POINT of VIEW

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Probable Cause to Search: The "Nexus" Requirement

Generally speaking, to find probable cause justifying a warrant, we require a "nexus" between the place to be searched and the evidence sought.[1]

Probable cause to search a person, place, or thing cannot exist unless there is a link or connection between the evidence to be seized and the location of the search. This is known as the "nexus" requirement and it is responsible for more than its fair share of rejected search warrants and suppressed evidence. A separate requirement (but equally problematic) is that there must be proof that the evidence is currently located in the place to be searched. This is known as the "currency" requirement.[2]

Both of these requirements (we will discuss both) are easily satisfied when as often happens, an officer or a reliable informant had just seen the evidence at the location. In most cases, however, the current location of the evidence must be based on circumstantial evidence or reasonable inference. Consequently, officers will be required to explain to a judge—whether the judge is reviewing a search warrant affidavit or ruling on a motion to suppress—why it is reasonable to believe the search will be productive. As the Ninth Circuit noted in a search warrant case:

> For probable cause to exist, a magistrate need not determine that the evidence sought is *in fact* on the premises to be searched, or that the evidence is more likely than not to be found where the search takes place. The magistrate need only conclude that it would be reasonable to seek the evidence in the place indicated in the affidavit.[3]

Before going further, it should be noted that because the test is whether there is a link between the evidence and the place to be searched, it is immaterial that the person who controlled the premises was not involved in the crime under investigation. This is why officers can obtain warrants to search utility companies, banks, and cellphone providers for records of their customers. It is also why officers who have probable cause to believe that the suspect was storing evidence inside the home of a friend or relative may obtain a warrant to search it, even though the friend of relative was not involved in the suspect's criminal activities.

The "Nexus" Requirement

In the context of probable cause to search, the term "nexus" simply means a "link" between the evidence and the location of the search. As the Court of Appeal explained, "In order to have a valid search, officers must have probable cause to believe that the object of the search is in the particular place to be searched."[4] In the absence of a direct link, officers may be able to satisfy this requirement by means of circumstantial evidence, meaning evidence that tends to—but does not directly—indicate where the evidence is located.

Defense attorneys have sometimes argued that officers cannot obtain a warrant to search two or more locations for the same piece of physical evidence since it cannot be located at two places at the same time. The courts have, however, consistently rejected these arguments because probable cause requires only a fair probability that the evidence is located in each location.[5] Thus, in *People v. Easley* the California Supreme Court pointed out that there is "no logical inconsistency" in an officer's conclusion that there is probable cause to believe that "evidence of a crime will be in any one of a suspect's homes or vehicles."[6]

As we will now explain, proof that a link exists may be based on circumstantial evidence or inference.

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[1] *U.S. v. Crawford* (6th Cir. 2019) 943 F.3d 297, 308.
[2] Note: A judge may, however, issue an anticipatory search warrant; i.e., a warrant that authorizes a search for evidence that is not yet at the place to be searched, but will be there when a "triggering event" occurs.
[3] *U.S. v. Peacock* (9th Cir. 1985) 761 F.2d 1313, 1315.
[4] *People v. Superior Courte (Haflich)* 1986 Cal.App.3d 759, 766. Also see *U.S v. Crews* (9th Cir. 2007) 502 F.3d 1130.
[5] See *U.S. v. Hillyard* (9th Cir. 1982) 677 F.2d 1336, 1339; *U.S. v. Barajas* (8th Cir. 2013) 710 F.3d 1102, 1109.
[6] (1983) 34 Cal.3d 858, 870.

Circumstantial evidence

Circumstantial evidence that an item is located at a certain place will exist if officers were aware of one or more facts that tended to—but did not directly—indicate it is there. For example, in *People v. Tuadles*[7] police officers in Long Beach learned that a large amount of marijuana was being shipped via UPS to Tuadles at an address in the city. They also learned that the phone number that Tuadles had given to UPS was for a house in Cerritos. Based on this information, they obtained a warrant to search both locations.

On appeal, Tuadles claimed there was insufficient nexus but the court disagreed, pointing out that because he had listed the phone number for the house in Cerritos with UPS, this indicated it was either his second home or the home of an accomplice. The court also noted that the affiant had stated that "large scale traffickers commonly use two, three, or more residences for their activities.

In *People v. Webb*[8] the California Supreme Court ruled that officers reasonably believed that duct tape used in the commission of a murder was inside the suspect's car since he had driven it on the night he killed the victim. In *Segura v. United States*[9] the Supreme Court ruled there was sufficient circumstantial evidence that drugs would be found in the suspect's home because federal agents had "maintained surveillance" over the home for weeks, and "had observed [him] leave the apartment to make sales of cocaine."

In *U.S. v. Curry*[10] the court ruled that officers had probable cause to search a storage locker that had been rented by a bank robbery suspect because, shortly after the robbery, he had taken a bag from the locker and put it into a dumpster and the bag was "covered in a red dye consistent with the dye in the bank's dye packs."

Finally, in *People v. Farley*[11] the California Supreme Court ruled it was reasonable to believe that evidence pertaining to the murder of seven people at a laboratory in Sunnyvale would be found in a storage locker the suspect had rented three days before the killings. Said the court, "In light of the circumstance that any items stored in the locker were placed there sometime during the three days preceding the shootings," it was reasonable to believe that incriminating evidence would be found there.

Reasonable inference

In the absence of direct or circumstantial proof as to the whereabouts of the evidence, officers may rely on reasonable inference. As the Ninth Circuit explained in *U.S. v. Gann,* "The required nexus between the items to be seized and the place to be searched rests not only on direct observation, but on the type of crime, the nature of missing items, the extent of the suspects' opportunity for concealment, and normal inferences as to where a criminal would be likely to hide [the evidence."[12]

THE SUSPECT'S HOME: Because a person's home is a relatively safe and convenient place to store things, it is almost always reasonable to believe that that's where the evidence is located.[13] "Simple common sense," said the Seventh Circuit, "supports the inference that one likely place to find evidence of a crime is the suspect's home, at least absent any information indicating to the contrary."[14]

For example, in ruling that it was reasonable for officers to infer that certain types of evidence would be found in the perpetrator's home, the courts have noted the following:

Drugs and sales paraphernalia: "In the case of drug dealers, evidence is likely to be found where the dealers live."[15] "Numerous cases have upheld search warrants on the theory that one who sells narcotics may have more at his residence or place

[7] (1992) 7 Cal.App.4th 1777.
[8] (1993) 6 Cal.4th 494.
[9] (1984) 468 U.S. 810-11.
[10] *U.S. v. Curry* (7th Cir. 2008) 538 F.3d 719, 729-30.
[11] (2009) 46 Cal.4th 1053, 1100.
[12] *U.S. v. Gann* (9th Cir. 1984) 732 F.2d 714, 722.
[13] See *People v. Dumas* (1973) 9 Cal.3d 871, 885.
[14] *U.S. v. Aljabari* (7th Cir. 2010) 626 F.3d 942, 945. Also see: *People v. Koch* (1989) 209 Cal.App.3d 770, 779.
[15] *U.S. v. Job* (9th Cir. 2017) 851 F.3d 889, 901.

or operations."[16] "For the vast majority of drug dealers, the most convenient location to secure items is the home. After all, drug dealers don't tend to work out of office buildings."[17]

Loot and stolen property: "It was likely that [bank robbers] would conceal the cash in the apartment rather than in some less secure and accessible place."[18] "Cash is the type of loot that criminals seek to hide in secure places like their homes."[19] "[W]e cannot disregard the likelihood that a person who holds stolen property he wishes to sell will attempt to conceal it in a place under his control that is nearby and apparently secure."[20]

Weapons used in a crime: "It is no great leap to infer that the most likely place to keep a firearm is in one's home."[21] "It was not unreasonable for the police to suspect that evidence of the murder might be found in petitioner's motel room."[22] It was reasonable to infer that "the murder weapon and/or ammunition would be located in the apartment where [the suspect] lived, or in his mother's house."[23]

Clothing worn by perpetrator: "After all, what more likely place to find a suspect's clothes than his own home."[24]

Arson instrumentalities: It was reasonable to search the home of an arson suspect for "gas cans, flammable liquids, lighters, burnt clothing, surgical masks, dark clothing, and shoes."[25]

BUSINESS RECORDS: Because people (including criminals) often keep business records in their homes, it is a logical place to look.[26]

THE SUSPECT'S VEHICLES: Like homes, vehicles belonging to the suspect may also be a logical place to store evidence because vehicles are convenient and fairly secure. As the D.C. Circuit observed, "Everyone knows that drivers who lawfully purchase items at stores often place their purchases in the trunks of their cars. Nothing in common experience suggests that criminals act any differently."[27] For example, in ruling that the suspect's car was a logical place to find stolen bonds, the California Supreme Court said, "When the officers were unable to discover the bonds in defendant's apartment, his automobile, parked outside on the street, quite naturally became an object of strong suspicion."[28]

THE SUSPECT'S PERSON: Depending on the time lapse between the commission of the crime and the suspect's detention or arrest, it may be reasonable to believe that he is still carrying the fruits and instrumentalities of the crime on his person. As the Supreme Court observed in *New Jersey v. T.L.O.*, the suspect's purse was "the obvious place" to look for cigarettes.[29] Similarly, "a student who carries a gun to school will generally keep the gun in one of three places: (1) his locker, (2) a backpack or purse or (3) on his person."[30] Another gun case: "It is no great leap to infer that the most likely place to keep a firearm is in one's home."[31]

SUSPECT'S COMPUTER, CELLPHONE: When there is probable cause to search for documents or photos, it is usually reasonable to believe they are stored in the suspects computer or cell phone. As the Sixth Circuit pointed out, "Computers are similar to guns

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[16] *People v. Superior Court (Marcil)* (1972) 27 Cal.App.3d 404, 414.
[17] *U.S. v. Spencer* (D.C. Cir. 2008) 530 F.3d 1003, 100.
[18] *U.S. v. Hendrix* (7th Cir. 1985) 752 F.2d 1226, 1231. Also see *People v. Carrington* (2009) 47 Cal.4th 145.
[19] *U.S. v. Jones* (3rd Cir. 1993) 994 F.2d 1051, 1056.
[20] *People v. Dumas* (1973) 9 Cal.3d 871, 885.
[21] *People v. Lee* (2015) 242 Cal.App.4th 161, 173.
[22] *People v. Bennett* (1998) 17 Cal.4th 373, 388.
[23] *People v. McCarter* (1981) 117 Cal.App.3d 894, 901.
[24] *U.S. v. Aljabari* (7th Cir. 2010) 626 F.3d 940, 946.
[25] *U.S. v. Aljabari* (7th Cir. 2010) 626 F.3d 940, 945.
[26] See *U.S. v. Khan* (10th Cir. 2021) 989 F.3d 806; *U.S. v. Clark* (7th Cir. 2012) 668 F.3d 934, 943
[27] *U.S. v. Brown* (D.C. Cir. 2004) 374 F.3d 1326, 1329.
[28] *People v. Dumas* (1973) 9 Cal.3d 871, 885.
[29] (1985) 469 U.S. 325, 345-46.
[30] *In re Joseph G.* (1995) 32 Cal.App.4th 1735, 1741-42.
[31] *Bastida v. Henderson* (5th Cir. 1973) 487 F.2d 860, 863.

in that they are both personal possessions often kept in their owner's residence and therefore subject to the presumption that a nexus exists between an object used in a crime and the suspect's current residence."[32] For example, in a child pornography case, the Sixth Circuit noted that "if a pornographic image has originated or emanated from a particular individual's email account, it logically follows that the image is likely to be found on that individual's computer or on storage media associated with the computer."[33]

BUSINESSES AND FRONTS: In criminal conspiracy cases, a commercial structure that is visited frequently by the suspects is a likely place to find evidence of the conspiracy; e.g., the names of co-conspirators.[34]

PROCESS OF ELIMINATION: If officers determine that the evidence they are seeking is not located in a likely place, it may be reasonable to infer that it is located in the next logical location. Thus, in *U.S. v. Vesikuru*, the Ninth Circuit said, "After learning that the package [of PCP] was neither on the porch nor in the minivan, and that it had been opened, the agents reached the logical conclusion: the package had been taken into the house."[35]

The "Currency" Requirement

Even if it is reasonable to look for evidence at a certain location, officers must prove is was reasonable to believe it is there currently. As the Fifth Circuit observed, "Although probable cause may exist at one point to believe that evidence will be found in a given place, the passage of time may render the original information insufficient to establish probable cause at the later time."[36] (If the evidence is not currently at the location, but there is probable cause to believe it will be when a "triggering" event occurs, officers may be able to obtain an anticipatory search warrant.)

In addition to the passage of time, the current whereabouts of the evidence may be based on the type of evidence sought, and the nature of the crime under investigation. As a Maryland court so aptly explained in *Andresen v. Maryland*:

> The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock: the character of the crime (chance encounter in the night or regenerating conspiracy?), of the criminal (nomadic or entrenched?), of the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), of the place to be searched (mere criminal forum of convenience or secure operational base?), etc.[37]

Nature of the evidence

By their very nature, some types of evidence are apt to be kept at one place for days, weeks, months, and even years. In another memorable passage, the court in *Andresen* said, "The observation of a half-smoked marijuana cigarette in an ashtray at a cocktail party may well be stale the day after the cleaning lady has been in; the observation of the burial of a corpse in a cellar may well not be stale three decades later. The hare and the tortoise do not disappear at the same rate of speed."

LOOT FROM ROBBERY, BURGLARY: Because it is often difficult to fence or otherwise sell stolen property, it is often reasonable to believe it will be kept in one place for weeks, months, or even years. For example, the courts have ruled it was reasonable to believe that stolen artwork would be kept for two years[38]; that stolen credit cards would be retained for three weeks,[39] that stolen railroad bonds and bank checks would be kept for eight weeks,[40] and stolen artwork for two years.[41]

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[32] *Peffer v. Stephens* (6th Cir. 2018) 880 F.3d 256, 272. Also see *U.S. v. Riccardi* (8th Cir. 2005) 405 F.3d 852, 860.
[33] *U.S. v. Terry* (6th Cir. 2008) 522 F.3d 645, 648.
[34] See *People v. Farley* (2009) 46 Cal.4th 1053, 1101; *U.S. v. Harris* (10th Cir. 2013) 735 F.3d 1187.
[35] *U.S. v. Vesikuru* (9th Cir. 2002) 314 F.3d 1116, 1123.
[36] *U.S. v. Freeman* (5th Cir. 1982) 685 F.2d 942, 951. Edited. Also see *People v. Gibson* (2001) 90 Cal.App.4th 371, 380.
[37] (1975) 24 Md.App. 128, 172. Also see *U.S. v. Morales*-Aldahondo (1st Cir. 2008) 524 F.3d 115, 119.
[38] *People v. Cletcher* (1982) 132 Cal.App.3d 878, 883.
[39] *U.S. v. Gann* (9th Cir. 1984) 732 F.2d 714, 722.
[40] *People v. Dumas* (1973) 9 Cal.3d 871, 885.
[41] *People v. Cletcher* (1982) 132 Cal.App.3d 878, 883.

In contrast, the court in *U.S. v. Steeves*[42] invalidated a warrant to search the defendant's home for $16,000 taken in a bank robbery three months earlier because, essentially, the amount of money taken in most bank robberies gets spent quickly. Said the court, "there was little reason to believe that any of the bank's money or the money bag would still be in the home."

FIREARMS: Although criminals may discard the firearms they use in the commission of their crimes, it is more likely that they will retain them because of their inherent value and usefulness. As the court in *U.S. v. Neal* observed, "Information that someone is suspected of possessing firearms illegally is not stale, even several months later, because individuals who possess firearms tend to keep them for long periods of time."[43] That's also the view of the California Supreme Court:

> Particularly with regard to the staleness question, the affidavit recites that guns are valuable and difficult to obtain, particularly by ex-convicts and parolees. Suspects often retain guns along with ammunition, documents, and gun-related equipment after a crime is committed.[44]

For example, the courts have ruled it was reasonable to believe that a firearm used by a bank robber would be retained for three weeks,[45] and that a murder weapon would be kept for six weeks.[46]

CLOTHING: Like firearms, clothing worn during the commission of a crime is likely to be kept because it retains its usefulness; e.g., it was reasonable to search for the clothing worn by a bank robber three weeks after the robbery.[47]

INSTRUMENTALITIES OF CRIME: Some of the things that criminals use to commit or facilitate crimes often have enduring utility or value, such that it may be reasonable to believe they are retained for a while; e.g., handcuffs (two months);[48] "knives, rope, twine, baling wire, plastic bags, a black attaché case" that were used by a serial murderer[49]; pliers and rope that were used by a murder suspect (6-7 months);[50] a .357 magnum handgun and silencer, gas cans, burnt clothing, and other items used in the commission of arson (one month).[51]

DRUGS: If there is probable cause to believe that the suspect is a drug dealer, it is usually reasonable to believe that he will maintain a supply of drugs in the place to be searched. As the Supreme Court observed, "The illicit manufacture of drugs is not a sporadic, isolated criminal incident, but a continuing, though illegal, business enterprise."[52] For example, in ruling that officers had satisfied the currency requirement, the courts have said:

- "In cases involving ongoing narcotics businesses, lapses of several months—and up to two years in certain circumstances—are not sufficient to render the information in an affidavit too stale to support probable cause."[53]
- "With respect to drug trafficking, probable cause may continue for several weeks, if not months, of the last reported instance of suspect activity."[54]
- "Because the underlying criminal activity was continuing in nature, probable cause did not dissipate during the ten-day period between the last identified drug-related activity and execution of the warrant."[55]

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[42] (8th Cir. 1975) 525 F.2d 33. 38.
[43] (8th Cir. 2008) 528 F.3d 1069, 1074..
[44] *People v. Bryant* (2014) 60 Cal.4th 335, 369.
[45] *U.S. v. Gann* (9th Cir. 1984) 732 F.2d 714, 722.
[46] *U.S. v. Bowers* (9th Cir. 1976) 534 F.2d 186, 192.
[47] (8th Cir. 1975) 525 F.2d 33, 38.
[48] *U.S. v. Laury* (5th Cir. 1993) 985 F.2d 1293, 1314.
[49] *People v. Cooks* (1983) 141 Cal.App.3d 224, 298.
[50] *People v. Frank* (1985) 38 Cal.3d 711, 722, 728.
[51] *U.S. v. Aljabari* (7th Cir. 2010) 626 F.3d 940, 945.
[52] *United States v. Russell* (1973) 411 U.S. 423, 432. Also see *People v. Mikesell* (1996) 46 Cal.App.4th 1711, 1718.
[53] *U.S. v. Fernandez* (9th Cir. 2004) 388 F.3d 1199, 1254.
[54] *U.S. v. Angulo-Lopez* (9th Cir. 1986) 91 F.2d 1394, 1396.
[55] *U.S. v. Davis* (8th Cir. 2017) 867 F.3d 1021, 1028.

BUSINESS RECORDS: Officers may usually infer that people who run legal and illegal businesses retain the records pertaining to sales and supplies.[56] Thus, the Court of Appeal noted that such records "presumably would be retained unaltered for periods of several years."[57] Another court said, "It is eminently reasonable to expect that such [business] records would be maintained in those offices for a period of time and surely as long as three months."[58]

EVIDENCE OF IDENTITY THEFT: Like business and financial records, evidence of identity theft may be retained for a long time. For example, the court in *People v. Jones*[59] ruled that evidence of identity theft would be at the suspect's home four weeks after his last use of the victim's credit card.

CHILD PORNOGRAPHY: People who possess child pornography are notorious for considering it a valuable possession, and are therefore likely to keep it for a long time, often many years.[60] As the Tenth Circuit observed, "Possessors of child pornography are likely to hoard their materials and maintain them for significant periods of time."[61] Or, as the Sixth Circuit put it, "The same time limitations that have been applied to more fleeting crimes do not control the staleness inquiry for child pornography."[62]

Ongoing crimes: Even if the evidence did not have enduring value, it may be reasonable to believe it had not been destroyed or depleted if (1) the crime under investigation was ongoing in nature, and (2) the evidence would have been useful in carrying out the crime. As the Fifth Circuit observed, the courts "allow fairly long periods of time to elapse between information and search warrant in cases where the evidence clearly shows a longstanding, ongoing pattern of criminal activity."[63] Similarly, the Court of Appeal explained that "if circumstances would justify a person of ordinary prudence to conclude that an activity had continued to the present time, then the passage of time will not render the information stale."[64]

It will surprise no one that the most common types of ongoing criminal activity that the courts see nowadays are drug manufacturing and sales. As the Ninth Circuit explained, "[I]n cases involving ongoing narcotics businesses, lapses of several months—and up to two years in certain circumstances—are not sufficient to render the information in an affidavit too stale to support probable cause."[65]

Similarly, in *U.S. v. Davis*[66] the court ruled that, "Because the underlying criminal activity was continuing in nature, probable cause did not dissipate during the ten-day period between the last identified drug-related activity and execution of the warrant."

In contrast, the Court of Appeal ruled that an eight-week delay between suspect's purchase of $7,000 of cocaine from a drug organization rendered the information stale because there was insufficient information to indicate the suspect was anything other than a customer.[67] Other continuing crimes include fraud,[68] production of child pornography, serial murders,[69] and stalking.[70] POV

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[56] See *U.S. v. Johnson* (D.C. Cir. 2006) 437 F.3d 69, 72; *U.S. v. Nguyen* (8th Cir. 2008) 526 F.3d 1129, 1134.
[57] *McKirdy v. Superior Court* (1982) 138 Cal.App.3d 12, 26.
[58] *Andresen v. Maryland* (1976) 427 U.S. 463, 478, fn.9.
[59] (2013) 217 Cal.App.4th 735, 791.
[60] See *U.S. v. Morgan* (8th Cir. 2016) 842 F.3d 1070, 1074; *U.S. v. Vosburgh* (3rd Cir. 2010) 602 F.3d 512, 528.
[61] *U.S. v. Potts* (10th Cir. 2009) 586 F.3d 823, 831.
[62] *U.S. v. Paull* (6th Cir. 2009) 551 F.3d 516, 522.
[63] *U.S. v. Hyde* (5th Cir. 1978) 574 F.2d 856, 865.
[64] *People v. Hulland* (2003) 110 Cal.App.4th 1646, 1652.
[65] *U.S. v. Fernandez* (9th Cir. 2004) 388 F.3d 1199, 1254. Also see *U.S. v. Russell* (1973) 411 U.S. 423, 432.
[66] (8th Cir. 2017) 867 F.3d 1021, 1028.
[67] *People v. Hirata* (2009) 175 Cal.App.4th 1499, 1504. Also see People v. Hulland (2003) 110 Cal.App.4th 1646, 1653
[68] See *People v. Hepner* (1994) 21 Cal.App.4th 761, 782-83; *U.S. v. Snow* (10th Cir. 1990) 919 F.2d 1458, 1460.
[69] See *People v. Cooks* (1983) 141 Cal.App.3d 224, 298; *People v. Miller* (1978) 85 Cal.App.3d 194, 204.
[70] See *Wood v. Emmerson* (2007) 155 Cal.App.4th 1506, 1522.

Crime Scene Searches

There is no "murder scene" exception to the warrant requirement.[1]

When someone commits a serious crime inside a home or business it might seem as if the officers would automatically have a right to enter and search for evidence pertaining to the crime. In reality, however, searches of crime scenes are subject to the same rules as any other search of private property. As we will discuss, those rules cover just about everything that officers might need to do, including (1) getting inside, (2) conducting protective sweeps, (3) conducting warrantless searches, (4) securing the premises pending issuance of a warrant, (5) vacating the premises, and (6) reentering after vacating.

Making Entry

The main legal grounds for making a warrantless entry into a crime scene are consent and exigent circumstances.

CONSENT: The initial entry by officers is often based on express or implied consent given by a resident or other person who answers the door. Express consent typically occurs when officers are invited in or when their request to enter is granted. In contrast, implied consent results if the person said or did something from which permission to enter will be implied.[2] As the Tenth Circuit explained, "Consent may be granted through gestures or other indications of acquiescence, so long as they are sufficiently comprehensible to a reasonable officer."[3]

For example, in *People v. Frye*[4] an officer knocked on the door of an apartment in response to a domestic violence call. A woman opened the door and the officer saw that her face was "bruised and swollen." When he asked who had hurt her, "she stepped back and pointed to defendant lying on the couch inside." The officer entered.

In ruling that the officer reasonably believed the woman had invited him in, the California Supreme Court said, "Here, the record shows that when officers standing outside the open door of the apartment asked [the woman] who had hurt her, she stepped back and pointed to defendant lying on the couch inside, letting officers step into the apartment to see who she was pointing at. Such actions provide sufficient indication of her consent to the entry."

Similarly, in *U.S. v. Risner*[5] the defendant's girlfriend, Deborah Dean, called 911 but hung up before talking to the operator. Officers were dispatched to the residence and were met outside by Dean who said she lived with Risner, that he was inside, and that he had just assaulted and choked her. Having noticed injuries to her face that were consistent with an assault, they entered, located Risner and arrested him. They also saw a firearm which they seized because Risner was a convicted felon.

Risner argued that the officers' entry was unlawful because Dean had not expressly consented to their entry. That was true, said the Seventh Circuit, but "any reasonable person would infer from [the victim's] communications that she consented to the police entry into her home to arrest Risner. In fact, we have trouble imagining why [the victim] would have provided [the officers] such information if she was not actually requesting that the police enter her home and arrest Risner."

One of the trickiest things about implied consent in domestic violence cases is whether officers may enter if one of the parties consented but the other objected. In these situations, the Supreme Court has ruled that officers may not enter if three things happen: (1) the objecting spouse expressly informed the officers that he objected to their entry, (2) the objection was made in the officers' presence, and (3) the purpose of their entry was to obtain evidence

[1] *People v. Timms* (1986) 179 Cal.App.3d 86, 90-91. Also see *Mincey v. Arizona* (1978) 437 U.S. 385, 395.
[2] See *People v. Justin* (1983) 140 Cal.App.3d 729; *People v. Timms* (1986) 179 Cal.App.3d 86.
[3] *U.S. v. Guerrero* (10th Cir. 2007) 472 F.3d 784, 789-90.
[4] (1998) 18 Cal.4th 894, 990.
[5] (7th Cir. 2010) 593 F.3d 692, 694.

against the objecting spouse.[6] But when, as is often the case, the officers entered for a purpose other than to obtain evidence—such as discussing the problem, keeping the peace, protecting the consenting party, or arresting the nonconsenting party—this restriction does not apply.

EXIGENT CIRCUMSTANCES: A warrantless entry is also permitted if officers reasonably believed there was a compelling need for an immediate entry but there was no time to secure a warrant; e.g., a violent crime had just occurred inside.[7] Thus, the California Supreme Court in *People v. Ray*[8] ruled that Richmond police officers had sufficient reason to enter the defendant's residence without a warrant based on a report from neighbors that "the door has been open all day and it's all a shambles inside." Similarly, an imminent threat will automatically exist if officers had probable cause to believe there was a lab inside that was being used to produce incendiary drugs, such as meth or PCP.[9]

In contrast, in *U.S. v. Davis*[10] officers in Kansas were dispatched at about 5:30 A.M. to a report of "possible domestic violence" at the home in which Jason Davis and Desiree Coleman lived. When they arrived they "heard no noise and saw no evidence of a disturbance." But just then, Davis walked outside and appeared to be drunk. He claimed that Coleman was out of town, at which point Coleman opened the door and said that she and Davis "had been arguing." An officer requested that she consent to their entry, but she refused. Nevertheless he entered and found drugs in plain view.

Prosecutors argued that warrantless entries into homes in which domestic violence had just been reported were necessarily justified. The court disagreed, saying that prosecutors were essentially asking "for a special rule for domestic calls because they are inherently violent" and thus "officers are automatically at greater risk." But the court pointed out that "granting unfettered permission" to enter "based only upon a general assumption domestic calls are always dangerous would violate the Fourth Amendment."

What about 911 hangup calls? While they do not automatically constitute an exigent circumstance, they would if there was some objective reason to believe that the caller or other occupant was in need of emergency assistance. Some examples:

- No one answered the callback number and no one answered the door when officers knocked.[11]
- When 911 operators called back, someone picked up the phone but then hung up.[12]
- The caller's demeanor was consistent with the nature of the emergency such as a call at 5 A.M. by an hysterical person who screamed "get the police over here now."[13]

Protective Sweeps

When officers enter a crime scene, they seldom know for sure whether there is someone "lurking on the premises" who poses a threat.[14] Worse yet, they "will rarely be familiar" with the physical layout, which means any such person has a tactical advantage.[15] For this reason, officers who have lawfully entered a crime scene may conduct a protective search of the

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[6] See *Georgia v. Randolph* (2006) 547 U.S. 103, 108, 120, 122; *U.S. v. Moore* (9th Cir. 2014) 770 F.3d 809, 813.
[7] See *Michigan v. Tyler* (1978) 436 U.S. 499, 509; *People v. Ortiz* (1995) 32 Cal.App.4th 286, 291-92.
[8] (1999) 21 Cal.4th 464, 478 [disapproved on other grounds *in People v. Ovieda* (2019) 7 Cal.5th 1034, 1048].
[9] (10th Cir. 2002) 290 F.3d 1239, 1244. Also see *People v. Duncan* (1986) 42 Cal.3d 91, 105 [chemicals "involved in the production of drugs such as PCP and methamphetamine creates a dangerous environment."]; *People v. Messina* (1985) 165 Cal. App.3d 937, 943 ["[T]he types of chemicals used to manufacture methamphetamines are extremely hazardous to health."].
[10] (10th Cir. 2002) 290 F.3d 1239, 1244.
[11] See *Hanson v. Dane County* (7th Cir. 2010) 608 F.3d 335, 337 ["A lack of an answer on the return of an incomplete emergency call implies that the caller is unable to pick up the phone—because of injury, illness (a heart attack, for example), or a threat of violence."]; *Johnson v. City of Memphis* (6th Cir. 2010) 617 F.3d 864, 869.
[12] See *U.S. v. Najar* (10th Cir. 2006) 451 F.3d 710, 720 ["Even more alarming, someone was answering the phone but immediately placing it back on the receiver."].
[13] *U.S. v. Snipe* (9th Cir. 2008) 515 F.3d 947.
[14] *State v. Murdock* (Wis. 1990) 455 N.W.2d 618, 624. Edited.
[15] *U.S. v. Nascimento* (1st Cir. 2007) 491 F.3d 25, 49.

premises if they reasonably believed (1) there was someone on the premises who had not made himself known, and (2) they reasonably believed that that person constituted a threat to them or others.[16] As the Fourth Circuit explained, "The question is whether there was a reasonable basis for the officers to believe that there could be other individuals in the residence who might resort to violence."[17]

An exception is made, however, for warrantless entries into the scenes of homicides because it is almost always reasonable to believe that someone other than the victim might have been injured, or that the perpetrator or an accomplice is on the scene. For these reasons, the Supreme Court ruled, "When the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if the killer is still on the premises."[18]

Regardless of the nature of the crime under investigation, protective sweeps must be limited to a quick inspection of those places in which a person might be hiding. Thus, sweeps "may extend only to a cursory inspection of those spaces where a person may be found,"[19] and they "may last no longer than is necessary to dispel the reasonable suspicion of danger."[20] For example, in rejecting arguments that a sweep was too intrusive, the courts have noted that the sweep "lasted no more than three to five minutes,"[21] the officer "moved briefly through two bedrooms, the bathroom and kitchen,"[22] and "the officers did not dawdle in each room looking for clues, but proceeded quickly."[23] In contrast, the Tenth Circuit invalidated a sweep because it "was not minimally intrusive; rather it was the commencement of a fishing expedition."[24]

Warrantless Searches

Because there is no "crime scene" exception to the warrant requirement, a warrantless search for evidence at a crime scene is seldom permitted unless officers had obtained valid consent or there were exigent circumstances. In some cases, however, a limited search for evidence may be permitted if the officers, after entering legally, developed probable cause to believe that an immediate search was reasonably necessary. Although this doesn't happen often, it certainly did in the case of *People v. Macioce*.[25]

Here, San Jose police were dispatched to the apartment of Giovanni and Thereza Macioce who had been reported missing by friends. After speaking with the friends, the officers entered and conducted a sweep of the premises. On the kitchen floor they found Giovanni's body, but there was no sign of Mrs. Macioce. A detective testified that he did not know whether Mrs. Macioce had been abducted or killed, or whether she was the killer. Consequently, he ordered a warrantless search of the apartment for "things to lead us to her location and possibly rescue her from any harm."

In ruling that the sweep was lawful, the court explained that "an exigency existed with regard to the whereabouts of Macioce herself. She was missing and [the detective] had every reason to believe [she] was in serious trouble. True, statistically, she might also have been the killer [she was], but they didn't know that at the time."

Sealing the Premises

After officers have lawfully entered a crime scene without a warrant, they will often determine there

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[16] See *Maryland v. Buie* (1990) 494 U.S. 325, 334 [only reasonable suspicion is required]; *People v. Werner* (2012) 207 Cal.App.4th 1195, 1209 ["Here, there were no particularized facts supporting a reasonable suspicion that there was a dangerous person inside defendant's home."]; *Dillon v. Superior Court* (1972) 7 Cal.3d 305, 314 [the "mere possibility without more" that others are in a house is not enough].

[17] *U.S. v. Jones* (4th Cir. 2012) 667 F.3d 477, 484. Edited.

[18] *Mincey v. Arizona* (1978) 437 U.S. 385, 392.

[19] *Maryland v. Buie* (1990) 494 U.S. 325, 335. Also see *U.S. v. Henderson* (7th Cir. 2014) 748 F.3d 788, 793. ["The sweep was cursory and lasted no longer than five minutes."].

[20] *U.S. v. Gould* (5th Cir. en banc 2004) 364 F.3d 578, 587.

[21] *U.S. v. Delgado* (11th Cir. 1990) 903 F.2d 1495, 1502.

[22] *US v. Richards* (7th Cir. 1991) 937 F.2d 1287, 1292.

[23] *U.S. v. Arch* (7th Cir. 1993) 7 F.3d 1300, 1304.

[24] *U.S. v. Shrum* (10th Cir. 2018) 908 F.3d 1219, 1232.

[25] (1987) 197 Cal.App.3d 262.

is probable cause to seek one. When this happens, they may take steps to locate and remove anyone on the premises pending issuance of the warrant if (1) they were diligent in applying for the warrant, and (2) they did not search or otherwise "exploit their presence simply because the warrant application process has begun."[26] As we will now discuss, there are two ways to secure the premises.

SECURING FROM THE OUTSIDE: If officers have determined there is no one on premises who has a motive to destroy evidence, they may post officers at strategic positions outside the building to make sure that no one enters pending issuance of a warrant. As the California Supreme Court observed, if "the investigating officers conclude that a search of the dwelling is called for, permitting the officers to bar entry will give the officers sufficient time to seek a warrant, thereby allowing a neutral and detached magistrate to determine whether the officers have probable cause to search."[27]

SECURING FROM THE INSIDE: To secure a residence from the inside means entering the premises and conducting a sweep or "walk through" during which officers briefly look in places where a person might be hiding. And if they find anyone, they will either arrest, detain, or release them. Securing from the inside constitutes a search and seizure of the premises. Consequently, officers must have *probable cause* to believe that evidence would be destroyed, hidden, or compromised if they abandoned the crime scene.[28]

For example, in *Illinois v. McArthur*[29] the Supreme Court ruled that the temporary seizure of McArthur's home was lawful because the officers had seen drugs in plain view and, therefore, they "had good reason to fear that, unless restrained, McArthur would destroy the drugs before they could return with a warrant.

In contrast, in *U.S. v. Etchin* the court ruled there was insufficient proof of a threat because it was based solely on an officer's report that she "heard a man's voice inside," and thought he might be try to destroy any evidence inside. These facts, said the court, are "too vague to justify a finding that there was an ongoing crime in the house requiring immediate entry."[30]

Vacating the Premises

Officers who have entered a home or business pursuant to exigent circumstances must leave within a reasonable amount of time after the threat to people, property, or evidence has been eliminated. Consequently, officers must stay alert to the possibility that the circumstances that justified their initial entry never existed or had been resolved, in which case they may be required to leave within a reasonable amount of time. Although the point at which an emergency ends depends on the facts of each case, the following examples are illustrative.

SHOOTING INSIDE A RESIDENCE: The emergency ended after the victim had been removed and officers had determined there were no suspects or other victims on the scene.[31]

BURGLARY IN PROGRESS: The emergency ended after officers arrested the burglar and had determined there were no accomplices on the premises, and that the residents were not harmed.[32]

BARRICADED SUSPECT: The emergency ended after the suspect was arrested and officers determined there were no victims or other suspects.[33]

EXPLOSIVES: The emergency resulting from explosives or dangerous chemicals on the premises ended when the danger had been eliminated.[34]

STRUCTURE FIRES, EXPLOSIVES: The emergency created by a structure fire does not end with the

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[26] *U.S. v. Madrid* (8th Cir. 1998) 152 F.3d 1034, 1041.
[27] *People v. Bennett* (1998) 17 Cal.4th 373, 377.
[28] See *Illinois v. McArthur* (2001) 531 U.S. 326, 331-32.
[29] (2001) 531 U.S. 326.
[30] (7th Cir. 2010) 614 F.3d 726.
[31] See *People v. Amaya* (1979) 93 Cal.App.3d 424, 430-32; *People v. Boragno* (1991) 232 Cal.App.3d 378, 392.
[32] See *People v. Bradley* (1982) 132 Cal.App.3d 737.
[33] See *People v. Keener* (1983) 148 Cal.App.3d 73, 77.
[34] See *People v. Remiro* (1979) 89 Cal.App.3d 809, 830-31; *People v. Avalos* (1988) 203 Cal.App.3d 1517, 1523.

"dousing of the last flame."[35] Instead, the Supreme Court has ruled that investigators may remain on the premises to (1) determine the cause and origin of the fire, and (2) determine that the premises were safe for re-occupancy. As the Court later explained:

> Fire officials are charged not only with extinguishing fires, but with finding their causes. Prompt determination of the fire's origin may be necessary to prevent its recurrence, as through the detection of continuing dangers such as faulty wiring or a defective furnace. Immediate investigation may also be necessary to preserve evidence from intentional or accidental destruction.[36]

The amount of time that is reasonably necessary for these purposes will depend on the size of the structure, conditions that made the investigation more time-consuming (e.g. heavy smoke, poor lighting), and whether there were other circumstances that delayed the investigation, such as the presence of explosives or dangerous chemicals.

Although officers may conduct a cause-and-origin investigation without a warrant, a warrant will be required if they determine that the cause was arson and that their primary objective had shifted from determining the cause to a search for incriminating evidence.[37]

Reentry

Officers and crime scene technicians at most crime scenes will necessarily leave the premises now and then. Unless they had vacated the premises or otherwise surrendered control, these reentries do not require authorization. Thus, in *San Francisco v. Sheehan*[38] the Supreme Court ruled that, because two entries by officers "were part of a single, continuous search or seizure," they "were not required to justify the continuing emergency with respect to the second entry."

Even if officers and technicians had temporarily vacated the premises, they may reenter without a warrant if they had good reason for vacating. Thus, the Court of Appeal noted, "California decisions uphold an officer's reentry to seize evidence observed in plain view during a lawful entry but not seized initially because the officer was performing a duty that took priority over the seizure of evidence."[39] Thus, in *People v. Superior Court (Quinn)*,[40] the court ruled that a sheriff's deputy in Plumas County "did not trench upon any constitutionally protected interest by returning for the single purpose of retrieving contraband he had observed moments before in the bedroom but had not then been in a position to seize."

A obvious need to reenter is found in the case of *Cleaver v. Superior Court.*[41] In this highly-publicized case, two men who were suspected of shooting two Oakland police officers had barricaded themselves in the basement of a home. At about 11 P.M., officers launched a tear gas canister into the building, resulting in a fire. One of the suspects was shot and killed as he fled; the other was arrested. Because of lingering smoke and tear gas, crime scene technicians were unable to retrieve evidence that officers had seen inside. So they waited. Then, about three hours later, a technician entered and seized some evidence but could not conduct a thorough search because of impaired visibility caused by lingering fumes. At about 8 A.M., officers entered and recovered additional evidence.

In upholding the reentries, the California Supreme Court said, "Since the officers had a conceded right to conduct a full and complete inspection of the basement at 11:30 P.M., we conclude that the subsequent searches of those same premises, occurring within a reasonable time thereafter and based upon a continued state of exigent circumstances, were reasonable under the foregoing constitutional provisions." POV

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[35] *Michigan v. Tyler* (1978) 436 U.S. 499, 510.
[36] See *Michigan v. Clifford* (1984) 464 U.S. 287, 293; *People v. Glance* (1989) 209 Cal.App.3d 836, 845.
[37] See *Michigan v. Tyler* (1978) 436 U.S. 499, 510, fn.6.
[38] (2015) 575 U.S. 600, __.
[39] *People v. Superior Court (Chapman)* (2012) 204 Cal.App.4th 1004, 1014.
[40] (1978) 83 Cal.App.3d 609.
[41] (1979) 24 Cal.3d 297.

Misdemeanor Arrest Quirks

As a general rule, officers may arrest a suspect for a misdemeanor if they have probable cause. Nothing more is required. But if the crime was a misdemeanor, there are some actual and plausible issues that may arise.

The "in the presence" rule: Officers may not ordinarily arrest someone for a misdemeanor unless they have probable cause to believe that the crime was committed in their "presence."[1] Unfortunately, the question of what constitutes "presence" seems to be more of a philosophical or existential question than a practical one. In any event, the requirement can be satisfied with circumstantial, as well as direct, evidence.[2] For example, in *People v. Lee*[3] an officer in an apparel store saw Lee carry five items of clothing into a fitting room, but when she left the room, she was carrying only three which she returned to the clothing rack. The officer then checked the fitting room and found one item there, which meant that one was unaccountted for. So, when Lee left the store, the officer arrested her for misdemeanor shoplifting. The missing item was found in Lee's purse. On appeal, Lee claimed the arrest was unlawful because her concealment of the item did not occur in the officer's presence. It didn't matter, said the court, because the term "presence" has "historically been liberally construed, and, thus, "neither physical proximity nor sight is essential. Also note that, there are several exceptions to this rule, most notably arrests for DUI, carrying a loaded firearm, domestic violence, and arrests of minors.[4]

Time of arrest: Unless the arrest occurs in a public place, it must ordinarily be made between the hours of 10 P.M. and 6 A.M. In this context, a place is "public" if it is a location in which the arrestee cannot reasonably expect privacy.[2] Exceptions: A misdemeanor arrest may be made at any hour of the day or night if the crime was committed in the officer's presence;[3] the suspect was arrested for domestic assault, battery, or for violation of a domestic violence protective or restraining order,[4] the arrest was made by a citizen,[5] or the arrestee was already in custody on another matter.[6]

Delaying an arrest: If officers have probable cause to arrest for a misdemeanor (or felony), they are not required to do so as soon as possible. In fact, the courts recognize there are several legitimate reasons to delay or defer, such as gathering additional evidence.[5] As the Seventh Circuit said, "Certainly, good police practice often requires postponing an arrest, even after probable cause has been established."[6] Similarly, the Eighth Circuit pointed said, "The fact that police may deprive someone of their liberty does not mean that they should."[7]

"Stale" misdemeanors: Speaking of delaying an arrest, there is an old, old rule that an arrest for a misdemeanor was unlawful if there was a substantial delay between the establishment of probable cause and the arrest itself. Thus, the California Supreme Court observed—in 1907—that "it seems to be generally held that an arrest for a misdemeanor without a warrant cannot be justified if made after the occasion has passed, though committed in the presence of the arresting officer."[7] This rule was apparently based on the idea that people who committed misdemeanors were less likely to remember what they did than people who commit felonies. Thus, it was unfair to arrest them because they "would not necessarily be familiar with the circumstances justifying the arrest."[8] Regardless of whether that ever made sense, the Supreme Court seemingly questioned the idea when it observed, "in earlier times the gulf between the felonies and the minor offenses was broad and deep. Today the distinction is minor and often arbitrary."[9] In addition, there are no cases in California (or anywhere else, as far as we know) in which evidence has been suppressed on grounds that the crime under investigation was a stale misdemeanor. Thus, the Supreme Court observed that "statutes in all 50 states permit warrantless misdemeanor arrests in a much wider range of situations—often whenever officers have probable cause for even a very minor criminal offense."[10]

When probable cause ends: Unlike probable cause to search, probable cause to arrest continues indefinitely unless a judge or the arresting officers make a determination that it never existed or that it no longer existed due to new information. As the Supreme Court explained,"Probable cause to arrest, once formed, will continue to exist for the indefinite future, at least if no intervening exculpatory facts come to light."[11]

[1] See *Pate v. Municipal Court* (1970) 11 Cal.App.3d 721, 725. [2] See *People v. Steinberg* (1957) 148 Cal.App.2d 855. [3] (1984) 157 Cal.App.3d Supp. 9. [4] See Pen. Code §§ 243.5, 836, 836.1, 1203.2 258.50(g); Welf. & Inst. Code § 625. [5] See *Nieves v. Bartlett* (2019) __ U.S. __ [139 S.Ct. 1715, 1727]. [6] *U.S. v. Haldorson* (7th Cir. 2019) 941 F.3d 284, 292. [7] *U.S. v. Pelletier* (8th Cir. 2012) 700 F.3d 1109, 1117. Also see *U.S. v. Wagner* (7th Cir. 2006) 467 F.3d 1085, 1090. [8] *People v. Bloom* (2010) 185 Cal.App.4th 1496, 1502. [9] *Tennessee v. Garner* (1985) 471 U.S. 1, 14. [10] See *Nieves v. Bartlett* (2019) __ U.S. __ [139 S.Ct. 1715]. [11] *United States v. Watson* (1976) 423 U.S. 411, 449.

Workplace Searches

Within the workplace context, this Court has recognized that employees may have a reasonable expectation of privacy against intrusions by police.[1]

Evidence of many types of crimes will be found in the suspect's office, desk, file cabinet, computer, locker or elsewhere in the workplace. In the absence of a warrant, officers can ordinarily obtain this evidence if the employer consents. But, as we discuss, that can be tricky. We will then cover an even trickier situation: The suspect's employer brings the evidence to officers, but it is inside a container. Can they open the container without a warrant?

Employer Consents to Search

A private employer may consent to a police search of places and things in the workplace if the employer (1) controlled the place or thing, and (2) openly exercised the right of control.

RIGHT TO CONTROL: In addition to having the ability to consent to searches of whatever is under its exclusive control, an employer may consent to searches of places and things over which it shares control with the employee. The theory here is that an employee cannot reasonably expect privacy in places and things over which he and his employer both have control. As the Supreme Court explained in *Ortega v. O'Connor*,[2] "Our cases establish that [the employee's] Fourth Amendment rights are implicated only if the conduct of the [consenting employer] infringed an expectation of privacy that society is prepared to consider reasonable." Taking note of this, the First Circuit observed, "Applying *O'Connor* in various work environments, lower federal courts have inquired into matters such as whether the work area in question was given over to an employee's exclusive use."[3]

An employer may also have joint control of a place or thing that was used primarily by an employee if the employee had been notified that, per company policy, the employer retained the right to search or inspect it. Thus, in ruling that an employer had the authority to consent, the courts have observed:

- The employee "was told that his [email] messages were subject to auditing."[4]
- The employee "was fully aware of the computer-use policy, as evidenced by his written acknowledgment of the limits imposed on his computer-access rights in 2000."[5]
- The employer "notified its work force in advance that video cameras would be installed and disclosed the cameras' field of vision. Hence, the affected workers were on clear notice from the outset that any movements they might make and any objects they might display within the work area would be exposed to the employer's sight."[6]
- The jail release office "was not exclusively assigned to [the employee] and had no lock on the door. The release office was accessible to any number of people, including other jail employees."[7]
- Although an employee had a reasonable expectation of privacy in his office (he had sole access and control), a search of his office computer at the request of an FBI agent did not violate the Fourth Amendment because IT-department employees "had complete administrative access to anybody's machine."[8]

Note that employees who had a right to exclusive use or control of a locked place or thing, may not

[1] *O'Connor v. Ortega* (1987) 480 U.S. 709.
[2] (1987) 480 U.S. 709, 715.
[3] *Vega-Rodriguez v. Puerto Rico Telephone Co.* (1st Cir. 1997) 110 F.3d 174, 179-80.
[4] *City of Ontario v. Quon* (2010) 560 U.S. 746, 762.
[5] *U.S. v. Thorn* (8th Cir. 2004) 375 F.3d 679, 683.
[6] *Vega-Rodriguez v. Puerto Rico Telephone Co.* (1st Cir. 1997) 110 F.3d 174, 180.
[7] *Sacramento County Deputy Sheriff's Assn. v. County of Sacramento* (1996) 51 Cal.App.4th 1468, 1482.
[8] (9th Cir. 2007) 474 F.3d 1184, 1190.

lose such control merely because the employer had a master key or otherwise had the ability to access it.[9] Thus, the courts have ruled that a physician at a state hospital had standing to challenge a search by hospital officials of the desk and files in his office,[10] and that the employee had "exclusive right to use the desk assigned to her made the search of it unreasonable."[11]

EMPLOYER ACTUALLY EXERCISED THE RIGHT: As noted, even if the employer had joint control over a place or thing, it may not consent to a search of it unless it had openly exercised the right to joint access or control and did so on a regular basis so as to put the employee on notice that he had no exclusive right to privacy. Thus, the Ninth Circuit ruled in *U.S. v. Ziegler* that an employer could search an employee's computer because company employees "were apprised of the company's monitoring efforts through training and an employment manual, and they were told that the computers were company-owned and not to be used for activities of a personal nature."[12]

Private Employer Finds Evidence

Employers sometimes intentionally or inadvertently find evidence of a crime in the workplace and turn it over to investigators. If the evidence incriminates an employee who reasonably expected that the evidence would remain private, it will not be suppressed unless the employer was functioning as a police agent when he conducted the search or other intrusion. As the Supreme Court observed, the exclusionary rule "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 official."[13]

In most cases, an employer will be deemed a police agent only if an officer requested, encouraged, or assisted in the search. As the Ninth Circuit explained, "Police officers may not avoid the requirements of the Fourth Amendment by inducing, coercing, promoting, or encouraging private parties to perform searches they would not otherwise perform."[14]

What if the evidence was inside a container when the employer gave it to officers? May they open it without a warrant? The answer is no unless the officer's act of opening the container allowed them to see something that had not been observed previously by the employer or the person who found the container. For example, in *United States v. Jacobson*[15] a cardboard box that was being shipped by Federal Ex was accidently torn by a forklift driver. When workers opened it to examine its contents (to prepare an insurance report) they found a "tube" about ten inches long covered in duct tape. The workers cut open the tape and found four zip-lock plastic bags containing white powder. Suspecting drugs, they notified the DEA and agents opened the box and the tube, removed some of the powder and tested it. It was cocaine.

The Supreme Court ruled the agents acted lawfully when they reopened the tube and examined its contents because the contents had already been observed by FedEx employees. Said the Court, "The removal of the plastic bags from the tube and the agents' visual inspection of their contents enabled the agent to learn nothing that had not previously been learned during the private search. It infringed no legitimate expectation of privacy and hence was not a 'search' within the meaning of the Fourth Amendment."

The Court also ruled that officers do not need a warrant to conduct a field test on suspected drugs that they had obtained lawfully. This is because "a chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy." POV

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[9] See *U.S. v. Taketa* (9th Cir. 1991) 923 F.2d 665, 673. Also see *U.S. v. Ziegler* (9th Cir. 2007) 474 F.3d 1184.
[10] See *O'Connor v. Ortega* (1987) 480 U.S. 709, 717.
[11] *U.S. v. Bilanzich* (7th Cir. 1985) 771 F.2d 292, 297; *U.S. v. Blok* (D.C. Cir. 1951) 188 F.2d 1019, 1021.
[12] (9th Cir. 2007) 474 F.3d 1184, 1192.
[13] See *O'Connor v. Ortega* (1987) 480 U.S. 709, 717.
[14] *George v. Edholm* (9th Cir. 2014) 752 F.3d 1206, 1215.
[15] (1984) 466 U.S. 113.
[16] *People v. Warren* (1990) 219 Cal.App.3d 619, 623-24.
[17] See *People v. Leichty* (1988) 205 Cal.App.3d 914, 923-24.

Basics of Evidence Suppression

Exclusion exacts a heavy toll on both the judicial system and society at large.[1]

In the dark ages of search and seizure law, the courts would simply suppress all evidence that was obtained in violation of the rules. But in a series of cases beginning in 1984,[2] the Supreme Court began to articulate a new rule that has evolved into the following: *Evidence may be suppressed only if the benefits of suppression outweigh its costs.*[3] This is known as the balancing-of-interests test, and it makes sense because the cost of suppresson falls heavily on the general public. As the Supreme Court observed:

> Exclusion exacts a heavy toll on both the judicial system and society at large. It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence. And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment.[3]

Admittedly, suppression also serves the public because it provides officers with a strong incentive to learn and apply the rules. But they are already motivated because violations commonly result in departmental discipline, passed-over promotions, bad press, and lawsuits.[4]

Magnitude of Misconduct

To determine whether an officer's misconduct was sufficiently blameworthy to warrant the suppression of evidence, the courts will often try to classify it as intentional, grossly negligent, or inadvertent. As noted, this is because the more egregious the officer's conduct, the greater the need to deter it and the more the public would view suppression as a necessary evil. As the Supreme Court put it, To trigger the exclusionary rule, "police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that deterrence is worth the price paid by the justice system."[5]

INTENTIONAL VIOLATIONS: Suppression is almost always warranted if the officer's misconduct was "substantial and deliberate"[6] because the deterrent value of exclusion is strong and will almost always outweigh the resulting costs to the public.[7] For example, evidence obtained during a detention would surely be suppressed–regardless of the seriousness of the crime under investigation—if the officers knew they had no legitimate reason to stop the suspect.[8]

GROSS NEGLIGENCE, RECKLESS DISREGARD: Suppression is also likely if a court concludes that the officer's misconduct constituted gross negligence or that he acted in reckless disregard of whether his conduct was lawful. As the Supreme Court explained, "When the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs."[9]

INADVERTENCE, ORDINARY NEGLIGENCE: In most cases, inadvertence and ordinary negligence are not sufficiently blameworthy to warrant suppression. This is because "the deterrence rationale loses much of its force" when an officer's conduct "involved only simple, isolated negligence."[10] Thus, in *Herring v. United States*, the Supreme Court ruled that "when police mistakes are the result of negligence, rather than systemic error or reckless disregard of constitutional

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[1] *Davis v. United States* (2011) 564 U.S. 229, 237.
[2] See *United States v. Leon* (1984) 468 U.S. 897, 908; *Herring v. United States* (2009) 555 U.S. 135, 143.
[3] *Davis v. United States* (2011) 564 US 229, 237. Also see *U.S. v. Szczerba* (8th Cir.2018) 897 F.3d 929, 938 ["Over time, the Supreme Court has recalibrated its cost-benefit analysis in exclusion cases to focus on the flagrancy of the police misconduct at issue"]; *People v. Willis* (2002) 28 Cal.4th 22, 30 ["Because the exclusionary rule is a remedial device, its application is restricted to those situations in which its remedial purpose is effectively advanced. Thus, application of the exclusionary rule is unwarranted where it would not result in appreciable deterrence."].
[4] See *Davis v. United States* (2011) 564 U.S. 229, 241.
[5] *Davis v. United States* (2011) 564 U.S. 229, 238. Also see *Herring v. United States* (2009) 555 U.S. 135, 145.
[6] *United States v. Leon* (1984) 468 U.S. 897, 909.
[7] See *Davis v. United States* (2011) 564 U.S. 229, 238. Also see *U.S. v. Cha* (9th Cir. 2010) 597 F.3d 995, 1004.
[8] See *U.S. v. Shaw* (6th Cir. 2013) 707 F.3d 666, 670.
[9] See *Davis v. United States* (2011) 564 U.S. 229, 237.
[10] *Davis v. United States* (2011) 564 U.S. 229, 238. Also see *People v. Robinson* (2010) 47 Cal.4th 1104, 1129.

requirements, any marginal deterrence does not pay its way."[11] For example, the courts have refused to suppress evidence when probable cause was a "close or debatable question."[12]

Applying the law

The following are common situations in which the magnitude of police misconduct affects suppression.

DEFECTIVE SEARCH WARRANTS: Judges will sometimes issue a warrant that an appellate court later determined was defective because there was no probable cause. Nevertheless, it is unlikely that the evidence obtained during the search will be suppressed because it is ordinarily reasonable for officers to rely on a judge's legal conclusions. To a lesser extent, suppression may be unwarranted if a knowledgeable prosecutor had reviewed and approved the warrant and affidavit,[13] or if the affiant notified the judge of a potential problem with the affidavit and the judge concluded that it was nevertheless sufficient.[14]

The evidence may, however, be suppressed if the affiant knew or should have known that he did not have probable cause. As the Supreme Court observed, an incompetent affiant cannot avoid suppression by "pointing to the greater incompetence of the magistrate."[15] Suppression is also likely if a court finds that a reasonably well-trained officer would have known that the descriptions of the evidence to be seized or the place to be searched were not sufficiently specific.[16]

MISTAKES OF LAW: In the past, evidence was routinely suppressed if it was obtained as the result of an officer's mistake as the law. That changed in 2014 when the Supreme Court ruled such evidence might not be suppressed if the officer's mistaken interpretaton of the law was not unreasonable. Under such circumstances, the Court pointed out that suppression would be unwarranted because it "would serve none of the purposes of the exclusionary rule" which is to deter unreasonable actions.[17]

DATABASE ERRORS: Officers will frequently make an arrest or conduct a search based on information they received from governmental databases, such a registries of people who are wanted on outstanding warrants, or probationers who are subject to warrantless searches. If this information was incorrect, the evidence may not be suppressed unless the officers knew or should have known that the database was unreliable, or if "the police have been shown to be reckless in maintaining" the database.[18]

SEARCH INVALIDATED AFTER THE FACT: It happens that officers will conduct a search that was in accord with an existing law that was later overturned. This used to be a problem because the the Supreme Court ruled in 1987 that if a court changes the law and this change renders the conduct unlawful the evidence must be suppressed if the defendant's conviction was not yet final.[19] In other words, evidence would sometimes be suppressed if officers failed to predict changes in the rules pertaining to search and sesizure. This, of course, made no sense. So the Court decided to change the rule.

Specifically, in 2011 the Court ruled that suppression may not be suppressed if the officer's conduct was lawful under the law *when the search occurred*. As the Court explained, "Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule."[20]

One other thing: One of the apparent consequences of implementing the balancing test was to make the so-called Good Faith Rule superflous. This is because the rule's objective was to eliminate suppresson when the officers' conduct was not sufficiently blameworthy. But because that is exactly the objective of the balancing test, there is no longer a need to consider whether officers acted in good or bad faith. Thus, the Supreme Court acknowled in 2009 that the term Good Faith was confusing and that it simply meant "objective reasonableness."[21] POV

[11] Herring v. United States (2009) 555 US 135, 147-48
[12] See *People v. Camarella* (1991) 54 Cal.3d 592, 606.
[13] See *Massachusetts v. Sheppard* (1984) 468 U.S. 981, 989; *People v. Camarella* (1991) 54 Cal.3d 592, 605, fn.5.
[14] See *Massachusetts v. Sheppard* (1984) 468 U.S. 981, 990.
[15] *Malley v. Briggs* (1986) 475 U.S. 335, 346, fn.9.
[16] See *Groh v. Ramirez* (2004) 540 U.S. 551, 558 ["the warrant did not describe the items to be seized at all"].
[17] *Heien v. North Carolina* (2014) 574 U.S. 54, 64.
[18] *Herring v. United States* (2009) 555 U.S. 135, 146-47. Also see *Arizona v. Evans* (1995) 514 U.S. 1, 15-16.
[19] *Griffith v. Kentucky* (1987) 479 U.S. 314, 328.
[20] *Davis v. United States* (2011) 564 U.S. 229, 241.
[21] *Herring v. United States* (2009) 555 U.S. 135, 142. Also see *People v. Willis* (2002) 28 Cal.4th 22, 29, fn.3.

Recent Cases

People v. Flores

(2021) 60 Cal.App.5th 978

Issue

Did officers have sufficient grounds for a detention?

Facts

At about 10 P.M., two Los Angeles police officers were driving down a cul-de-sac that was a known hangout for gangs and drug sellers. As they pulled up, they noticed a man, later identified as Marlon Flores, standing in the street behind a parked car. Here is a very brief summary of what he did in the next 60 seconds as recorded by the officers' body camera or as described by the court:

1. Flores "ducked behind the rear passenger panel of the vehicle." His head "rises into view" and he seems "to be making some sort of motion with one arm."
2. He ducked down again and his head "drops out of view." He does this *three times*.
3. As the officer approach, Flores disregards their bright flashlights and the clamor of a police radio. Instead, he "remains crouched" and continues to move his elbows and arms.
4. Flores ignores a command to stand up and continues to conceal his hands.

Having concluded that Flores was only "pretending to tie his shoe," the officers arrested him (probably for 148 P.C.). Searching his car incident to the arrest the officers found meth and a loaded and unlicensed firearm. He is later charged with being a felon in possession of a firearm. When his motion to suppress the gun was denied, he pled no contest.

Discussion

Flores argued that his conduct and the surrounding circumstances did not provide the officers with reasonable suspicion to detain him. The rules, here, are fairly straightforward: Reasonable suspicion requires only a "moderate chance"[1] that the suspect is engaged in criminal activity which is "considerably less" than a 50% chance.[2] Still, Flores faulted the officers for failing to conclude that he was merely having trouble tying his shoes. But, as the California Supreme Court explained, "When circumstances are consistent with criminal activity, they permit—even demand—an investigation."[3] In this case, the circumstances were blatantly consistent with an attempt by Flores to hide drugs or weapons from the officer's view.

Undeterred, Flores asked the court how it could possibly have known that he was only *pretending* to tie a shoe. It wasn't hard, said the court, because it was simply unbelievable that Flores had just "picked an unlikely moment for the task—in the dark, just after seeing police." Accordingly, the court ruled that the detention was lawful.

Comment

This was not a close case. In fact, many readers are probably wondering how Flores could think that a panel of the California Court of Appeal could possibly fall for such a childish argument. And yet, one of the three justices on the panel did just that.

In her dissenting opinion, Marie Stratton claimed there was nothing suspicious about Flores's desperate attempt to tie an errant shoelace behind a parked car at 10 P.M. as officers approached with flashlights and a noisy police radio. Furthermore, she said she "cannot abide" with the court's ruling because it "threatens to allow police detention based on commonplace conduct subject to interpretation." Commonplace?

But there's more. She said the officers should have viewed the circumstances through the eyes of an Hispanic man who was "wary of police." In rejecting a similar argument, the Eleventh Circuit said, "Even if we could derive uniform—or at least predominant—attitudes from a characteristic like race, we have no workable method to translate general attitudes

[1] *Safford Unified School District v. Redding* (2009) 557 U.S. 364, 371.
[2] *United States v. Sokolow* (1989) 490 U.S. 1, 7.
[3] *People v. Souza* (1994) 9 Cal.4th 224, 233.

towards the police into rigorous analysis of how a reasonable person would understand his freedom of action in a particular situation."

More important, the Supreme Court has repeatedly said that the various circumstances must be viewed "from the perspective of an objectively reasonable officer," which necessarily means someone who is not wary of police) and, furthermore, officers are "entitled to draw reasonable inferences" based on their prior experience.[4] As the Court observed, "Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers."[5]

U.S. v. Knights

(11th Cir. 2021) 989 F.3d 1281

Issue

Was a suspect "detained" when officers walked up to investigate suspicious circumstances? And is the rule changing?

Facts

At about 1 A.M., two officers in Tampa, Florida noticed two men leaning into a car that was parked in the front yard of a home. Two of the doors on the car were open. As the officers drove by, the men looked at them with a "blank stare" and "seemed nervous." Thinking that the men might be trying to steal the car, the officers stopped and parked their car next to the vehicle, but did not block it in.

By the time the officers parked their car, one of the men, Anthony Knights, had entered the vehicle and was trying unsuccessfully to start it. An officer knocked on the driver's window with his flashlight and Knights opened the door, at which point the officer was "overwhelmed with an odor of burnt marijuana." The officer asked Knights if there was any marijuana in the vehicle and Knights responded, "I'll be honest with you. It's all gone."

Nevertheless, the officers searched the car and found, among other things, a handgun, a rifle, and two firearm cartridges. Knights was subsequently charged with possession of a firearm and ammunition by a felon. He filed a motion to suppress which was denied, and he was found guilty.

Discussion

Knights argued that the evidence should have been suppressed because the officers' initial contact with him constituted a detention, and that it was an illegal detention because the officers lacked reasonable suspicion. It was, however, unnecessary for the court to determine whether there was reasonable suspicion because, as we will explain, it ruled that Knights was not detained until the officers smelled the marijuana, at which point they clearly had reasonable suspicion because recreational marijuana is illegal in Florida.

It is settled that a person becomes a detainee if a reasonable person under the circumstances would have believed he was not free to leave.[6] Applying this test, the court ruled that Knights was not initially detained because the officers "did not make a show of authority communicating that Knights was not free to leave," and they did not park their patrol car so as to prevent Knights from driving off.

Equally settled is the rule that in determining whether a reasonable person would have believed he was free to leave, the courts examine only the objective circumstances; i.e., the officers' words and actions. As the court pointed out, "The circumstances of the situation are key to this inquiry—in particular the police officer's objective behavior."

Knights, however, urged the court to implement a new test by which officers and courts must consider how the circumstances would have appeared to the suspect—not the fictitious reasonable person. Specifically, he contended that officers must take into account the suspect's race because young African-American men, like Knights, "feel that they cannot walk away from police without risking arrest or bodily harm."

[4] *U.S. v. Pabon* (2nd Cir. 2017) 871 F.3d 164, 174. Also see *Illinois v. Gates* (1983) 462 U.S. 213, 231.
[5] *United States v. Cortez* (1981) 449 U.S. 411, 418.
[6] See *Brendlin v. California* (2007) 551 U.S. 249, 256-57; *People v. Brown* (2015) 61 Cal.4th 968, 977.

The court responded that, "even if we could derive uniform—or at least predominant—attitudes from a characteristic like race, we have no workable method to translate general attitudes towards the police into rigorous analysis of how a reasonable person would understand his freedom of action in a particular situation."

Consequently, the court ruled that, because none of the objective circumstances would have caused a reasonable person in Knights' position to believe he was not free to leave, Knights had not been detained before the officers smelled the marijuana.

Comment

One of the judges on the panel, Robin Rosenbaum, wrote a thoughtful concurring opinion in which she urged the Supreme Court to abandon the "free to leave" test because it had become "unworkable and dangerous."[7] It's unworkable, she said, because it requires that officers and judges guess as to what the various surrounding circumstances would have communicated to a reasonable person. It also requires that suspects guess as to whether they are free to leave. As she explained, "Perhaps the most troubling aspect of this [objective] 'free to leave' standard is the Russian Roulette nature of it. [The test] foists on the citizen the complete responsibility for ascertaining whether the officer is detaining him." She also noted that if the suspect erroneously concluded that he was free to leave, might try to do so, and this would be dangerous to the suspect and the officers.

Consequently, she said "it is worth considering" what can be done "to improve the ability of people of all races to feel equally able to exercise their Fourth Amendment rights to leave." One idea, she said, is to require that officers inform contacted suspects that they are free to leave. Although the Supreme Court has consistently rejected this suggestion, she said that it is "ripe for change," especially in light of recent events. Furthermore, she said that such a rule "would provide a clear framework for citizens, officers, and courts to determine when a seizure has occurred." She acknowledged that this was not a "perfect solution" to the problem, but "it would take a big step towards reflecting the realities of police-citizen interactions and making them safer for both officers and citizens."

U.S. v. Reedy

(7th Cir. 2021) __ F.3d __ [2021 WL 777768]

Issue

Was the detention of a burglary suspect unduly prolonged?

Facts

At about 8:30 A.M., police in Eau Claire, Wisconsin responded to a report from an employee of a Goodwill store that a homeless person appeared to be living in a white SUV parked behind the store. Upon arriving, an officer saw a beat-up white Kia SUV that matched the vehicle description given by the employee. Inside the vehicle, sitting on the passenger seat, was Joshua Reedy, a known felon with approximately 27 prior arrests. The officer saw that Reedy was wearing a bulletproof vest, and there was a walkie-talkie was on the floor next to him. It was tuned to "channel 13"

Reedy claimed he had driven to the Goodwill store with a friend, Jason Harding, who had walked off to visit a friend who lived nearby. A second officer, who had just arrived, went looking for Harding. A third officer arrived and, on the floorboard of the Kia, he noticed a crowbar and an open hunting knife. The third officer ordered Reedy out of the car and conducted a pat search with negative results. Reedy and the two officers remained at the scene while the third officer went looking for Harding whom he found in the backyard of a nearby home.

When asked what he was doing there, Harding said he was doing landscaping. That explanation made

[7] Also see *People v. Linn* (2015) 241 Cal.App.4th 46, 68, fn.10 ["recent empirical research suggesting that a significant number of people do not feel free to leave when approached by police, and even less so when police assert even mild forms of authority"]; *People v. Spicer* (1984) 157 Cal.App.3d 213, 218 [the notion that a contacted suspect would ever feel perfectly free to disregard an officer's requests may be "the greatest legal fiction of the late 20th century"].

"no sense" to the officer because he was wearing dress pants and dress shoes. During a consensual pat search, the officer found a walkie-talkie. It, too, was tuned to channel 13. The officer also noticed a backpack in the yard and, after obtaining Harding's consent, searched it and found several credit cards in the names of various people, shotgun shells, knives, latex gloves, bolt cutters, and a syringe containing methamphetamine. Harding was arrested for possession of drugs. The detention lasted for about 90 minutes.

Having returned to the parking lot, the third officer searched the Kia and found a shotgun and arrested Reedy for possession of a firearm by a felon. Reedy confessed that the shotgun was his. When his motion to suppress the evidence was denied, Reedy pled guilty to the firearm charge.

Discussion

Reedy argued that the shotgun should have been suppressed because the detention had been unduly prolonged while the officers went looking for Harding. The Seventh Circuit disagreed.

Officers who are detaining a person must, of course, carry out their duties diligently.[8] And if they don't, the detention becomes a de facto arrest which, like any arrest, is illegal unless the officers had developed probable cause. For many years, it was fairly easy for officers and judges to determine whether a detention had been unduly prolonged because the test was simply whether the officers carried out their duties diligently. But in 2005 the Supreme Court ruled in *Illinois v. Caballes*[9] that the test is whether the detention was conducted "beyond the time reasonably required to complete [their] mission."

Then, in 2009, the Court in *Arizona v. Johnson*[10] changed the test again, ruling that the issue was whether the detention had been "measurably extended." (It did not define the term.)

Six years later, the Court in *Rodriguez v. United States* reviewed the issue once more and ruled that a detention would become unlawful if officers prolonged it for *any* amount of time.[11] Said the Court the "critical question" is whether "the investigation added time to the stop."

It was immediately apparent that the "adds time" test made no sense because everything officers say or do while detaining a suspect necessarily "adds time" to it. For example, detentions could conceivably be invalidated if an officer engaged the suspect in some small talk to soften the mood. Thus, in their dissenting opinions from the ruling in *Rodriguez*, Justices Kennedy, Thomas, and Alito called it "impractical" and "arbitrary," and pointed out that it "cannot be reconciled with our decision in *Caballes* or a number of common police practices." Three years later, the Third Circuit described the Court's "adds time" test in *Rodriguez* as "impractical in light of the factual complexity inherent in [detentions]."[12]

This brings up back to *Reedy*. How could the Seventh Circuit (or any other court) make sense of these seemingly contrary and nonsensical tests? The answer: *It ignored them*. In fact, nowhere in its opinion does the Court even mention *Caballes*, *Johnson*, or *Rodriguez*. Instead, it essentially went back to the original—and more sensible—test: Did the officers carry out their duties diligently. Thus, in ruing that the detention of Reedy was not unduly prolonged, the court said, "Nothing about the timeline or sequence of evens suggests delay by the police. To the contrary, the facts make clear that the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly that a burglary may be underway." Accordingly the court ruled that Reedy's motion to suppress was properly denied.

A brief comment: We suspect that the Seventh Circuit was sending a message to the Supreme Court: Stop writing confusing opinions.

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[8] See *United States v. Sharpe* (1985) 470 U.S. 675, 686 ["we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly"].
[9] (2005) 543 U.S. 405, 407.
[10] (2009) 555 U.S. 323, 333.
[11] (2015) 575 U.S. 348.
[12] *U.S. v. Green* (3rd Cir. 2018) 897 F.3d 173, 180.

U.S. v. Bruce

(9th Cir. 2021) __ F.3d __ [2021 WL 98242]

Issue

In attempting to identify a perpetrator, under what circumstances may officers show a witness a single photo of the suspect?

Facts

David Bruce was a correctional officer at the federal penitentiary at Atwater, California. He was also smuggling drugs into the facility. His side hustle was uncovered as the result of an investigation that began when officers found four vacuum-packed bags of marijuana and a package of heroin while conducting a random search of a vehicle entering the facility. The occupants of the vehicle, Thomas and Tracy Jones, were arrested.

Thomas cooperated with investigators and said he was supposed to give the drugs to a correctional officer he knew only as "Officer Johnson." According to Thomas, someone would deliver the drugs to his home, and he would pass them to Officer Johnson during clandestine meetings in a parking lot near the facility. He also provided investigators with a physical description of Officer Johnson, including a Pittsburg Steeler's hat he had been wearing. Having determined that this description matched that of Bruce, one of the investigators obtained a Facebook photo of Bruce and showed it to Thomas who positively identified him as Officer Johnson.

Bruce was arrested when he arrived at the parking lot, expecting to meet with Thomas. He was charged with attempting to distribute drugs, conspiracy, and bribery. At his trial, the prosecution was permitted to present testimony that Thomas had identified Bruce as Officer Johnson. He was convicted.

Discussion

Bruce argued that Thomas should not have been permitted to identify him as his contact because an identification made by showing the witness a single photo is impermissibly suggestive. It is settled that a lineup or other identification procedure that was otherwise fair may be deemed impermissibly suggestive if officers said or did something beforehand that would have prompted the witness to focus on the suspect.[13] And it is equally settled that showing a witness a single photograph—and then effectively asking "Is this the guy?"—is glaringly suggestive.

Even so, there are situations in which such a procedure is not unduly suggestive. Specifically, an identification by a witness will not ordinarily be suppressed if the witness had a clear memory of the suspect's appearance, usually because he and the suspect were friends or relatives.

Although Bruce was an accomplice, not a friend or relative, the court ruled that the same principle applied because Thomas had an ongoing relationship with Bruce. As the court explained, "Unlike witnesses who are startled by a crime in progress, [Thomas] ventured out to meet with 'Officer Johnson' on two occasions and voluntarily got into his car both times. The two men were in close proximity and the second meeting took place just 15 days before Jones was stopped and questioned at the checkpoint." Accordingly, the court ruled that, under these circumstances, the identification was sufficiently reliable.

U.S. v. Trader

(11th Cir 2020) 981 F.3d 961

Issue

Must officers obtain a search warrant or other court authorization to obtain a suspect's email and internet protocol addresses from a provider?

Facts

The parent of a nine-year old girl discovered that someone named Scott had emailed child pornography to her and had solicited nude photos. The request was made via an app called SayHi. The case was referred to the Department of Homeland Security (DHS) which determined that the sender also had an email account with an app called Kik.

Pursuant to an emergency disclosure request by DHA agents, Kik sent them Scott's email and internet

[13] See *Moore v. Illinois* (1977) 434 U.S. 220, 224-25; *Simmons v. United States* (1968) 390 U.S. 377, 383.

protocol (IP) addresses. This information led them to Scott's internet service provider, Comcast, so they sent Comcast a request for subscriber records associated with that IP address. Comcast complied.

With this information, agents learned that the person who sent the photos was Scott Trader who lived in Florida. As the result, they obtained a warrant to search Trader's home, and this led to the discovery of pornographic photographs of more than forty minors, including one of Trader's daughters.

After Trader was charged with enticing a minor to engage in sexual activity and possessing and distributing child pornography, he filed a motion to suppress the evidence obtained as the result of the disclosure requests. The motion was denied, and he pled guilty to all charges. He was sentenced to life in prison.

Discussion

Although Kik and Comcast furnished the information to the agents voluntarily, Trader filed a motion to suppress the photographs on grounds that a search warrant was requiredofficers should have obtained a search warrant. In the past, a warrant was not required to obtain information that a person had transmitted to a third party, such as an internet provider.

In 2018, however, the Supreme Court ruled in *Carpenter v. United States* that a warrant was required to obtain a suspect's cell site location information (CSLI) from a provider.[14] The Court reasoned that people can reasonably expect that such information will be private because "cell phone users do not share their cell-site location information voluntarily," and that "carrying a cell phone" has become "indispensable to participation in modern society."

The court in *Trader*, however, ruled that *Carpenter* did not apply in this case because there is a big difference between CSLI, which discloses a person's current and past whereabouts, and "ordinary business records like email addresses and internet protocol addresses." Although it is true that such records could eventually lead agents to private information, email and IP addresses, the court explained that "this kind of business record that might incidentally reveal location information falls outside *Carpenter's* narrow

People v. Hardy

(2021) 61 Cal.App.5th 290

Issue

Under what circumstances are "ShotSpotter" notifications admissible in court to prove the number of shots that were fired?

Facts

At about 7:30 P.M., Oakland police officers were conducting surveillance on the parking lot of a liquor store where about 20 people had gathered to make a music video. One of the officers was inside a vehicle across the street from the store, and he recognized Hardy as one of the participants. A short time later, he saw Hardy "sprint" into the street, remove a handgun from under his clothing. and fire several shots at a passing car. After the officer alerted the surveillance team, he received a ShotSpotter alert that "seven distinct percussive rounds, one right after the other" had been fired at that location.

Hardy was arrested and charged with, among other things, assault with a semiautomatic firearm" in violation of Penal Code section 245(b). To prove that Hardy had fired a semiautomatic—not a revolver—prosecutors introduced the ShotSpotter recording which proved that he had fired seven shots. This was significant because an officer had testified that revolvers can only fire five or six shots at a time, while semi-automatics can fire seven. Hardy was convicted.

Discussion

At the outset, the court explained that "ShotSpotter is an acoustic gunfire detection and location system of GPS-enabled microphones placed in various locations of a municipal area." The technology uses sensors to analyze sounds to determine if they were, in fact, gunshots. If so, an alert will be sent to officers.

[14] (2018) __ U.S. __ [138 S.Ct. 2206].

In this case, the issue was whether the ShotSpotter recording was admissible to prove the number of shots that Hardy had fired (seven) which, as noted proved that he had fired a semi-automatic. Although ShotSpotter recordings are routinely admitted to prove that officers had received a shots-fired notification, this case was different because prosecutors used the recording to prove an element of the crime; i.e., that the firearm Hardy fired was a semi-automatic.

Hardy argued that the recordings were not admissible because—pursuant to the so-called *Kelly/Frye* rule[15]—prosecutors may be required to prove that a new or novel technolgy is reliable. But in this case, prosecutors presented only the testimony of the arresting officer who was "not offered as an expert and [who] said nothing indicating he was anything more than a user of the technology." Consequently, the court reversed Hardy's conviction for firing a semi-automatic.

People v. Johnsen

(2021) __ Cal.5th __ [2021 WL 318246]

Issue

Did officers violate the Sixth Amendment when, at their request, a jailhouse informant elicited a confession from a murder defendant in the facility?

Facts

Brian Johnsen was a career criminal whose most recent crime was the burglary of a duplex next to his home in Modesto. The resident of the duplex, Sylvia Rudy, reported that the burglar had taken cash and jewelry. About two weeks later, Johnsen burglarized Rudy's duplex again and stole more property, including a television, answering machine, microwave, and a portable bar.

Ten days later, while Rudy was out of town, Johnsen broke into her home a third time. Unbeknownst to him, Rudy's parents were temporarily staying in the duplex. Using a ballpeen hammer and a knife, Johnson killed Rudy's mother and critically injured her father. He also stole more property.

Within a day or so, Modesto police arrested Johnsen for the murder and burglaries and booked him into the Stanislaus County Jail. They also recorded Johnsen's phone conversations. One of those conversations was with a friend named Mickey Landrum. In the call, Johnsen asked Landrum to remove the stolen property from his home in case the officers obtained a search warrant. It appears that Landrum did not comply. During another recorded phone call, this one to his friend Chester Thorne, Johnsen asked if he could get somebody to "whack" Landrum. Johnsen said that he wanted him killed with a knife and ballpeen hammer so that it would appear that the "real" burglar-murderer was "still out there killing people" and, therefore, the officers would be forced to release him. Thorn did not comply with the request.

Undeterred, Johnsen asked another inmate, Eric Holland, if he could find someone who was willing to kill Landrum in return for Johnsen's Harley-Davidson motorcycle and "some commissary credit." Holland responded that he wanted some assurance that Johnsen would not renege, so Johnson provided him with a detailed written statement in which he confessed to the murder and burglaries.

Holland later contacted his attorney and asked him to notify the DA of Johnsen's confession because "he believed Johnsen was sick" and might "get off and kill others." He also wanted a reduced sentence. This led to several meetings between Holland and an investigator with the DA's office, Fred Antone. Antone told him he was "definitely interested" in any information that Holland could provide, but also told him, "If you have any idea that you even think you're working for us, stop" and "I don't want you to do anything to try and make my case [against Johnsen] better." Holland agreed.

In the following weeks, Holland gave Antone several incriminating notes that Johnsen had given him. He also mentioned that Johnson had confessed to an unrelated murder in San Diego. Antone "emphasized it was up to Holland whether he decided to inquire into the San Diego murder."

[15] See *People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. U.S.* (App.D.C. Cir. 1923) 293 F. 1013.

Johnsen filed a motion to suppress his written confession on grounds that Holland was functioning as a police agent. And this would have violated the Sixth Amendment because Johnsen had already been charged with the crimes. The court denied the motion on grounds that Holland was acting on his own initiative. He was convicted and was sentenced to death.

Discussion

It is settled that police officers and police agents violate the Sixth Amendment if they deliberately elicit incriminating information from a suspect who had been charged and arraigned on the crime under investigation.[16] And a civilian will be deemed a police agent if he was acting under the express or implied direction of an officer. Conversely, an informant is not a police agent if he did so on his own initiative, or if officers had instructed him to do nothing but listen to the suspect.[17]

At the outset, the California Supreme Court explained that a person does not become a police agent if officers merely asked him to keep his ears open and report what that suspect had to say. "Where the informant is a jailhouse inmate," said the court, "the test is not met where law enforcement officials merely accept information elicited by the informant-inmate on his own initiative."[18]

Applying this test, the court noted that Antone had "repeatedly informed" Holland "that the district attorney would accept any useful information Holland had to offer about Johnsen's case, but would not make any promises of leniency." And although Holland understood that Johnsen's confessions "were sufficiently valuable that they could be leveraged into some deal" with the DA, he "also understood he was eliciting Johnsen's confessions on his own initiative without external direction, guidance, or. encouragement." Consequently, the court ruled that Johnsen's confession was obtained lawfully, and it affirmed his conviction and death sentence.

U.S. v. Mastin

(11th Cir 2020) 972 F.3d 1230

Issue

When executing an arrest warrant in a home, may officers detain people on the premises who are not subject to arrest?

Facts

Members of a fugitive task force in Montgomery, Alabama went to the Country Inn hotel in search of two men who were wanted on a warrant for armed robbery. The officers reasonably believed that one or both of the men were staying at the hotel and were now inside the room. As they approached, the door swung open and they saw Darrius Mastin standing in the doorway with his hands in the pocket of his hoodie.

Although the officers knew that Mastin was not one of the wanted suspects, they ordered him to exit. As he did so, a pistol fell out of his waistband. He was then arrested and later charged with being a felon in possession of a firearm. His motion to suppress the gun was denied, and he was convicted.

Discussion

Mastin argued that the gun should have been suppressed because the officers lacked grounds to order him to exit. The court disagreed.

It is settled that officers who are executing search warrants in homes may detain and control the movements of everyone on the premises.[19] But Mastin argued that this rule does not apply because the officers were executing *arrest* warrants. Did that matter? No, said the court, because the threats to officers who are executing search warrants apply equally to threats to officers who are executing warrants to arrest- people for violent crimes. Consequently, the court ruled that Johnsen's confession was obtained lawfully, and it affirmed his conviction. POV

[16] See *Massiah v. United States* (1964) 377 U.S. 201; *People v. Coffman* (2004) 34 Cal.4th 1, 67.
[17] See *People v. Dement* (2011) 53 Cal.4th 1, 35; *People v. Keo* (2019) 40 Cal.App.5th 169, 181.
[18] Quoting from *In re Neely* (1993) 6 Cal.4th 901, 915.
[19] See *Michigan v. Summers* (1981) 452 U.S. 692, 705.

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