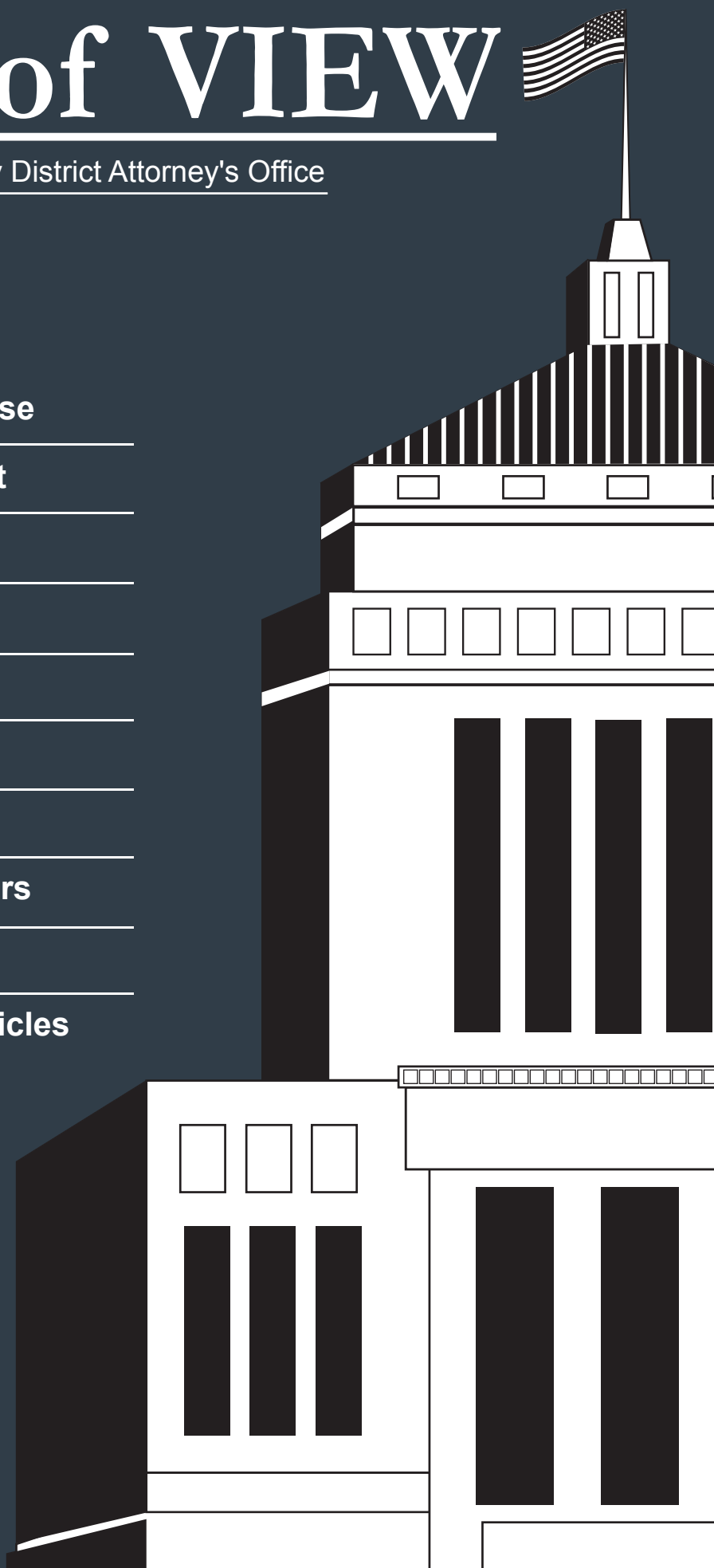
POINT of VIEW

A publication of the Alameda County District Attorney's Office

Nancy E. O'Malley, District Attorney

In this Issue

- Principles of Probable Cause
- Searches Incident to Arrest
- Exigent Circumstances
- Miranda Invocations
- Marijuana Searches
- Forcible Entry
- Pat Searches
- Email Searches by Providers
- Computer Searches
- Probation Searches of Vehicles



Winter 2021

Point of View
Since 1970

Executive Editor
Nancy O'Malley
District Attorney

Writer and Editor
Mark Hutchins

Point of View Online
Featuring new and archived articles, case reports, plus updates, alerts, and forms.
le.alcoda.org

Volume 48 Number 1
Point of View is published in January, May, and September. Articles and case reports may be reprinted by any law enforcement agency or for any educational or public service purpose if attributed to our office. Send correspondence to Point of View, District Attorney's Office, 1225 Fallon St., Room 900, Oakland, CA 94612. Email: pov@acgov.org.

Contents

Articles

1 Principles of Probable Cause
Got probable cause? It may depend on how the courts define "probable."

9 Searches Incident to Arrest
Searching arrestees is standard procedure. But the required search procedure depends mainly on certain circumstances.

Recent Cases

15 People v. Suarez
Did officers need a warrant to forcibly enter the home of a multiple-murder suspect?

16 People v. Hall
Did officers have probable cause to search a vehicle for marijuana?

18 U.S. v. Brinkley
As this case demonstrates, it can be difficult to determine where an arrestee "lives."

19 U.S. v. Weaver
In a bizarre opinion, two judges on the Second Circuit try to rewrite the rules on pat searches. It won't work.

21 People v. Wilson
Do Google's searches of email for child pornography constitute "police" searches?

23 U.S. v. Cobb
When writing search warrants for computers, it is often difficult to describe the target files. This case might help.

24 People v. Maxwell
Can officers conduct a probation search of a vehicle if the probationer was not the driver or owner?

Moving? Retiring?
Please let us know so we can update our mailing list.
pov@acgov.org

Principles of Probable Cause

Articulating precisely what reasonable suspicion and probable cause mean is not possible.[1]

It is seldom a good idea to begin an article by admitting that its topic cannot be usefully defined. But when the subject is as notoriously imprecise as probable cause, it would be pointless to deny it. Even the Supreme Court has admitted that probable cause is an "elusive" and "somewhat abstract" concept that cannot be "fine-tuned."[2] In fact, the Seventh Circuit once tried to provide a helpful definition but eventually concluded that, when all is said and done, probable cause just means "having a good reason to act."[3]

Reasonable suspicion to detain is even more elusive. About the only thing we know for sure is that it "requires more than a naked hunch."[4] (Don't write that down. It's not on the test.)

This imprecision is not, however, a problem that needs to be corrected by the courts. This is because both probable cause and reasonable suspicion are ultimately conclusions drawn by officers from the evidence at hand, based on training, experience, logic, and a heavy dose of common sense. So, while there are no tidy rules for determining whether there is probable cause,[5] there are some principles that can ordinarily provide officers with a way to make the determination with a fair degree of consistency and accuracy. Note that most of these apply to both probable cause and reasonable suspicion to detain or pat search.

How Much "Probability" is Required?

The first thing that most people want to know about probable cause is how much probability is required? This is understandable because, as the Supreme Court observed, "in dealing with probable cause, as the very name implies, we deal with probabilities."[6] So, what is the required probability? Is it 75%? 60%? 51%?

According to the Supreme Court, all of those answers are wrong. That is because it has steadfastly refused to assign a probability percentage since it views probable cause as a nontechnical standard based on common sense, not mathematical precision.[7] "The probable cause standard," said the Court, "is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of circumstances."[8] Similarly, the Tenth Circuit observed, "Besides the difficulty of agreeing on a single number, such an enterprise would, among other things, risk diminishing the role of judgment based on situation-sense."[9] Still, we can provide a ballpark probability percentage for probable cause, but reasonable suspicion is hopeless.

Probable cause

It would be logical to assume that probable cause (also known as "reasonable cause"[10]) requires at least a 51% probability because anything less would not be "probable." While this is technically true, the Supreme Court has ruled that probable cause does not require "any showing that such belief be correct

---

[1] *Ornelas v. United States* (1996) 517 U.S. 690, 695. Also see *U.S. v. Jones* (1st Cir. 2012) 700 F.3d 615, 621.
[2] See *United States v. Cortez* (1981) 449 U.S. 411, 417 ["elusive"]; *United States v. Arvizu* (2002) 534 U.S. 266, 274 ["somewhat abstract"]; *Ornelas v. United States* (1996) 517 U.S. 690, 695 ["not a finely-tuned standard"].
[3] *Hanson v. Dane County* (7th Cir. 2010) 608 F.3d 335. 338.
[4] *U.S. v. Jones* (1st Cir. 2012) 700 F.3d 615, 621. Note: Most of the principles we discuss apply to both probable cause and reasonable suspicion. See *Green v. Reeves* (6th Cir. 1996) 80 F.3d 1101, 1106.
[5] See *United States v. Sokolow* (1989) 490 U.S. 1, 7; *United States v. Arvizu* (2002) 534 U.S. 266, 274.
[6] *Illinois v. Gates* (1983) 462 U.S. 213, 231.
[7] See *Texas v. Brown* (1983) 460 U.S. 730, 742; *Illinois v. Gates* (1983) 462 U.S. 213, 232.
[8] See *Maryland v. Pringle* (2003) 540 U.S. 366, 371; *U.S. v. Howard* (7th Cir. 2018) 883 F.3d 703, 707.
[9] *U.S. v. Ludwig* (10th Cir. 2011) 641 F.3d 1243, 1251.
[10] See *Heien v. North Carolina* (2014) 574 U.S. 54.

or more likely true than false,"[11] and that it requires only a "fair" probability, not a statistical probability.[12] It is therefore apparent that probable cause requires something less than a 50% chance.[13] How much less? Although the courts have not tried to figure it out (because the Supreme Court told them not to), it is certainly not much lower than 50%.

Reasonable suspicion

As noted, the required probability percentage for reasonable suspicion is a mystery. For example, the Supreme Court has said that, while probable cause requires a "fair probability," reasonable suspicion requires only a "moderate" probability.[14] What is the difference between a "moderate" and "fair" probability? Who knows? But because the Court has said that reasonable suspicion requires "considerably less [proof] than a preponderance of the evidence,"[15] it necessarily requires "considerably less" than probable cause.[16] Thus, the Tenth Circuit observed that "reasonable suspicion may exist even if it is more likely than not that the individual is not involved in any illegality. This is because reasonable suspicion requires considerably less proof of wrongdoing by a preponderance of the evidence."[17]

Facts: The Lifeblood of Probable Cause

The first thing—and sometimes the only thing—that the courts look for in determining whether officers had probable cause is the factual basis for their belief that it exists. Indeed, the Supreme Court has called this the "central teaching of this Court's Fourth Amendment jurisprudence," explaining that officers "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion."[18] Thus, in *People v. Maltz* the court observed, "Over and over again the cases instruct that the question of reasonable cause is to be determined by reference to the particular facts and circumstances in the case at hand."[19] We will now discuss how the courts determine whether information was sufficiently factual.

Reliability

Information can help establish probable cause or reasonable suspicion only if there was reason to believe it was reliable, or at least "reasonably trustworthy."[20] In other words, "Information is only as good as its source."[21] Thus, information from untested informants will have little, if any, weight unless there was some circumstantial evidence of its reliability. As the Supreme Court explained, probable cause and reasonable suspicion "are dependent upon both the content of the information possessed by police and its degree of reliability. Both factors are considered in the totality of circumstances."[22]

PRESUMPTIVELY RELIABLE SOURCES: Some sources of information are presumptively reliable, most notably law enforcement officers, "citizen informants," and official government records such as rap sheets. But the most common reliable source is the "tested police informant," also known as a "confidential reliable informant" or CRI. To prove that an informant qualifies as "tested," officers will ordinarily explain that he previously furnished information that led to arrests, holding orders, indictments, or convictions. An informant who provided information that led to the issuance of a search warrant may also be deemed

[11] *Texas v. Brown* (1983) 460 U.S. 730, 742. Also see *People v. Carrington* (2009) 47 Cal.4th 145, 163.
[12] See *Illinois v. Gates* (1983) 462 U.S. 213, 238; *Safford Unified School District v. Redding* (2009) 557 U.S. 364, 371.
[13] See *U.S. v. Melvin* (1st Cir. 1979) 596 F.2d 492, 495.
[14] *Safford Unified School District v. Redding* (2009) 557 U.S. 364, 371.
[15] *Illinois v. Wardlow* (2000) 528 U.S. 119, 123. Also see *United States v. Arvizu* (2002) 534 U.S. 266, 274.
[16] *United States v. Sokolow* (1989) 490 U.S. 1, 7. Also see *Kansas v. Glover* (2020) __ U.S. __ [140 S.Ct. 1183].
[17] *U.S. v. Latorre* (10th Cir. 2018) 893 F.3d 744, 751.
[18] *Terry v. Ohio* (1968) 392 U.S. 1, 21.
[19] (1971) 14 Cal.App.3d 381, 390-391. Also see *U.S. v. Cervantes* (9th Cir. 2012) 678 F.3d 798, 803 ["But in the absence of any underlying facts, this [information] is entitled to little, if any, weight"].
[20] *Beck v. Ohio* (1964) 379 U.S. 89, 91. Also see *United States v. Harris* (1971) 403 U.S. 573, 582.
[21] *U.S. v. Hauk* (10th Cir. 2005) 412 F.3d 1179, 1188.
[22] *Alabama v. White* (1990) 496 U.S. 325, 330.

"tested" if the search resulted in the discovery of evidence that the informant said would be there. In contrast, an informant's reliability will not be established by an officer's assertion that his tips led to "many ongoing investigations" or resulted in some other ambiguous achievement.[23]

PRESUMPTIVELY UNRELIABLE SOURCES: The least reliable of all sources are untested police informants who, by definition, have no track record in providing accurate information. As the California Supreme Court observed, "All familiar with law enforcement know that the tips they provide may reflect their vulnerability to police pressure or may involve revenge, braggadocio, self-exculpation, or the hope of compensation."[24]

For this reason, information from untested informants is virtually useless unless officers were able to corroborate some or all of it. In discussing this requirement, the Court of Appeal observed, "Corroboration is not limited to a given form but includes within its ambit any facts, sources, and circumstances which reasonably tend to offer independent support for information claimed to be true."[25]

Information from "official channels"

Facts are ordinarily irrelevant in determining the existence of probable cause or reasonable suspicion unless they had been communicated to the officer who acted on it; i.e., the officer who made the detention, arrest, or search; or the officer who applied for the search or arrest warrant.[26] As the California Supreme Court explained, "The question of the reasonableness of the officers' conduct is determined on the basis of the information possessed by the officer at the time a decision to act is made."[27] Thus, a search or seizure made without sufficient justification cannot be rehabilitated in court by showing that it would have been justified if the officer had been aware of information possessed by a colleague.

Officers may, however, consider information they received through "official channels," even if they knew nothing else about it. This is because "effective law enforcement cannot be conducted unless police officers can act on directions and information transmitted by one officer to another and that officers, who must often act swiftly, cannot be expected to cross-examine their fellow officers about the foundation for the transmitted information."[28] Or, as the Ninth Circuit put it:

> The accepted practice of modern law enforcement is that an officer often makes arrests at the direction of another law enforcement officer even though the arresting officer himself lacks actual, personal knowledge of the facts supporting probable cause.[29]

For example, in *U.S. v. Lyons*[30] state troopers in Michigan stopped and searched the defendant's car based on a tip from DEA agents that the driver might be transporting drugs. On appeal to the Sixth Circuit, Lyons argued that the search was unlawful because the troopers had no information as to why she was a suspected of carrying drugs. But, as the court pointed out, "it is immaterial that the troopers were unaware of all the specific facts that supported the DEA's reasonable suspicion analysis. The troopers possessed all the information they needed to act—a request by the DEA (subsequently found to be well-supported)."

What's an "official" channel? It is any conduit through which information pertaining to the existence of probable cause or reasonable suspicion is transmitted from one officer to another, or from one governmental agency or database to officers. Such transmissions may be formal or informal. A formal official channel is a dedicated conduit through which information pertaining to probable cause is routinely transmitted to officers. These include NCIC, CLETS, AWS, "be on the lookout" notices, wanted flyers, and roll call notifications.

---

[23] See *People v. McFadin* (1982) 127 Cal.App.3d 751, 764.
[24] *People v. Kurland* (1980) 28 Cal.3d 376, 393. Also see *Higgason v. Superior Court* (1985) 170 Cal.App.3d 929, 952.
[25] *People v. Levine* (1984) 152 Cal.App.3d 1058, 1065. Also see *People v. Spencer* (2018) 5 Cal.5th 642, 664, 667.
[26] See *Ker v. California* (1963) 374 U.S. 23, 40, fn.12; *Maryland v. Garrison* (1987) 480 U.S. 79, 85.
[27] *People v. Gale* (1973) 9 Cal.3d 788, 795.
[28] *United States v. Hensley* (1985) 469 U.S. 221, 231.
[29] *U.S. v. Jensen* (9th Cir. 2005) 425 F.3d 698, 704.
[30] (6th Cir. 2012) 687 F.3d 754, 768.

An informal official channel is simply a conduit by which information is spontanenously transmitted between officers and law enforcement agencies about criminal activity, a particular crime, or about a particular suspect. These communications are usually transmitted via police radios, cell phones, text messages, and face-to-face conversations.

This does not mean, however, that information transmitted through formal or informal official channels is somehow sacrosanct and cannot be tested or questioned by defendants in court when they seek to suppress evidence obtained as the result of an arrest or detention. Although officers "are entitled to presume the accuracy of information furnished to them by other law enforcement personnel,"[31] prosecutors may be required to prove in court that the information was factual, and that it had been disseminated to the officer who acted upon it.[32]

Totality of circumstances

Probable cause and reasonable suspicion are based on an assessment of the overall force of the facts at hand; i.e., the "totality of circumstances." This is significant because some courts in the past would utilize a "divide-and-conquer"[33] approach whereby they would subject each fact to meticulous appraisal, then rule probable cause did not exist because none of the individual facts were compelling.

This practice officially ended when, in the landmark decision in *Illinois v. Gates*,[34] the Supreme Court announced that probable cause and reasonable suspicion must be based on the convincing force of the officers' information as a whole. As the Fifth Circuit pointed out, "We must be mindful that probable cause is the sum total of layers of information and the synthesis of what the police have heard, what they know, and what they observed as trained officers. We weigh not individual layers but the laminated total.[35] Thus, in *People v. McFadin* the court responded to the defendant's "divide-and-conquer" strategy by utilizing the following analogy:

> Defendant would apply the axiom that a chain is no stronger than its weakest link. Here, however, there are strands which have been spun into a rope. Although each alone may have insufficient strength, and some strands may be slightly frayed, the test is whether when spun together they will serve to carry the load of upholding [the probable cause determination].[36]

For example, in *Maryland v. Pringle*[37] an officer made a traffic stop on a car occupied by three men and, in the course of the stop, he saw some things that reasonably caused him to suspect that the men were drug traffickers. One of those things was a wad of cash ($763). Consequently, he searched the car and found cocaine. At a hearing on a motion to suppress, Pringle argued that the officers lacked probable cause. The state court agreed, saying the officer should have ignored the money because possession of money is not illegal. Prosecutors appealed the ruling to the Supreme Court which ruled that the Maryland court had focused erroneously on the money when it should have considered all of the relevant circumstances. Said the Court, "[C]onsideration of the money in isolation, rather than as a factor in the totality of the circumstances, is mistaken."

Considering exculpatory facts

If probable cause exists, officers are not required to conduct an additional investigation to determine if there were other facts that might undermine probable cause.[38] Still, officers are "not free to disregard plainly exculpatory evidence, even if substantial inculpatory evidence (standing by itself) suggests that probable cause exists."[39]

---

[31] *U.S. v. Lyons* (6th Cir. 2012) 687 F.3d 754, 768.
[32] See *United States v. Hensley* (1985) 469 U.S. 221, 232. Also see *People v. Madden* (1970) 2 Cal.3d 1017.
[33] *United States v. Arvizu* (2002) 534 U.S. 266, 274.
[34] (1983) 462 U.S. 213. Also see *Massachusetts v. Upton* (1984) 466 U.S. 727, 734 ["internal coherence"].
[35] *U.S. v. Edwards* (5th Cir. 1978) 577 F.2d 883, 895. Also see *U.S. v. Valdes-Vega* (9th Cir. 2013) 739 F.3d 1074.
[36] (1982) 127 Cal.App.3d 751, 767.
[37] (2003) 540 U.S. 366.
[38] See *Hamilton v. City of San Diego* (1990) 217 Cal.App.3d 838, 845; *U.S. v. Pabon* (2nd Cir. 2017) 871 F.3d 164, 176.
[39] *Goodwin v. Conway* (3rd Cir. 2016) 836 F.3d 321, 328.

Evaluating the Facts

After all of the relevant facts have been isolated, the courts must determine whether they added up to probable cause. Although this process is highly subjective, there are certain rules that apply, as follows.

Common sense

The significance of the facts is judged by applying common sense, not hypertechnical analysis. Thus, the circumstances must be "viewed from the standpoint of an objectively reasonable police officer."[40] As the Supreme Court explained, "Perhaps the central teaching of our decisions bearing on the probable cause standard is that it is a practical, nontechnical conception. In dealing with probable cause, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."[41]

Legal, but suspicious, activities

Activities and circumstances that are not illegal per se may contribute to or even establish probable cause if they become suspicious when considered in light of the other circumstances. To put it another way, the distinction between criminal and non-criminal conduct "cannot rigidly control" because probable cause and reasonable suspicion "are fluid concepts that take their substantive content from the particular contexts in which they are being assessed."[42]

For example, in *People v. Juarez*[43] the defendant argued that officers lacked grounds to detain him because the only "suspicious" thing he did was run when he saw them. The court acknowledged that "running down a street is indistinguishable from the action of a citizen engaged in a program of physical fitness," but it can become "highly suspicious" when it is "viewed in context of immediately preceding gunshots." Similarly, in *Massachusetts v. Upton*[44] a lower court ruled that probable cause to arrest the defendant could not have existed because is was based on evidence that was "related to innocent, nonsuspicious conduct." That does not matter, said the Supreme Court, because the test is whether the various pieces "fit neatly together" as demonstrating of criminal conduct.

For example, in *United States v Sokolow*,[45] DEA agents detained Andrew Sokolow after he landed at Honolulu International Airport from Miami. The reasons for the detention were: (1) he had paid $2,100 for two airplane tickets from a roll of $20 bills; (2) he was traveling under a name that did not match the name under which his telephone number was listed; (3) he had stayed in Miami for only 48 hours, even though a round-trip flight from Honolulu to Miami takes 20 hours; (4) he appeared nervous during his trip; and (5) he checked none of his luggage.

The Ninth Circuit ruled these circumstance were irrelevant in establishing reasonable suspicion because they were all "legal." The Supreme Court reversed, saying, "Any one of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion."

Possibility of innocent explanation

If the facts support an officer's conclusion that there is probable cause, it does not matter that the officer could not "rule out the possibility of innocent conduct."[46] As the California Supreme Court explained, "The possibility of an innocent explanation does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct. Indeed, the principal function of his investigation is to resolve that very ambiguity and establish whether the activity is in fact legal or illegal to enable the police to quickly determine whether they should allow the suspect to go about his business or hold him to answer charges."[47]

---

[40] *Ornelas v. United States* (1996) 517 U.S. 690, 696.
[41] *Illinois v. Gates* (1983) 462 U.S. 213, 231. Also see *Illinois v. Wardlow* (2000) 528 U.S. 119, 125.
[42] *Safford Unified School District v. Redding* (2009) 557 U.S. 364, 371. Also see *Maryland v. Pringle* (2003) 540 U.S. 366, 372, fn.2.
[43] (1973) 35 Cal.App.3d 631, 636.
[44] (1984) 466 U.S. 727, 731-32.
[45] (1989) 490 U.S. 1. Also see *People v. Glenos* (1992) 7 Cal.App.4th 1201, 1207; *U.S. v. Ruidiaz* (1st Cir. 2008) 529 F.3d 25, 30
[46] *United States v. Arvizu* (2002) 534 U.S. 266, 277. Also see *District of Columbia v. Wesby* (2018) __ U.S. __ [138 S.Ct. 577, 588].
[47] *In re v. Tony C.* (1978) 21 Cal.3d 888, 894. Also see *People v. Brown* (2015) 61 Cal.4th 968, 985.

Multiple incriminating circumstances

Here is a principle of probable cause that is often overlooked or underappreciated: The chances of having it increase *exponentially* with each additional piece of independent incriminating evidence that comes to light. In other words, when there are two pieces of evidence that exist independently of each other, the combination of the two generates somewhat more suspicion than would have resulted if the two pieces were interrelated.

To illustrate, if probable cause and reasonable suspicion could be tallied on a scorecard, and a suspect on the street matched a general description of the perpetrator of a robbery that had just occurred nearby, we would give him a PC score of, say, two: one point because he resembled the robber and a second point for being near the crime scene shortly after the robbery occurred. But he would also be entitled to a bonus of, say, one tenth of a point because the combination of two independent circumstances (physical description plus location) is, in effect, an additional incriminating circumstance in that it constitutes a noteworthy "coincidence of information."[48] Thus, when it comes to probable cause, "the whole is greater than the sum of its parts."[49]

For example, in *People v. Hillery*,[50] officers in Kings County arrested Booker Hillery who had been walking in a rural area near where a 15-year old girl had been raped and murdered. In addition to the time and distance evidence, officers knew that a car "similar to defendant's uniquely painted black and turquoise 1952 Plymouth" had been seen about two-tenths of a mile from the scene of the crime. They were also aware that Hillery had a prior record of conviction for forcible rape, and he knew that the victim occasionally baby sat at the farm where defendant worked." In ruling that these pieces of independent incriminating evidence constituted probable cause, the California Supreme Court said, "The probability of the independent concurrence of these factors in the absence of the guilt of defendant was slim enough to render suspicion of defendant reasonable and probable.

Similarly, in a case from Santa Clara County,[51] a man named Anthony Spears, who worked at a Chili's in Cupertino, arrived at the restaurant one morning and "discovered" that the manager had been shot and killed before the restaurant had opened for the day. In the course of their investigation, sheriff's deputies learned that Spears had left home shortly before the murder even though it was his day off, there were no signs of forced entry, and that Marlboro cigarette butts (the same brand that Spears smoked) had been found in an alcove near the manager's office. Moreover, Spears had given conflicting statements about his whereabouts when the murder occurred; and, after "discovering" the manager's body, he told other employees that the manager had been "shot" but the cause of death was not apparent from the condition of the body.

Based on this evidence, detectives obtained a war-rant to search Spears' apartment and the search netted, among other things, "large amounts of blood-stained cash." On appeal, Spears argued that the detectives lacked probable cause for the warrant but the court disagreed, saying, "[W]e believe that all of the factors, considered in their totality, supplied a degree of suspicion sufficient to support the magistrate's finding of probable cause."

While this principle also applies to reasonable suspicion to detain, a lesser amount of independent incriminating evidence will be required. Examples:

- The suspect's physical description and his clothing were similar to that of the perpetrator.[52]

---

[48] *Illinois v. Gates* (1983) 462 U.S. 213, 222, fn.7; *Ker v. California* (1963) 374 U.S. 23, 36 ["To say that this coincidence of information was sufficient to support a reasonable belief of the officers that Ker was illegally in possession of marijuana is to indulge in understatement."]; *U.S. v. Arthur* (1C 2014) 764 F.3d 92, 97-98.

[49] *District of Columbia v. Wesby* (2018) __ U.S. __ [138 S.Ct. 577, 588].

[50] (1967) 65 Cal.2d 795.

[51] *People v. Spears* (1991) 228 Cal.App.3d 1.

[52] See *Chambers v. Maroney* (1970) 399 U.S. 42, 46-47; *People v. Adams* (1985) 175 Cal.App.3d 855, 861.

- In addition to a description similarity, the suspect was in a car similar in appearance to that of the perpetrator.[53]
- The suspect resembled the perpetrator and he was in the company of a person who was positively identified as one of two men who had just committed the crime.[54]
- The suspect resembled the perpetrator plus he was detained shortly after the crime occurred at the location where the perpetrator was last seen or on a logical escape route.[55]

Unique circumstances

The odds of having reasonable suspicion or probable cause also increase dramatically if the matching or similar characteristics were unusual or distinctive. As the Court of Appeal observed, "Uniqueness of the points of comparison must also be considered in testing whether the description would be inapplicable to a great many others."[56] Conversely, the Second Circuit noted that "when the points of similarity are less unique or distinctive, more similarities are required before the probability of identity between the two becomes convincing."

Training and experience: Making inferences

As noted earlier, probable cause and reasonable suspicion must be based on "specific and articulable facts." Nevertheless, the courts will also consider an officer's inferences as to the meaning or significance of the facts so long as the inference appeared to be reasonable; e.g., inferences based on training and experience.[57] In the words of the Supreme Court, "The evidence must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."[58] Or, as the Supreme Court explained in *United States v. Arvizu*:

> The process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person.[59]

For example, in *People v. Soun*[60] the defendant and three other men killed the owner of a video store in San Jose during a botched robbery. The men were all described as Asian, but witnesses provided conflicting descriptions of their getaway car. Some reported that it was a two-door Japanese car, but one said it was a Volvo "or that type of car." Two of the witnesses provided a partial license plate number. One said he thought it began with "1RCS," possibly "1RCS525" or "1RCS583." The other said he thought it was 1RC(?)538.

A San Jose officer at the station was monitoring these developments on a radio and he made two inferences: (1) the actual license plate probably began with "1RCS ___," and (2) the last three numbers included a 5 and an 8. So he started running these combinations through the DMV computer until he got a hit on 1RCS558, a 1981Toyota registered in Oakland.

Because the car was last seen heading in the direction of Oakland, officers notified OPD and, the next day, OPD officers stopped the car and, after consulting with SJPD investigtors, arrested the occupants for the murder. This, in turn, resulted in the seizure of the murder weapon. On appeal, one of the occupants, Soun, argued that the weapon should have been suppressed because the detention was based on nothing more than "hunch and supposition." On the contrary, said the court, what Soun labeled "hunch and supposition" was actually "intelligent and resourceful police work."

---

[53] See *People v. Hill* (2001) 89 Cal.App.4th 48, 55; *People v. Soun* (1995) 34 Cal.App.4th 1499, 1524-25.
[54] *People v. Bowen* (1987) 195 Cal.App.3d 269, 274. Also see *In re Carlos M.* (1990) 220 Cal.App.3d 372, 382; *In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1092.
[55] *People v. Atmore* (1970) 13 Cal.App.3d 244, 246.
[56] *In re Brian A.* (1985) 173 Cal.App.3d 1168, 1174.
[57] See *United States v. Cortez* (1981) 449 U.S. 411, 418; *People v. Ledesma* (2003) 106 Cal.App.4th 857, 866; *U.S. v. Lopez-Soto* (9th Cir. 2000) 205 F.3d 1101, 1105 ["An officer is entitled to rely on his training and experience in drawing inferences from the facts he observes, but those inferences must also be grounded in objective facts and be capable of rational explanation."]
[58] *Illinois v. Gates* (1983) 462 U.S. 213, 232.
[59] (2002) 534 U.S. 266, 273.
[60] (1995) 34 Cal.App.4th 1499. Also see *Maryland v. Pringle* (2003) 540 U.S. 366, 371-72.

Hunches and unsupported conclusions

In contrast to reasonable inferences, are hunches. It might be surprising that the courts are aware that hunches play an important role in solving crimes. Said the Ninth Circuit, "A hunch may provide the basis for solid police work; it may trigger an investigation that uncovers facts that establish reasonable suspicion, probable cause, or even grounds for a conviction."[61] Still, hunches are irrelevant in determining the existence of probable cause or reasonable suspicion.

The same is true of unsupported conclusions.[62] For example, in ruling that a search warrant affidavit failed to establish probable cause, the court in *U.S. v. Underwood*[63] noted that much of the affidavit was "made up of conclusory allegations" that were "entirely unsupported by facts." Two of these allegations were that officers had made "other seizures" and had "intercepted conversations" that tended to prove the defendant was a drug trafficker. "[T]hese vague explanations," said the court, "add little if any support because they do not include underlying facts."

Information inadmissible in court

In determining whether probable cause or reasonable suspicion exist, officers may consider both hearsay and privileged communications.[64] For example, although a victim's identification of the perpetrator might constitute inadmissible hearsay or fall within the marital privilege, officers may rely on it unless they had reason to believe it was false. As the Court of Appeal observed, "The United States Supreme Court has consistently held that hearsay information will support issuance of a search warrant. Indeed, the usual search warrant, based on a reliable police informer's or citizen-informant's information, is necessarily founded upon hearsay."[65] On the other hand, information will not be considered if it was later determined that it was obtained in violation of the suspect's constitutional rights; e.g., an illegal search or seizure.[66]

Mistakes of fact and law

If probable cause was based on information that was subsequently determined to be inaccurate or false, the information may nevertheless be considered if the officers reasonably believed it was true. As the Court of Appeal put it, "If the officer's belief is reasonable, it matters not that it turns out to be mistaken."[67] Or, in the words of the Supreme Court, "[W]hat is generally demanded of the many factual determinations that must regularly be made by agents of the government is not that they always be correct, but that they always be reasonable."[68]

What about mistakes as the law? In the past, searches and seizures were routinely invalidated if probable cause was based on an officer's mistake pertaining to the applicable law; e.g., that officer arrested the suspect for the "wrong" crime. In 2014, however, the Supreme Court ruled that suppression may not be appropriate if the mistake of law was reasonable. For example, an officer's mistake as to the existence or meaning of a statute will not invalidate a search or seizure if the mistake was objectively reasonable.[69] It appears, however, that this ruling may not apply to mistakes of law pertaining to the constitutional requirements for conducting searches and seizures. As the Ninth Circuit observed, "If an officer simply does not know the law, and makes a stop based upon objective facts that cannot constitute a violation, his suspicions cannot be reasonable."[70] POV

---

[61] *U.S. v. Thomas* (9th Cir. 2000) 211 F.3d 1186, 1192.
[62] See *Illinois v. Gates* (1983) 462 U.S. 213, 239 [a "wholly conclusory statement" is irrelevant]; *People v. Leonard* (1996) 50 Cal. App.4th 878, 883 ["Warrants must be issued on the basis of facts, not beliefs or legal conclusions."]; *U.S. v. Garcia-Villalba* (9th Cir. 2009) 585 F.3d 1223, 1234.
[63] (9th Cir. 2013) 725 F.3d 1076.
[64] See *United States v. Ventresca* (1965) 380 U.S. 102, 108; *People v. Navarro* (2006) 138 Cal.App.4th 146, 147.
[65] *People v. Superior Court (Bingham)* (1979) 91 Cal.App.3d 463, 472.
[66] See *Lozoya v .Superior Court* (1987) 189 Cal.App.3d 1332, 1340; *U.S. v. Barajas-Avalos* (9th Cir. 2004) 377 F.3d 1040, 1054.
[67] *Cantrell v. Zolin* (1994) 23 Cal.App.4th 128, 134. Also see *Hill v. California* (1971) 401 U.S. 797, 802.
[68] *Illinois v. Rodriguez* (1990) 497 U.S. 177, 185. Edited.
[69] *Heien v. North Carolina* (2014) 574 U.S. 54, 66.
[70] *U.S. v. Mariscal* (9th Cir. 2002) 285 F.3d 1127, 1130.

Searches Incident to Arrest

It is a difficult exercise at best to predict a criminal suspect's next move."[1]

Taking a suspect into custody is almost always a "tense and risky undertaking."[2] This is especially so whenever the crime was a felony because many of today's felons are not only violent and well armed, they are often desperate. And they know that if officers are able to handcuff them, they will be spending years, decades, or the rest of their lives in prison. As the D.C. Circuit observed, "A willful and apparently violent arrestee, faced with the prospect of long-term incarceration, could be expected to exploit every available opportunity."[3]

But even if the crime was not a high-stakes felony, there is still a threat of violence because people who are about to lose their freedom—even for a short time—may act impulsively and "attempt actions which are unlikely to succeed."[4] In the words of the Seventh Circuit, "It is the threat of arrest or the arrest itself which may trigger a violent response—regardless of the nature of the offense which first drew attention to the suspect."[5]

For these reasons, officers who have arrested a suspect, or who are about to do so, may ordinarily conduct a limited search for the purpose of locating and securing any weapons or destructible evidence in his possession. And unlike most other police searches, searches incident to arrest may be conducted as a matter of routine, regardless of the nature of the crime for which the suspect was arrested or his state of mind.[6] As the United States Supreme Court explained, "The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm or to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect."[7]

Still, as we will discuss in this article, there are certain restrictions on when and how officers may conduct these searches.

Requirements

Officers may search a suspect incident to an arrest if (1) they have probable cause to arrest him, (2) the arrest was "custodial" in nature; and (3) the search was "contemporaneous" with the arrest.

Lawful arrest

In the context of searches incident to arrest, an arrest is deemed lawful if officers had probable cause to arrest the suspect.[8] This rule may have some practical consequences.

SEARCH BEFORE OR AFTER ARREST: If officers have probable cause to arrest, they may conduct the search before or after they had placed the suspect under arrest.[9] Thus, the search "need not be delayed until the arrest is effected."[10]

OFFICER'S MOTIVATION IMMATERIAL: If there was probable cause, the arrest is lawful regardless of the officer's motivation for conducting the search.[11]

---

[1] *U.S. v. Reilly* (9th Cir. 2000) 224 F.3d 986, 993. Also see *Washington v. Chrisman* (1982) 455 U.S. 1, 7 ["There is no way for an officer to predict reliability how a particular subject will react to arrest or the degree of the potential danger."].
[2] *State v. Murdock* (Wis. 1990) 155 Wis.2d 217, 231.
[3] *U.S. v. Abdul-Saboor* (D.C. Cir. 1996) 85 F.3d 664, 670.
[4] *U.S. v. McConney* (9th Cir. 1984) 728 F.2d 1195, 1207.
[5] *U.S. v. Arango* (7th Cir. 1989) 879 F.2d 1501, 1505.
[6] See *Washington v. Chrisman* (1992) 455 U.S. 1, 7; *People v. Macabeo* (2016) 1 Cal.5th 1206, 1214 ["An officer need not have particularized cause to believe an arrestee is actually armed or possesses contraband in order to search him."].
[7] *United States v. Robinson* (1973) 414 U.S. 218, 235. Emphasis omitted.
[8] See *Virginia v. Moore* (2008) 553 U.S. 164, 177; *People v. Fay* (1986) 184 Cal.App.3d 882, 892.
[9] *Rawlings v. Kentucky* (1980) 448 U.S. 98, 111; *People v. Limon* (1993) 17 Cal.App.4th 524, 538.
[10] *U.S. v. Smith* (9th Cir. 2004) 389 F.3d 944, 951.
[11] See *Whren v. United States* (1996) 517 U.S. 806, 812-13.

OFFICERS UNSURE ABOUT PROBABLE CAUSE: If the court finds there was probable cause, it is immaterial that the officers were unsure about it when they conducted the search. "It is not essential," said the Court of Appeal, "that the arresting officer at the time of the arrest or search have a subjective belief that the arrestee is guilty of a particular crime so long as the objective facts afford probable cause."[12]

For example, in *People v. Loudermilk*[13] two Sonoma County sheriff's deputies detained a hitchhiker at about 4 A.M. because he matched the description of a man who had shot another man about an hour earlier in nearby Healdsburg. When the hitchhiker, Loudermilk, claimed he had no ID in his possession, one of the deputies started to search his wallet and, as he did so, Loudermilk spontaneously exclaimed, "I shot him. Something went wrong in my head." Prosecutors used this statement against Loudermilk at trial and he was convicted of assault with a deadly weapon.

On appeal, he contended that his statement should have been suppressed because it was made in response to the deputy's warrantless search of his wallet which, according to Loudermilk, did not qualify as a search incident to arrest because the deputy had testified that he did not think he had probable cause at that point. Said the court:

> [I]t makes no difference that the detaining officer did not himself believe he had probable cause to arrest. The lawfulness of the search is examined under a standard of objective reasonableness, without regard to the underlying intent or motivation of the officers involved.

ARREST FOR "WRONG" CRIME: If a court rules that officers had arrested the suspect for a crime for which they lacked probable cause, the arrest will nevertheless be deemed lawful if there was probable cause to arrest him for some other crime. As the Court of Appeal observed,"Courts have never hesitated to overrule an officer's determination he had probable cause to arrest. We see no reason why a court cannot find probable cause, based on facts known to the officer, despite the officer's judgment none existed."[14]

Custodial arrest

The second requirement—that the arrest be "custodial"—means that officers must have intended to, or were required to, transport him from the scene of the arrest; i.e., he will not be cited and released. This is required because "the primary objective of searches incident to arrest is to ensure [the officers'] safety during the extended exposure which follows the taking of a suspect into custody and transporting him to the police station."[15] Similarly, an arrest will be deemed custodial if officers had decided to transport the arrestee to a detox facility, mental health facility, or hospital;[16] or if the arrestee was a minor who would be transported to his home, juvenile hall, school, or a curfew center.[17]

For example, in *People v. Sanchez*[18] a San Jose officer, having just arrested Sanchez for being drunk in public, searched his clothing and found drugs. Sanchez argued there was insufficient need to conduct a search incident to arrest because he would automatically be released from custody after spending some time in the drunk tank. In rejecting this argument, the court pointed out that what matters is that "the officer testified he fully intended to book appellant into jail; he did not plan to release appellant."

In contrast, in *U.S. v. Parr*[19] an officer in Portland searched Parr after he learned that Parr was driving

---

[12] *People v. Le* (1985) 169 Cal.App.3d 186, 193.
[13] (1987) 195 Cal.App.3d 996,
[14] *People v. Adams* (1985) 175 Cal.App.3d 855, 863. Also see *Florida v. Royer* (1983) 460 U.S. 491, 507.
[15] *Virginia v. Moore* (2008) 553 U.S. 164, 177. Also see *United States v. Robinson* (1973) 414 U.S. 218; *U.S. v. Jackson* (7th Cir. 2004) 377 F.3d 715, 717 ["it is *custody*, and not a stop itself, that makes a full search reasonable"].
[16] See *People v. Boren* (1987) 188 Cal.App.3d 1171, 1177.
[17] See *In re Demetrius A.* (1989) 208 Cal.App.3d 1245, 1248 [transport home."]; *In re Charles C.* (1999) 76 Cal.App.4th 420, 424 [transport home]; *People v. Humberto O.* (2000) 80 Cal.App.4th 237 [transport to school]; *In re Ian C.* (2001) 87 Cal.App.4th 856, 860 [transport to curfew center]; *People v. Breault* (1990) 223 Cal.App.3d 125, 132 [protective custody].
[18] (1985) 174 Cal.App.3d 343.
[19] (9th Cir. 1988) 843 F.2d 1228.

on a suspended license. During the search, the officer found stolen mail, but the court suppressed it because the officer testified that he had decided to release Parr pending submission of the case to prosecutors. Similarly, in *People v. Macabeo*[20] the California Supreme Court ruled that an arrest for running a stop sign was not custodial because, even though the officer could have lawfully transported the arrestee to jail, there were no "objective indicia" to suggest that he would have done so.

The question arises: Is an arrest "custodial" if officers were required under California law to cite and release the suspect? Technically, this does not matter because the Penal Code permits officers to book any person they have arrested; i.e., "nothing prevents an officer from first booking an arrestee."[21]

Furthermore, because California courts can ordinarily suppress evidence only if the search violated the Fourth Amendment, a violation of a state statute seldom constitutes grounds to suppress.[22] As the California Supreme Court explained in *People v. McKay,* if officers have probable cause, "a custodial arrest—even one effected in violation of state arrest procedures—does not violate the Fourth Amendment."[23] The court added, however, that "we in no way countenance violations of state arrest procedure," and that "violation of those rights exposes the peace officers and their departments to civil actions seeking injunctive or other relief."

Contemporaneous search

The third requirement is that the arrest and search must have been contemporaneous. Although the word "contemporaneous," in common usage, refers to situations in which two acts occur at about the same time, the courts have consistently ruled that the circumstances surrounding most arrests are much too erratic and unpredictable to require a strict succession of events. Instead, the Supreme Court ruled that the arrest and search need only be "substantially contemporaneous."[24] This simply means that the search must have been conducted in conjunction with the arrest and not at a later time or place.

Scope of the Search

Although officers may conduct searches incident to arrest as a matter of routine, the search must be reasonable in its scope. This means it must be limited to "the arrestee's person and the area within his immediate control," meaning "the area from within which he might gain possession of a weapon or destructible evidence."[25] Note that the test is whether the search was limited to places and things within the arrestee's immediate control *at the time of the search*—not at the time of the arrest.[26]

Search of the arrestee's person

Because the clothing worn by an arrestee is necessarily within his immediate control (even if he was handcuffed[27]), officers may conduct a "full search" of it to locate and seize any weapons or evidence that might be hidden.[28] As the Supreme Court observed, "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape."[29]

---

[20] (2016) 1 Cal.5th 1206.
[21] Pen. Code § 853.6(a)(1).
[22] See *Atwater v. City of Lago Vista* (2001) 532 U.S. 318; *Virginia v. Moore* (2008) 553 U.S. 164.
[23] (2002) 27 Cal.4th 601, 619. Also see *People v. Gomez* (2004) 117 Cal.App.4th 531, 539.
[24] See *Shipley v. California* (1969) 395 U.S. 818, 819 ["a search can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest"]; *Stoner v. California* (1964) 376 U.S. 483, 486 ["a search can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest"]; *Vale v. Louisiana* (1970) 399 U.S. 30, 330.
[25] *Arizona v. Gant* (2009) 556 U.S. 332, 339; *Chimel v. California* (1969) 395 U.S. 752, 763. Also see *People v. Johnson* (2018) 21 Cal.App.5th 1026, 1037 [search was not "incident to arrest" since it occurred two blocks away from the site of the arrest].
[26] See *Arizona v. Gant* (2009) 556 U.S. 332, 343;
[27] See *U.S. v. Sanders* (5th Cir. 1993) 994 F.2d 200, 209.
[28] See *United States v. Robinson* (1973) 414 U.S. 218, 235; *U.S. v. Knapp* (10th Cir. 2019) 917 F.3d 1161, 1166.
[29] *Chimel v. California* (1969) 395 U.S. 752, 762-63. Edited.

Although the term "full search" is vague, it includes a "relatively extensive exploration" of the arrestee, including his pockets,[30] and most containers inside the clothing.[31] Officers may not, however, conduct a strip search or any other exploration that is "extreme or patently abusive."[32] Furthermore, in the unlikely event it becomes necessary to remove some of the arrestee's clothing to conduct a full search, officers must do so with appropriate regard for the arrestee's legitimate privacy interests.[33] Note that, before conducting the search, officers may ask the arrestee if he possesses any weapons or evidence; these questions need not be preceded by a *Miranda* warning.[34]

Search of personal property

Containers and other personal property in close proximity to the arrestee at the time of the arrest may be searched incident to the arrest if the arrestee could have accessed the contents when the search occurred.[35] Exception: Cell phones may not be searched as an incident to arrest.[36] The following circumstances are relevant in determining whether the arrestee had access to a container or other personal property.

ARRESTEE'S PROXIMITY TO THING SEARCHED: In determining whether an unsecured arrestee had immediate access to a place or thing at the time of the search, one of the main factors is the distance between the two.[37] Although the area accessible to an arrestee is sometimes called "grabbing distance,"[38] it is not limited to places and things that were literally within his reach or "wingspan."[39] Instead, officers may ordinarily search places and things that were within his "lunging" distance.[40]

For example, in ruling that a search of a backpack qualified as a search incident to arrest, the Fourth Circuit in the recent case of *U.S. v. Ferebee*[41] pointed out that "Ferebee was only a few steps away from the backpack. He was handcuffed, but he still could walk around somewhat freely and could easily have made a break for the backpack," and "indeed, the body-camera video reveals that after Ferebee was handcuffed and led outside, he managed to wad up and throw away his marijuana joint without attracting the attention of the police officers around him."

In determining whether something was within lunging distance, officers may consider that arrestees may act irrationally—that their fear of incarceration may motivate them to try to reach places some distance away. Thus, in discussing this issue, the courts have noted the following:

- Officers are not required "to calculate the probability that weapons or destructible evidence may be involved,"[42] or "to presume that an arrestee is wholly rational."[43]
- "[Officers] cannot be expected to make punctilious judgments regarding what is within and what is just beyond the arrestee's grasp."[44]
- "[W]e cannot require an officer to weigh the arrestee's probability of success in obtaining a weapon or destructible evidence hidden within his or her immediate control."[45]

---

[30] *United States v. Robinson* (1973) 414 U.S. 218, 236; *People v. Laiwa* (1983) 34 Cal.3d 711, 726.
[31] See *U.S. v. Knapp* (10th Cir. 2019) 917 F.3d 1161, 1167.
[32] *United States v. Robinson* (1973) 414 U.S. 218, 236.
[33] *Illinois v. Lafayette* (1983) 462 U.S. 640, 645; *U.S. v. Edwards* (4th Cir. 2011) 666 F.3d 877, 883.
[34] See *New York v. Quarles* (1984) 467 U.S. 649, 656; *U.S. v. Simpkins* (1st Cir. 2020) __ F.3d __ [2020 WL 6067397].
[35] See *Robey v. Superior Court* (2013) 56 Cal.4th 1218, 1233-34; *U.S v. Knapp* (10th Cir. 2019) 917 F.3d 1161, 1168.
[36] See *Riley v. California* (2014) 573 U.S. 373, 403; *People v. Macabeo* (2016) 1 Cal.5th 1206, 1219.
[37] See *U.S. v. Neely* (5th Cir. 2003) 345 F.3d 366, 371-72.
[38] *Chimel v. California* (1969) 395 U.S. 752, 763: *U.S. v. Tejada* (7th Cir. 2008) 524 F.3d 809, 811.
[39] See *U.S. v. Ingram* (N.D.N.Y. 2001) 164 Fed.Supp.2d 310, 314.
[40] See *Thornton v. United States* (2004) 541 U.S. 615, 621 ["nor is an arrestee less likely to attempt to lunge for a weapon"].
[41] (4th Cir. 2020) 957 F.3d 406.
[42] *United States v. Chadwick* (1977) 433 U.S. 1, 15.
[43] *U.S. v. McConney* (9th Cir. 1984) 728 F.2d 1195, 1207.
[44] *U.S. v. Lyons* (D.C. Cir 1983) 706 F.2d 321, 330.
[45] *State v. Murdock* (Wis. 1990) 455 N.W.2d 618, 626. Also see *U.S. v. Tejada* (7th Cir. 2008) 524 F.3d 809, 812.

Still, the place or thing "must be conceivably accessible to the arrestee—assuming that he was neither an acrobat nor a Houdini."[46] For example, the Sixth Circuit ruled that an arrestee did not have immediate access to his car when, although not handcuffed, he was standing two or three feet from the rear bumper with three officers standing around him.[47] In contrast, the Third Circuit ruled that a search of a gym bag at the feet of a handcuffed arrestee was unlawful because, "[a]lthough he was handcuffed and guarded by two policemen, Shakir's bag was literally at his feet, so it was accessible if he had dropped to the floor."[48] As these cases demonstrate, the courts have a lot of discretion in determining what things are "accessible" to arrestees.

OTHER SUSPECTS HAD IMMEDIATE ACCESS: To date, the courts in three cases have ruled that, although the arrestee did not have immediate access to the thing that was searched, the search was lawful because there were other suspects who did.[49]

IF THE ARRESTEE FLED: Before the Supreme Court announced the "immediate access" requirement, the courts generally ruled that, if the arrestee fled when officers tried to arrest him, the officers could search places and things that were under his immediate control at the time they attempted to arrest him, plus places and things under his immediate control when he was arrested.[50] They reasoned that the law should not give arrestees the ability to thwart the discovery of incriminating evidence by defying officers and forcibly distancing themselves from it. This makes sense and we think the courts would so rule, but it uncertain. In any event, if the item or its contents have apparent value, or if its value cannot be determined, officers may ordinarily conduct these types of searches for the reasons we will discuss in the next section.

COMPARE INVENTORY SEARCHES OF CONTAINERS: It should be noted that personal property may also be searched if officers have a duty to transport the property to a police facility for safekeeping. These searches are permitted because it is reasonable for officers to inventory the contents of containers to provide the owner with an inventory of the contents and to make sure they do not contain weapons, explosives, or dangerous chemicals. As he Supreme Court observed, "It would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, even for their own protection, to search it."[51]

The Court also ruled that these searches are permitted "to ensure that it is harmless, to secure valuable items, and to protect against false claims of loss or damage."[52] Thus, in ruling that such searches were lawful, the courts have explained:

- "An inventory search is the search of property lawfully seized and detained, in order to ensure that it is harmless, to secure valuable items (such as might be kept in a towed car), and to protect against false claims of loss or damage."[53]
- The officer had authority "to search the person of the defendant which would include the jacket that defendant indicated he wished to take with him to jail."[54]
- "It would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, even for their own protection, to search it."[55]

---

[46] *U.S. v. Queen* (7th Cir. 1988) 847 F.2d 346, 353.
[47] *U.S. v. McCraney* (6th Cir. 2012) 674 F.3d 614, 619-20.
[48] *U.S. v. Shakir* (3rd Cir. 2010) 616 F.3d 315, 321.
[49] See *U.S. v. Davis* (8th Cir. 2009) 569 F.3d 813, 817.
[50] See *People v. Pressley* (1966) 242 Cal.App.2d 555, 559-60 ["[T]he actual arrest was not made until defendant was under restraint and that his flight and struggle had carried him some 100 feet away. But we do not think that this is controlling. The process of arrest had begun at the door"].
[51] *Cooper v. California* (1967) 386 U.S. 58, 61-62.
[52] *Whren v. United States* (1996) 517 U.S. 806, 811, fn.1. Also see *Cooper v. California* (1967) 386 U.S. 58, 61-62.
[53] *Whren v. United States* (1996) 517 U.S. 806, 811, fn.1.
[54] *People v. Topp* (1974) 40 Cal.App.3d 372, 378. Also see *U.S. v. Lyons* (D.C. Cir. 1983) 706 F.2d 321, 331 [ok to search jacket "for weapons before giving it to him"].
[55] *Cooper v. California* (1967) 386 U.S. 58, 61-62.

Three other things should be noted. First, such a search may be invalidated if the court concludes that the officers' objective in searching the container was to obtain evidence of a crime.[56] Second, if officers have probable cause to search an item belonging to the arrestee, they may also seize it and promptly apply for a search warrant.[57] Third, as noted earlier, officers may not search the contents of cell phones as an incident to arrest.

Search of vehicles

In the past, officers were permitted to search the passenger compartment of vehicles for weapons and evidence whenever they made a custodial arrest of an occupant. These were known as *"Belton"* searches.[58] But, in 2009, the Supreme Court in *Arizona v. Gant* ruled that *Belton* searches would be permitted only if the arrestee had immediate access to the passenger compartment at the moment the search was conducted.[59] Because officers seldom permit arrestees to have unfettered access to anything, *Belton* searches have become virtually extinct. As the result, most vehicle searches are based on probable cause, inventory search of towed vehicle, or consent.

Search of homes

A search of a residence incident to an arrest is permitted only if (1) the arrest occurred inside the residence,[60] and (2) the search was limited to places and things to which the arrestee had immediate access when the search occurred; e.g., under a bed on which the arrestee was lying, inside a duffel bag at the foot of a bed on which the arrestee was lying.[61] Thus, officers may not routinely search beyond the room in which the arrest occurred. As the court explained in *People v. Bagwell*, "routine searches of rooms other than that in which an arrest is made will not be tolerated."[62] Thus, in *Guidi v. Superior Court* the court ruled that a search of the arrestee's kitchen was unlawful because he had been arrested in the living room.[63] And in *People v. Block* a search that occurred upstairs was ruled unlawful because the suspect was arrested downstairs.[64] Furthermore, a search of an area distant from the arrest scene will not be permitted if officers compelled the arrestee to go there without good cause.[65] As the Court of Appeal explained, "The police should not be allowed to extend the scope of [the search] by having a person under arrest move around the room at their request."[66]

If, however, the suspect was arrested outside his home but requested permission to enter (e.g., to get a jacket), and if officers granted the request, they may accompany him and stay "literally at [his] elbow at all times."[67] Thus, in *U.S. v. Garcia* the court observed that "[i]t would have been folly for the police to let [the arrestee] enter the home and root about [for identification] unobserved."[68] POV

[56] See *Colorado v. Bertine* (1987) 479 U.S. 367, 372; *People v. Wallace* (2017) 15 Cal.App.5th 82, 90.
[57] See *Riley v. California* (2014) 573 U.S. 373, 388; *U.S. v. Henry* (1st Cir. 2016) 827 F.3d 16, 28 ["the officers did exactly what the Supreme Court [in *Riley*] suggested they do: seize the phones to prevent destruction of evidence but obtain a warrant before searching the phones"].
[58] See *New York v. Belton* (1981) 453 U.S. 454.
[59] (2009) 556 US 332.
[60] See *Chimel v. California* (1969) 395 U.S. 752, 763; *Vale v. Louisiana* (1970) 399 U.S. 30, 33-34.
[61] See *People v. Arvizu* (1970) 12 Cal.App.3d 726, 729.
[62] (1974) 38 Cal.App.3d 127, 131.
[63] (1973) 10 Cal.3d 1, 7.
[64] (1971) 6 Cal.3d 239, 243.
[65] See *Shipley v. California* (1969) 395 U.S. 818, 820; *People v. Mendoza* (1986) 176 Cal.App.3d 1127, 1132.
[66] *Eiseman v. Superior Court* (1971) 21 Cal.App.3d 342, 350.
[67] *Washington v. Chrisman* (1982) 455 U.S. 1, 6. Also see *People v. Breault* (1990) 223 Cal.App.3d 125, 133 ["*Chrisman* does not require a showing of exigent circumstances."]: *U.S. v. Reid* (8th Cir. 2014) 769 F.3d 990, 992 ["When an arrestee chooses to reenter her home for her own convenience, it is reasonable for officers to accompany her and to monitor her movements."]; *U.S. v. Nascimento* (1st Cir. 2007) 491 F.3d 25, 50 ["[I]t was not inappropriate for the police to escort Nascimento to his bedroom in order that he might get dressed."].
[68] (7th Cir. 2004) 376 F.3d 648, 651.

Recent Cases

People v. Suarez

(2020) 10 Cal.5th 116

Issues

(1) Did exigent circumstances justify a warrantless entry into a murder suspect's home? (2) Did deputies violate *Miranda* when they questioned him?

Facts

Suarez was a seasonal worker at a ranch in Placer County where he lived in a trailer. His two brothers-in-law, Jose and Juan Martinez, along with Jose's wife Y.M., visited him on a Sunday afternoon. The purpose of the visit was to allow Jose to borrow Suarez's car on Monday to keep an appointment with immigration authorities. The brothers were accompanied by Jose's two children, identified as 5-year old J.M. and 3-year old A.M. The men spent most of the day out on the ranch, while Y.M. stayed in or near the trailer with the children.

Although Suarez seemed friendly at first, he was seething because Y.M. had recently refused to have sex with him. Whether this was the motive for what happened next is not known. What *is* known is that, while the men were out on the ranch property, Suarez shot Jose and Juan multiple times in the head. He then returned to the ranch where he confronted Y.M., put a rope around her neck, dragged her inside the trailer and tied her with duct tape. The children, who had been playing Nintendo, were terrified and begged Suarez to stop. Instead, he put a chain around Y.M. neck, tied her wrists behind her back, and tied her feet. He then raped her. At some point, Y.M. lost consciousness and, when she awoke, the children were gone. She untied herself and ran to a nearby home. A resident called 911.

When Placer County sheriff's deputies arrived and learned what had happened, they entered Suarez's trailer and conducted a "quick walk-through" to see if he or any of the other family members were inside. They weren't. The deputies did, however, see a rifle and shotgun, which they seized. They also found duct tape, expended casings, and other evidence outside. Then they expanded their search and, about one quarter of a mile away, found "an area of freshly moved dirt that appeared to be a grave." They dug it up and found the bodies of Jose, Juan, and the two children. The children had been bludgeoned.

Suarez fled to Wilmington in Los Angeles County where he stayed with friends. Investigators from Placer and Los Angeles counties tracked him to his friends' home where they arrested him. They initially took him to the Long Beach police station for questioning; he waived his rights and confessed to the murders but not the rape. During a subsequent interview 14 hours later in Placer County, he provided additional details; e.g., he said he had killed the children because "they had been crying and he had been nervous."

Suarez filed a motion to suppress his confessions and the evidence the investigators had found in his trailer. The motion was denied and Suarez was convicted of murder and other felonies. He was sentenced to death.

Discussion

This was an unusual case because most—if not all—of the physical evidence that Suarez sought to suppress was probably superfluous in light of his confessions to investigators and to his friends in Wilmington and an abundance of other incriminating evidence. Still, there were two legal issues for the court to resolve.

SEARCH OF THE TRAILER: Suarez argued that the warrantless search of his trailer was unlawful because there were no exigent circumstances. This argument was frivolous. As the trial judge observed, "There was a fresh report of a violent assault and the suspect and his family members, including children, were missing." The California Supreme Court agreed, and it also pointed out that the deputies did not conduct an unrestricted search of the trailer, but had properly confined their initial search to places in which

a person might be located. The court also ruled that the deputies were justified in seizing the rifle and shotgun in the trailer "to prevent Suarez from using them against law enforcement or anyone else."

Prosecutors also argued that Suarez had effectively abandoned his trailer when he fled to Los Angeles County, and he therefore did not have a reasonable expectation of privacy as to the evidence he left behind. This was a valid argument but the court did not address it because the search was plainly justified by exigent circumstances.

MIRANDA: Suarez also argued that his confession to the detectives after he was returned to Placer County should have been suppressed because, although he had waived his rights in Long Beach, they did not re-*Mirandize* him.

While *Mirandizing* is required whenever officers interrogate suspects who are in custody, they are not required to re-*Mirandize* them after every break or interruption in the proceedings. Instead, one warning at the beginning of the first interview will suffice if it was "reasonably contemporaneous" with the beginning of the second one. As the court observed in *People v. Braeseke*, "A *Miranda* warning is not required before each custodial interrogation; one warning, if adequately and reasonably contemporaneously given, is sufficient."[1]

What does "reasonably contemporaneous" mean? It means that the circumstances surrounding the two interviews were such that a reasonable person in the suspect's position would have understood that the rights he had previously waived still applied. Two of the most important circumstances are the amount of time that elapsed between the two interviews and whether the officers, before the start of the second interview, confirmed with the suspect that he remembered his rights. The courts will also consider whether the topics under discussion in the two interviews were the same or different, whether the they occurred at the same or different locations, and whether the same officers conducted both interviews.

In *Suarez*, the topics under discussion were the same, and both interviews were conducted by Placer County deputies. On the other hand, the interviews occurred in different locations, and the amount of time between the interviews (14 hours) was significant.

It was, however, unnecessary for the court to engage in an extended discussion of the issue because the deputies, before they began the second interview, confirmed with Suarez that he remembered the rights he had waived in Long Beach. As the court pointed out, before the Placer County interrogation began, one of the deputies "showed Suarez the form he had signed the day before and asked whether he recalled and understood it and whether they could talk. Suarez nodded his head," and the interview proceeded. Accordingly, the court ruled "that the Placer County interrogation was reasonably contemporaneous with the earlier advisement and waiver in Long Beach, and that no *Miranda* readvisement was necessary at the outset of the Placer County interrogation."

For these reasons, the court ruled that deputies did not violate Suarez's constitutional rights, and it affirmed his conviction and death sentence.

People v. Hall

(2020) __ Cal.App.5th __ [2020 WL 6882240]

Issue

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

Facts

At about 11 P.M., an SFPD officer stopped a car driven by Dontaye Hall because the license plate light was out. As he approached the driver's side window, he saw "a clear plastic baggie" on the center console, and it appeared the baggie contained marijuana. Although he did not detect an odor of fresh or burnt marijuana, he concluded that he had probable cause to search the car "due to the fact that having an open container of marijuana is a violation of the

[1] (1979) 25 Cal.3d 691, 701-2. Also see *People v. San Nicolas* (2004) 34 Cal.4th 614, 640 ["where a subsequent interrogation is 'reasonably contemporaneous' with a prior knowing and intelligent waiver, a readvisement of *Miranda* rights is unnecessary."].

law." During the search, the officer found a loaded firearm inside Hall's backpack. As the result, he was charged with "two felony weapons counts."

Although his motion to suppress the gun was denied, the DA allowed him to plead guilty to one misdemeanor count of carrying a loaded firearm. He then appealed the denial of his suppression motion.

Discussion

Hall argued that his motion to suppress should have been granted because the officer did not have probable cause to believe that the marijuana in the baggie was possessed illegally. Under California law, it is legal for adults to possess one ounce or less of marijuana in a vehicle if it was in a "closed" container.[2] Thus, the search of Hall's car would have been lawful if the officer reasonably believed that the amount of marijuana in the baggie exceeded one ounce, or if the baggie was "open."

HOW MUCH MARIJUANA WAS IN THE BAGGIE? The amount of marijuana in the baggie might or might not have exceeded one ounce. But it doesn't matter because the officer, while testifying at the suppression hearing, was not asked to explain why he believed it did. As the court pointed out, "There was no testimony about the weight of the baggie and no description of the baggie from which one could reasonably infer that it contained over 28.5 grams of marijuana. Thus, there was no evidence to support a belief that Hall had an unlawful amount of marijuana in his car."

WAS THE BAGGIE "OPEN" OR "CLOSED"? At the suppression hearing, the officer testified "I observed a clear plastic baggie, inside of which was green leafy substance. Based on my training and experience, I believed it to be marijuana." The officer's belief that the substance was marijuana was not challenged. Instead, Hall argued that prosecutors failed to prove that the baggie was "open." And, again, the court agreed because "there simply was no evidence about the condition of the plastic baggie" and "for all we know, the baggie was purchased from a dispensary and had never been opened."

For these reasons, the court ruled that the officer did not have probable cause to believe that the marijuana in Hall's car was possessed illegally and, therefore, the search was unlawful.

Comment

There is some confusion as to whether a container of marijuana in a vehicle must be "closed" or "sealed." The source of this confusion is the interrelationship between the Health & Safety Code and the Vehicle Code. Specifically, the Vehicle Code prohibits driving a vehicle in which there is a container of marijuana that "has been opened *or has a seal broken*.[3] In contrast, the Health and Safety Code requires only that these containers be closed.[4] Which one applies?

The answer is that the Health and Safety Code overrides "any other provision of law" pertaining to the possession of marijuana.[5] And because it prohibits only "open" containers—not "unsealed" ones—there is no requirement that containers of marijuana in vehicles be sealed. The only case in which a court ruled that containers of marijuana must be both closed and sealed is *People v. McGee*.[6] But this ruling is questionable because the court ruled that McGee violated the Health and Safety Code by possessing "an *unsealed* container of marijuana."[7] But, as noted, the Health and Safety Code does not require that such containers be sealed.

---

[2] See Health & Saf. Code §§ 11362.1(a) [one-ounce limitation], 11362.3(a)(4) ["closed" container requirement].
[3] Vehicle Code § 23222(b)(1) Emphasis added.
[4] Health & Saf. Code § 11362.3(a)(4).
[5] Health & Saf. Code § 11362.1(a). Also see *People v. Johnson* (2020) 50 Cal.App.5th 620, 634 ["Based on the plain language of the statute and its legislative history, we conclude section 11362.3, subdivision (a)(4) applies to a container or package of cannabis that is open when found"]; *U.S. v. Talley* (2020 N.D. Cal.) __ F.Supp.3rd ___ [2020 WL 3275735] [court rejects the government's argument that "any non-sealed container is illegal]; *People v. Shumake* (2019) 45 Cal.App.5th Supp.1 [court rejects the government's argument that cannabis being transported in a vehicle "must be in a heat-sealed container."].
[6] (2020) 53 Cal.App.5th 796, 804.
[7] Emphasis added.

U.S. v. Brinkley

(4th Cir. 2020) 980 F.3d 377

Issue

Did officers have sufficient grounds to make a forcible entry into a residence to execute an arrest warrant?

Facts

Agents with a federal-state task force in North Carolina learned the a warrant had been issued for the arrest of Kendrick Brinkley for possession of a firearm by a felon. They wanted to execute the warrant but they couldn't figure out where he lived. This was not unusual because, as one of the agents testified, it was "common for someone like Mr. Brinkley to have more than one place where they will stay the night." For example, just five days earlier, Brinkley was stopped for a traffic violation and provided an address on Planter's View Drive. And about a month before that, during another traffic stop, he gave an address on Stone Post Road.

An ATF analyst checked a law enforcement database and found two possible addresses, one of which was on Stoney Trace Drive. Checking Brinkley's Facebook page, agents learned that he was currently dating Brittany Chisholm, and that she was "associated" with the apartment on Stoney Trace. So they decided to go there and conduct a knock and talk.

Ms. Chisholm answered the door and denied that Brinkley was there. But the agents were not convinced because Chisholm seemed nervous and kept looking toward the rear of the apartment where they had also heard the sound of "movement." So they asked Chisholm for consent to search the apartment and she refused. So they forcibly entered and found Brinkley in a bedroom. While conducting a protective sweep of the apartment, they saw drugs and a bullet. So they obtained a warrant to search the apartment; they found three firearms.

As the result, Brinkley was charged in federal court with possession of a firearm in furtherance of a drug offense. When his motion to suppress the evidence was denied, he pled guilty, but later appealed the denial of his suppression motion to the Fourth Circuit.

Discussion

It is settled that officers do not need a warrant to forcibly enter a home to execute an arrest warrant but they must have probable cause to believe that (1) the arrestee lived there, and (2) he was now inside.[8] The agents' belief that Brinkley lived in the Stoney Trace apartment was based on his Facebook page and two entries in the state's law enforcement database. This information, said the court, "was somewhat sparse, in that police officers typically rely on considerably more evidence to establish reasonable belief as to a suspect's residence." Moreover, the database "did not point to just one address but rather indicated that Brinkley might well be a transient," and that he "tended to stay temporarily in various places rather than residing at any one address."

In addition, the agents were aware that Brinkley's name was listed on the utility records for another residence but they did not check this out and, in fact, "did not look into any of the numerous other addresses" that were linked to Brinkley. The court also noted that the officers "did not even ask Chisholm if Brinkley resided there, but only if he was present—a critical difference." For these reasons, the court ruled that the agents did not have probable cause to believe that Brinkley lived in the Stoney Trace apartment.

Although this rendered the entry and search unlawful, the court also considered whether the agents had probable cause to believe that Brinkley was now present in the apartment. As noted, this belief was based mainly on Chisholm's nervousness, her repeatedly looking toward the rear of the apartment, and the sound of "movement" from that area. In ruling that this was not enough, the court explained, "When police have limited reason to believe a suspect resides in a home, generic signs of life inside and understandably nervous reactions from residents, without more, do not amount to probable cause that the suspect is present within." For these reasons, the firearms were suppressed.

[8] See *Payton v. New York* (1980) 445 U.S. 573, 602-3.

U.S. v. Weaver

(2nd Cir. 2020) 975 F.3d 94

Issue

If a detainee attempts to hide something down his pants, is it unreasonable for officers to believe that he might be trying to hide a firearm?

Facts

At about 5 P.M., two officers with the Syracuse Police Department in New York stopped a vehicle for a minor traffic violation. The stop occurred in an area of the city where, as one of the officers testified, there is "typically a high volume of shots fired and gun-related crime" including "multiple homicides." As the car came to a stop, a passenger in the back seat on the driver's side suddenly opened the door into traffic as if he "was about to flee from the vehicle." One of the officers ordered him to stay inside and he complied.

As the officer approached the driver's side window, he noticed that the front-seat passenger—later identified as Calvin Weaver—was "slouched down [and] pushing down his pelvic area and kind of squirming in his seat." Weaver was also using both hands in a "downward motion, trying to push something down." For these reasons, the officer ordered him to step outside, put both hands on the trunk, and spread his legs.

Although Weaver briefly complied, he "immediately stepped forward and pressed his pelvic area against the quarter panel or the vehicle," thus making it impossible for the officer to determine what he was hiding under his clothing. When the officer ordered him to step back from the car, he again briefly complied but, as before, immediately pressed his body into the car. Having run out of patience, the officer handcuffed him, conducted a pat search and discovered a "fully loaded semiautomatic handgun with a detachable magazine locked into place, ready for use."

When Weaver's motion to suppress the weapon was denied, he pled guilty to possession of a firearm by a felon. He appealed the denial of his suppression motion to the Second Circuit.

Discussion

Weaver argued that the firearm should have been suppressed because his suspicious conduct did not provide the officer with grounds to conduct a pat search. In a split decision, two of the three judges on the panel agreed. As we will explain, the judges were able to reach this dubious conclusion by ignoring Supreme Court precedent and disregarding the realities of everyday life on the streets.

DON'T WORRY WHEN A DETAINEE HIDES AN UNKNOWN OBJECT: Although the judges acknowledged that "[w]e have no doubt that [the officer] reasonably suspected that Weaver was hiding *something* based on his downward motion and wiggling," they ruled that this did not justify a pat search because "there are no specific or articulable facts that Weaver was hiding something *dangerous*." Elsewhere they said, "It is not enough that officers rely on a suspicion that a suspect was hiding something, even if that something is contraband, like drugs."

Let this sink in: According to these two judges, when officers see a detainee furtively or desperately trying to hide an unknown object under his clothing, the law requires that they ignore the possibility that the object was a dangerous weapon. Don't laugh. They appear to be serious.

Meanwhile, the Ninth Circuit recently rejected this precise argument in *U.S. v. Bontempts* when it said, "A concealed weapon is necessarily obscured by something, typically clothing, A rule that always required more than a suggestive bulge, or that required the concealed weapon be revealed, would run counter to [the Supreme Court's] fact-based standard and pose obvious safety concerns."[9] The judges in *Weaver* were apparently unaware of this.

[9] *U.S. v. Bontempts* (9th Cir. 2020) 977 F.3d 909. Also see *People v. Macabeo* (2016) 1 Cal.5th 1206, 1214 ["An officer need not have particularized cause to believe an arrestee is actually armed or possesses contraband in order to search him."].

THE POSSIBILITY OF AN "INNOCENT" EXPLANATION: The judges also claimed that a detention or pat search is illegal if there might have been an innocent explanation for the suspect's suspicious conduct. For example, they ruled that Weaver's desperate attempt to hide something down his pants was not suspicious because these actions "were equally consistent with the act of secreting drugs or other nonhazardous contraband." Later, the judges said it was unimportant that Weaver had been "tugging at his waistband" because it did not suggest "that Weaver was attempting to make that item inaccessible."

This ruling also violated Supreme Court precedent. Specifically, the Court has consistently ruled that an otherwise lawful search or seizure does not become unlawful merely because there was a possibility of an innocent explanation for the suspect's conduct. As the Court explained in *United States v. Arvizu*, "A determination that reasonable suspicion exists need not rule out the possibility of innocent conduct."[10]

For example, the Court recently chastised a panel of the D.C. Circuit because it "mistakenly believed that it could dismiss outright any circumstances that were susceptible of innocent explanation" when, in fact, "probable cause does not require officers to rule out a suspect's innocent explanation for suspicious facts."[11] Similarly, in *Kansas v. Glover*[12] a state court ruled that officers could not stop a vehicle merely because DMV reported that the license of the registered owner had been suspended. The state court "reasoned" that officers must assume that someone other than the registered owner was driving. The Supreme Court reversed, pointing out "[t]he fact that the registered owner of a vehicle is not always the driver of the vehicle does not negate the reasonableness of [the officer's] inference."

IGNORING THE TOTALITY OF CIRCUMSTANCES: The judges also ignored one of the fundamental rules pertaining to searches and seizures: In determining whether probable cause or reasonable suspicion exist, the courts must consider the totality of relevant circumstances. The purpose of this rule is to prevent judges from isolating the various facts known to officers, belittling the importance of each one, then ruling that the resulting search or seizure was unlawful because none of the facts were sufficiently suspicious or incriminating.

In rejecting this type of analysis, the Supreme Court observed in *Ryburn v. Huff* that "it is a matter of common sense that a combination of events each of which is mundane when viewed in isolation may paint an alarming picture."[13] The dissenting judge in *Weaver* took note of her colleagues' violation of this rule when she pointed out that they had "improperly evaluat[ed] these facts piecemeal, discarding each as insufficient to create reasonable suspicion."

A PAT SEARCH BEGINS BEFORE IT BEGINS: As noted, when Weaver was ordered to put his hands against the car, he pressed his body against it so as to prevent the patdown. The officer then ordered him to step back, and he complied. But when the officer touched Weaver's waist area, he did it again. So the officer handcuffed him, conducted the pat search, and found the gun.

It would have been difficult—if not impossible—for the judges to suppress Weaver's firearm if they were forced to consider this desperate attempt to prevent the frisk. So, in an equally desperate move, they ruled that the search had actually occurred *before* Weaver attempted to prevent it; and therefore his subsequent attempt to hide "something" down his pants did not matter. As the judges put it, "Touching the suspect with the intention of frisking him constitutes a search," and that "ordering someone to spread-eagle on a car is a search!" (Don't be fooled by the exclamation point. Nonsense followed by an explanation point is still nonsense. It was simply a device to create a false impression of certainty.)

---

[10] (2002) 534 U.S. 266, 277

[11] *District of Columbia v. Wesby* (2018) __ U.S. __ [138 S.Ct. 577, 588].

[12] (2020) __ U.S. __ [140 S.Ct. 1183]. Also see *United States v. Arvizu* (2002) 534 U.S. 266, 277 ["A determination that reasonable suspicion exists need not rule out the possibility of innocent conduct."].

[13] (2012) 565 U.S. 469, 476-77. Also see *District of Columbia v. Wesby* (2018) __ U.S. __ [138 S.Ct. 577, 588] ["the panel majority viewed each fact in isolation rather than as a factor in the totality of circumstances"].

It is also noteworthy that the two judges indicated that the pat search began at the moment Weaver subjectively believed that a search was imminent. But because Weaver did not testify at the suppression hearing, it is a mystery how the judges were able to determine his undisclosed beliefs and intentions.

In any event, the Supreme Court has consistently ruled that an officer's subjective intentions are irrelevant in such a context. As the Court explained in *United States v. Mendenhall*, "[T]he subjective intention of the DEA agent in this case to detain the respondent, had she attempted to leave, is irrelevant except insofar as that may have been conveyed to the respondent."[14] Or, as the California Supreme Court put it, "The officer's uncommunicated state of mind [is] irrelevant in assessing whether a seizure triggering Fourth Amendment scrutiny has occurred."[15]

Thus, the dissenting judge in *Weaver*, Chief Judge Debra Ann Livingston, pointed out that "the majority's conclusion that a frisk commences when an officer (supposedly) decided to perform a frisk and orders a suspect to assume what the majority terms an 'in search' position, is both erroneous and problematic." She concluded, "I am unwilling to send police and judges into a new thicket of Fourth Amendment law that requires them to assess the propriety of a frisk based on the likely judgments of appellate courts regarding an officer's intent in issuing an order or appellate judges' view as to what constitutes an 'in search' position."

For all of these reasons, we think the judges' ruling in *Weaver* will be overturned or ignored.

Comment

Although the judges' ruling in *Weaver* was absurd, we do not question the obligation of the courts to make sure that officers conduct pat searches only if they reasonably believed that the detainee was armed or dangerous.[16] But, judging from some of the police reality shows on television, officers frequently pat search detainees as a matter of routine. This is not only illegal, it is one of the things that are responsible for the anger and mistrust that we are seeing today. As the Supreme Court observed, a pat search, "performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly."[17]

People v. Wilson

(2020) 56 Cal.App.5th 128

Issues

(1) Does Google's routine search of emailed photos constitute a "police" search? (2) When Google sends photos of suspected child pornography to law enforcement, are officers required to obtain a warrant before viewing them?

Facts

When a photo is attached to an email sent via Google, the company's computers automatically scan it for indications that it, or an attachment, contains child pornography. This is accomplished by identifying certain features that are indicative of child pornography, assigning these features an alphanumeric "hash value," then comparing it with the hash values of the photos are stored in a repository of confirmed child pornography. If there is a sufficient match, Google must transmit an alert or "Cybertip" to the National Center for Missing and Exploited Children (NCMEC). The Cybertip will include a copy of the photos.

---

[14] (1980) 446 U.S. 544, 554, fn.6.

[15] *In re Manuel G.* (1997) 16 Cal.4th 805, 821.

[16] "Armed and dangerous"? Pat searches are permitted if officers reasonably believed that the suspect was "armed or dangerous"—not "armed and dangerous." Although the Supreme Court used the term "armed and dangerous" at one point in its seminal case on pat searches—*Terry v. Ohio* 1968) 392 U.S. 1, 28—elsewhere it said that "a reasonably prudent man would have been warranted in believing [the detainee] was armed and thus presented a threat." Also see *Michigan v. Long* (1983) 463 U.S. 1032, 1049

[17] *Terry v. Ohio* 1968) 392 U.S. 1, 16-17.

When it receives a Cybertip, NCMEC will either physically open the photo to determine whether it does, in fact, constitute child pornography; or send the photo (without inspecting it) to the law enforcement agency that has jurisdiction in the matter.

In *Wilson*, Google's computers flagged four photos that had been attached to an email that was sent to or received by Luke Wilson in San Diego. Accordingly, the letters were transmitted to NCMEC which, without reviewing them, transmitted them directly to the San Diego Internet Crimes Against Children task force (ICAC) which is run by state and federal law enforcement. ICAC investigators opened the files and confirmed they constituted child pornography. So they obtained a warrant to search Wilson's "apartment and vehicle, and to seize computer equipment, storage devices, and other effects."

During the search, they found the four photos and many more that contained child pornography. Furthermore, based on information included in Wilson's emails, they were able to identify some of the children in the photos. As the result, Wilson was charged with one count of oral copulation of a child 10 years or younger, and three counts of committing a lewd act upon a child.[18] His motion to suppress the photos was denied and, following a jury trial, he was convicted and sentenced to a prison term of 45 years to life.

Discussion

Wilson argued that his motion to suppress should have been granted for two reasons: (1) Google functions as a law enforcement agency when it scans email attachments for child pornography; and, therefore, a warrant was required. (2) ICAC agents needed a warrant to open the files.

"Police" vs. "private" searches

A search conducted by a person who is neither a law enforcement officer nor a police agent is not a search covered by the Fourth Amendment and, therefore, a warrant is not required.[19] As a general rule, a search will be attributable to police if officers played such a role in the person's decision to search, or in his decisions on how and where to search, that the intrusion can fairly be imputed to law enforcement. In other words, everything depends on "the degree of the Government's participation in the private party's activities."[20]

Consequently, a search by a civilian will ordinarily be deemed a police search only if there was "some evidence of Government participation in or affirmative encouragement,"[22] which includes requesting, encouraging, assisting or authorizing the person to do so.[21] In *Wilson*, it was apparent that no government agency was involved in Google's routine practice of scanning email attachments to make sure the corporation is not transmitting child pornography. Thus, these activities were not attributable to officers.

Did NCMEC or ICAC agents need a warrant?

As a general rule, officers who receive computer files that were obtained in the course of a private search may open them without a warrant only if, by doing so, they did not see anything that the sender had not already seen. The theory here is that people cannot reasonably expect privacy as to photos or information that had already been lawfully examined by the people who willingly gave them to officers. As the Supreme Court explained, "Once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now nonprivate information."[23]

---

[18] Pen. Code §§ 288.7, 288(a).

[19] See *United States v. Jacobsen* (1984) 466 U.S. 109, 113 ["[The Fourth Amendment] is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official."].

[20] *Skinner v. Railway Labor Exec. Assn.* (1989) 489 U.S. 602, 614; *Lustig v. United States* (1949) 338 U.S. 74, 78 [did the officer "have a hand" in the search?].

[21] See *Lugar v. Edmondson Oil Co.* (1982) 457 U.S. 922, 941.

[22] *United States v. Jacobsen* (1984) 466 U.S. 109, 113 [search "with the participation" of an officer].

[23] *United States v. Jacobsen* (1984) 466 U.S. 109, 117.

Consequently, Wilson argued that he retained a reasonable expectation of privacy in the photos because no employee of Google or NCMEC had actually seen them. This was true, said the court, but any privacy expectation that Wilson might have had as to the contents of the photos was eliminated when two things occurred: (1) Google's algorithms searched them and identified features (i.e., hash values) that were identical to child pornography in its repository; and (2) all of the photos that had been included in the repository had been examined by a Google employee who confirmed that they constituted child pornography. As the court explained:

> The government was merely reviewing what Google had already found, but in a different format—visually reviewing the photographs with the agent's human eye versus replicating the computer's generation of a numerical algorithm. Because the assigned numerical values, or "digital fingerprints," are representative of the contents depicted in the photographs themselves, the government gained no material information by viewing the images.

Accordingly, the court ruled that the officers did not conduct a "search" when they viewed the photos, and it affirmed Wilson's conviction.

U.S. v. Cobb

(4th Cir. 2020) 970 F.3d 319

Issue

Did a warrant to search a computer adequately describe the files that could be searched?

Facts

James Cobb and his cousin, Paul Wilson, got into a fight at the home of Cobb's parents in West Virginia. During the fight, Cobb put Wilson in a choke hold and "put his knee in Wilson's chest." While this was happening, Cobb's mother or father called 911 but, when officers arrived, Wilson was dead. Cobb was arrested and, within 48 hours of his arrest, he phoned his father from the jail. In the recording of their conversation, Cobb asked his father to remove a laptop computer in his room, put it somewhere "safe," and "wipe [it] down" because it had "some shit on it." Based on this information, officers obtained a warrant to search the house for a Gateway laptop, which they seized.

About two weeks later, the officers obtained a warrant to search the laptop for "any material associated with the murder of Paul Dean Wilson stored internally on a Gateway laptop computer serial number [omitted]." During the search, officers found child pornography and, as the result, Cobb was charged, in addition to murder, with possession of child pornography. When his motion to suppress the files containing child pornography was denied, he pled guilty.

One other thing: Investigators later spoke with Cobb's cellmate who said that Cobb told him that he killed Wilson "because Wilson had discovered the child pornography on Cobb's computer and had threatened to turn him in to the authorities."

Discussion

It is settled that a search warrant must provide a "particular" description of the listed evidence by imposing a "meaningful restriction" on what officers may search for and seize.[24] On appeal, Cobb argued that the affidavit for the warrant to search his computer files was insufficient because the affiant "failed to explain the types of files sought, the location of the files, the timeframe or the relationship between the files and information about the murder."

One of the problems that officers frequently encounter with computer searches is that they seldom know the names of the files that contain the information they are seeking. To complicate things, judges who issue warrants for documents often require a more detailed description because document searches are highly intrusive, plus there are usually some ways to restrict them. As the Second Circuit explained in *U.S.*

[24] See *People v. Tockgo* (1983) 145 Cal.App.3d 635, 640 ["meaningful restriction"]; *U.S. v. SDI Future Health, Inc.* (9th Cir. 2009) 568 F.3d 684, 702 ["Particularity means that the warrant must make clear to the executing officer exactly what it is that he or she is authorized to search for and seize."].

v. Ulbricht, "Where the property to be searched is a computer hard drive, the particularity requirement assumes even greater importance."[25]

Nevertheless, the courts have consistently ruled that "[s]earch warrants covering digital data may contain some ambiguity so long as law enforcement agents have done the best that could reasonably be expected under the circumstances, have acquired all the descriptive facts which a reasonable investigation could be expected to cover."[26]

Consequently, the court ruled that the description of the searchable files in Cobb's computer (i.e., the files containing evidence of Wilson's murder) was sufficient because that was the only descriptive information that the officers had or could have obtained with reasonable effort.

For these reasons, the court affirmed Cobb's conviction for possession of child pornography.

People v. Maxwell

(2020) __ Cal.App.5th __ [2020 WL 7296850]

Issue

What is the permissible scope of a probation search of a vehicle if the probationer was a passenger?

Facts

Chico police received a tip that Christy Scarbrough, who was wanted on four arrest warrants, was currently at a certain location. When officers arrived there, they spotted Scarbrough sitting in the front passengers seat of a minivan. As she stepped out of the car, the officers arrested her. They then spoke with the driver, Maxwell, who acknowledged that he had a prior for robbery, and he had put a knife in the trunk.

Having learned that Scarbrough was on searchable probation, they searched the car and found "large balls" of black tar heroin, used hypodermic needles, and trafficking paraphernalia. Maxwell was later charged with possession of heroin with intent to distribute. Prior to trial, Maxwell filed a motion to suppress the evidence, alleging that officers cannot search a vehicle pursuant to the terms of a passenger's probation. The motion was denied. Maxwell was convicted.

Discussion

Maxwell argued that the evidence should have been suppressed because he was not the person on searchable probation—it was the passenger, Scarbrough. Strangely, the issue of whether officers can search a vehicle because a passenger is on searchable probation is unsettled. But the California Supreme Court ruled in a similar case that if the passenger was on parole, officers could search "those areas of the passenger compartment where the officer reasonably expects that the parolee could have stowed personal belongings or discarded items when aware of police activity."[27] The issue in *Maxwell* was whether this rule also applies if the passenger was on searchable probation.

The court ruled there was no rational reason to restrict this rule to parole searches. As the court pointed out, probationers are similar to parolees in that they "are more likely to engage in criminal conduct than an ordinary member of the community."[28] In addition, it observed that "passengers in noncommercial cars—in our case a minivan—typically have ready access to areas in both the front and the back seats."

For these reasons, the court ruled that when a probationer with a search condition was a passenger in a stopped vehicle, officers "may search those areas in the passenger compartment where the officer reasonably expects that the probationer could have stowed personal belongings or discarded items when aware of police activity." Maxwell's conviction was affirmed. POV

---

[25] (2nd Cir. 2017) 858 F.3d 71, 99. Also see *U.S. v. Walser* (10th Cir. 2001) 275 F.3d 981, 986.
[26] *U.S. v. Ulbricht* (2nd Cir. 2017) 858 F.3d 71, 100. Also see *U.S. v. Phillips* (4th Cir. 2009) 588 F.3d 218, 225 ["A warrant need not—and in most cases, cannot—scrupulously list and delineate each and every item to be seized."].
[27] *People v. Schmitz* (2012) 55 Cal.4th 909, 926.
[28] Quoting from *United States v. Knights* (2001) 534 U.S. 112, 121.

Now Shipping

The 25th Annual Edition of California Criminal Investigation

For details or to order online
www.le.alcoda.org

Alameda County District Attorney's Office
1225 Fallon Street, Room 900
Oakland, CA 94612

PRESORTED STANDARD
U.S. POSTAGE
PAID
OAKLAND, CA
PERMIT NO. 2030