the car.[41]

In contrast, the Court of Appeal ruled that a community caretaking detention was unwarranted merely because the detainee was "walking with an unsteady gait and sweating" and "stumbled." Such symptoms, said the court, demonstrated "a low level of distress."[42]

Threat to Law Enforcement Interests

In the past, detentions could not qualify as serving a "special need" unless its purpose was "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."[43] In other words, the purpose of the stop must have been something other than a "general interest in crime control."[44] In many cases, however, it is impossible to neatly separate community caretaking interests from law enforcement interests because they are often linked—indirectly or even directly. As one court observed, "Police often operate in the gray area between their community caretaking function and their function as criminal investigators."[45]

Fortunately, much of the confusion surrounding this issue was eliminated by the Supreme Court in the case of *Illinois v. Lidster* where the Court ruled that officers may conduct special needs detentions that are linked to a law enforcement interests if the officers' *primary* objective was to alleviate a serious threat.[46] With this in mind, we will now examine the types of situations in which special needs detentions have been upheld when the officers' secondary objective was related to a law enforcement interest.

Securing the scene of police activity

Officers who are conducting a search, making an arrest, or processing a crime scene may, of course, take "unquestioned command" of the scene.[47] As the Supreme Court observed, "[A] police officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety."[48] To accomplish this, however, officers must sometimes order people to do things, such as staying away or waiting in a particular place. As the Tenth Circuit pointed out, "[D]etention or control of both suspects and non-suspects may be necessary to insure officer safety and to maintain the officers' control over a crime scene."[49] Such a command will not, however, result in an illegal seizure if the need for compliance with the officers' directions outweighed the intrusiveness of those directions. The following are the most common situations in which this issue is likely to arise.

DETAINING PASSENGERS IN STOPPED VEHICLE: Officers who make car stops will usually have grounds to detain or arrest the driver. But because car stops are notoriously dangerous, it is often necessary to exercise control over any passengers as well. In the past, this was a problem when, as was usually the case, the officers had no reason to believe the passengers constituted a threat. That changed in 2007 when the Supreme Court ruled in *Brendlin v. California*[50] that, because of the overriding need to exercise control over all occupants, they are deemed lawfully detained and thus subject to reasonable restrictions.

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[40] *State v. Crawford* (Iowa 2003) 659 N.W.2d 537, 543.
[41] *State v. Litschauer* (Mont. 2005) 126 P.3d 456.
[42] *People v. Madrid* (2008) 168 Cal.App.4th 1050, 1060.
[43] *Cady v. Dombrowski* (1973) 413 U.S. 433, 441.
[44] See *Indianapolis v. Edmond* (2000) 531 U.S. 32, 41.
[45] *State v. Blades* (Conn.1993) 626 A.2d 273, 279.
[46] (2004) 540 U.S. 419, 423. Also see *U.S. v. Curry* (4th Cir. 2019) __ F.3d __ .
[47] See *Brendlin v. California* (2007) 551 U.S. 249, 258.
[48] *Brendlin v. California* (2007) 551 U.S. 249, 258.
[49] *U.S. v. Walker* (10th Cir. 2006) 451 F.3d 1139, 1149.
[50] (2007) 551 U.S. 249.

EXECUTING SEARCH AND ARREST WARRANTS: Like car stops, the execution of search and arrest warrants is especially dangerous because officers seldom know enough about the people inside to determine whether they constitute a threat. For this reason, the Supreme Court ruled that officers who are executing search warrants for drugs, illegal weapons, or other contraband may, as a matter of course, detain all residents and visitors pending completion of the search. Said the court, "[A] warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted."[51]

PROBATION SEARCHES OF HOMES: Although probation and parole searches of homes can be as dangerous as warranted searches for contraband, the courts have not authorized wholesale detentions of all occupants under a special needs theory. Instead, they seem to uphold detentions of non-suspects only if there was some additional reason to believe the person constituted a threat. For example, one such detention was upheld when the probationer was a gang member, and the visitor who was detained had "visible gang tattoos on his face and hand."[52] And in another case, the court ruled that officers could detain visitors because the probationer was prohibited from associating with convicted felons, and the purpose of the detention was to determine if the probationer was complying with that restriction.[53]

ROADBLOCKS: Like other special needs detentions, stopping motorists at roadblocks and checkpoints may constitute a lawful detention if the need for the roadblock outweighed its intrusiveness. For example, in *Michigan State Police v. Sitz*[54] the Court upheld a DUI checkpoint because of, among other things, the "magnitude of the drunken driving problem," the "State's interest in preventing drunken driving," and the need to remove impaired drivers from the roads. In contrast, in *Indianapolis v. Edmond*[55] police set up a checkpoint to determine if any motorists possessed illegal drugs (a drug-sniffing dog was used). Although it was argued that one objective of these roadblocks was to remove impaired drivers from the roads, the Court rejected the argument because, said the Court, the "primary purpose" was to "advance the general interest in crime control."

Another requirement for special needs detentions resulting from roadblocks is that officers must have had reason to believe that the roadblock or checkpoint would succeed in its objective. For example, the Court in *Edmond* indicated that a roadblock would be permitted "to catch a dangerous criminal who is likely to flee by way of a particular route." In contrast, the Court in *Delaware v. Prouse*[56] invalidated a departmental practice in which officers would stop motorists at random to determine if they were properly licensed. Apart from the fact that the threat to the public (unlicensed drivers) was relatively insignificant, the Court noted that the effectiveness of such car stops is minimal because "the percentage of all drivers on the road who are driving without a license is very small and that the number of licensed drivers who will be stopped in order to find one unlicensed operator will be large indeed." In addition, such roadblocks were objectionable because there were no standards by which officers would determine which motorists to stop.

Finally, roadblocks and checkpoints must be conducted in a manner so as to minimize their intrusiveness. This means that roadblocks and checkpoints will ordinarily be permitted only if (1) the motorists were detained only briefly, (2) all vehicles were stopped (i.e., certain vehicles were not singled

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[51] *Michigan v. Summers* (1981) 452 U.S. 692, 705. Also see *Muehler v. Mena* (2005) 544 U.S. 93, 100; *People v. Thurman* (1989) 209 Cal.App.3d 817, 823

[52] *People v. Rios* (2011) 193 Cal.App.4th 584, 595. Also see *People v. Hannah* (1996) 51 Cal.App.4th 1335, 1343-44.

[53] *People v. Matelski* (2000) 82 Cal.App.4th 837, 841-42.

[54] (1990) 496 U.S. 444.

[55] (2000) 531 U.S. 32. Also see *State v. Hayes* (Tenn. 2006) 188 S.W. 505 [checkpoint outside housing project].

[56] (1979) 440 U.S. 648, 659-60.

out), and (3) it would have been apparent to the motorists that the checkpoint was operated by law enforcement officers; e.g., uniformed officers, marked patrol cars.[57]

Detaining witnesses

It is, of course, in the public interest to apprehend and convict criminals. But this ordinarily requires witnesses, and witnesses frequently will not come forward because they don't want to get involved or because they don't realize they had seen or heard something significant. While some courts have ruled that detentions to locate witnesses cannot constitute special needs detentions (because the objective is too closely associated with law enforcement objectives), that has changed.

Now, brief special needs detentions of potential witnesses have been upheld when the need to identify witnesses was sufficiently strong. And this will depend on the seriousness of the crime under investigation, the likelihood that the detainee was a witness, and the importance of the information that the witness might possess.

For example, in *Illinois v. Lidster*[58] officers were investigating a felony hit-and-run accident in which a bicyclist was killed. About one week after the accident, officers set up a checkpoint near the scene and asked each passing motorist if they had seen anything that might help identify the perpetrator. Lidster was one of the drivers who was stopped, and he was arrested after officers determined that he was under the influence of alcohol.

Lidster argued that he was detained unlawfully because its purpose was to apprehend the hit-and-run driver. But, while that was certainly its ultimate objective, the Court ruled that its immediate objective was technically—but significantly—different: "to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others."

The Court also pointed out that the roadblock was sufficiently likely to be productive because it "took place about one week after the [accident], on the same highway near the location of the accident, and at about the same time of night [when] motorists [were] routinely leaving work after night shifts at nearby industrial complexes." Finally, the Court concluded that the roadblock was relatively non-intrusive because, although "[t]he blockage forced traffic to slow down, leading to lines of up to 15 cars in each lane," the detentions lasted only ten to fifteen seconds.

In a recent case on this subject, *U.S. v. Curry,*[59] officers in Richmond, Virginia were patrolling a neighborhood in which six shootings and two homicides had occurred in the previous three months. When two of these officers heard "around a half dozen gunshots" coming from a nearby street, they sped there and saw several men walking away from the area where the gunshots appeared to have originated. The officers detained some of them and ordered them to "lift their shirts and submit to a visual inspection of their waistbands for concealed firearms." All of them complied except Curry, who fought with the officers when they attempted to pat search him. And, during the scuffle, he dropped a handgun.

On appeal from his conviction of possessing a firearm by a convicted felon, Curry argued that he was detained illegally because the officers lacked sufficient grounds to believe he was the shooter. Even if that were true, said the court, the detention was still lawful because the officers had a "strong government interest—calling for first responders to prevent any further shootings (either as retaliation or a continuation of the opening salvo) and treat wounded citizens on the scene." Thus, the court concluded that the officers' "split-second decision" to briefly detain the men "effectively advanced the public concerns present."

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[57] See *Michigan Department of State Police v. Sitz* (1990) 496 U.S. 444, 450.
[58] (2004) 540 U.S. 419, 425.
[59] (4th Cir. 2019) 937 F.3d 363.

Finally, in *Wold v. Minnesota*[60] officers in Duluth were dispatched at about 11 P.M. to a stabbing that had just occurred. When they arrived, they detained Wold and another man who were shouting at paramedics. During the detention, Wold admitted that he had stabbed the victim, and he was subsequently convicted of murder. On appeal, he argued that his admission should have been suppressed because the officers lacked grounds to believe he was involved in the attack. The court responded that, even if the officers had insufficient reason to believe that Wold had stabbed the victim, the detention was lawful because they reasonably believed he was an eyewitness. Said the court, "[W]e cannot fault [the officers'] conclusion that both of the individuals may have witnessed the crime, or that either or both might be potential suspects."

One other thing. In *Maxwell v. County of San Diego* the Ninth Circuit said that, "in the hierarchy of state interests justifying detention, the interest in detaining witnesses for information is of relatively low value."[61] While most people would probably disagree with the idea that solving crimes and bringing criminals to justice is of "relatively low value," we think the court meant to say that a detention to speak with possible witnesses would qualify as a special needs detention only if officers reasonably believed that the witness possessed crucial information pertaining to a serious crime.

Detentions on School Grounds

Officers may, of course detain anyone on school property if they reasonably believed the person was committing a crime. Under certain circumstances they may detain visitors if they reasonably believed the stop was neccessary to restrict access by outsiders or otherwise provide students with a safe environment.[62] Specifically, such detentions have been upheld when (1) they were conducted by a school resource officer or other officer employed by the school district; (2) the detention served a school-related interest, such as safety or maintaining order; and (3) the detention was not arbitrary or capricious. As the California Supreme Court explained, "[S]chool officials [must] have the power to stop a minor student in order to ask questions or conduct an investigation even in the absence of reasonable suspicion, so long as such authority is not exercised in an arbitrary, capricious, or harassing manner."[63]

For example, in *People v. William V.*,[64] a school resource officer at a high school in Hayward noticed that a student named William was carrying "a neatly folded red bandanna" in his back pocket. This caught the officer's attention because it violated a school rule prohibiting bandannas since their colors "commonly indicate gang affiliation." So, the officer detained him and determined that he was armed with a knife. William contended that the detention was unlawful because the officer did not have grounds to believe he was committing a crime. It didn't matter, said the court, because "William's violation of the school rule prohibiting bandannas on school grounds justified the initial detention."

Finally, in *People v. Joseph F.*[65] an assistant principal and school resource officer at a middle school in Fairfield saw Joseph, a high school student, on campus at about 3 P.M. At the request of the assistant principal, the officer tried to detain him to determine if he had registered as a visitor per Penal Code section 627.2. Joseph refused to stop and was arrested for interfering with an officer in the performance of his duties. On appeal, the court ruled that the officer had a legal right to detain Joseph because the detention of a high school student on a middle school campus is plainly lawful, even if the only purpose is to determine whether he has a legitimate reason for being there. POV

[60] (Minn. 1988) 430 N.W.2d 171.
[61] (9th Cir. 2013) 708 F.3d 1075, 1083
[62] See *New Jersey v. T.L.O.* (1985) 469 U.S. 325, 339.
[63] *In re Randy G.* (2001) 26 Cal.4th 556, 559.
[64] (2003) 111 Cal.App.4th 1464.
[65] (2000) 85 Cal.App.4th 975.

Pat Searches

American criminals have a long tradition of armed violence.[1]

The statistics are chilling. According to the FBI, almost 93% of the officers killed in the line of duty in 2018 were killed by gunfire.[2] And most of these shootings took place while the officers were detaining or pursuing the killer. This is hardly surprising since officers who are detaining suspects are "particularly vulnerable in part because a full custodial arrest has not been effected, and the officer must make a quick decision as to how to protect himself and others from possible danger."[3] And even though the suspect is technically under the officer's "control" in the sense that he is not free to leave, the Supreme Court has noted that he still might "reach into his clothing and retrieve a weapon."[4] The Ninth Circuit captured the essence of the problem when it said, "It is a difficult exercise at best to predict a criminal suspect's next move, and it is both naive and dangerous to assume that a suspect will not act out desperately despite the fact that he faces the barrel of a gun."[5]

To reduce this danger, the Supreme Court ruled that officers may pat search detainees to determine whether they are carrying a weapon "and to neutralize the threat of physical harm."[6] But there is one restriction—and it's a big one: They may ordinarily conduct pat searches only if they have reason to believe the detainee was armed or dangerous.

The question arises: Why can't officers pat search all detainees? It's a legitimate question because, as the Tenth Circuit observed in *U.S. v. Rice*, "An officer in today's reality has an objective, reasonable basis to fear for his or her life every time a motorist is stopped."[7] Still, there are reasons for not permitting indiscriminate pat searches. The Supreme Court summed them up when it noted that pat searches are "a sensitive area of police activity" which "must surely be an annoying, frightening, and perhaps humiliating experience." In other words, said the Court, "[I]t is simply fantastic to urge that [a pat search] performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a 'petty indignity.' It is a serious intrusion."[8] The issue we will discuss in this article is how officers can determine whether this intrusion is justified.

Two other things before we begin. First, although we will focus on pat searches of detainees, it should be noted that officers may also pat search (1) people who consented, (2) people who were inside a home that officers were searching for drugs or weapons pursuant to a warrant, and (3) people who were being transported in a police vehicle; e.g., transporting a witness to a showup.[9] Second, it must acknowledged that officers sometimes encounter situations in which they have reason to believe that a pat search is necessary even though the legal grounds are questionable. In such situations they should do what they think is necessary for their safety, and not worry about whether the search will stand up in court. As the Court of Appeal put it, "Ours is a government of laws to preserve which we require law enforcement officers—live ones."[10]

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[1] *Terry v. Ohio* (1968) 393 U.S. 1, 23.
[2] FBI Report: "Law Enforcement Officers Killed and Assaulted, 2018."
[3] *Michigan v. Long* (1983) 463 U.S. 1032, 1051.
[4] *Michigan v. Long* (1983) 463 U.S. 1032, 1051
[5] *U.S. v. Reilly* (9th Cir. 2000) 224 F.3d 986, 993.
[6] *Terry v. Ohio* (1968) 393 U.S. 1, 24.
[7] (10th Cir. 2007) 483 F.3d 1079, 1083.
[8] *Terry v. Ohio* (1968) 393 U.S. 1, 16-17.
[9] See *People v. Glaser* (1995) 11 Cal.4th 354, 365, 367; *People v. Huerta* (1990) 218 Cal.App.3d 744, 750.
[10] *People v. Koelzer* (1963) 222 Cal.App.2d 20, 27. Also see *People v. Dumas* (1967) 251 Cal.App.2d 613, 617.

Armed or Dangerous

Officers may pat search a detainee if they have reason to believe he was armed or dangerous. But unless they actually saw a weapon, or unless the detainee's behavior was overtly threatening, this determination must be based on circumstantial evidence. In this section, we will discuss the circumstances that are most commonly cited by officers and the courts. But first, the basic principles.

General Principles

ARMED OR DANGEROUS: In the Supreme Court's seminal pat search case, *Terry v. Ohio*, the Court said that officers may search detainees only if they reasonably believed that the detainee was "armed *and* dangerous."[11] Almost immediately, however, the lower courts understood that the use of the conjunctive "and" was an unfortunate lapse, and that officers may pat search any detainee who they reasonably believed was armed *or* dangerous. This was because every detainee who is armed with a weapon is necessarily "dangerous" to the officer who is detaining him, even if he was currently "friendly." In fact, the Supreme Court in *Terry* applied the armed *or* dangerous standard when it said that a prudent officer would have been warranted in believing that an armed detainee is necessarily a dangerous one.[12]

It follows that officers should not be required to assume that every dangerous detainee is necessarily unarmed. As the Tenth Circuit observed, "[T]he reasonable suspicion test does not require [the officer] to be absolutely certain that the individual is armed; rather the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger."[13]

THE "REASONABLE OFFICER" TEST: In determining whether a pat search was warranted, the courts apply the "reasonable officer" test, meaning that the search will be upheld if a reasonable officer under the circumstances would have believed that the detainee was armed or dangerous. As the Fifth Circuit put it, "[T]he facts must be such that a hypothetical officer in exactly the same circumstances reasonably could believe that the individual is armed and dangerous."[14] Thus, if a reasonable officer would have seen the threat, it is immaterial that the officer testified that he did not feel "threatened" by the detainee or "scared."[15]

THE NEED FOR FACTS: A reasonable officer's belief that a detainee was armed or dangerous depends on the existence of facts. As the Fifth Circuit observed, "the feelings or hunches of an officer are too lacking in substance to effectively guarantee protection of constitutional rights."[16] But, in the context of pat searches, "facts" include circumstantial evidence and reasonable inferences based on facts.[17]

"ROUTINE" PAT SEARCHES: Because facts are required, officers may not conduct pat searches as a matter of routine. For example, courts have summarily invalidated pat searches when the officer testified that it was "standard procedure,"[18] or "[I] pat down everyone that I talk to, for safety reasons,"[19] or "As far as I'm concerned, anybody I stop may have been armed."[20]

TOTALITY OF CIRCUMSTANCES: In determining whether officers reasonably believed that a detainee was armed or dangerous, the courts will consider the totality of circumstances surrounding the incident. Thus, the courts must not fractionalize the facts by isolating each one, belittling its importance or explaining it away. For example, in upholding a

[11] (1968) 392 U.S. 1, 27. Emphasis added.
[12] *Terry v. Ohio* (1968) 393 U.S. 1, 28. Also see *Michigan v. Long* (1983) 463 U.S. 1032, 1049.
[13] *U.S. v. Garcia* (10th Cir. 2014) 751 F.3d 1139, 1144. Also see *U.S. v. White* (11th Cir. 2010) 593 F.3d 1199, 1202.
[14] *U.S. v. Hanlon* (8th Cir. 2005) 401 F.3d 926, 929.
[15] See *U.S. v. Tharpe* (5th Cir. 1976) 536 F.2d 1098, 1101.
[16] *U.S. v. Tharpe* (5th Cir. 1976) 536 F.2d 1098, 1100.
[17] See *Terry v. Ohio* (1968) 392 U.S. 1, 21.
[18] *Santos v. Superior Court* (1984) 154 Cal.App.3d 1178, 1181.
[19] *People v. Hubbard* (1970) 9 Cal.App.3d 827, 830.
[20] *People v. Griffith* (1971) 19 Cal.App.3d 948, 952.

pat search in *People v. Avila* the court said, "All of these factors, although perhaps individually harmless, could reasonably combine to create fear in the detaining officer."[21]

CIRCUMSTANTIAL EVIDENCE: The existence of a threat may be based on direct or circumstantial evidence. As the Court of Appeal observed, it would be "utter folly" to require an officer "to await an overt act of hostility before attempting to neutralize the threat of physical harm."[22]

Nature of crime under investigation

Grounds to pat search will automatically exist if the suspect was detained to investigate a crime closely linked to weapons or violence, or a crime in which the perpetrators commonly use tools that could be used as weapons; e.g., burglary, car theft.[23] Another crime for which a pat search is always authorized is drug dealing. "In the narcotics business," said the California Supreme Court, "firearms are as much 'tools of the trade' as are most commonly recognized articles of narcotics paraphernalia."[24] It is, however, doubtful that mere possession for personal use would suffice.[25]

Although domestic violence is, by definition, a violent crime, it is not clear whether domestic violence—in the absence of violent or threatening conduct—would warrant a pat search.[26] Finally, officers may pat search all occupants in a car involved in a pursuit, regardless of the initial reason for the stop.[27]

(We are aware of *In re Jeremiah S.* in which a panel of the Court of Appeal seemingly rejected this principle. For reasons we discussed in the report on *Jeremiah S.* in the Recent Cases section, we believe that the contrary decisions on this issue by the Supreme Courts of the United States and California are controlling.)

A bulge

A bulge under the detainee's clothing will warrant a pat search if—based on its size, shape, or heft—there was a reasonable possibility it was a weapon.[28] As the Fifth Circuit observed, a pat search is permissible "if an officer observes or feels bulges on a suspect's person so long as an officer is investigating an object that reasonably may be a weapon."[29] Similarly, the Ninth Circuit noted that "we have given significant weight to an officer's observation of a visible bulge in an individual's clothing that could indicate the presence of a weapon."[30]

A bulge may become even more suspicious if it was located where conventional weapons are commonly concealed (e.g. at the waist, under a jacket),[31] or if the suspect attempted to keep the bulge hidden from officers, or if he suddenly reached for it.[32] Also see "Sudden movement," below.

Furtive gestures

A so-called "furtive gesture" is a movement by a suspect, usually of the hands or arms, that (1) reasonably appeared to have been made in response to seeing an officer; and (2) was secretive in nature, meaning that it appeared the suspect did not want the officer to see what he was doing. A furtive gesture is a legitimate concern because of the possibility that the detainee was attempting to hide or retrieve a weapon. Some examples:

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[21] (1997) 58 Cal.App.4th 1069, 1075.
[22] *People v. Thurman* (1989) 209 Cal.App.3d 817, 823. Also see *People v. Samples* (1992) 11 Cal.App.4th 389, 393.
[23] See *People v. Osborne* (2009) 175 Cal.App.4th 1052, 1061; *People v. Vermouth* (1971) 20 Cal.App.3d 746, 753.
[24] *People v. Glaser* (1995) 11 Cal.4th 354, 367.
[25] See *Ramirez v. City of Buena Park* (9th Cir. 2009) 560 F.3d 1012, 1022.
[26] See *U.S. v. McCants* (3rd Cir. 2018) 911 F.3d 127, 133-34. Compare *People v. H.M.* (2019) 167 Cal.App.4th 136, 144.
[27] See *People v. Hill* (1974) 12 Cal.3d 731, 746, fn.13. Also see *Haynie v. Los Angeles County* (9th Cir. 2003) 339 F.3d 1071.
[28] See *People v. Miles* (1987) 196 Cal.App.3d 612, 618; *U.S. v. Black* (4th Cir. 2008) 525 F.3d 359, 365.
[29] *U.S. v. Williams* (5th Cir. 2018) 880 F.3d 713, 719.
[30] *People v. Snyder* (1992) 11 Cal.App.4th 389, 393.
[31] See *Pennsylvania v. Mimms* (1977) 434 U.S. 106, 107, 112; *People v. Snyder* (1992) 11 Cal.App.4th 389, 391.
[32] See *People v. Superior Court (Brown)* (1980) 111 Cal.App.3d 948, 957.

- The suspect "was fidgeting and constantly moving inside the SUV and keeping his hands out of view."[33]
- A detainee "angled his body away" from the officers so they could not see his right side."[34]
- At a traffic stop, the suspect moved his hand and body "as if to reach under the seat."[35]
- The suspect "clutched his stomach as he got out of the car, as if he were trying to keep something held against the front part of his body."[36]
- When the officer asked the suspect to exit the vehicle, he "dropped his wallet and his cell phone onto the ground as he got out of the car."[37]

Sudden movement

A sudden and unexpected movement by a detainee may justify a pat search, especially a reach into a place where weapons are commonly secreted. As the Ninth Circuit observed, "We have also considered sudden movements by defendants, or repeated attempts to reach for an object that was not immediately visible, as actions that can give rise to a reasonable suspicion that a defendant is armed."[38] Some examples:

- The suspect fumbled "frantically" in his pockets.[39]
- When asked for ID, the suspect "repeatedly reached under his jacket, delved into the vehicle's center console, and reached underneath the seat before finally withdrawing his driver's license from a rear pocket."[40]
- A suspected heroin dealer "suddenly put his hand into the bulging pocket."[41]
- Another suspected heroin dealer "turned toward the patrol car and placed his hand inside his jacket."[42]

Refusal to comply

A detainee's refusal to comply with an officer's request or command may indicate defiance which is a relevant circumstance, especially if the objective of the officer's command was to restrict the detainee's ability to obtain a weapon. For instance:

- Detainee made "evasive movements even after [the officer] asked him to stop."[43]
- Detainee "ignored directions from [the officer] by removing his hands from the dashboard and reaching towards the floorboard of the vehicle."[44]
- After twice ignoring an officer's command to raise his hands, the defendant "turned his back" and started to walk away.[45]
- Suspect refused to drop an object in his hands.[46]
- The officer "twice called to defendant to stop but defendant without hesitation or turning around continued walking away from him."[47]
- "The deputy asked defendant to put the [fanny pack] on the hood of the patrol car, but defendant put it on the ground."[48]
- "[W]illiams rolled down his window, rather than comply with the policeman's request to step out of the car so that his movements could more easily be seen."[49]

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[33] *People v. Fews* (2018) 27 Cal.App.5th 553, 560.
[34] *U.S. v. Oglesby* (7th Cir. 2010) 597 F.3d 891, 894.
[35] *U.S. v. Washington* (D.C. Cir. 2009) 559 F.3d 573. Also see *People v. King* (1989) 216 Cal.App.3d 1237, 1240.
[36] *U.S. v. Raymond* (4th Cir. 1998) 152 F.3d 309, 311.
[37] *U.S. v. George* (4th Cir. 2013) 732 F.3d 296, 301.
[38] See *U.S. v. Flatter* (9th Cir. 2006) 456 F.3d 1154, 1158.
[39] *U.S. v. Hood* (10th Cir. 2014) 774 F.3d 638, 643.
[40] *U.S. v. Stewart* (8th Cir. 2011) 631 F.3d 453, 458.
[41] *People v. Rosales* (1989) 211 Cal.App.3d 325.
[42] *People v. Lee* (1987) 194 Cal.App.3d 975.
[43] *People v. Rios* (2011) 193 Cal.App.4th 584, 599.
[44] *U.S. v. Orth* (1st Cir. 2017) 873 F.3d 349, 358.
[45] *People v. Wigginton* (1973) 35 Cal.App.3d 732, 735.
[46] *In re John C.* (1978) 80 Cal.App.3d 814, 819.
[47] *People v. Superior Court (Brown)* (1980) 111 Cal.App.3d 948, 954-55.
[48] *People v. Ritter* (1997) 54 Cal.App.3d 274, 277.
[49] *Adams v. Williams* (1972) 407 U.S. 143, 148.

Detainee's current mental state

HOSTILE, AGITATED: A detainee's overt hostility toward officers or an agitated mental state are both indicative of an impending threat because of the likelihood that he is unable to control himself. This was an issue in *People v. Michael S.* where officers, who had detained a juvenile for mildly suspicious behavior, testified that he "started breathing very rapidly, hyperventilating, and became boisterous and angry and very antagonistic [and] clenched and unclenched his fists.[50] Similarly, in *U.S. v. Micheletti*[51] the court ruled that a pat search was warranted because the detainee, "a large and imposing man, was heading straight toward [the officer] with a 'cocky,' perhaps defiant attitude and his right hand concealed precisely where a weapon could be located."

NERVOUSNESS: A detainee's nervousness has little relevance unless it was extreme or unusual under the circumstances; e.g., the detainee "was shaking and trembling,"[52] he "began turning pale and his hands began to shake,"[53] "visibly elevated heart rate, shallow breathing, and repetitive gesticulations, such as wiping his face and scratching his head."[54] In contrast, the court will disregard "run-of-the-mill" nervous reactions.[55] Note that a detainee's failure to make eye contact is not ordinarily given much weight and "must be evaluated in light of the circumstances of each case."[56]

UNDER THE INFLUENCE: A detainee who is under the influence of alcohol or drugs might be considered dangerous if his behavior was unpredictable or unable to control himself.[57]

Detainee's criminal history

A detainee's criminal history, especially a history of committing violent or weapons-related crimes is another legitimate reason to be leery. As the Tenth Circuit explained, "[W]here the circumstances of the stop itself interact with an individual's criminal history to trigger an officer's suspicions, that criminal history becomes critically relevant."[58]

For example, the courts have cited the following circumstances as relevant:

- "[N]umerous prior police contacts and arrests for drug-related crimes."[59]
- The suspect "told the officer he had recently done time for robbery."[60]
- The detainee "had a history of violence, possession of weapons and was reported to be a kickboxer."[61]
- The officer knew that he detainee "was able and willing to act combatively toward police officers in confrontational settings."[62]
- The suspect's "girlfriend had an order for protection against him and that [his] name had been mentioned, around this time, at officer safety briefings."[63]

It has also been deemed relevant that the detainee "had a prior felony conviction,"[64] or that he was on probation or parole, especially probation for a crime involving weapons or violence.[65]

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[50] (1983) 141 Cal.App.3d 814, 816-17.
[51] *U.S. v. Michelletti* (5th Cir. 1994) 13 F.3d 838, 842.
[52] *People v. Saunders* (2006) 38 Cal.4th 1129, 1132.
[53] *People v. Brown* (1985) 169 Cal.App.3d 159, 164.
[54] *U.S. v. Riley* (8th Cir. 2012) 684 F.3d 758, 763.
[55] See *People v. Dickey* (1994) 21 Cal.App.4th 952, 956; *People v. Lawler* (1973) 9 Cal.3d 156, 162.
[56] *U.S. v. Montero-Camargo* (9th Cir. 2000) 208 F.3d 1122, 1136.
[57] See *Michigan v. Long* (1983) 463 U.S. 1032, 1050; *U.S. v. Salas* (9th Cir. 1989) 879 F.2d 530, 535.
[58] *U.S. v. Hammond* (10th Cir. 2018) 890 F.3d 901, 907.
[59] *People v. Methey* (1991) 227 Cal.App.3d 349, 352.
[60] *People v. Autry* (1991) 232 Cal.App.3d 365, 367.
[61] *People v. Bush* (2001) 88 Cal.App.4th 1048, 1050.
[62] *U.S. v. Garcia* (10th Cir. 2014) 751 F.3d 1139, 1144.
[63] *U.S. v. Preston* (8th Cir. 2012) 685 F.3d 685, 690.
[64] *U.S. v. Stewart* (8th Cir. 2011) 631 F.3d 453, 457.
[65] See *People v. Williams* (1992) 3 Cal.App.4th 1100, 1105; *People v. Allen* (1975) 50 Cal.App.3d 896, 899.

Location of detention

HIGH CRIME AREA: That a detention occurred in an area where crime, gang, or drug problems are prevalent is also a relevant circumstance.[66] But it will not automatically justify a patdown.[67] As the Seventh Circuit put it, "The police do not have carte blanche to pat down anyone in a dangerous neighborhood."[68] As the court explained in *People v. King*, "[T]he fact that an area involves increased gang activity may be considered if it is relevant to an officer's belief that the detainee is armed and dangerous. While this factor alone may not justify a weapon search, combined with additional factors it may."[69]

SECLUDED AREA: A detention that occurs in a secluded area may present increased danger because the lack of witnesses and potential assistance to the officer may motivate the detainee to take chances he would not otherwise have taken.[70]

NIGHTTIME, DARKNESS: Some courts have indicated there is increased danger when a detention occurs at night.[71] It is not clear whether they mean that increased danger results from darkness, or whether they view nighttime detentions as inherently dangerous, even if they occurred in well-lighted places. In any event, when officers or prosecutors cite "nighttime" as a factor, they should explain why it contributed to the threat.[72] The fact that a detention occurred in a dark place may also be relevant because officers may not be able to see the detainee's hands, movements by the detainee's companions, or potential weapons nearby.[73] As the court observed in *People v. Satchell,* "The area was dark and preparatory movements by defendant and his two companions might easily go unnoticed."[74]

Miscellaneous Circumstances

The following circumstances, while relevant, are not ordinarily given much weight in the absence of other circumstances: detainee was "big,"[75] detainee kept a hand inside a pocket,[76] detainee was wearing baggy clothing,[77] the officers were outnumbered,[78] the detention occurred in a high-crime area,[79] the detainee was a gang member or affiliate,[80] the detainee did not answer when asked if he "had any weapons on him,"[81] the detainee refused to identify himself.[82]

It is not clear whether a pat search would be justified because the detainee possessed an object that might have been used as a weapon, such as a baseball bat or hammer.[83] In such cases, it might depend on whether there was reason to believe it was being used as a weapon; e.g., baseball bat stowed between bucket seats, handle up.[84] POV

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[66] See *Maryland v. Buie* (1990) 494 U.S. 325, 334, fn.2; *Illinois v. Wardlow* (2000) 528 U.S. 119, 124.
[67] See *In re Marcellus L.* (1991) 229 Cal.App.3d 134, 138, fn.2; *People v. Medina* (2003) 110 Cal.App.4th 171, 178.
[68] *U.S. v. Brown* (7th Cir. 1999) 188 F.3d 860, 865.
[69] *People v. King* (1989) 216 Cal.App.3d 1237, 1241.
[70] See *Michigan v. Long* (1983) 463 U.S. 1032, 1050; *People v. Lafitte* (1989) 211 Cal.App.3d 1429, 1433.
[71] See *Adams v. Williams* (1972) 407 U.S. 143, 147; *In re Frank V.* (1991) 233 Cal.App.3d 1232, 1241.
[72] See *People v. Medina* (2003) 110 Cal.App.4th 171, 177.
[73] See *Michigan v. Long* (1983) 463 U.S. 1032, 1050; *People v. Superior Court (Brown)* (1980) 111 Cal.App.3d 948, 956.
[74] (1978) 81 Cal.App.3d 347, 354.
[75] See *People v. Osborne* (2009) 175 Cal.App.4th 1052, 1061; *In re Michael S.* (1983) 141 Cal.App.3d 814, 817.
[76] See *People v. Woods* (1970) 6 Cal.App.3d 832, 837; *In re Frank V.* (1991) 233 Cal.App.3d 1232, 1240-41.
[77] See *People v. Rios* (2011) 193 Cal.App.4th 584, 599; *U.S. v. Dortch* (8th Cir. 2017) 868 F.3d 674, 680.
[78] *People v. Limon* (1993) 17 Cal.App.4th 524, 531. Also see *People v. Suennen* (1980) 114 Cal.App.3d 192, 199.
[79] See *People v. Limon* (1993) 17 Cal.App.4th 524, 531; *U.S. v. Johnson* (9th Cir. 2009) 581 F.3d 994, 1000.
[80] See *In re H.M.* (2008) 167 Cal.App.4th 136, 146; *In re William V.* (2003) 111 Cal.App.4th 1464, 1472.
[81] *U.S. v. Banks* (8th Cir. 2009) 553 F.3d 1101, 1106. Also see *U.S. v. Tinnie* (7th Cir. 2011) 629 F.3d 749, 752.
[82] See *U.S. v. Mouscardy* (1st Cir. 2013) 722 F.3d 68, 75; *U.S. v. Campbell* (6th Cir. 2006] 549 F.3d 364, 372.
[83] See *People v. Lafitte* (1989) 211 Cal.App.3d 1429, 1433, fn.5; *U.S. v. Orth* (1st Cir. 2017) 873 F.3d 349, 356.
[84] See *People v. Avila* (1997) 58 Cal.App.4th 1069, 1074; *People v. Lafitte* (1989) 211 Cal.App.3d 1429, 1433.

Miranda "Interrogation"

"Not every question directed by an officer to a person in custody amounts to an 'interrogation' requiring Miranda warnings."[1]

One of the most basic rules in criminal procedure is that officers may not "interrogate" a suspect in custody unless he had waived his *Miranda* rights. As the Supreme Court explained, "[T]he special procedural safeguards outlined in *Miranda* are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation."[2] This issue usually arises when officers—intentionally or inadvertently—say or do something that causes an unwarned suspect to respond in some way. If prosecutors want to use the suspect's response in court, its admissibility may depend on whether the officer's words constituted "interrogation" as the term is used in *Miranda*.

While interrogation always results if officers asked the suspect questions that were directly related to the crime under investigation, it may also result if officers said something that was reasonably likely to elicit an incriminating response about the crime. As the Supreme Court explained, "[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response."[3] Furthermore, the term "incriminating response" is defined broadly so as to include "an admission, an alibi, or any other inculpatory or exculpatory conduct."[4]

It is therefore important the officers understand the various subjects that are apt to constitute interrogation and, just as important, the types of things that are not.

General Principles

In determining whether an officer's words constituted interrogation, the courts will apply the following principles.

Reasonably likely: As noted, interrogation does not result merely because there was a possibility that the officers' words would have resulted in a confession or incriminating response. Instead, it results only if the officers asked a question or made a comment that was "reasonably likely" to do so.[5] "The standard here," said the Court of Appeal, "is not what the police absolutely know; it is what they *should* know is *reasonably* likely to elicit an incriminating response from a suspect."[6]

For example, in *People v. Claxton*[7] a juvenile hall supervisor asked an incarcerated minor, whom he knew from previous visits, "What did you get yourself into?" The minor, Claxton, replied by confessing to the murder for which he was in custody. The Court of Appeal concluded that the question was not reasonably likely to have elicited such a response because, "In the patois of the streets or jailhouse, the inquiry is tantamount to 'What's up?' or 'What are you in for?' The question did not require an inculpatory reply, nor does anything in the record suggest that [the supervisor] expected one."

The officers' motivation: If the court finds that the officers intended to elicit an incriminating statement, their words or actions will likely constitute interrogation because they would have known that an incriminating response was reasonably likely. As the Third Circuit explained, "[T]he fact that the police intended to elicit incriminating information, though not dispositive, suggests that they should have known a particular ploy was reasonably likely to

[1] *People v. Wader* (1993) 5 Cal.4th 610, 637. Also see *People v. Mayfield* (1997) 14 Cal.4th 668, 732.
[2] *Rhode Island v. Innis* (1980) 446 U.S. 291, 300.
[3] See *Rhode Island v. Innis* (1980) 446 U.S. 291, 301. Edited.
[4] *Shedelbower v. Estelle* (9th Cir. 1989) 885 F.2d 570, 573.
[5] See *Rhode Island v. Innis* (1980) 446 U.S. 291, 301.
[6] *People v. Morris* (1987) 192 Cal.App.3d 380, 389.
[7] (1982) 129 Cal.App.3d 638.

succeed."[8] The fact that officers did not intend to elicit an incriminating response, or that the suspect thought that he did, is unimportant because, as noted, the test is whether an incriminating response was reasonably likely.[9]

UTILIZING INTERROGATION TACTICS: Utilizing an interrogation tactic such as "good cop-bad cop" will likely constitute interrogation because the objective is to elicit an incriminating response and, therefore, an incriminating response would have been reasonably foreseeable. Thus, in *Miranda v. Arizona* the Supreme Court said, "[W]here a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect."[10]

EXPLOITING VULNERABILITIES: If officers were aware that the suspect was especially vulnerable to an particular appeal, their attempt to exploit it will likely constitute interrogation because, again, an incriminating response would have been reasonably likely. In the words of the Supreme Court, "Any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response."[11]

A good example of such exploitation is found in the Supreme Court's landmark decision in *Brewer v. Williams.*[12] The defendant, Robert Williams, abducted a 10-year old girl in Des Moines, Iowa, killed her, and hid her body in a ditch. A day or two later, he surrendered to police in Davenport, Iowa, and two Des Moines detectives drove there to bring him back. The detectives still did not know where the girl's body was located. They did, however, know that Williams was a former mental patient who was deeply religious. So, on the trip back to Des Moines, one of the detectives delivered to Williams a monologue that has become known as the "Christian burial speech." The following is an edited version:

> I want to give you something to think about while we're traveling down the road.... Number one, I want you to observe the weather conditions. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is and if you get a snow on top of it you, yourself, may be unable to find it. I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas Eve and murdered.

This was an obvious appeal to Williams' strong religious beliefs, and it worked—he directed the officers to the girl's body. At trial, the officer was allowed to testify to this despite the absence of a waiver, but the Supreme Court ruled that the "speech" was tantamount to interrogation and that it should have been suppressed because Williams had not waived his rights beforehand.

In contrast, in *Rhode Island v. Innis*[13] two officers on patrol spotted Thomas Innis who was wanted for robbing and murdering a taxicab driver with a sawed-off shotgun. After arresting him, and while driving him to the police station, the officers had a conversation between themselves in which they discussed the urgent need to find the shotgun. As the officers later testified, the conversation went something like this:

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[8] *Nelson v. Fulcomer* (3rd Cir. 1990) 911 F.2d 928, 934.
[9] See *People v. O'Sullivan* (1990) 217 Cal.App.3d 237, 242 ["Since this part of the definition is qualified by the term 'reasonably,' which typically is used to signify that the definition is objective, the mere fact that appellant might have actually perceived Officer Elliott's remark as being directed to her does not compel the conclusion that the officer's conduct was the functional equivalent of an interrogation."].
[10] (1966) 384 U.S. 436, 452. Also see *People v. Saldana* (2018) 19 Cal.App.5th 432, 460 ["classic interrogation techniques"].
[11] *Rhode Island v. Innis* (1980) 446 U.S. 291, 302, fn.8. Also see *Pennsylvania v. Muniz* (1990) 496 U.S. 582, 601.
[12] (1977) 430 U.S. 387.
[13] (1980) 446 U.S. 291.

> Officer Gleckman: I was talking back and forth with Patrolman McKenna stating that I frequent this area while on patrol, and that because a school for handicapped children was located nearby, there's a lot of handicapped children running around in this area, and God forbid one of them might find the shotgun weapon with shells and they might hurt themselves.
>
> Officer McKenna: I more or less concurred with him that it was a safety factor and that we should, you know, continue to search for the weapon and try to find it before one of the children found it, picked it up, and maybe killed herself.

At this point, Innis interrupted the conversation and told the officers to turn around so that he could show them the general area where he had hidden the weapon. Officers found it and were permitted to testify about the discovery during trial. Innis was convicted.

On appeal, Innis argued that the testimony was obtained in violation of *Miranda* since he had not previously waived his rights. Although he was certainly "in custody" at the time, the Court ruled there was no *Miranda* violation because there "is nothing in the record to suggest that the officers were aware that [Innis] was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children," and furthermore "the entire conversation appears to have consisted of no more than a few offhand remarks."

Applying the Principles

The following are the most common types of questions, comments, and statements by officers that the courts have analyzed to determine if they constituted interrogation.

Accusations

Accusing a suspect of having committed the crime under investigation will almost always constitute interrogation because of the likelihood that he will respond by saying something incriminating. That is what happened in the case of *In re Albert R.*[14] when an officer, having just arrested Albert for car theft, said, "That was sure a cold thing you did to [your friend], selling him that hot car." Albert responded, "Yes, but I made the money last." In ruling that the officer's words constituted interrogation, the court said, "There was nothing subtle about the officer's statements to defendant. They were blatantly and flagrantly accusatorial."

Similarly, in *People v. Saldana*[15] the defendant was questioned at a police station about allegations that he had molested two young girls. Among other things, the officer told him "It looks bad. It looks very bad because I have information that that happened. Okay? And part of what you're telling me, doesn't coincide.… What did you do with them?" In ruling that the officer's words constituted interrogation, the court said:

> These tactics are not unusual, nor are they unreasonable. In fact, if Saldana had been properly *Mirandized* and made the same confession, it might be called good police work. But such an interrogation is associated with the full-blown interrogation of an arrestee, and except for a *Miranda* advisement, we cannot conceive how [Saldana's] interrogation might have differed had he been under arrest.

Interrogation will also result if officers arranged for someone else to make the accusation in their presence. For example, in *People v. Stewart*[16] an officer brought two robbery suspects, Stewart and Clements, into an interrogation room and instructed Clements to read aloud his confession in which he had implicated Stewart. At Stewart's trial, prosecutors were permitted to present evidence that Stewart did not deny Clements' allegation. This was an error, said the court because, "When police officers confront an accused under the circumstances presented in the case at bench, with an accusatory statement which on its face requires an explanation, they can be seeking no other result but an oral acknowledgment of the truth of the statement."

[14] (1980) 112 Cal.pp.3d 783. Also see *People v. O'Sullivan* (1990) 217 Cal.App.3d 237, 243.
[15] (2018) 19 Cal.App.5th 432.
[16] (1965) 236 Cal.App.2d 27. Also see *Nelson v. Fulcomer* (3rd Cir. 1990) 911 F.2d 928, 934.

Disclosing incriminating evidence

Before or while questioning suspects, officers may conclude that it would be advantageous to inform the suspect of some or all of the incriminating evidence they had gathered so far. As a general rule, the disclosure of evidence will not constitute interrogation if it was done in a brief, factual, and dispassionate manner, as opposed to goading, provocative, or accusatory.[17] Said the Ninth Circuit, "[O]bjective, undistorted presentations by the police of the evidence against a suspect are less constitutionally suspect than is continuous questioning because the risk of coercion is lessened when information is not directly elicited."[18] The following are examples of disclosures that were deemed not interrogation:

YOU WERE ID'D: After the suspect invoked, an officer told him that the victim had identified him as the perpetrator. Court: "The officer's statements were not the type of comments that would encourage [the defendant] to make some spontaneous incriminating remark."[19]

WE FOUND A GUN: While executing a warrant to search the defendant's house, one officer told another that they had found a gun, and the second officer told the suspect that he would be charged with being a felon in possession of a firearm. The suspect responed by saying he bought the gun "for my own protection." Court: "The officer's words indicating that McGlothen was to be charged with possession of a firearm were statements of fact, not the functional equivalent of an interrogation."[20]

WE FOUND THE DOPE: After a suspected drug dealer was arrested and invoked, an officer informed him that officers who were searching his car "had seized approximately 600 pounds of cocaine and that [he] was in serious trouble." Court: The officers "merely informed" the defendant of "the circumstances of his arrest and contributed to an intelligent exercise of his judgment."[21]

PLAYING WIRETAPPED CONVERSATION: Officers played a tape recording of a wiretapped conversation that incriminated the suspect. Court: "Merely apprising Vallar of the evidence against him by playing tapes implicating him in the conspiracy did not constitute interrogation."[22]

YOUR ACCOMPLICE CONFESSED: An officer informed the suspect that his accomplice confessed. Court: "It is well established that the practice of confronting a suspect with the confession of an accomplice is entirely lawful and does not vitiate the voluntariness of a *Miranda* waiver."[23]

DISPLAYING A SURVEILLANCE PHOTO: After arresting a suspect for bank robbery, an FBI agent showed him a surveillance photo of him robbing the bank and then asked if he wanted to reconsider his decision to remain silent in view of the photo. The suspect agreed and later made an incriminating statement. Court: "Here, the agent merely asked Davis if he wanted to reconsider his decision to remain silent, in view of the picture; the questioning did not resume until after Davis had voluntarily agreed that it should."[24]

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[17] See *Arizona v. Roberson* (1988) 486 U.S. 675, 687 [officers "are free to inform the suspect of the facts of the second investigation as long as such communication does not constitute interrogation"; i.e., providing such information does not automatically constitute interrogation].

[18] *U.S. v. Hsu* (9th Cir. 1988) 852 F.2d 407, 411. Also see *People v. Gray* (1982) 135 Cal.App.3d 859, 865.

[19] *Shedelbower v. Estelle* (9th Cir. 1989) 885 F.2d 570, 573. Edited. Also see *Easley v. Frey* (7th Cir. 2006) 433 F.3d 969, 974.

[20] *U.S. v. McGlothen* (8th Cir. 2009) 556 F.3d 698. Also see *U.S. v. Payne* (4th Cir. 1992) 954 F.2d 199, 203; *U.S. v. Wipf* (8th Cir. 2005) 397 F.3d 677 [an officer informed the suspect that "he had been arrested for possession of child pornography based on a number of tapes that had been seized from inside his home"].

[21] *U.S. v. Moreno-Flores* (9th Cir. 1994) 33 F.3d 1164, 1169. Also see *U.S. v. Lopez* (1st Cir. 2004) 380 F.3d 538, 545-46 [an officer told an arrested drug dealer that he has found "the stuff" in his van]; *U.S. v. Wipf* (8th Cir. 2005) 397 F.3d 677 [an officer informed the suspect that "he had been arrested for possession of child pornography based on a number of tapes that had been seized from inside his home."].

[22] *U.S. v. Vallar* (7th Cir. 2011) 635 F.3d 271, 285.

[23] See *People v. Patterson* (1979) 88 Cal.App.3d 742, 752.

[24] *U.S. v. Davis* (9th Cir. 1976) 527 F.2d 1110.

In contrast, the courts have ruled that the following disclosures did constitute interrogation:

- The officer "launched into a monologue on the status of the investigation" including that a witness disputed defendant's story. Court: "[B]y confronting defendant once again with a discrepancy in his story, [the officer] effectively invited defendant to make an incriminating response."[25]
- When a detective told a murder suspect to "[t]hink about that little fingerprint on [the Uzi]," he "implied that defendant's fingerprint had been found on the Uzi, and thus indirectly accused defendant of personally shooting the victims."[26]

Neutral questions and comments

An officer's brief statement or question in response to something the suspect said is unlikely to constitute interrogation. For example, in *People v. Mercer* the court ruled that an officer's question upon arriving at the crime scene—"What happened?"—was "proper and the response of a suspect is admissible."[27]

Two other things should be noted before we move on. First, in *People v. Taylor*[28] the court ruled that an officer interrogated a suspect when, after a pursuit, the officer showed him some jewelry that he had tried to hide. But because the court did not explain its novel conclusion, it may be an aberration. Second, it is likely that an officer's disclosure of *false* evidence of the suspect's guilt would constitute interrogation even if the officer did so in an informative—not accusatory—way. This is because the purpose of such a tactic is plainly to elicit an incriminating response. And, as noted earlier, "where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect."[29]

Answering questions

An officer's brief and spontaneous remark or question in response to something the suspect said or did is unlikely to constitute interrogation unless the court concluded that it was a tactical move to undermine *Miranda*. The following are examples of answers to questions that the courts ruled did not constitute interrogation:

- Defendant asked why he was arrested, and the FBI agent told him "he was being charged with possession and distribution of child pornography. He responded, ""I don't even own a computer." Court: "Defendant asked the arresting officer a question, and the officer responded. The officer's comment did not require a response."[30]
- An armed robbery suspect asked an investigator why the DA wanted a 16-year sentence, and the detective said it was probably because of the seriousness of the crime and [the defendant's] criminal record. The defendant responded that his accomplice was the one who had the gun. Court: "Defendant obviously did not perceive that he was being interrogated but, rather, wanted to voluntarily assert a reason for leniency.[31]
- A suspect who had been arrested for murder asked an officer "What can someone get for something like this, thirty years?" The officer responded, "Probably not unless you were a mass murderer," and that he had never seen anybody serve more than seven and a half years. Clark responded, "I want this on the record. I'm guilty. I killed her. What do you want to know?" Court: "[T]here was no reason for [the officer] to have known that his casual estimate of possible penalties would produce an incriminating response from this defendant."[32]

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[25] *People v. Boyer* (1989) 48 Cal.3d 247, 274.
[26] *People v. Davis* (2005) 36 Cal.4th 510, 555.
[27] (1967) 257 Cal.App.,2d 244, 248.
[28] (1986) 178 Cal.App.3d 217.
[29] *Rhode Island v. Innis* (1980) 446 U.S. 291, 301, fn.7.
[30] *U.S. v. Sweeney* (1st Cir. 2018) 887 F.3d 529, 535.
[31] *People v. Stephens* (1990) 218 Cal.App.3d 575.
[32] *People v. Clark* (1993) 5 Cal.4th 950, 985.

- A sheriff's detective was returning a murder suspect to the U.S. from Japan. During the flight, the suspect asked if the two murder victims were buried together. The detective said the victims' bodies were cremated and their ashes scattered in the High Sierra. The defendant broke down and "gave answers implicating himself in the deed and also in its planning and aftermath." Court: "To be sure, defendant was in custody. But he was simply not interrogated."[33]

In contrst, in *People v. Sims* a murder suspect asked an officer about the procedure for his extradition from Nevada. The officer responded by describing the crime scene, "including the condition of the victim, bound, gagged, and submerged in the bathtub, and said to defendant that the victim 'did not have to die in this manner and could have been left there tied and gagged in the manner in which he was found.'" In ruling that suspect's response should have been suppressed, the court said that the officer "pursued a line of conversation far exceeding the scope of any answer legitimately responsive to a question concerning extradition."[34]

Factual statements about procedure

An officer's explanation of the procedure to be followed will seldom constitute interrogation if it was brief, to the point, and informational (as opposed to provocative or goading). Thus, the following were deemed not interrogation:

"YOU'RE UNDER ARREST FOR…": Informing a suspect that he is under arrest for a certain crime is not reasonaby likely to elicit an incriminating response. As the Court of Appeal pointed out, "Far more is required to constitute the functional equivalent of questioning than merely advising a person he is under arrest for a specific offense."[35]

EXPLAINING TOPIC OF INTERVIEW: It is not interrogation to inform a suspect of the purpose of the interview. For example, in *People v. Huggins*[36] an officer informed the defendant that he wanted to talk to him because he was suspected of murder. In ruling that this information did not constitute interrogation, the court said, "[T]elling defendant he was a murder suspect did not call on him to confess."

EXPLAINING POST-ARREST PROCEDURE: Informing a suspect that he would be taken to jail and booked for murder "was nothing more than a factual statement about the immediate next step in the criminal justice process and cannot be considered as [interrogation]."[37] However, interrogation will result if officers said or implied that the suspect would not be booked if he talked to them.[38]

FIELD SOBRIETY TESTS: An officer's explanation of the FST procedure and asking the suspect whether he understood it do not constitute interrogation.[39] In contrast, a question that expressly calls for the suspect to say something that would confirm or dispel the officer's suspicions will ordinarily constitute interrogation; e.g., "What was the year of your sixth birthday?"[40]

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[33] *People v. Mickey* (1991) 54 Cal.3d 612, 651.
[34] (1993) 5 Cal.4th 405, 444.
[35] *People v. Celestine* (1992) 9 Cal.App.4th 1370, 1374. Also see *U.S. v. McGlothen* (8C 2009) 556 F.3d 698, 702.
[36] (2006) 38 Cal.4th 175, 198. Also see *U.S. v. Head* (8th Cir. 2005) 407 F.3d 925, 929 ["[The FBI agent] had no reason to know that informing Head that he wanted 'to talk to him about what had occurred that morning' would elicit an incriminating response."].
[37] *People v.Harris* (1989) 211 Cal.App.3d 640, 647-48. Also see *People v.Guerra* (2006) 37 Cal.4th 1067, 1096; *People v.Hayes* (1985)169 Cal.App.3d 898, 908.
[38] See *Martinez v. Cate* (9th Cir. 2018) 903 F.3d 982, 995 ["Telling Martinez that he was being booked *because* he did not give his side of the story is different than an officer setting out the charges and the evidence against the suspect."].
[39] See *Pennsylvania v. Muniz* (1990) 496 U.S. 582, 602-5 [not interrogation when officer asked DUI suspect if he understood the FST instructions]; *South Dakota v. Neville* (1983) 459 U.S. 553, 564 [not interrogation to ask DUI suspect if he will submit to a chemical test]; *People v. Cooper* (2019) 37 Cal.App.5th 642 [not interrogation when officer asked a DUI arrestee if she understood the FST instructions].
[40] See *Pennsylvania v. Muniz* (1990) 496 U.S. 582, 597.

Requesting clarification

Merely asking a suspect to clarify something he said is unlikely to constitute interrogation so long as clarification was reasonably necessary.[41] As the Fifth Circuit explained, "[W]hen a suspect spontaneously makes a statement, officers may request clarification of ambiguous statements without running afoul of the Fifth Amendment."[42] For example, in *People v. Ray*[42] the court explained, "To the extent [that the investigator] interrupted and asked questions, they were merely neutral inquiries made for the purpose of clarifying statements on points that he did not understand. Nothing in the substance or tone of such inquiries was reasonably likely to elicit information that defendant did not otherwise intend to freely provide."

Similarly, in *People v. Maxey*,[44] when an officer arrested Maxey in a bank for passing a forged money order, Maxey spontaneously said he received the money order from two men who had accompanied him to the bank. The officer asked Maxey to describe the two men, and his response to the officer's request was used against him at trial. In ruling that the officer's question did not constitute interrogation, the court pointed out that the officer "was in the awkward situation of either not asking what the two men looked like and risking the disappearance of the real culprits, or of believing Maxey and attempting to check out his story. We cannot say that the few questions asked in response to Maxey's volunteered story about the two men constituted custodial interrogation"

Finally, in *Andersen v. Thieret*[45] when an officer informed an arrestee that he was under arrest for disorderly conduct, the arrestee said "I stabbed her." The officer responded, "Who?" and the suspect identified the person he murdered five days earlier. Court: "The police officer's question was a neutral response, intended to clarify Anderson's puzzling declaration; it was not coercive interrogation that *Miranda* seeks to prevent."

Questioning witnesses

When officers question a person in custody about a crime for which he is believed to be merely a witness, their questions should not constitute interrogation because the officers could not have known that an incriminating response was reasonably likely. For example in *People v. Dement* the California Supreme Court ruled that a murder suspect was not interrogated when he made an incriminating statement after an officer asked him about a separate murder for which he was not in custody.[46]

Routine Booking Questions

When a person is arrested, there are certain questions that officers ask as a matter of routine, usually in conjunction with the booking process. These so-called "routine booking questions" do not ordinarily constitute interrogation because they seldom call for an incriminating response. Instead, most such questions are "normally attendant to arrest and custody,"[47] and consist mainly of basic identifying data or biographical information that is necessary to com-

[41] See *In re Frank C.* (1982) 138 Cal.App.3d 708, 714 ["What did you want to talk to me about?"]; *Andersen v. Thieret* (7th Cir. 1990) 903 F.2d 526, 532 [when an officer told Andersen that he was under arrest for disorderly conduct he responded, "I stabbed her." The officer asked, "Who?" Anderson then named the woman he had murdered five days earlier. Court: "The police officer's question was a neutral response, intended to clarify Anderson's puzzling declaration; it was not coercive interrogation that *Miranda* seeks to prevent"].

[42] *U.S. v. Gonzales* (5th Cir. 1997) 121 F.3d 928, 940.

[43] (1996) 13 Cal.4th 313, 338.

[44] (1985) 172 Cal.App.3d 661, 667. Also see *People v. Franzen* (2012) 210 Cal.App.4th 1193, 1203 ["Detective Buckleman's only contribution was to ask 'What guy?' in response to defendant's spontaneous reference to a 'guy looking for his money.'"].

[45] (7th Cir. 1990) 903 F.2d 526, 532 .

[46] (2011) 53 Cal.4th 1, 26. Also see *People v. Wader* (1993) 5 Cal.4th 610 ["[The sergeant's] inquiry regarding the whereabouts of Hillhouse was designed to elicit information about Hillhouse, not defendant."]; *People v. Moore* (2011) 51 Cal.4th 386, 395 [the interview "focused on information defendant had indicated he possessed rather than on defendant's potential responsibility for the crimes"].

[47] *Rhode Island v. Innis* (1980) 446 U.S. 291, 301.

plete the booking or pretrial services process.[48] As the Court of Appeal observed, "The booking procedure has been described as essentially a clerical process. The limited information needed at a booking procedure is required solely for the purposes of internal jail administration, not for use in connection with any criminal proceeding against the arrestee. When use of this information is confined to those proper purposes, its elicitation cannot be considered incriminatory."[49]

What about asking an arrestee if he is affiliated with a street gang? Although these questions are asked as a matter of routine (otherwise rival gang members would be housed together resulting in predictable consequences), the California Supreme Court has ruled that the answers to such questions are not admissible unless the suspect waived his *Miranda* rights.[50] Nevertheless, the court acknowledged that officers may ask any questions that are necessary for "the needs of jail security," but the arrestee's answer may be suppressed.

Miscellaneous Issues

LECTURES AND MONOLOGUES: An officer's lecture to a suspect or other monologue in his presence may constitute interrogation if it was lengthy, provocative, or goading.[51]

SEEKING CONSENT TO SEARCH: Seeking consent to search does not constitute interrogation because it essentially calls for a yes or no response.[52]

CASUAL CONVERSATION: Officers will frequently have some brief casual conversation or "small talk" with a suspect before an interview, oftentimes to help reduce tension; e.g., "The initial questions here appear to have been an attempt by the officer to establish rapport with defendant."[53] Such a conversation is unlikely to constitute interrogation. As the Ninth Circuit observed, "Casual conversation is generally not the type of behavior that police should know is reasonably likely to elicit an incriminating response,"[54] and "[t]here is nothing inherently wrong with efforts to create a favorable climate for confession."[55] Or, as the Eighth Circuit put it, "Polite conversation is not the functional equivalent of interrogation."[56]

CONVERSATION FILLERS: Using a conversation filler when a suspect is making a statement does not constitute interrogation; e.g., "Yeah," "I can understand that," I hear you," "Would you repeat that?[57]

SPONTANEOUS RESPONSES: An officer's failure to stop a suspect from making a spontaneous statement does not constitute interrogation.[58]

SECRETLY RECORDING SUSPECTS' CONVERSATION: Placing suspects alone together and secretly recording their conversation does not constitute interrogation.[59]

DO YOU HAVE AN ATTORNEY? After the suspect invoked the right to an attorney, the officer asked him if he had an attorney; this did not constitute "interrogation."[60] POV

[48] See *People v. Elizalde* (2015) 61 Cal.4th 523, 535; *People v. Farnam* (2002) 28 Cal.4th 107, 180.
[49] *People v. Powell* (1986) 178 Cal.App.3d 36, 39.
[50] *People v. Elizalde* (2015) 61 Cal.4th 523, 538.
[51] See *Brewer v. Williams* (1977) 430 U.S. 387; *People v. Boyer* (1989) 48 Cal.3d 247, 274 [the officer "launched into a monologue on the status of the investigation" including that a newly contacted witness disputed defendant's claim as to the last time defendant had visited the victims' residence"].
[52] See *Doe v. United States* (1988) 487 U.S. 201, 219; *People v. Ruster* (1976) 16 Cal.3d 690, 700.
[53] *People v. McCurdy* (2014) 59 Cal.4th 1063, 1087. Also see *People v. Gurule* (2002) 28 Cal.4th 557, 602 ["pre-interview banter"]; *People v. Gamache* (2010) 48 Cal.4th 347, 388.
[54] *Mickey v. Ayers* (9th Cir. 2010) 606 F.3d 1223, 1235.
[55] *Clark v. Murphy* (9th Cir. 2003) 331 F.3d 1062, 1073.
[56] *U.S. v. Tail* (8th Cir. 2006) 459 F.3d 854, 858.
[57] See *People v. Ray* (1996) 13 Cal.4th 318, 338; *People v. Matthews* (1968) 264 Cal.App.3d 557, 567.
[58] See *Miranda v. Arizona* (1966) 384 U.S. 436, 478; *People v. West* (1980) 107 Cal.App.3d 987, 994.
[59] See *U.S. v. Hernandez-Mendoza* (8th Cir. 2010) 600 F.3d 971, 977.
[60] See *Martinez v. Cate* (9th Cir. 2018) 903 F.3d 982, 993-94.

Recent Cases

People v. Lopez

(2019) __ Cal.5th __ [2019 WL 6267367]

Issue

If a traffic violator is unable to produce a driver's license or other evidence of ID, may officers search for it in the passenger compartment?

Facts

During a traffic stop in Woodland, Maria Lopez said that she did not have a driver's license. The officer then handcuffed her and searched her car for ID. In the course of the search, he found methamphetamine in her purse. The trial judge ordered the evidence suppressed, but the Court of Appeal ruled the search was lawful. Lopez appealed that ruling to the California Supreme Court.

Discussion

In 2002, the California Supreme Court ruled in *In re Arturo D.*,[1] that when a traffic violator refuses or is unable to produce a driver's license or other proof of identification, officers may search for it in the vehicle. The court reasoned that, because officers may search vehicles as an incident to an arrest, they should be permitted to conduct a less intrusive search as an incident to a traffic stop.

In 2009, the U.S. Supreme Court ruled in *Arizona v. Gant*[2] that officers may conduct vehicle searches incident to the arrest of an occupant only if the arrestee had immediate access to the passenger compartment at the time. Because Lopez had been handcuffed, she argued that the search violated *Gant* and was therefore unlawful. The California Supreme Court agreed that *Gant* and *Arturo* cannot be reconciled and, as the result, ruled that the search of Lopez's purse was unlawful and that the evidence should have been suppressed.

The court acknowledged that officers in California have relied on *Arturo* for over 25 years, that "law enforcement agencies have crafted policies in reliance on *Arturo D.*," and that they must now "adopt a different approach in scenarios like the one presented here." It pointed out, however, that officers now have a range of options that are less intrusive than a warrantless search. Those options include seeking the driver's consent to search for ID, and requiring the driver to "place a right thumbprint on the notice to appear."[3]

But in most cases, the best option is to obtain as much identifying information as possible from the driver (e.g., DOB, address) and run it through DMV or another law enforcement database. The court in *Lopez* also said that officers may question other occupants in the vehicle to confirm the identifying information provided by the driver.

It also ruled that vehicle searches for ID would be permissible if officers had probable cause to believe the driver had given a false name or had provided false ID. Said the court, "[A]n officer may search a vehicle upon probable cause to believe evidence of such lying will be found therein." Finally, the court said that "if no other path seems prudent or permissible," officers may arrest the driver under the authority of Vehicle Code section 40302 and seek to identify him during booking. Officers may not, however, pat search the suspect to see if he was carrying a wallet since the sole purpose of conducting pat searches is to locate weapons.[4]

One other thing: The court said that its ruling did not prohibit warrantless searches for vehicle registration. This leaves open the possibility that officers may search the vehicle for registration if the driver is unable to produce it.[5] But we will have to wait and see how the lower courts interpret this ruling.

[1] (2002) 27 Cal.4th 60.
[2] (2009) 556 U.S. 332.
[3] See Veh. Code, §§ 40302(a), 40500(a), 40504.
[4] See *People v. Garcia* (2006) 145 Cal.App.4th 782, 788.
[5] See Veh. Code § 12951(b).

People v. Krebs

(2019) __ Cal.5th __ [2019 WL 6207609]

Issues

(1) Did an officer obtain a confession by means of a "two-step" interrogation process? (2) Did the investigator coerce the suspect into confessing?

Facts

In 1998, Krebs kidnapped, raped, and murdered a woman who was a student at Cal Poly in San Luis Obispo. About four months later, he murdered, raped, and kidnapped a student at Cuesta College, which is also located in San Luis Obispo. He became a suspect when his parole officer notified investigators of similarities between the two crimes and Krebs's criminal history of sex crimes.

Investigators subsequently conducted parole searches of Krebs's home and truck, during which they found a distinctive keychain that was later identified as belonging to one of the victims. They also found a BB gun and, as the result, they arrested Krebs for violating his parole by possessing a "simulated firearm."

After his arrest, Krebs was interviewed for about an hour by an investigator with the San Luis Obispo County District Attorney's Office. The investigator did not *Mirandize* Krebs beforehand,[6] but the interview was largely unproductive. A few days later, Krebs agreed to take a polygraph examination. Prior to the test, the polygraph examiner *Mirandized* Krebs and obtained an oral and written waiver.

About three weeks later, on April 21, 1999, the investigator met with Krebs again and confirmed that he was willing to talk to him about the crimes, and that the polygraph examiner had *Mirandized* him and that he remembered his *Miranda* rights. Krebs was cooperative at the start and acknowledged that he had "fantasized about abducting women" but claimed to have "worked through" that. After the investigator informed him about some of the physical evidence linking him to the crimes, he "lapsed into silence" for about 15 minutes and did not respond to any of the investigator's questions.

After a ten minute break, the investigator told Krebs "we know you did it, what matters is why you did it." Krebs responded that he "had nothing to say," but then said "[p]ut me down in a holding cell and let me think, all right?" When the investigator did not do so, Krebs told him that if he "sits there and tried to keep beating on him," he was "not gonna say nothing." Before terminating the interview, the investigator asked Krebs if it would be okay if he visited him the next day, and Krebs responded, "Maybe I'll deal with it tomorrow."

The next day, the investigator returned to the jail and met with Krebs in an employee break room. He decided to use the break room because it was a "noncustodial-type situation" where Krebs "would not feel any type of coercion." When the investigator informed Krebs that "the investigation painted a terrible picture," Krebs responded, "I'm nothing but an animal, and I don't deserve to live. Nothing can justify what I did." At this point, the investigator *Mirandized* Krebs who acknowledged that he understood his rights. He then confessed to both crimes.

Before trial, the judge suppressed Krebs's statement about being an "animal" since he had not been *Mirandized*. However, the judge ruled that his subsequent confession was admissible because it occurred after he had waived his rights. Krebs was convicted and sentenced to death.

Discussion

On appeal, Krebs argued that his confession should have been suppressed for various reasons. In this report we will discuss the most significant ones: that his confession was obtained as the result of an illegal interrogation tactic known as "the two step," and that he did not confess voluntarily.

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[6] **NOTE**: It is possible that the investigator did not *Mirandize* Krebs because he had not yet been arrested for the murder; i.e., he was in custody on a parole violation. If so, he was wrong: *Miranda* rights are not "case specific," meaning that a suspect who is in custody for one crime (e.g., parole violation) is deemed "in custody" for *Miranda* purposes even if officers questioned him about an unrelated crime. See *Michigan v. Mosley* (1975) 423 U.S. 96; *Mathis v. United States* (1968) 391 U.S. 1, 4-5.

The two-step

Although he had been *Mirandized* before he confessed, Krebs argued that his confession was inadmissible because it was obtained by means of an illegal "two step" interrogation process. What's the "two step"? The term refers to an interrogation tactic in which officers would question a suspect at length without *Mirandizing* him. Then, if he confessed or made a damaging admission, they would seek a waiver and, if he waived, they would try to get him to repeat the statement. The two-step was often successful because most suspects would freely waive their rights and repeat their confession or incriminating statement because they would think (erroneously) that it could be used against them at trial and, therefore, they had nothing to lose by repeating it.

While there is no standard list of circumstances that must exist for an interrogation to be deemed a two-step, the courts are likely to invalidate a statement if, before *Mirandizing* the suspect, the officers engaged him in an extended conversation pertaining to the crime under investigation. Other indications of a two-step interview are:

> INTERROGATION TACTICS: During the conversation, the officers utilized interrogation tactics that were designed to produce an admission; e.g., "good cop/bad cop."
>
> SHORT TIME LAPSE: The post-waiver interrogation occurred shortly after the pre-waiver interrogation.[7]
>
> NOTHING TO LOSE: Officers reminded the suspect that he had already confessed so he would think he had nothing to lose by doing it again.

Applying these criteria to the facts, the court ruled there was insufficient reason to believe that the investigator had utilized a two-step procedure. Among other things, it noted that "there was no extended questioning before *Miranda* warnings were given," and that Krebs's pre-warning statements "were nonspecific and lacking in detail." The court acknowledged that the investigator "could have read defendant his *Miranda* rights before defendant made inculpatory statements" but ruled this "was not enough to show that he delayed in a calculated way to undermine the *Miranda* warning." Thus, the court concluded that, even if the investigator "had no good reason for failing to give *Miranda* warnings when he first approached defendant," there was no reason to believe that he "acted deliberately to obscure both the practical and legal significance of the admonition."

Was Krebs coerced?

The court did not disturb the trial judge's ruling that Krebs invoked his right to remain silent on April 21st when, after remaining mute for about 15 minutes, he said he had "nothing to say" and that he wanted to go back to his cell. This did not mean, however, that Krebs's confession on April 22nd was obtained in violation of *Miranda*. For one thing, Krebs agreed that the investigator could meet with him the next day; i.e., "I'll deal with it tomorrow."

Furthermore, even if Krebs had not done so, his confession would probably have been admissible because the Supreme Court has ruled that if officers violated *Miranda* in obtaining a statement from a suspect, but later obtained a second statement from him in which officers fully complied with *Miranda*, the second statement may be admissible if the *Miranda* violation was "technical" in nature, meaning it was not inherently coercive; e.g., the officers neglected to obtain a waiver but did not pressure the suspect.[8]

Consequently, the court examined the investigator's conduct during the interview and determined that there was no evidence that he had pressured or otherwise coerced Krebs to confess. Among other things, it pointed out that the interview on April 21st lasted only about fifteen minutes, Krebs was not handcuffed, the interview

[7] See *Missouri v. Seibert* (2004) 542 U.S. 600, 616; *Bobby v. Dixon* (2011) 565 U.S. 23, 30-31.
[8] See *Oregon v. Elstad* (1985) 470 U.S. 298, 318; *Michigan v. Harvey* (1990) 494 U.S. 344, 351.

occurred in an employee break room instead of a more imposing interrogation room, the investigator *Mirandized* Krebs twice and merely asked him to tell the truth. In addition, Krebs later told the investigator that he decided to confess—not because of coercion—but because he felt "what he did was wrong," and because of the incriminating evidence that officers had already gathered; e.g., the blood from one of the victims was found on the jump seat of his truck.

For these reasons, the court ruled that the investigator had sufficiently complied with *Miranda*, and it affirmed Krebs's confession and death sentence.

In re Jeremiah S.

(2019) 41 Cal.App.5th 299

Issue

May officers pat search a suspect who had been lawfully detained to investigate a violent crime if there was no direct evidence that he was carrying a weapon?

Facts

Late one night in downtown San Francisco, Jeremiah and another young man accosted a woman on Market Street and knocked her to the ground. As they stood over her, one of them demanded, "Give me your phone, bitch." The woman resisted but they grabbed her purse and phone, then fled. When SFPD officers arrived a few minutes later, they used the woman's "Find My iPhone" app and located the phone a few blocks away near Pier 19. Other officers were dispatched to that location where they detained Jeremiah and the other man, both of whom matched the descriptions of the perpetrators. While pat searching Jeremiah, an officer found the victim's phone and arrested him.

Jeremiah filed a motion to suppress the phone on grounds that the pat search was unlawful. The motion was denied and the robbery allegation was affirmed.

Discussion

On appeal, Jeremiah argued that the victim's phone should have been suppressed because the officer had no reason to believe he was armed and, therefore, the pat search was unlawful. The court agreed. We do not, and here's why:

In the Supreme Court's seminal case on pat searches, *Terry v. Ohio,*[9] the Court ruled that officers may pat search detainees who are reasonably believed to be "armed and dangerous." While the Court used the conjunctive "and" instead of the disjunctive "or," it was apparent that the Court did not rule, as the court in *Jeremiah* insisted, that pat searches of dangerous detainees were prohibited absent some indication that they were also armed. The facts in *Terry* make this clear.

One afternoon, an officer in downtown Cleveland noticed that Terry was acting as if he might be casing a jewelry store for a robbery. So the officer detained him and, during a pat search, found two firearms. Like Jeremiah, Terry claimed the pat search was unlawful because the officer had no reason to believe he was armed. But unlike the court in *Jeremiah*, the Supreme Court ruled that the nature of the crime under investigation—robbery—provided the officer with sufficient reason to believe that Terry was armed since robbery is the type of crime that "would be likely to involve the use of weapons."

Consequently, the Court ruled that officers "need not be absolutely certain that the individual is armed" because "the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Thus in discussing this ruling, the Eleventh Circuit recently observed:

> *Terry* does not demand definitive evidence of a weapon or absolute certainty that an individual is armed. Reasonable suspicion is not concerned with hard certainties but with probabilities, and law enforcement officers may rely on common sense conclusions.[10]

[9] (1968) 392 U.S. 1.

[10] *U.S. v. Bishop* (11th Cir. 2019) 940 F.3d 1242, 1250.

Similarly, the Sixth Circuit observed that "[t]he focus of judicial inquiry is whether the officer reasonably perceived the subject of a frisk as potentially dangerous, not whether he had an indication that the defendant was in fact armed."[11]

The California Supreme Court applied this rule in *People v. Mendoza*.[12] The defendant in *Mendoza* shot and killed a Pomona police officer who had detained him and two companions because they were acting suspiciously. Mendoza was convicted of murdering the officer in the performance of his lawful duties. On appeal, he argued that the officer was not acting lawfully because, at the time he shot the officer, the officer was pat searching one of his companions, and that the pat search was unlawful because the officer lacked grounds to believe that his companion was armed.

The California Supreme Court disagreed, saying, "even assuming [the officer] did not know if any of the three were armed," the pat search "was perfectly appropriate" because the "totality of the circumstances gave rise to a reasonable apprehension of danger on the officer's part, and the detention and pat search were reasonably designed to discover weapons."[13] Other crimes that have been found to warrant pat searches include burglary, car theft, and drug trafficking.[14]

This brings us back to *Jeremiah* where the court seemingly disregarded these rulings. Instead, it ruled the pat search was unlawful because, apart from the fact that he had just robbed and battered a young woman, "there was nothing about Jeremiah's appearance, behavior, or actions" that would have caused a reasonable officer to believe he was armed.

For these reasons, the court ruled the pat search of Jeremiah was illegal and that the victim's cell phone should have been suppressed.

Comment

There are two other things about this opinion that should be noted. First, the court indicated that Jeremiah was not even "dangerous" because, said the court, he was only "5 feet 5 inches tall and weighed 130 pounds." And yet, a desperate criminal of any size can draw a firearm in less than a second. The court even suggested that robbery is not necessarily a violent crime because it "encompasses a broad range of conduct and includes a variety of unacceptable behavior." As far as we know, robbery in California is still classified as a "violent" felony,[15] not "unacceptable behavior."

As noted, the ruling in *Jeremiah S*. is in direct conflict with decisions of, among others, the U.S. Supreme Court, the California Supreme Court, and the Ninth Circuit. Nevertheless, we decided to report on it because officers need to be certain that there is substantial legal authority for pat searching *all* suspects who have been detained to investigate violent crimes.

People v. Tran

(2019) 42 Cal.App.5th 1

Issue

Did an officer violate the Fourth Amendment by seizing a dashcam from a driver who had just caused a major injury accident?

Facts

Tran was driving a car that crossed into the oncoming lane and struck a motorcycle. The motorcycle rider suffered critical injuries. At the scene, CHP officers examined the tire marks and concluded that Tran was speeding and driving recklessly. They also learned from a witness that Tran had removed a dashcam from his car just before they arrived, and that he had put it inside his

[11] *U.S. v. Bell* (6th Cir. 1985) 762 F.2d 495, 500, fn.7.
[12] (2011) 52 Cal.4th 1056.
[13] Also see *People v. Superior Court (Brown)* (1980) 111 Cal.App.3d 948, 956 ["a pat-down search for weapons may be made predicated on specific facts and circumstances giving the officer reasonable grounds to believe that defendant is armed or on other factors creating a potential for danger to the officers"]; *U.S. v. Brown* (7th Cir. 2000) 232 F.3d 589, 592 [pat search of strangely-behaving detainee upheld even though there "was the lack of specific facts indicating that [he] possessed a weapon"].
[14] See, for example, *Richards v. Wisconsin* (1997) 520 U.S. 385, 391, fn.2; *People v. Glaser* (1995) 11 Cal.4th 354, 367.
[15] See Pen. Code § 667.5(c)(9).

backpack. At the request of one of the officers, Tran removed the dashcam from his backpack and handed it to the officer. The officer kept the camera and, three days later, obtained a warrant to search it. The search revealed evidence that confirmed that Tran had been driving recklessly.

After Tran was charged with reckless driving, he filed a motion to suppress the evidence contained in the camera. The court denied the motion, and Tran was convicted.

Discussion

On appeal, Tran did not attack the validity of the search warrant. Instead, he argued that the evidence obtained from the dashcam should have been suppressed for the following reasons: (1) the warrantless seizure of his dashcam was unlawful, and (2) the delay of three days in seeking a warrant was unreasonable. The court rejected both arguments.

WAS THE SEIZURE LAWFUL? At the outset, the court explained that the requirements for seizing something are less strict than the requirements for searching it because "a search implicates a person's right to keep the contents of his or her belongings private, a seizure only affects their right to possess the particular item in question."

For these reasons, the Supreme Court has ruled that officers may seize a container pending issuance of a warrant if (1) they had probable cause to believe that evidence of a crime was inside, and (2) they had reasonable suspicion that the evidence would be destroyed or otherwise corrupted if they permitted the owner to retain possession while they sought a warrant.[16]

Tran argued that the officer's suspicion was unreasonable because there was "no evidence that [he] was going to destroy the camera or the camera's SD card." The court disagreed, pointing out that the officer knew the following: (1) dashcams usually contain a removable internal recording device, (2) that these devices "are breakable and easily hidden," (3) Tran would have had a motive to destroy the data because he was aware that he had caused the accident and that the motorcycle rider had been critically injured, and (4) Tran had apparently tried to hide the dashcam from the officers by removing it from his car and putting it in his backpack before they arrived.

Consequently, the court ruled that "all the circumstances, and the rational inferences stemming from them . . . would have caused a reasonable officer to believe that immediate acquisition of the camera was necessary to preserve potential evidence on it," and it therefore ruled that the seizure of the dashcam was lawful.

THE DELAY IN SEEKING A WARRANT: As noted, Tran also argued that the seizure of his dashcam was unlawful because the officers retained it for three days before seeking a warrant. It is true that a delay in seeking a warrant may render a seizure unlawful. As the Seventh Circuit observed, "When officers fail to seek a search warrant, at some point the delay becomes unreasonable and is actionable under the Fourth Amendment."[17]

This issue typically arises when officers seize luggage, cell phones, or computers because depriving people of these items often causes serious disruptions with their jobs and lives. As the Supreme Court observed in *United States v. Place*,[18] "seizures of property can vary in intrusiveness, some brief detentions of personal effects may be so minimally intrusive of Fourth Amendment interests that strong countervailing governmental interests will justify a seizure based only on specific articulable facts that the property contains contraband or evidence of a crime."

In *Place* officers at LaGuardia Airport seized an airline passenger's luggage on a Friday afternoon but did not apply for a warrant until after the weekend. The Court ruled that the three day delay was unreasonable because the seizure of luggage is

[16] *United States v. Place* (1983) 462 U.S. 696, 706.
[17] *U.S. v. Burgard* (7th Cir. 2012) 675 F.3d 1029, 1032.
[18] (1983) 462 U.S. 696, 705.

highly intrusive and inconvenient, and because the only reason for the delay was to wait until after the weekend. Although the officer in Tran also waited three days, the court ruled that this did not render the seizure unlawful because the seizure of a dashcam is much less intrusive and inconvenient than the seizure of luggage.

For these reasons, the court ruled that the seizure of Tran's dashcam was lawful, and it affirmed his conviction.

People v. Lee

(2019) 40 Cal.App.5th 853

Issues

(1) Did an officer have probable cause to search a suspect's car for drugs? (2) Was the inventory search of the car a pretext to look for drugs?

Facts

San Diego police officers stopped a car for illegally-tinted windows and no front license plate. When the driver, Brandon Lee, said he did not have his license with him, one of the officers pat searched him "to confirm he did not have any sort of identification." During he search, he found $100-$200 in cash and a small bag of marijuana. He also learned via DMV that Lee's license had been suspended, so he decided to impound the vehicle pursuant to Vehicle Code sections 14602.6. and 22651(h). Although Lee offered to have someone pick up the car for him, the officer responded, "That's not going to work." In the course of an intensive inventory search, the officer found two ounces of cocaine in the glovebox and a firearm in the trunk.

Lee was charged with transporting cocaine for personal use while armed. He filed a motion to suppress the evidence which was granted.

Discussion

On appeal, prosecutors argued that the search was lawful for two reasons: (1) the officer had probable cause to search the car for drugs, and (2) the search qualified as an inventory search.

PROBABLE CAUSE? Officers may, of course, search a vehicle without a warrant if they had probable cause to believe it contained drugs or other evidence of a crime. Prosecutors argued that the officer who arrested *Lee* had probable cause to believe there were illegal drugs in the vehicle based mainly on the amount of marijuana he possessed.

While it is true that probable cause to search a vehicle for drugs may be based on finding other drugs in the possession of an occupant (*"where there's some, there's probably more"*), this applies only if officers had probable cause to believe the drugs were possessed for sale. But, as the officer who arrested Lee acknowledged, the amount of marijuana in his possession was for personal use. Thus, the court concluded that "[t]he recent legalization of marijuana in California means we can now attach fairly minimal significance to the presence of a legal amount of the drug."

Nevertheless, prosecutors argued that probable cause was established by the combination of the marijuana (albeit a small amount), and Lee's possession of $100-$200. But, again, possession of cash may indicate possession for sale only if the amount was suspiciously high. And in today's economy, it would be difficult to find people who *don't* carry $100.

Finally, it was argued that two additional circumstances established probable cause for possession for sale: Lee told the officer that he delivered medical marijuana, and he "tensed up" when the officer started to handcuff him. But, like the other circumstances, these two are virtually irrelevant. Accordingly, the court ruled that the officer did not have probable cause to search Lee's car.

INVENTORY SEARCH: For various reasons, officers may order a vehicle impounded. And when they do, they are ordinarily permitted to conduct an inventory search in which they list items having some value.[19] The objectives of these searches are to (1) provide a record of the property inside the vehicle so as to furnish the owner with an accounting; (2) protect officers, their departments (and

[19] See *Whren v. United States* (1996) 517 U.S. 806, 811, fn.1.

ultimately taxpayers) from false claims that property in the vehicle was lost, stolen, or damaged; and (3) protect officers and others from harm if the vehicle contained a dangerous device or substance.

An inventory search is, however, illegal if a court concludes it was merely a pretext to look for evidence. And one indication of a pretext vehicle search is the absence of a good reason to tow or impound the vehicle. Although Lee's license was suspended, and although the Vehicle Code permits officers to tow vehicles that were driven by a person with a suspended license, the court concluded that there was insufficient reason to tow Lee's car because it "was parked in or alongside an apartment complex; it was "not blocking a roadway, the sidewalk, or a driveway"; and Lee "offered to have someone else come pick it up so it would not need to be impounded."

Another indication of a pretext is that the scope and intensity of the search was much greater than that necessary to provide an inventory. So, having examined the manner in which the officer searched the vehicle, the court concluded that it demonstrated an intent to find evidence. Said the court, "Rather than search areas where someone might normally keep valuables, [the officer] examined places where illegal items might be stashed, such as the underside of the back seat." It also noted that the officer "repeatedly asked Lee and [his] passenger if there was anything illegal in the car, as opposed to whether there were valuables or other items in the car he needed to inventory."

For these reasons, the court ruled that the search was illegal.[20]

People v. Khan

(2019) 41 Cal.App.5th 460

Issue

Did officers have probable cause to search the home of an arson suspect?

Facts

Khan was hired as manager of HanaHaus in Palo Alto which provides office space mainly for tech workers. According to his boss (who was identified only as "S.S."), Khan was an "outstanding" employee for most of the first year, but then his job performance "dropped off quite a bit" and it became worse and worse. Among other things, S.S. testified that Khan frequently "disappeared from work during the day" and sometimes for days, that he allowed friends to use the facility for free, and became "very aggressive" and "very arrogant" with staff. He was not fired, however, until his boss caught him releasing cockroaches in the office.

A week or so after Khan was fired, someone drove a car into the glass entrance of the office and fled, causing approximately $125,000 in damage. A week after that, Khan sent an email to Kaiser Permanente in which he threatened to commit suicide. And on two occasions he phoned the police and said he believed that "someone" was outside of his house. The responding officers testified that Khan appeared to be "out of touch with reality" and "might be suffering from mental health issues."

And then, about two weeks later, in the early morning hours, he set fire to the home of S.S. and his family. It appeared that the fire was confined to the outside of the garage. Investigators determined it was arson due to "multiple start points" and the presence of gasoline. In the course of an intensive investigation, officers obtained a "Nest Cam" security video from a neighbor that showed someone in a Cadillac ATS driving away from the scene at about the time the fire started. Investigators determined that Khan had rented the car one day earlier from Zipcar, and that he returned it a few hours after the fire was reported. A Zipcar employee told officers that Khan rented the car only after he confirmed that it did not have GPS tracking capability.

[20] **NOTE**: As noted, when Lee said he did not have a driver's license with him, the officer pat searched him "to confirm he did not have any sort of identification." This, too, was illegal. See *People v. Garcia* (2006) 145 Cal.App.4th 782, 788 ["authority to conduct a pat search "by no means authorizes a search for contraband, evidentiary material, or anything else in the abssence of reasonaable grounds to arrest."]; *King. v. U.S* (6th Cir. 2019) 917 F.3d 409, 428.

Based primarily on this information, officers obtained a warrant to search Khan's home and storage shed for such things as receipts for gasoline purchases, and towels similar to some gasoline-soaked towels that were found at the scene. In the course of the search, they found a gas can with a small amount of gasoline inside (this was especially significant because there was nothing in his home that would have required gasoline). They also found a "heat-resistant" glove and a ski mask which had been delivered to Khan by Amazon on the day before the fire. The ski mask matched one was found on the driveway near the fire's point of origin.

Khan was arrested and charged with arson of an inhabited structure. His motion to suppress the evidence was denied and he was convicted.

Discussion

On appeal, Khan argued that the search warrant was defective because the supporting affidavit failed to establish probable cause. The court disagreed. In addition to the physical evidence found in Khan's home and storage shed, and the circumstantial evidence that Khan was present when the fire started, the court noted there was overwhelming evidence of Khan's motive which, in most arson cases, is critically important. As the court explained:

> [T]he affidavit set forth evidence of defendant's extended leave from work due to workplace performance problems; his termination of employment after he surreptitiously released cockroaches into his workplace; defendant's disgruntled attitude toward his termination and his former supervisor; the multiple harmful actions targeting defendant's former workplace and his former supervisor shortly after defendant was terminated; and defendant's apparent mental health problems.

Accordingly, the court concluded that, "[v]iewing the totality of circumstances through the lens of common sense," the affidavit demonstrated probable cause "that arson had been committed against S.S.'s home using an accelerant, defendant was implicated, and evidence of the arson would be found in defendant's home." Accordingly, the court ruled that the warrant was supported by probable cause.[21] Comment: The court indicated that the existence of probable cause might have been a "close question." But arson cases are almost always built on circumstantial evidence, especially motive. So, as far as arson cases go, this one seems to have been unusually strong.)

People v. Ovieda

(2019) 7 Cal.5th 1034

Issues

(1) Did exigent circumstances justify a warrantless entry into the defendant's home? (2) If not, is there a "community caretaking" exception that would apply?

Facts

Santa Barbara police received a call that Ovieda was suicidal and that he had access to a gun. When officers arrived outside at his home, they learned that he was inside with two friends, Case and Woellert. Case met with the officers outside and told them that Ovieda had started talking with them about suicide and had tried twice to grab a gun. Case said that he and Woellert were able to disarm him, and that he had taken Ovieda's guns to the garage. At the request of the officers, Ovieda walked outside and was handcuffed.

Although the officers "had no specific information that led them to believe somebody else was inside," one of them testified they were "unsure if all parties were accounted for" and that they "felt duty bound to secure the premises and make sure there were no people inside that were injured." So they entered and conducted a protective sweep, during which they seized "large quantities of guns, ammunition, and drug-producing equipment."

Ovieda was charged with growing marijuana and possession of an assault rifle. Before trial, he filed a motion to suppress the evidence on grounds that the warrantless entry into his home was unwarranted. The motion was denied, and Ovieda pled guilty.

Discussion

There were two theories upon which the search was arguably justified: (1) exigent circumstances, and (2) community caretaking. The term "exigent circumstances" refers to situations in which "real, immediate, and serious" consequences" would probably result if officers did nothing.[21] Because the officers in *Ovieda* knew that no one was inside the home at the time, the prosecution conceded that exigent circumstances did not exist.

Nevertheless, prosecutors argued that the search was justified under a related theory known as "community caretaking." The term has been loosely defined as encompassing situations in which officers reasonably believed that an immediate warrantless entry or search was necessary because of a threatened harm, but that the harm, while pressing, did not rise to the level of an emergency.

Although community caretaking has sometimes been cited as justification for entries and searches, it is not a universally-recognized exception to the warrant requirement. As the Fourth Circuit observed in *Hunsberger v. Wood,* "What community caretaking involves, and what boundaries upon it exist, have simply not been explained to an extent that would allow us to uphold this warrantless entry based on that justification."[22] And that is essentially what the California Supreme Court ruled in *Ovieda*. Said the court, "[T]he community caretaking exception asserted in the absence of exigency is not one of the carefully delineated exceptions to the residential warrant requirement."

It is true, of course, that the situation in *Ovieda* would have constituted an exigent circumstance if the gun had been discharged and an unaccounted-for person had been inside. Under these circumstances, the officers might have been legitimately concerned that the bullet had penetrated a wall and struck the person. This is especially because the courts are usually willing to give officers the benefit of a doubt in dealing with perceived threats to people, especially threats involving guns. But because such a threat cannot exist unless officers have reason to believe there is someone on the premises, it was apparent to the court that no one else was inside:

> At the suppression hearing, neither officer testified that they had asked defendant's permission to enter to check for others or that they questioned the veracity of Case and Woellert. They mentioned no noise or movement in the house or garage creating concern that others might be inside or that anything was amiss there. They were not asked what, if anything, they intended to do with defendant or whether he would have been allowed to return to the residence.

For these reasons, the court ruled that the entry into Ovieda's home was unlawful.

U.S. v. Haldorson

(7th Cir. 2019) 941 F.3d 284

In *Haldorson*, the Seventh Circuit addressed a problem that has arisen in cases where officers make arrests based on controlled buys. The problem is that officers may not want to arrest the suspect immediately after the sale occurs because they want to obtain additional evidence of his guilt, or they are hoping he will lead them to his supplier or other associates. In this case, Haldorson sold drugs to a CI during a controlled buy, but the officers waited three weeks before arresting him without a warrant.

The court pointed out that one of the differences between probable cause to arrest and probable cause to search is that cause to search can evaporate over time because most evidence can be moved or destroyed. In contrast, probable cause to arrest lasts until the suspect is arrested or officers determine that probable cause no longer exists. Furthermore, the court noted that "good police practice often requires postponing an arrest, even after probable cause has been established, in order to place the suspect under surveillance or otherwise develop further evidence neecessary to prove guilt to a jury." POV

[21] See *Michigan v. Tyler* (1978) 436 U.S. 499, 509; *Illinois v. McArthur* (2001) 531 U.S. 326, 331.
[22] (4th Cir. 2009) 570 F.3d 546, 554.

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