POINT of VIEW

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In this issue

- Special Needs Detentions
- Entrapment
- Recording inmate conversations
- Clarifying Miranda rights
- Does “small talk” violate Miranda?
- Citizen’s arrests by 9-1-1 operators
- Are text messages private?

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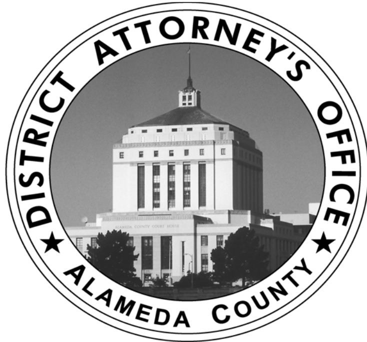

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Contents

ARTICLES

1 Special Needs Detentions
Because of the expanding role of law enforcement officers in the community, the courts now recognize a type of detention that is based on special—noncriminal—needs. In this article, we discuss the requirements.

13 Entrapment
Entrapment is a complete defense to a crime. So it is essential that undercover officers and police agents understand how to avoid such a catastrophe.

RECENT CASES

21 People v. Hartsch
The California Supreme Court rules on the propriety of secretly recording jailhouse conversations between charged accomplices.

23 People v. Williams
Trying to obtain a *Miranda* waiver in a capital murder case can be stressful—especially when, as in *Williams*, the suspect says something that might have constituted an invocation.

24 Mickey v. Ayers
Under what circumstances does casual conversation or small talk constitute "interrogation" under *Miranda*?

26 People v. Bloom
A police dispatcher makes a citizen's arrest of a man for making annoying 9-1-1 calls. Was the arrest lawful?

27 City of Ontario v. Quon
In a unanimous decision, the United States Supreme Court decides to dodge an important and recurring issue: whether people can reasonably expect privacy in the contents of their text messages and other digital communications.

FEATURES

29 The Changing Times
31 War Stories

Special Needs Detentions

Special law enforcement concerns will sometimes justify detentions without reasonable suspicion.
—*Illinois* v. *Lidster*[1]

For years and years, every police interaction with the citizenry was classified by the courts as a contact, an investigative detention, or an arrest. Over time, however, a fourth category started to appear in the cases—and today it has become firmly established in the law. Commonly known as a "special needs" or "community caretaking" detention, it is defined as a temporary seizure of a person that serves a public interest *other than* the need to determine if the detainee had committed a crime or was committing one.

Why was a new type of detention necessary? It was because the role of law enforcement officers in the community has expanded over the years to include an "infinite variety of services"[2] that are "totally divorced" from the apprehension of criminals."[3] As the First Circuit observed in *U.S.* v. *Rodriguez-Morales,* officers are now expected to "aid those in distress, combat actual hazards, [and] prevent potential hazards from materializing."[4]

As the result of these new demands, it is sometimes necessary for officers to stop and speak with people who are not suspected of criminal activity. This creates a problem: When an officer signals or otherwise instructs a person to stop, that person is automatically "detained."[5] And, under the old law, it would be an *illegal* detention because officers were only allowed to detain suspected criminals; i.e., the officers must have had reasonable suspicion. So, they would often find themselves in a classic Catch-22 situation: the public interest would be served if they detained the person; but if they did so, they would be breaking the law. Commenting on this dilemma, the Supreme Judicial Court of Maine said:

> If we were to insist upon suspicion of activity amounting to a criminal or civil infraction to meet the [detention] standard, we would be overlooking the police officer's legitimate role as a public servant to assist those in distress and to maintain and foster public safety.[6]

And that, in a nutshell, is why special needs detentions are now recognized by the courts. But this recognition came slowly. There were no "major" cases or public outcry over death or destruction resulting from the inability of officers to make special detentions.[7] Instead, it happened slowly as state appellate courts and the federal circuits were called upon more and more to address these situations. As the California Court of Appeal observed in 2008, "Though no published California case has specifically addressed this question, a number of other states recognize that a police officer may utilize the community caretaking exception to justify the stop."[8]

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[1] (2004) 540 U.S. 419, 424. Edited.
[2] *U.S.* v. *Rodriguez-Morales* (1st Cir. 1991) 929 F.2d 780, 785. ALSO SEE *People* v. *Madrid* (2008) 168 Cal.App.4th 1050, 1055 [the community caretaking exception "derives from the expanded role undertaken by the modern police force"]; *U.S.* v. *Dunavan* (6th Cir. 1973) 485 F.2d 201, 204 ["[P]articularly in big city life, the Good Samaritan of today is more likely to wear a blue coat than any other."]; *U.S.* v. *Finsel* (7th Cir. 2003) 326 F.3d 903, 907 ["But in addition to chasing criminals, law enforcement officers have another role in our society, a community caretaking function."].
[3] *Cady* v. *Dombrowski* (1973) 413 U.S. 433, 441.
[4] (1st Cir. 1991) 929 F.2d 780, 784-85.
[5] See *Brendlin* v. *California* (2007) 551 U.S. 249, 254 [a seizure results "when the officer, by means of physical force or show of authority, terminates or restrains his freedom of movement"].
[6] *State* v. *Pinkham* (Me. 1989) 565 A.2d 318, 319.
[7] See *People* v. *Hernandez* (N.Y. App. 1998) 679 N.Y.S. 790, 793 ["[T]his issue [stopping suspected victims of a crime] has received little attention in the reported case law because victims and witnesses have little reason to challenge in court their detention."].
[8] *People* v. *Madrid* (2008) 168 Cal.App.4th 1050, 1057-58. Edited. Citations omitted. ALSO SEE *State* v. *Lovegren* (Mont. 2002) 51 P.3d 471, 474 ["[W]e note that the majority of the jurisdictions that have adopted the community caretaker doctrine have determined that a peace officer has a duty to investigate situations in which a citizen may be in peril or need some type of assistance from an officer." Citations omitted.]; *State* v. *Marcello* (Vt. 1991) 599 A.2d 357, 358 ["safety reasons alone can be sufficient to justify a stop"]. ALSO SEE *Illinois* v. *McArthur* (2001) 531 U.S. 326, 330 ["When faced with special law enforcement needs . . . the Court has found that certain general, or individual circumstances may render a warrantless search or seizure reasonable." Citations omitted.].

But without a groundbreaking case, there have been no authoritative decisions setting forth the precise requirements for detaining people under the many and varied circumstances that constitute special needs. Nevertheless, as we will discuss in this article, the number of published cases on this issue has reached the point that most of the uncertainty has been eliminated.

When Permitted

There is general agreement that officers may conduct special needs detentions if both of the following circumstances existed:

(1) **Public interest**: The primary purpose of the detention must have been to further a public interest *other than* determining whether the detainee had committed a crime.[9] The most common public interests that fall into this category are checking welfare or otherwise preventing harm, locating witnesses to a crime, securing the scene of police activity, and conducting noncriminal detentions on school grounds.

(2) **Public interest outweighed intrusiveness**: This public interest must have outweighed the intrusiveness of the detention.

As the U.S. Supreme Court explained, "[I]n judging reasonableness, we look to the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."[10]

Public interests vs. law enforcement interests

While all lawful detentions serve the public interest, the courts sometimes say that special needs detentions are permitted only if their primary purpose was "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."[11] To put it another way, the objective must have been something other than a "general interest in crime control."[12]

Yet, this concept can be confusing because many of the special needs that result in detentions are linked indirectly—and sometimes directly—to criminal activity. As the Supreme Court of Connecticut observed, "Police often operate in the gray area between their community caretaking function and their function as criminal investigators."[13]

Fortunately, much of the confusion surrounding the terms "totally divorced" and "general interest in crime control" was eliminated by the Supreme Court in its most recent case on the subject, *Illinois* v. *Lidster*.[14] Specifically, the Court ruled that this language simply means that a detention will not be upheld under a special needs theory if the officers' *primary* objective was to determine if there were grounds to arrest the detainee.

The facts in *Lidster* are illustrative. Officers in Lombard, Illinois had been unable to locate the hit-and-run driver of a car that had struck and killed a bicyclist. So, one week after the accident, they set up a checkpoint near the scene and asked each passing motorist if he had seen anything that might help identify the perpetrator. Lidster was one of the drivers who was stopped, and he was arrested after officers determined that he was under the influence of alcohol. Lidster argued that the detention was unlawful because its purpose was to apprehend the hit-and-run driver. While that was its ultimate purpose, said the court, it met the requirement for a special needs detention because its immediate objective was "to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others."

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[9] **NOTE RE PRETEXT DETENTIONS**: If the officer's reasons for detaining the person were objectively reasonable, the officer's motivation for doing so is immaterial. See *Brigham City* v. *Stuart* (2006) 547 U.S. 398, 404-5; *Whren* v. *United States* (1996) 517 U.S. 806, 813 ["[W]e have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers"].

[10] *Illinois* v. *Lidster* (2004) 540 U.S. 419, 427.

[11] *Cady* v. *Dombrowski* (1973) 413 U.S. 433, 441.

[12] *Indianapolis* v. *Edmond* (2000) 531 U.S. 32, 41.

[13] *State* v. *Blades* (Conn. 1993) 626 A.2d 273, 279.

[14] (2004) 540 U.S. 419, 423 ["The stop's primary law enforcement purpose was not to determine whether a vehicle's occupants were committing a crime"].

Another objective that often falls into the gray area between special needs and crime control is public safety. Thus, while one of the objectives of DUI checkpoints is to arrest impaired motorists, these checkpoints fall into the category of special interest detentions because their co-objective is to reduce the death and destruction that results from drunk driving.[15]

An additional public safety interest that sometimes touches on crime control is the stopping of cars that are being operated in an unusual manner, but not so unusual or erratic as to be "worthy of a citation."[16] For example, in *People* v. *Bellomo*[17] an LAPD motorcycle officer noticed that the driver of a car stopped at a red light had his head "resting on the window" and his eyes "appeared to be closed." The officer stopped the car because he thought it was "very strange for the driver of the vehicle to be in this condition in a moving lane of traffic," and because he was concerned there was "something physically or mentally wrong" with him. It turned out the driver, Bellomo, was under the influence of alcohol, and he argued that the detention was unlawful because the officer saw nothing to indicate that he was impaired or citable. Even so, said the court, the detention was warranted because the officer's conduct was "reasonably consistent with his overall duties of protecting life and property and aiding the public."

In contrast, officers in *Indianapolis* v. *Edmond* established a drug-interdiction checkpoint in which they would walk a drug-detecting dog around each car in the line. Thus, unlike the situation in *Lidster*, the purpose of the checkpoint in *Edmond* was, in fact, to determine if the occupants were committing a crime. Edmond sued the city, arguing that the checkpoint resulted in an unlawful detention, and the United States Supreme Court agreed. Said the Court, "Because the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment."[18]

Similarly, in *State* v. *Hayes*[19] officers in Chattanooga set up a roadblock outside a high-crime housing project for the purpose of "excluding trespassers." Although one of its objectives was "to help [the residents'] quality of life issues," the court ruled it did not qualify as a special needs detention because its immediate objective was to identify and exclude those vehicle occupants who were believed to be causing problems.

Weight of the public interest

As noted, even if the primary purpose of the detention was to further a public interest other than general crime control, it will not be permitted unless the need for the detention outweighed its intrusiveness.[20] Consequently, it is necessary to determine the weight of the public interest that was served by taking into account the following: (1) its importance to the public, (2) the likelihood that the detention would effectively serve that public interest, and (3) whether there were any less intrusive alternatives that were readily available.

IMPORTANCE OF THE PUBLIC INTEREST: Although a special needs detention is much less intrusive than an arrest or search, it will not be upheld unless is serves a sufficiently important public interest.[21] As the Washington Supreme Court explained, "We must cautiously apply the community caretaking function exception because of a real risk of abuse in allowing even well-intentioned stops to assist."[22] Or, as the court put it in *People* v. *Molnar*, "[W]e neither want

[15] See *Michigan State Police* v. *Sitz* (1990) 496 U.S. 444, 451 ["No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it."]; *Indianapolis* v. *Edmond* (2000) 531 U.S. 32, 37 [Court notes that the DUI checkpoint it approved in *Sitz* was "aimed at removing drunk drivers from the road"]; *Illinois* v. *Lidster* (2004) 540 U.S. 419, 424 [Court refers to DUI checkpoints as a "special law enforcement *concern*." Emphasis added.].
[16] *State* v. *Pinkham* (Me. 1989) 565 A.2d 318, 318. ALSO SEE *State* v. *Rinehart* (S.D. 2000) 617 N.W.2d 842.
[17] (1984) 157 Cal.App.3d 193.
[18] (2000) 531 U.S. 32, 48.
[19] (Tenn. 2006) 188 S.W.3d 505.
[20] See *Indianapolis* v. *Edmond* (2000) 531 U.S. 32, 47; *People* v. *Glaser* (1995) 11 Cal.4th 354, 365; *In re Randy G.* (2001) 26 Cal.4th 556, 566 ["there is no ready test for determining reasonableness other than by balancing the need to search or seize against the invasion which the search or seizure entails"].
[21] See *Illinois* v. *Lidster* (2004) 540 U.S. 419, 427 ["we look to the gravity of the public concerns served by the seizure"]; *People* v. *Profit* (1986) 183 Cal.App.3d 849, 883 [the seriousness of the offense is a "highly determinative"].
[22] *State* v. *Acrey* (Wash. 2003) 64 P.3d 594, 600.

not authorize police to seize people or premises to remedy what might be characterized as minor irritants."[23] For example, in *U.S.* v. *Dunbar,* where an officer stopped a motorist because he appeared lost, the court pointed out that the "policy of the Fourth Amendment is to minimize governmental confrontations with the individual"; but that policy is not served if the courts permit officers to detain people "simply for the well-intentioned purpose of providing directions."[24]

On the other hand, the California Court of Appeal explained that, while officers are not permitted to "go around promiscuously bothering citizens," they may take actions that are "reasonably consistent" with their "overall duties of protecting life and property and aiding the public in maintaining lives of relative serenity and tranquility."[25] For example, the Supreme Court in *Michigan State Police* v. *Sitz* upheld a DUI checkpoint because of, among other things, the "magnitude of the drunken driving problem," and the "State's interest in preventing drunken driving."[26] Similarly, in determining the need for the detentions of possible witnesses in *Lidster* (the felony hit-and-run case discussed earlier) the Court pointed out that "[t]he relevant public concern was grave. Police were investigating a crime that had resulted in a human death."[27] (Several other examples of significant public interests will be discussed later.)

Proof of effectiveness: The strength of the need to detain will also depend on the likelihood that the detention would effectively serve that need; i.e., that it will be "a sufficiently productive mechanism" to justify the intrusion.[28] For example, in *Delaware* v. *Prouse* the Supreme Court invalidated a departmental practice in which officers would make random car stops to determine whether the drivers were properly licensed. Said the Court, it was apparent that "the percentage of all drivers on the road who are driving without a license is very small and that the number of licensed drivers who will be stopped in order to find one unlicensed operator will be large indeed."[29]

In contrast, the Court in *Lidster* pointed out that there was reason to believe the checkpoint to locate witnesses would be effective because it "took place about one week after the hit-and-run accident, on the same highway near the location of the accident, and at about the same time of night."[30]

Alternatives? Finally, the need to detain a person would necessarily be greater if there were no less intrusive alternatives that were readily available. For example, in *People* v. *Spencer*[31] officers stopped a car because the driver was a friend of the suspect in a day-old assault, and the officer wanted to determine if he knew the suspect's whereabouts. But the court ruled there was insufficient need for the detention because the officers knew the detainee's name and they could have contacted him at home. Said the court, "[T]here was no genuine need for so immediate and intrusive an action as pulling over defendant's freely moving vehicle." In contrast, the court in *U.S.* v. *Ward* ruled that a car stop of a potential witness by FBI agents was lawful because, although the agents knew the witness's name and address, they could not question him at his home because his roommates were suspected fugitives.[32]

Note that the mere existence of a less intrusive alternative will not invalidate a detention unless the officers were negligent in failing to recognize and

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[23] (N.Y. App. 2002) 774 N.E.2d 738, 741.
[24] (D. Conn. 1979) 470 F.Supp. 704, 708. ALSO SEE *Stevens* v. *Rose* (9th Cir. 2002) 298 F.3d 880, 884 [detention unlawful because its purpose was to obtain a set of keys that were the subject of a civil dispute].
[25] *Batts* v. *Superior Court* (1972) 23 Cal.App.3d 435, 439.
[26] (1990) 496 U.S. 444, 451.
[27] (2004) 540 U.S. 419, 427.
[28] *Delaware* v. *Prouse* (1979) 440 U.S. 648, 659. ALSO SEE *Michigan State Police* v. *Sitz* (1990) 496 U.S. 444, 455 [consider "the extent to which [checkpoints] can reasonably be said to advance that interest"].
[29] (1979) 440 U.S. 648, 660.
[30] *Illinois* v. *Lidster* (2004) 540 U.S. 419, 427.
[31] (N.Y. App. 1995) 646 N.E.2d 785. ALSO SEE *State* v. *Ryland* (Neb. 1992) 486 N.W.2d 210 [detention unnecessary because the officer knew the witness's phone number, and the crime occurred a week earlier].
[32] (9th Cir. 1973) 488 F.2d 162, 164. ALSO SEE *In re Kelsey C.R.* (Wisc. 2001) 626 N.W.2d 777, 789 ["there were not any alternatives"]; *State* v. *Pierce* (Vt. 2001) 787 A.2d 1284, 1289 ["the license number will not always allow identification of the occupants of a vehicle, and a very brief stop will produce that identification"]; *Wold* v. *State* (Minn. 1988) 430 N.W.2d 171, 175 ["An atmosphere of haste pervaded the scene."].

implement it.[33] As the Supreme Court put it, "The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it."[34]

Intrusiveness of the Detention

Until now, we have been discussing only one half of the balancing equation: the strength of the need for the detention. But, as noted, the legality of a special needs detention depends on whether this need outweighed the intrusiveness of the stop. "[T]he manner in which the seizure was conducted," said the Supreme Court, "is as vital a part of the inquiry as whether it was warranted at all."[35]

How do the courts assess a detention's intrusiveness? The most cited circumstances are, (1) the manner in which the detainee was stopped, (2) whether officers utilized officer-safety precautions, (3) the length of the detention, and (4) whether it was conducted in a place and in a manner that would have caused embarrassment or unusual anxiety.

Although the above circumstances are relevant, in most cases a special needs detention is not apt to be viewed as excessively intrusive if, (1) it was brief, and (2) officers did only those things that were reasonably necessary to accomplish their objective. That is because brief and efficient detentions are viewed by the courts as "modest" or "minimal" intrusions. Thus, in ruling that special needs detentions were relatively nonintrusive, the courts have noted:

- "Such a stop entailed only a brief detention, requiring no more than a response to a question or two and possible production of a document."[36]
- The detention was "minimally" intrusive as it lasted "a very few minutes at most."[37]
- "Several circumstances diminish the intrusiveness of the initial detention here. First and foremost, it was extremely brief."[38]
- "[T]he restraint at issue was tailored to that need, being limited in time and scope."[39]
- Traffic stop was only a "minor annoyance."[40]
- The officer "did no more than was reasonably necessary to determine whether [the detainee] was in need of assistance."[41]
- "At a minimum, officers had a right to identify witnesses to the shooting, to obtain the names and addresses of such witnesses, and to ascertain whether they were willing to speak voluntarily with the officers."[42]

As for roadblocks and checkpoints, they too will usually be considered only a minor intrusion if, (1) they were brief, (2) all vehicles were stopped (i.e., vehicles were not singled out), and (3) it would have been apparent to the motorists that the stop was being conducted by law enforcement officers.[43]

Having examined the procedure for determining whether a special needs detention was justified, we will now look at the most common special needs cited by officers, and how the courts have analyzed them.

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[33] See *Atwater* v. *City of Lago Vista* (2001) 532 U.S. 318, 350; *People* v. *Bell* (1996) 43 Cal.App.4th 754, 761, fn.1.
[34] *United States* v. *Sharpe* (1985) 470 U.S. 675, 687.
[35] *United States* v. *Place* (1983) 462 U.S. 696, 707-8. ALSO SEE *Meredith* v. *Erath* (9th Cir. 2003) 342 F.3d 1057, 1062 ["the reasonableness of a detention depends not only on *if* it is made, but also on *how* it is carried out"].
[36] *Ingersoll* v. *Palmer* (1987) 43 Cal.3d 1321, 1333.
[37] *Illinois* v. *Lidster* (2004) 540 U.S. 419, 427. ALSO SEE *People* v. *Dominguez* (1987) 194 Cal.App.3d 1315, 1318 ["brief stop at the side of a public roadway"]; *People* v. *Hannah* (1996) 51 Cal.App.4th 1335, 1344 ["Although the duration of a detention is not determinative of its reasonableness, its brevity weighs heavily in favor of a finding of reasonableness."].
[38] *People* v. *Glaser* (1995) 11 Cal.4th 354, 366.
[39] *Illinois* v. *McArthur* (2001) 531 U.S. 326, 331. ALSO SEE *Palacios* v. *Burge* (2nd Cir. 2009) 589 F.3d 556, 565 ["there was appropriate tailoring"]; *U.S.* v. *Garner* (10th Cir. 2005) 416 F.3d 1208, 1213 ["the detention must last no longer than is necessary to effectuate its purpose, and its scope must be carefully tailored to its underlying justification"].
[40] *People* v. *Bellomo* (1984) 157 Cal.App.3d 193, 198.
[41] *State* v. *Crawford* (Iowa 2003) 659 N.W.2d 537, 543.
[42] *Walker* v. *City of Orem* (10th Cir. 2006) 451 F.3d 1139, 1148.
[43] See *Illinois* v. *Lidster* (2004) 540 U.S. 419, 425 ["information-seeking highway stops are less likely to provoke anxiety or to prove intrusive"]; *United States* v. *Martinez-Fuerte* (1976) 428 U.S. 543, 557-58 ["brief detention of travelers" was "quite limited"]; *Michigan State Police* v. *Sitz* (1990) 496 U.S. 444, 451 ["the measure of the intrusion on motorists stopped briefly at sobriety checkpoints is slight"]. ALSO SEE *People* v. *Manis* (1969) 268 Cal.App.2d 653, 666 ["The temporary loss of personal mobility which accompanies detention may be deemed part payment of the person's obligation as a citizen to assist law enforcement authorities in the maintenance of public order."].

Types of Special Needs Detentions

There are essentially four types of special needs detentions that have been recognized to date: community caretaking detentions, stops to locate witnesses to a crime, securing the scene of police activity, and noncriminal detentions on school grounds.

Community caretaking detentions

Of all the circumstances that may warrant a special needs detention, the most urgent is an officer's reasonable belief that the detainee was in imminent danger or was otherwise in need of immediate assistance. Thus, in discussing these types of stops—commonly known as "community caretaking detentions"[44]—the Montana Supreme Court pointed out that "the majority of the jurisdictions that have adopted the community caretaker doctrine have determined that a peace officer has a duty to investigate situations in which a citizen may be in peril or need some type of assistance from an officer."[45]

The following are the most common justifications that are cited for community caretaking detentions.

Sick or injured person: Whether officers may detain a person whom they believe may be sick or injured will generally depend on "the nature and level of distress exhibited."[46] The following are examples of circumstances that have been found to generate a strong need:

- The victim of an assault had just left the crime scene in the car; officers stopped the vehicle because the crime was "potentially serious" and "the victim, with knowledge of the incident and possibly in need of medical attention, had just left the scene.[47]
- An officer detained a man who was sitting in a vehicle that was parked at the side of a roadway at 3 A.M.; the headlights were off but the motor was running. Although the man appeared to be asleep, the court pointed out that "he might just as likely have been ill and unconscious and in need of help."[48]
- The driver of a car that was stopped at a traffic light was leaning his head against the window, and his eyes "appeared to be closed. Said the court, "The operation of a motor vehicle by a driver disabled for *any* reason be it a disability that is statutorily prohibited or not, is manifestly a serious event and the need for swift action is clear beyond cavil."[49]
- At 3 A.M., the driver of a car "stopped or slowed considerably five times within approximately 90 seconds" and then pulled off the road. The court ruled that "it was reasonable for the officer to conclude, among other things, that "something was wrong" with the driver or his vehicle.[50]

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[44] See, for example, *People* v. *Madrid* (2008) 168 Cal.App.4th 1050, 1060 [car stop was appropriate to discharge "community caretaking functions"]; *U.S.* v. *Garner* (10th Cir. 2005) 416 F.3d 1208, [detention of ill man fell within the "community caretaking function"]; *In re Kelsey C.R.* (Wisc. 2001) 626 N.W.2d 777, 789 [detention of suspected runaway "was reasonable under the police community caretaker function"]; *State* v. *Diloreto* (N.J. 2004) 850 A.2d 1226, 1233 [detention of missing person fell within the "community caretaker doctrine"]. ALSO SEE *Cady* v. *Dombrowski* (1973) 413 U.S. 433, 441 [the Court's first reference to "community caretaking functions"].

[45] *State* v. *Lovegren* (Mont. 2002) 51 P.3d 471, 474. Citations omitted. ALSO SEE *State* v. *Litschauer* (Mont. 2005) 126 P.3d 456, 457-58 ["[O]fficers have a duty not only to fight crime, but also to investigate uncertain situations in order to ensure the public safety."].

[46] *Corbin* v. *State* (Tex. App. 2002) 85 S.W.3d 272, 277. ALSO SEE *U.S.* v. *King* (10th Cir. 1993) 990 F.2d 1552, 1560 ["In the course of exercising this noninvestigatory function, a police officer may have occasion to seize a person in order to ensure the safety of the public and/or the individual."]; *Wright* v. *State* (Tex. 1999) 7 S.W.3d 148, 151 ["As part of his duty to 'serve and protect,' a police officer may stop and assist an individual whom a reasonable person—given the totality of the circumstances—would believe is in need of help."]. **NOTE**: While this type of special need is similar to traditional exigent circumstances, it is treated differently because it involves detentions of people as opposed to searches of people or property.

[47] *Metzker* v. *State* (Alaska App. 1990) 797 P.2d 1219, 1222. ALSO SEE *People* v. *Hernandez* (N.Y. App. 1998) 679 N.Y.S.2d 790 [officers reasonably believed that one of the occupants of the stopped vehicle had just been shot].

[48] *State* v. *Lovegren* (Mont. 2002) 51 P.3d 471. ALSO SEE *State* v. *Pinkham* (Me. 1989) 565 A.2d 318, 319 ["Police officers do not violate the Fourth Amendment if they stop a vehicle when they have adequate grounds to believe the driver is ill or falling asleep."].

[49] *People* v. *Bellomo* (1984) 157 Cal.App.3d 193, 197.

[50] *State* v. *Bakewell* (Neb. 2007) 730 N.W.2d 335, 339. ALSO SEE *State* v. *Reinhart* (S.D. 2000) 617 N.W.2d 842 [car stop because the driver was driving 20-25 m.p.h. in 40 m.p.h. zone, and the officer believed "he might have a medical problem such as a stroke"]; *State* v. *Marcello* (Vt. 1991) 599 A.2d 357, 358 [motorist told an officer to stop the defendant's car because "there's something wrong with that man."]; *State* v. *Vistuba* (Kan. 1992) 840 P.2d 511, 514.

- Responding to a report that a man in a field was "unconscious in a half-sitting, half-slumped-over position," officers found him on the ground and detained him so that fire department personnel could examine him.[51]

In contrast, the California Court of Appeal in *People* v. *Madrid* ruled that a community caretaking detention was unwarranted because the detainee was merely "walking with an unsteady gait and sweating" and "stumbled." Such symptoms, said the court, demonstrated "a low level of distress."[52]

MISSING PERSON: Another significant circumstance is that the detainee had been reported missing. Thus, in *State* v. *Diloreto*, the New Jersey Supreme Court ruled that a car stop was warranted because, per NCIC, a possible occupant of the vehicle was an "endangered missing person."[53]

MENTAL HEALTH ISSUES: A detention may be warranted if it appeared that the detainee was so mentally unstable as to constitute a threat to himself or others. Some examples:

- Detainee "was possibly intoxicated and was observed exiting and reentering a vehicle that was parked on a dead-end street."[54]
- Detainee was walking down the street at 1 A.M. "crying and talking really loudly or shouting," "his hands were over his face."[55]
- Detainee had reportedly taken "some pills," he was "agitated" and "physically aggressive" and he "did not know where he was."[56]
- Before driving off in a car, the detainee went "ballistic," screaming and banging her head on the car.[57]

WARN OF DANGER: Officers may detain a person to notify him of a dangerous condition or prevent him from entering a dangerous place.[58] For example, in *People* v. *Ellis* the California Court of Appeal ruled that an officer properly stopped a car at 2 A.M. in a parking lot to warn the driver that his lights were off. Said the court, the officer was "not required to wait until appellant actually drove upon a public street to stop appellant."[59]

Similarly, in *State* v. *Moore* a park ranger signaled the defendant to stop because, although he was not speeding, he was driving too fast for conditions; i.e., pedestrians in the campground did not have a clear view of approaching cars because of parked vehicles. Said the court, "Although defendant makes a plausible argument that his driving did not constitute a criminal violation, the park ranger nevertheless could have reasonably concluded that it posed a threat to the safety of other persons in the park."[60]

Finally, in *In re Kelsey C.R.*[61] officers in Milwaukee were patrolling a high-crime neighborhood at about 7:40 P.M. when they saw a 17-year old girl who was leaning against a storefront in a "huddled position." Thinking that she might be a runaway, the officers detained her and subsequently discovered she was armed with a handgun. On appeal, the Supreme Court of Wisconsin ruled that these circumstances constituted sufficient reason to detain her, pointing out, among other things, that "something bad could have happened" to her if the officers had not intervened; and that a minor "alone in a dangerous neighborhood is vulnerable to kidnappers, sexual predators, and other criminals."

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[51] *U.S.* v. *Garner* (10th Cir. 2005) 416 F.3d 1208.
[52] (2008) 168 Cal.App.4th 1050, 1060.
[53] (N.J. 2004) 850 A.2d 1226.
[54] *Winters* v. *Adams* (8th Cir. 2001) 254 F.3d 758, 760.
[55] *Gallegos* v. *City of Colorado Springs* (10th Cir. 1997) 114 F.3d 1024.
[56] *State* v. *Crawford* (Iowa 2003) 659 N.W.2d 537, 543.
[57] *State* v. *Litschauer* (Mont. 2005) 126 P.3d 456.
[58] See *People* v. *Williams* (2007) 156 Cal.App.4th 949, 959 [deputy detained a motorcyclist to prevent him from driving into a forested area in which officers were about to conduct a raid on a marijuana grow; in addition, a deputy testified that "[o]ftentimes these fields are booby-trapped"]; *U.S.* v. *King* (10th Cir. 1993) 990 F.2d 1552, 1559 [at the scene of a traffic accident, an officer detained the driver of a passing vehicle "to alleviate what she perceived as a traffic hazard resulting from [the driver's] incessant honking at the intersection"].
[59] (1993) 14 Cal.App.4th 1198, 1202.
[60] (Iowa 2000) 609 N.W.2d 502, 503.
[61] (Wisc. 2001) 626 N.W.2d 777. ALSO SEE *State* v. *Acrey* (Wash. 2003) 64 P.3d 594, 601 ["a 12-year-old boy, out after midnight on a weeknight without adult supervision"].

Locate witnesses

The need to locate or identify witnesses to a crime may also constitute a special need, especially if the crime was serious and if it had just occurred. The theory here is that, while many witnesses will voluntarily come forward and tell officers what they saw, some will not because they are hesitant about becoming involved or because they don't realize they saw or heard something significant. This can create a problem for officers at the crime scene because the only way to determine whether someone was a witness is to talk to him; and if he is leaving, they must either let him go (and lose whatever information he might have) or detain him.

While some courts ruled in the past that detentions for such an objective are not permitted,[62] the U.S. Supreme Court rejected this view in 2004. The case was *Illinois* v. *Lidster*[63] (the felony hit-and-run case discussed on page two) and the Court ruled that, like other special needs detentions, detentions for the purpose of locating and identifying witnesses are lawful if the need to find a witness outweighed the intrusiveness of the stop. As the Court observed, it would seem "anomalous" if the law allowed officers "to seek the voluntary cooperation of pedestrians but ordinarily to forbid police to seek similar voluntary cooperation from motorists."

Before we discuss how officers can determine whether a need to locate witnesses is sufficiently strong, it should be noted that in many cases the circumstances that would justify a detention of a person as a potential witness would also warrant a detention of that person to determine if he was the perpetrator. This is especially true if officers arrived shortly after the crime occurred or if there was some other reason to believe that the perpetrator was still on or near the scene. Thus, in one such case, the D.C. Circuit ruled that officers who had just arrived at the scene of a shooting were "not required to sort out appellant's exact role—participant or witness—before stopping him to inquire about a just-completed crime of violence."[64]

Seriousness of the crime: The most important circumstance is, of course, the seriousness of the crime that the detainee might have witnessed. In most cases, these types of detentions will be upheld only when the crime was especially serious, usually a felony and oftentimes one that resulted in an injury or an imminent threat to life or property.[65]

Likelihood the detainee witnessed the crime: The need for a detention will also depend on the likelihood that the detainee had, in fact, witnessed the crime. While officers must, at a minimum, have reasonable suspicion,[66] their belief that the detainee was a witness may be based on direct evidence or reasonable inference. An example of direct evidence is found in *Williamson* v. *U.S.*[67] in which two officers on patrol in Washington D.C. heard several gun shots nearby at about 3:45 A.M. As they looked in the direction of the shots, they saw one car speeding off and some people starting to get into a second car in a "very quick hurry." The officers stopped the second

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[62] See *Walker* v. *City of Orem* (10th Cir. 2006) 451 F.3d 1139, 1148 ["[S]ome courts have prohibited the involuntary detention of witnesses to a crime." Citations omitted.].

[63] (2004) 540 U.S. 419, 426-27. ALSO SEE *Walker* v. *City of Orem* (10th Cir. 2006) 451 F.3d 1139, 1148 [*Lidster* "suggests that a brief detention of a witness is in fact permitted, provided it meets the reasonableness test"]; *State* v. *Gorneault* (Me. 2007) 918 A.2d 1207, 1209 [applying *Lidster*, the court ruled that officers who were investigating a burglary that had occurred 30 minutes earlier could briefly stop passing motorists to determine if they saw anything suspicious].

[64] *Williamson* v. *U.S.* (D.C. App. 1992) 607 A.2d 471, 476.

[65] See *Illinois* v. *Lidster* (2004) 540 U.S. 419 [felony hit-and-run]; *Williamson* v. *U.S.* (D.C.App. 1992) 607 A.2d 471 [shooting]; *Wold* v. *State* (Minn. 1988) 430 N.W.2d 171 [stabbing]; *Walker* v. *City of Orem* (10th Cir. 2006) 451 F.3d 1139, 1148 [shooting]; *State* v. *Gorneault* (Me. 2007) 918 A.2d 1207 [burglary]; Beauvois v. State (Alaska App. 1992) 837 P.2d 1118 [robbery]; *State* v. *Pierce* (Vt. 2001) 787 A.2d 1284, 1289 [DUI was sufficiently serious]. **COMPARE**: *State* v. *Dorey* (Wash.App. 2008) 186 P.3d 363, 368 [a "disturbance"]; *Castle* v. *State* (Alaska App. 2000) 999 P.2d 169, 173 [driving on a revoked license]; *State* v. *Ryland* (Neb. 1992) 486 N.W.2d 210 [week-old traffic accident]; *City of Kodiak* v. *Samaniego* (Alaska 2004) 83 P.3d 1077 [INS investigation]; *State* v. *Wixom* (Idaho 1997) 947 P.2d 1000 [non-injury traffic accident].

[66] **NOTE**: Probable cause is the standard of proof suggested in the Model Code of Pre-Arraignment Procedure. Although the Code uses the term "reasonable cause," it used that term elsewhere to denote probable cause. ALSO SEE 2 LaFave, *Search and Seizure* (3rd edition) § 3.2(e) p.64; *People* v. *Hernandez* (Sup.Ct. Bronx County 1998) 679 N.Y.S.2d 790, 794 ["[T]he Model Code proposes appropriate guidelines"].

[67] (D.C. App. 1992) 607 A.2d 471.

car because, as one of them testified, he was unsure whether the occupants were the shooters or the targets of the shooting. In the course of the stop, one of the occupants was arrested for carrying an unregistered firearm. On appeal, he contended that the gun should have been suppressed because the officers lacked grounds to stop the car. But the court disagreed, pointing out that the officers had firsthand knowledge that the occupants of the second car "were either participants in the shooting or witnesses to it who could provide material information about the event and the possible identity of the shooter."

An officer's belief that a person was a witness to a crime may also be based on circumstantial evidence, such as the following: (1) the crime had just occurred, (2) the perpetrator fled toward a certain area, (3) the detainee was the only person in that area or one of only a few, and (4) it was likely that anyone in the area would have seen the perpetrator. It may also be reasonable to believe that a person was a witness if the crime had just occurred and he was one of few people at the scene when officers arrived. As the Minnesota Supreme Court observed, "Our court, as well as courts of other states, have recognized that in order to 'freeze' the situation, the stop of a person present at the scene of a recently committed crime of violence may be permissible."[68]

Importance of information: Even if officers had good reason to believe that the detainee was a witness, the legality of the detention will depend on whether they reasonably believed that he would be able to provide important information. It seems apparent, however, that anyone who was reasonably believed to have been a witness to all or part of the crime would qualify because he could be expected to, among other things, identify or describe the perpetrator, describe the perpetrator's vehicle, explain what the perpetrator said or did, explain what the victim said or did, recount how the crime occurred, eliminate another suspect as the perpetrator, lead officers to physical evidence, or provide officers with the names of other witnesses.

For example, in *Wold* v. *Minnesota,*[69] officers in Duluth were dispatched at about 11 P.M. to a stabbing that had just occurred on a street. When they arrived, they noticed that two men were shouting at the paramedics who were treating the unconscious victim. So the officers detained the men and, as things progressed, determined that one of them, Wold, was the assailant. On appeal, the court ruled that the officers had good reason to detain the men because, as the only people on the scene (other than the victim), they might have seen what had happened. Said the court, "[W]e cannot fault [the officers'] conclusion that both of the individuals may have witnessed the crime, or that either or both might be potential suspects involved in the commission of this violent assault."

Similarly, in *Barnhard* v. *State,*[70] police officers in Maryland were dispatched to a report of a stabbing at Bubba Louie's Bar. One of the patrons, Barnhard, told them that he knew where the knife had been discarded. But then he became uncooperative and started to leave. So the officers detained him, apparently for the purpose of learning where the knife was located. But Barnhard fought the officers and was charged with, among other things, battery on an officer in the performance of his duties. Barnhard claimed that the officers were not acting in the performance of their duties because they did not have grounds to believe he was the perpetrator. It didn't matter, said the court, because Barnhard had indicated that he possessed "material information" pertaining to the stabbing.

It appears that a person who was not an eyewitness to the crime might, nevertheless, be detained if officers reasonably believed he had seen the perpetrator or his car. For example, in *Baxter* v. *State,*[71] two men armed with handguns and wearing Halloween masks robbed a jewelry store in Little Rock at about 4 P.M. Witnesses reported that the men ran out the back door. One of the responding officers was aware that the back door of the jewelry store led to a wooded area that adjoined Kanis Park. So he headed

[68] *Wold* v. *State* (Minn. 1988) 430 N.W.2d 171, 174. COMPARE *State* v. *Dorey* (Wash. App. 2008) 186 P.3d 363, 368 ["there was no reason to believe that [the detainee] could assist in the investigation"].
[69] (Minn. 1988) 430 N.W.2d 171.
[70] (Md. App. 1992) 602 A.2d 701.
[71] (Ark. 1982) 626 S.W.2d 935.

for the park and, just as he arrived, he saw a man in a car traveling in the direction away from the jewelry store. The officer decided to stop the car to determine if the driver "had seen anybody." It turned that out he had. In fact, he was the getaway driver and the two robbers were found hiding in the back seat. In ruling that the stop was justified by the need to locate a witness, the court pointed out that "[t]he time sequence was such that a person in Kanis Park about the time that appellant was stopped likely would have seen the robbers—there being no one else in the park on this rainy afternoon."

In a similar case, *Beauvois* v. *State,*[72] a man armed with a knife robbed a 7-Eleven store in Fairbanks, Alaska at about 2:50 A.M. He was last seen on foot and, according to witnesses, he was running in the direction of a campground. Within a minute of receiving the call, an officer arrived at the only entrance to the campground, intending to "stop any moving vehicle" on the theory that, while "most people would be sleeping at 3 A.M., anyone who was awake might have seen something." The first car he saw was a Corvette occupied by two men, so he stopped it and discovered that one of the men was the robber. In ruling that the detention was lawful, the court said:

> It was reasonable to suspect that the occupants of the Corvette had been awake in the campground when the robber came through, and that they might have seen something. Under these circumstances, and especially given the recency and the seriousness of the crime, prompt investigative efforts were justified.

Securing the scene of police activity

Officers who are conducting a search, making an arrest, or processing a crime scene may, of course, take "unquestioned police command" of the location. As the Supreme Court observed, "[A] police officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety."[73] Similarly, the Eleventh Circuit noted that "a police officer performing his lawful duties may direct and control—to some extent—the movements and location of persons nearby."[74]

But because a command to such a person will necessarily result in a detention (since a reasonable person in such a situation would not feel free "to decline the officer's requests"[75]) it falls into the category of a special needs detention. The following are the most common situations in which these types of detentions occur:

CAR STOPS: When officers make a car stop, they will usually have grounds to detain the driver and sometimes one or more of the passengers. But what about passengers for whom reasonable suspicion does not exist?

In the past, this was problematic because, in the absence of reasonable suspicion, officers could not lawfully command a non-suspect occupant to do anything without converting the encounter into an illegal detention. In 2007, however, the United States Supreme Court ruled in *Brendlin* v. *California* that, because of the overriding need of officers to exercise control over all of the occupants, any non-suspect passengers will be deemed detained under what is essentially a special needs theory.[76]

HIGH-RISK RESIDENTIAL SEARCHES: Because of the increased danger associated with the execution of warrants to search private residences for drugs, illegal weapons, or other contraband, the Supreme Court ruled that officers may detain all residents and other occupants pending completion of the search.[77] Officers may also briefly detain people who arrive outside the residence while officers are on the scene

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[72] (Alaska 1992) 837 P.2d 1118.
[73] *Brendlin* v. *California* (2007) 551 U.S. 249, 258. ALSO SEE *Arizona* v. *Johnson* (2009) __ U.S. __ [129 S.Ct. 781, 783] [officer was "not constitutionally required to give Johnson an opportunity to depart the scene after he exited the vehicle without first ensuring that, in doing so, she was not permitting a dangerous person to get behind her"].
[74] *Hudson* v. *Hall* (11th Cir. 2000) 231 F.3d 1289, 1297; *U.S.* v. *Clark* (11th Cir. 2003) 337 F.3d 1282, 1286-87.
[75] *Florida* v. *Bostick* (1991) 501 U.S. 429, 436.
[76] (2007) 551 U.S. 249, 257.
[77] See *Michigan* v. *Summers* (1981) 452 U.S. 692. 705 ["[A] warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted."]; *People* v. *Thurman* (1989) 209 Cal.App.3d 817, 823 ["That appellant's posture, at that moment, was nonthreatening does not in any measure diminish the potential for sudden armed violence that his presence within the residence suggested."].

if the person's identity and connection to the premises are unknown and cannot be immediately determined without detaining him.[78] The purpose of these types of detentions is to ascertain whether the person is a detainable occupant or merely an uninvolved visitor.

EXECUTING ARREST WARRANTS: Officers who have entered a home to execute an arrest warrant, like officers who have made a car stop, need to exercise unquestioned control over all of the occupants. Consequently, they may detain people who are inside when they arrive, or who are about to enter.[79]

SEARCHES AND ARRESTS IN PUBLIC PLACES: Officers who are searching a business or other place that is open to the public may detain a person on or near the premises only if there was reasonable suspicion to believe that *that* person was connected to the illegal activities under investigation.[80] In other words, a special needs detention will not be permitted merely because the detainee was present in a public place in which criminal activity was occurring. Officers may, however, prevent people from entering a public place that is about to be searched pursuant to a warrant.[81]

PAROLE AND PROBATION SEARCHES: A brief detention of people leaving the home of a probationer has been deemed a special need when officers, who had arrived to conduct a probation search, detained them to determine if they were felons. This information was relevant in determining whether the probationer was associating with felons, which is ordinarily a violation of probation.[82]

DETENTIONS WHILE DETAINING OTHERS: There is authority for ordering a person at the scene of a detention to stand at a certain place if, (1) it reasonably appeared that person and the detainee were associates, and (2) there was some reason to believe the person posed a threat to officers.[83]

EXECUTING A CIVIL COURT ORDER: Officers who are executing a civil court order may detain a person on the premises who reasonably appears to pose a threat to them or others. For example, in *Henderson* v. *City of Simi Valley*[84] officers were standing by while a minor was removing property from her mother's home pursuant to a court order. While the officers were outside the house, the mother made threats to release her two Rottweilers on them." The dogs were inside her house, and when she started to untie them, the officers entered and detained her. In ruling that their entry into the house was reasonable, the court noted that they "were serving as neutral third parties acting to protect all parties," and that they "did not enter the house to obtain evidence."

Detentions on school grounds

Officers may, of course, detain students or anyone else on school grounds if they have reasonable suspicion. In the absence of reasonable suspicion, certain special needs detentions are permitted on school grounds because of the overriding need to provide students with a safe environment and to restrict access by outsiders.[85] These types of detentions are permitted if the following circumstances existed:

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[78] See *People* v. *Glaser* (1995) 11 Cal.4th 354; *People* v. *Samples* (1996) 48 Cal.App.4th 1197 [detainee arrived at a residence as officers were arriving to execute a warrant to search for drugs]; *U.S.* v. *Fountain* (9th Cir. 1993) 2 F.3d 656, 663 [officers may detain residents and any other occupant who is present when officers arrive]; *U.S.* v. *Bohannon* (6th Cir. 2000) 225 F.3d 615, 616 [officers may detain people who arrive at the scene after officers arrived]; *Burchett* v. *Kiefer* (6th Cir. 2002) 310 F.3d 937, 943-44 [officers may detain a person "who approaches a property being searched pursuant to a warrant, pauses at the property line, and flees when the officers instruct him to get down"].

[79] See *People* v. *Hannah* (1996) 51 Cal.App.4th 1335, 1346 [the officers "were entering a residence, the exact floor plan of which they were unaware, to arrest a juvenile . . . when they encountered individuals whose identity and relationship to the juvenile they were seeking was unknown"]; *U.S.* v. *Maddox* (10th Cir. 2004) 388 F.3d 1356, 1363 ["officer safety may justify protective detentions"].

[80] See *Ybarra* v. *Illinois* (1979) 444 U.S. 85.

[81] See *People* v. *Williams* (2007) 156 Cal.App.4th 949, 959.

[82] See *People* v. *Matelski* (2000) 82 Cal.App.4th 837, 850.

[83] See *U.S.* v. *Clark* (11th Cir. 2003) 337 F.3d 1282, 1288; *State* v. *Childress* (Ariz. App. 2009) 214 P.3d 422, 427.

[84] (9th Cir. 2002) 305 F.3d 1052.

[85] See *Wofford* v. *Evans* (4th Cir. 2004) 390 F.3d 318, 321 ["School officials must have the leeway to maintain order on school premises and secure a safe environment in which learning can flourish."]. ALSO SEE *New Jersey* v. *T.L.O.* (1985) 469 U.S. 325, 339 ["Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems."].

(1) **School resource officer**: These types of detentions must be conducted by a school resource officer (i.e., police officers or sheriff's deputies who are specially assigned to the school by their departments) or an officer who is employed by the school district.[86]

(2) **Proper school-related interest**: The detention must have served a school-related interest, such as safety or maintaining order.

DETENTIONS OF STUDENTS: Detentions of students are permitted so long as the stop was not arbitrary, capricious, or harassing. As the California Supreme Court put it:

> [S]chool officials [must] have the power to stop a minor student in order to ask questions or conduct an investigation even in the absence of reasonable suspicion, so long as such authority is not exercised in an arbitrary, capricious, or harassing manner.[87]

For example, in *In re William V.*[89] the court ruled that a detention was warranted even though it was based solely on a violation of a school rule.[88] The facts in the case were as follows: A school resource officer at Hayward High School in Alameda County saw that a student, William, was displaying a folded red bandanna. The bandanna was hanging from William's back pocket and it caught the officer's attention because, as he testified, colored bandanas "commonly indicate gang affiliation" and are therefore not permitted on school grounds. Furthermore, he explained that the manner in which the bandanna was folded and hanging from the pocket indicated to him that "something was about to happen or that William was getting ready for a confrontation." The officer's suspicions were heightened when William, upon looking in the direction of the officer, "became nervous and started pacing" and began "trembling quite heavily, his entire body, especially his hands, his lips, his jaw." At that point, the officer detained him and subsequently discovered that he was carrying a knife. William contended that the detention was unlawful because the officer did not have reasonable suspicion to believe he was committing a crime. It didn't matter, said the court, because "William's violation of the school rule prohibiting bandannas on school grounds justified the initial detention."

DETENTIONS OF NONSTUDENTS: A nonstudent may be detained during school hours to confirm he has registered with the office as required by law.[90] An outsider may also be detained after school hours to confirm he has a legitimate reason for being on the school grounds.

For example, in *In re Joseph F.*[91] an assistant principal and school resource officer at a middle school in Fairfield saw a high school student named Joseph on campus at about 3 P.M. At the request of the assistant principal, the officer tried to detain Joseph to determine whether he had registered, but Joseph refused to stop, and the officer had to forcibly detain him. As the result, Joseph was arrested for battery on a peace officer engaged in the performance of his duties.

On appeal, Joseph argued that the officer was not acting in the performance of his duties because the registration requirement does not apply after school hours. Even so, said the court, it is appropriate for officers to determine whether any outsider on school grounds has a legitimate reason for being there. This is because "schools are special places in terms of public access," and also because "outsiders commit a disproportionate number of the crimes on school grounds." Accordingly, the court ruled that "school officials, or their designees, responsible for the security and safety of campuses should reasonably be permitted to detain an outsider for the limited purpose of determining such person's identity and purpose regardless of 'school hours.'" POV

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[86] See *In re William V.* (2003) 111 Cal.App.4th 1464, 1471 ["We see no reason to distinguish for this purpose between a non law enforcement security officer and a police officer on assignment to a school as a resource officer."].

[87] *In re Randy G.* (2001) 26 Cal.4th 556, 559.

[88] See *New Jersey* v. *T.L.O.* (1985) 469 U.S. 325 [detention for smoking in a lavatory]; *Wofford* v. *Evans* (4th Cir. 2004) 390 F.3d 318, 327 [detention to investigate a report that a student was carrying a gun].

[89] (2003) 111 Cal.App.4th 1464.

[90] See Penal Code § 627.2.

[91] (2000) 85 Cal.App.4th 975.

Entrapment

"I ate the apple because the serpent beguiled me."
—Eve[1]

While most modern-day serpents have curtailed their beguilement activities, there is another form of enticement that continues to be viewed as problematic, at least by the courts: entrapment by law enforcement officers. There are two reasons for this.

First, it is distasteful for officers to entice people to break laws that the officers are sworn to enforce. As the California Supreme Court observed, it's the job of officers "to investigate, not instigate, crime."[2] That's also the sentiment of the U.S. Supreme Court which said, "The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime."[3]

Second, entrapment is viewed as a poor "substitute for skillful and scientific investigation" and a tactic that is based on the misguided belief that the "employment of illegal means" can be justified when officers are dealing with "known criminals or the criminal classes."[4]

For these reasons, entrapment constitutes a complete defense to a crime. This means that if a jury finds that the defendant was entrapped, he goes free.[5] It doesn't matter that the crime was a major felony, or that the evidence against him was overwhelming, or even that his guilt was not disputed. If he was entrapped, he walks.[6]

Because these consequences are so severe, it is essential that officers understand how the courts determine whether a defendant was entrapped and, just as important, what investigative methods are—and are not—likely to constitute entrapment.

What is Entrapment?

In California, entrapment occurs if the following three circumstances existed: (1) an officer communicated with the defendant before he committed the crime with which he was charged, (2) the officer's communication included an inducement to commit the crime, and (3) the inducement was such that it would have motivated a "normally law-abiding person" to commit it.[7] Later we will discuss the kinds of inducements that may constitute entrapment. But first, the basics.

Basic principles

Because entrapment depends mainly on the probable affect of the officer's words on a basically honest person, the courts start by isolating the words at issue, after which they seek to determine whether they would have motivated a "normally law-abiding person" to commit the crime.

THE OFFICER'S WORDS: In determining whether a defendant was entrapped, California courts apply what they call an "objective" test. This essentially means that they are interested only in what the officer actually said to the defendant before he com-

[1] See Genesis 3:13. **HISTORICAL NOTE**: This was the first reported assertion of the entrapment defense. It was not successful.
[2] *Patty* v. *Board of Medical Examiners* (1973) 9 Cal.3d 356, 364; *People* v. *McIntire* (1979) 23 Cal.3d 742, 748.
[3] *Sherman* v. *United States* (1958) 356 U.S. 369, 372. ALSO SEE *Olmstead* v. *United States* (1928) 277 U.S. 438, 484 (conc. opn. of Holmes, J.) ["I think it a less evil that some criminals should escape than that the government should play an ignoble part."].
[4] *People* v. *Barraza* (1979) 23 Cal.3d 675, 689.
[5] See CALCRIM 3408.
[6] **NOTE**: A court must give the jury an entrapment instruction if "there is substantial evidence supportive of a defense that is not inconsistent with the defendant's theory of the case." *People* v. *Barraza* (1979) 23 Cal.3d 675, 691. The court may not, however, dismiss charges on grounds of entrapment. See *People* v. *Harris* (1985) 165 Cal.App.3d 324, 332.
[7] See *People* v. *Watson* (2000) 22 Cal.4th 220, 223 ["Entrapment is established if the law enforcement conduct is likely to induce a normally law-abiding person to commit the offense."]; *People* v. *Barraza* (1979) 23 Cal.3d 675, 689-90 [the test is whether the conduct of the law enforcement agent was "likely to induce a normally law-abiding person to commit the offense"]; CALCRIM 3408 ["When deciding whether the defendant was entrapped, consider what a normally law-abiding person would have done in this situation."].

mitted the crime.[8] "What we do care about," said the California Supreme Court, "is how much and what manner of persuasion, pressure, and cajoling are brought to bear by law enforcement officials to induce persons to commit crimes."[9] Thus, entrapment cannot ordinarily occur in the absence of "something akin to excessive pressure, threats, or the exploitation of an unfair advantage."[10]

CONSIDER OFFICER'S WORDS IN CONTEXT: Although everything depends on what the officers said to the defendant before he committed the crime, the courts will consider their words in context (i.e., in light of the surrounding circumstances or earlier conversations) if it would add meaning to them. As the court explained in *People* v. *Smith*:

> [T]he conduct of the police does not occur in a vacuum, especially in a sting operation. The court's assessment of an officer's objective conduct will inevitably be colored by, for example, whether the defendant was from the start an enthusiastic proponent of the proposed crime or initially declined and was only gradually worn down.[11]

"NORMALLY LAW-ABIDING PERSON": Having determined what the officers said to the defendant, and the context in which it was said, the courts will consider whether a "normally law-abiding person" would have responded by committing the crime in question. Said the court in *People* v. *Barraza*, "[W]hile the inquiry must focus primarily on the conduct of the law enforcement agent, that conduct is not to be viewed in a vacuum; it should also be judged by the effect it would have on a normally law-abiding person situated in the circumstances of the case at hand."[12]

So, what do we know about this hypothetical person whose ethical principles must be overpowered to produce entrapment? Technically, he is a scoundrel. After all, while he disapproves of crime in the abstract, he is not averse to listening to and giving serious consideration to whatever criminal schemes are presented to him by total strangers. Moreover, it is hard to distinguish him from a run-of-the-mill crook because anybody who only "normally" obeys the law is, by definition, a person who commits crimes—albeit occasionally.

This is not, however, the type of person that the courts have in mind. To them, he is nothing more than an individual whose natural impulse is to say "no" if presented with a criminal proposal or opportunity. Said the California Supreme Court:

> [W]e presume that such a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully.[13]

But while he would *normally* resist, he could be persuaded if the inducement was sufficiently attractive. Thus, everything depends on how enticing the crime was made to appear. As the Alaska Supreme Court put it, "[T]he line between what is permitted and not must be drawn somewhat as a matter of degree."[14]

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[8] See *People* v. *Cappellia* (1989) 208 Cal.App.3d 1331, 1340 [the "focus of inquiry" is "the conduct of the law enforcement officer preceding the offense"]; *People* v. *Holloway* (1996) 47 Cal.App.4th 1757, 1764-65 ["The California entrapment doctrine is known as an objective defense because it focuses exclusively on police conduct and ignores the suspect's subjective intent or any predisposition to commit the crime."]; CALCRIM 3408 ["Do not consider the defendant's particular intentions or character, or whether the defendant had a predisposition to commit the crime."].

[9] *People* v. *Barraza* (1979) 23 Cal.3d 675, 688. ALSO SEE *People* v. *McClellan* (1980) 107 Cal.App.3d 297, 302 ["Only undue pressure from law enforcement officials is proscribed."].

[10] *U.S.* v. *Shinderman* (1st Cir. 2008) 515 F.3d 5, 14.

[11] (2003) 31 Cal.4th 1207, 1218. ALSO SEE *People* v. *McClellan* (1980) 107 Cal.App.3d 297, 302 ["[T]he conduct of the law enforcement officials must be considered in light of the surrounding circumstances."]. **NOTE**: In *Barraza,* the court said that, in addition to considering the officers' conduct, courts may take into account "the gravity of the crime, and the difficulty of detecting instances of its commission." At p. 690. It is not, however, apparent why these two circumstances are relevant to the issue of whether the officers' pressured or the defendant?

[12] (1979) 23 Cal.3d 675, 690 ALSO SEE *People* v. *Smith* (2003) 31 Cal.4th 1207, 1218.

[13] *People* v. *Barraza* (1979) 23 Cal.3d 675, 690. ALSO SEE *People* v. *Grant* (1985) 165 Cal.App.3d 496, 500 ["This hypothetical is similar to the 'reasonable man' instructions which define a negligence standard in civil cases."].

[14] *Grossman* v. *State* (Alaska 1969) 457 P.2d 226, 230.

Compare federal entrapment: To fully understand the significance of California's objective test, it will be helpful to consider the federal court's "subjective" test and the "deep schism" that exists between the two.[15] In the federal system, entrapment cannot occur if the defendant was predisposed to commit the crime. Thus, there is virtually nothing that officers can say or do that will result in entrapment if the defendant was already inclined to commit the crime.[16] As the court explained in *United States* v. *Padron*, "A successful entrapment defense requires two elements: (1) government inducement of the crime, and (2) lack of predisposition on the part of the defendant."[17] So, because the people who commit crimes are ordinarily predisposed to commit them, it is difficult for defendants in federal courts to successfully raise an entrapment defense.[18]

In contrast, as noted earlier, a defendant's predisposition to commit the offense is irrelevant in California courts.[19]

Other issues

In addition to the basic principles, there are some other things about entrapment that should be noted.

Gaining the defendant's confidence: One of the most common misconceptions among criminals is that entrapment automatically results whenever an undercover officer assures them that he is not an officer or if he took other reasonable steps to gain the suspect's confidence. But, as the California Supreme Court explained:

> There will be no entrapment when the official conduct is found to have gone no further than necessary to assure the suspect that he is not being "set up." The police remain free to take reasonable, though restrained, steps to gain the confidence of suspects.[20]

Officers initiated the criminal plan: Entrapment will not automatically result merely because officers initiated the contact with the defendant or because officers proposed the commission of a crime.[21] Again quoting the California Supreme Court, "[W]e are not concerned with who first conceived or who willingly, or reluctantly, acquiesced in a criminal project."[22] As a practical matter, however, entrapment seldom results when the defendant was the instigator because there would have been no reason for officers to entice him.[23]

No vicarious entrapment: Entrapment is a defense only if the defendant was the person who was induced to commit the crime; i.e., the law does not recognize vicarious entrapment.[24]

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[15] *People* v. *Barraza* (1979) 23 Cal.3d 675, 686.

[16] See *United States* v. *Russell* (1973) 411 U.S. 423, 436; *Sherman* v. *United States* (1958) 356 U.S. 369, 372. **NOTE**: There is one exception to this rule. Known as "outrageous police conduct," it provides that a defendant who was predisposed will be entitled to an entrapment instruction if the officers' misconduct was "so shocking, outrageous and intolerable" as to constitute a violation of due process. See *U.S.* v. *Perrine* (10th Cir. 2008) 518 F.3d 1196, 1207; *U.S.* v. *Fernandez* (9th Cir. 2004) 388 F.3d 1199, 1238.

[17] (11th Cir. 2008) 527 F.3d 1156, 1159.

[18] See *People* v. *Holloway* (1996) 47 Cal.App.4th 1757, 1765 [California's entrapment standard "arguably provides defendants more protection from overreaching police conduct than the federal rule"].

[19] See *Douglass* v. *Board of Medical Quality Assurance* (1983) 141 Cal.App.3d 645, 655; *People* v. *Lee* (1990) 219 Cal.App.3d 829, 835 ["Under California law, "matters such as the character of the suspect, his predisposition to commit the offense, and his subjective intent are irrelevant."]; *People* v. *Peppars* (1983) 140 Cal.App.3d 677, 685-86 ["California has explicitly rejected the federal standard for entrapment; the stated purpose of the entrapment defense in this state is to assure lawfulness of law enforcement activity."]. **NOTE**: In *People* v. *Martinez* (1984) 157 Cal.App.3d 660 the court ruled that, because California's standard takes into account the mindset of a normally law-abiding person, it is the same or similar to the federal "subjective" test. But neither law nor logic supports this view. The "normally law-abiding person" test merely creates a standard of proof that the defendant must overcome. See *People* v. *Lee* (1990) 219 Cal.App.3d 829, 838 ["We agree with the weight of authority which has rejected this portion of *Martinez*."]; *People* v. *Slatton* (1985) 173 Cal.App.3d 487, 491-92 [rejects *Martinez* holding]; *People* v. *Arthurlee* (1985) 168 Cal.App.3d 246, 251 ["We do not follow the *Martinez* rationale"]; *People* v. *Grant* (1985) 165 Cal.App.3d 496, 500 [rejects *Martinez*].

[20] *People* v. *Barraza* (1979) 23 Cal.3d 675, 690, fn.4. ALSO SEE CALCRIM 3408 [no entrapment if the officer "merely tried to gain the defendant's confidence through reasonable and restrained steps"].

[21] See *U.S.* v. *Padron* (11th Cir. 2008) 527 F.3d 1156, 1159 ["The mere suggestion of a crime or initiation of contact is not enough."].

[22] *People* v. *Barraza* (1979) 23 Cal.3d 675, 688.

[23] See *People* v. *West* (1990) 224 Cal.App.3d 1337 [defendant approached undercover officer and asked, "You got anything?"].

[24] See *People* v. *Harris* (1985) 165 Cal.App.3d 324, 332 ["The law does not recognize a defense of vicarious entrapment."]; *People* v. *Holloway* (1996) 47 Cal.App.4th 1757, 1767 [entrapment defense cannot be asserted "by defendants not themselves affected by the alleged police overreaching"].

ENTRAPMENT BY A POLICE AGENT: Entrapment may result from the actions of a police agent, as well as an officer.[25] As the court explained in *People* v. *McIntire*, "[M]anipulation of a third party by law enforcement officers to procure the commission of a criminal offense by another renders the third party a government agent for purposes of the entrapment defense."[26]

SENTENCE ENTRAPMENT: In the federal courts, "sentence entrapment" occurs if the defendant was predisposed to commit a certain crime, but was persuaded by officers to commit a crime with more prison time.[27] In such cases, the defendant cannot be given the harsher sentence. Sentence entrapment is not a recognized defense in California.[28]

Having covered the basics, we will now examine the five types of inducements that are commonly alleged to constitute entrapment: providing a criminal opportunity, making the crime appear unusually attractive, importuning, exploiting vulnerabilities, and appeals to friendship or sympathy.

Providing a criminal opportunity

Entrapment does not result if officers merely provided the defendant with an opportunity to commit a crime. In the words of the U.S. Supreme Court:

> It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offenses does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises.[29]

Consequently, in the absence of pressure or importuning, officers may employ an undercover officer or police agent to pose as someone who is looking to commit a crime, such as a seller or buyer of drugs or stolen property, a prostitute, or a john.[30] For example, in *Provigo Corp*. v. *ABC Appeals Board* the court ruled that the use of underage decoys to attempt to buy alcoholic beverages in grocery stores did not constitute entrapment "so long as no pressure or overbearing conduct is employed by the decoy."[31]

Similarly, in *Douglass* v. *Board of Medical Quality Assurance*,[32] undercover agents posing as patients started visiting a physician, Douglass, because he was suspected of prescribing controlled drugs that were not medically indicated. Over time, Douglas prescribed Preludin, Seconal, Quaalude, Dexamyl, and Dexedrine to three "patients" who had merely complained of such maladies as backache, virus, and the need to "get going" in the morning. Once, he even prescribed Quaaludes to an agent because "she liked the way they made her feel." In rejecting the argument that the agents had entrapped Douglass, the court said, "Here, the agents' conduct simply provided Douglass the opportunity to engage in unprofessional conduct for the ordinary criminal motive of pecuniary gain. Douglass does not argue that agents badgered or cajoled him into providing the drugs and there is no evidence they did."

The same principle applies to "bait car" stings. For example, in *People* v. *Watson*[33] the defendant argued that a bait car operation constituted entrapment

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[25] See *Sherman* v. *United States* (1958) 356 U.S. 369, 373 ["The Government cannot disown [the informant] and insist that it is not responsible for his actions"]; *Bradley* v. *Duncan* (9th Cir. 2002) 315 F.3d 1091, 1096 [although the officers did not badger the defendant, "their decoy did"].
[26] (1979) 23 Cal.3d 742, 748.
[27] See *U.S.* v. *Knox* (7th Cir. 2009) 573 F.3d 441, 451 ["Sentencing entrapment occurs when a defendant who lacks a predisposition to engage in more serious crimes nevertheless does so as a result of unrelenting government persistence."].
[28] See *People* v. *Smith* (2003) 31 Cal.4th 1207.
[29] *Jacobson* v. *United States* (1992) 503 U.S. 540, 548. ALSO SEE *People* v. *Benford* (1959) 53 Cal.2d 1, 15 [the officers "simply gave defendant the opportunity to commit a crime, a legal, reasonable stratagem]; CALCRIM 3408 [entrapment does not result "[i]f an officer simply gave the defendant an opportunity to commit the crime"].
[30] See *U.S.* v. *Poehlman* (9th Cir. 2000) 217 F.3d 692, 701 ["Where government agents merely make themselves available to participate in a criminal transaction, such as standing ready to buy or sell illegal drugs, they do not induce commission of the crime."]; *Reyes* v. *Municipal Court* (1981) 117 Cal.App.3d 771, 778 [court rejects argument that a john was entrapped "because he was deceived by [the undercover agent's] looks and acts into thinking she was a prostitute"]; *People* v. *Holloway* (1996) 47 Cal.App.4th 1757, 1764 ["The police merely posed as drug buyers and sellers in a notorious drug trafficking area."]; *People* v. *Shapiro* (1974) 37 Cal.App.3d 1038, 1043 [controlled delivery of drugs was not entrapment].
[31] (1994) 7 Cal.4th 561, 568.
[32] (1983) 141 Cal.App.3d 645.
[33] (2000) 22 Cal.4th 220.

because the officers made a big production of stopping the car and "arresting" the driver while a group of spectators watched, then leaving the car unattended with the keys in the ignition. But the court ruled this was not entrapment because "normally law-abiding persons do not take a car not belonging to them merely because it is unlocked with the keys in the ignition and it appears they will not get caught."

While a lack of pressure is a relevant circumstance in determining whether a sting constituted entrapment, so is the fact that undercover officers or agents had provided the defendant with an opportunity to withdraw. For example, in *People* v. *Reed*[34] the court ruled that a sting involving lewd conduct with a minor did not constitute entrapment because, among other things, "the officers gave defendant every opportunity to withdraw from the plan," and "reminded him of the risks involved in such an enterprise."

One other thing pertaining to stings: In *United States* v. *Russell* the Supreme Court ruled that an undercover officer did not entrap a manufacturer of methamphetamine merely because he provided him with a precursor. As the Court pointed out, an undercover officer who is trying to infiltrate a criminal enterprise "will not be taken into the confidence of the illegal entrepreneurs unless he has something of value to offer them."[35]

Making the crime appear attractive

An officer's act of making the crime appear rewarding or otherwise attractive will not result in entrapment because, as the First Circuit observed, undercover operations are often "designed to tempt the criminally inclined, and a well-constructed sting is often sculpted to test the limits of the target's criminal inclinations."[36] For example, in *People* v. *Holloway*[37] the defendant argued that an undercover Santa Monica police officer entrapped him in the course of a reverse sting when, after the defendant initiated contact, the officer sold him drugs at less than resale value. In rejecting the argument, the court pointed out that the officer sold the drugs "only after trying to negotiate a higher price, which [the defendant] insisted he could not meet."

Similarly, in *People* v. *Peppars*[38] an undercover Sonoma County sheriff's deputy contacted Peppars, apparently for the purpose of selling a stolen wedding ring. In the course of the conversation, Peppers asked the officer if he "knew of a warehouse to rip off." The officer dodged the question but, about a week later, he told Peppers that he could obtain the keys to a certain warehouse from a former employee who had made a set of duplicates. He added that the warehouse was "full of stereo equipment, TVs and video recorders," and that the burglary will "just be a matter of walkin' in, loadin' up and walkin' out. No break in, no alarms or nothing'." Peppars took the bait, committed the burglary, and was arrested two days later. In what appears to be a close case, the court ruled that the defendant was not entrapped mainly because "it was appellant who had suggested the idea in the first place. . . . There was no reluctance on appellant's part to commit the crime; he was willing from the beginning."

Entrapment will, however, result if officers provided an extraordinary incentive; e.g., they represented that commission of the act was not illegal, or that it would go undetected, or that it would result in an exorbitant payoff.[39] As the Ninth Circuit put it:

> [T]he government induces a crime when it creates a special incentive for the defendant to commit the crime. This incentive can consist of anything that materially alters the balance of risk and rewards bearing on defendant's decision whether to commit the offense, so as to increase the likelihood that he will engage in the particular criminal conduct.[40]

[34] (1996) 53 Cal.App.4th 389.
[35] (1973) 411 U.S. 423.
[36] *U.S.* v. *Connell* (1st Cir. 1992) 960 F.2d 191, 196.
[37] (1996) 47 Cal.App.4th 1757.
[38] (1983) 140 Cal.App.3d 677. ALSO SEE *People* v. *Watson* (2000) 22 Cal.4th 220, 224 [officers "merely conveyed the idea detection was unlikely"].
[39] See *People* v. *Barraza* (1979) 23 Cal.3d 675, 690 ["[Entrapping] conduct would include a guarantee that the act is not illegal or the offense will go undetected, an offer of exorbitant consideration, or any similar enticement."].
[40] *U.S.* v. *Poehlman* (9th Cir. 2000) 217 F.3d 692, 698.

Importuning

Importuning will ordinarily result in entrapment because it is a form of pressure that results from persistent appeals, badgering, or harassment.[41] In the words of the California Supreme Court. "[I]t is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime."[42]

For example, in *Jacobson* v. *United States*[43] government agents happened to find the defendant's name on a list of people who had purchased a magazine containing nude photographs of young boys. Suspecting that he might also be ordering child pornography through the mails, a postal inspector sent him a letter from a fictitious business asking if he would be interested in purchasing photos of "lusty and youthful lads" and "pre-teen sex." While Jacobson responded to a questionnaire, he did not order anything. According to the Court, "There followed over the next 2½ years repeated efforts by two Government agencies, through five fictitious organizations and a bogus pen pal, to explore petitioner's willingness to break the new [child pornography] law by ordering sexually explicit photographs of children through the mail." Eventually, Jacobson ordered a catalogue containing child pornography but the Supreme Court ruled that the agents' importuning amounted to impermissible inducement. "By the time petitioner finally placed his order," said the Court, "he had already been the target of 26 months of repeated mailings and communications from Government agents and fictitious organizations."

Similarly, in *People* v. *McIntire*[44] an LAPD narcotics officer who was working undercover at a high school learned that the sister of a student named Todd was selling marijuana. There was testimony that, during a seven week period, the officer repeatedly asked Todd for marijuana, that he "always wanted dope," and that the officer "urged him to keep asking his sister to supply marijuana after she had indicated she didn't have any." Eventually, Todd's sister, McIntire, sold marijuana to the officer and was arrested. At her trial, the judge refused her request for an entrapment instruction, and she was convicted. But the California Supreme Court ruled that an entrapment instruction was warranted because there had been testimony that the defendant "acquiesced after constant urging by her younger brother because of sympathy aroused by family problems; and that the importuning from her brother was the direct result of strong and persistent pressure brought to bear by an undercover police agent."

While importuning will likely result in entrapment, officers may initiate contact with a suspect and make a request that would result in the commission of a crime or would probably do so. For example, in *People* v. *Smith*[45] the court ruled that the defendant was not entrapped when a police agent approached him with a plan for a home-invasion robbery. As the court observed, the defendant "expressed nothing but enthusiasm at the prospect of robbing a home where she was told 200 kilograms of cocaine would be found." Similarly, in *People* v. *McClellan* the defendant claimed that he had been entrapped when an undercover officer knocked on the door of his apartment and asked if he knew where he could get a "Sherm" (i.e., a cigarette dipped in PCP). In rejecting the defense, the trial judge told the defendant, "[N]ow here is a situation where the officer simply walks in. You don't know him from the man in the moon. He walks in and says he wants to buy a Sherm, and you just go and get him one."[46]

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[41] See *People* v. *Barraza* (1979) 23 Cal.3d 675, 690 [the law prohibits "overbearing conduct such as badgering, cajoling, importuning"]; *Provigo Corp.* v. *ABC Appeals Board* (1994) 7 Cal.4th 561, 569 ["[T]he rule is clear that ruses, stings, and decoys, are permissible stratagems in the enforcement of criminal law, and they become invalid only when badgering or importuning takes place to an extent and degree that is likely to induce an otherwise law-abiding person to commit a crime."].

[42] *People* v. *Barraza* (1979) 23 Cal.3d 675, 690.

[43] (1992) 503 U.S.540. ALSO SEE *Bradley* v. *Duncan* (9th Cir. 2002) 315 F.3d 1091 [agent was an addict going through withdrawal who begged the defendant to sell him drugs].

[44] (1979) 23 Cal.3d 742.

[45] (2003) 31 Cal.4th 1207, 1218.

[46] (1980) 107 Cal.App.3d 297.

Nor will entrapment result if officers ask a suspect to do something that, while not illegal per se, will likely result in the commission of a crime. For example, in *People* v. *Graves*[47] the defendant was operating a scam in which he would take orders from people on the street for "discount" airline tickets, which he would then purchase with stolen credit cards. In the course of the investigation, a Secret Service agent learned that one of the tickets was used by Reggie Cooks who told the agent that he bought the tickets from a man later identified as Graves. Under the agent's direction, Cooks phoned Graves and placed an order for two tickets to Hawaii.

A few days later, while still operating under the agent's direction, Cooks phoned Graves and told him that he and his girlfriend were "stuck in Hawaii," that they were not allowed to board their return flight because the airline claimed that the tickets were purchased with a stolen credit card. Cooks then told Graves, "Look, we can't get out of Hawaii, You have got to do something." Graves said he would "take care of it" and, a few hours later, he provided Cooks with two tickets on a return flight that Graves had purchased with a stolen American Express Card. Graves was subsequently convicted of, among other things, grand theft.

On appeal, the court rejected his argument that Cooks had entrapped him, citing two reasons. First, Cooks' request did not constitute "overbearing police conduct." Second, even though it was likely that Graves would charge the tickets on another stolen credit card, a "normally law-abiding person would not be induced by this telephone call to purchase more airline tickets with a stolen credit card in order to help the caller."

Similarly, in *Alcoholic Beverage Control* v. *ABC Appeals Board* the Court of Appeal ruled that an undercover ABC agent did not entrap a stripper at a club in San Diego merely because, in the course of a "couch dance," he asked if there would be "more skin involved," after which she showed him so much skin that her employer lost his liquor license. The agent's conduct, said the court, "was not of such a nature that it was likely to induce a normally law-abiding person to commit the offense." [48]

Exploiting vulnerabilities

The courts are especially apt to find entrapment if officers pressed a defendant who was physically or mentally vulnerable to their enticement. For example, in *People* v. *Barraza*[49] the California Supreme Court ruled that the defendant was entitled to a jury instruction on entrapment because there was evidence that he was a recovering heroin addict who sold heroin to an informant only because, (1) the informant telephoned him repeatedly at work; (2) the defendant agreed to meet with the informant because he was afraid that he would lose his job if the agent kept calling; and (3) during the meeting, which lasted more than an hour, the agent pressed him until he caved. Said the court, such conduct was consistent with the defense that the defendant "was a past offender trying desperately to reform himself but was prevented from doing so by an overzealous law enforcement agent who importuned him relentlessly until his resistance was worn down and overcome."

Similarly, in *U.S.* v. *Poehlman*[50] an undercover agent who was investigating child pornography began corresponding with Poehlman, apparently after finding his name on the membership list of an "alternative lifestyle" chat group. While Poehlman told her he was looking for companionship, the agent, "Sharon," suggested that she would be interested only if he agreed to become the "special teacher" to her two young daughters, eventually making it clear that this meant having sexual relations with them. As the court noted, she "repeatedly held her own relationship with Poehlman hostage to his fulfilling the role of special man teacher." Eventually, following lengthy correspondence along these lines, Poehlman arranged to meet with Sharon and her children at a motel. When he arrived, he was arrested, and was

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[47] (2001) 93 Cal.App.4th 1171.
[48] (2002) 100 Cal.App.4th 1094.
[49] (1979) 23 Cal.3d 675. ALSO SEE *Patty* v. *Board of Medical Examiners* (1973) 9 Cal.3d 356, 369 ["the employment of young women to obtain illegal prescribed drugs from elderly male doctors is not a new tactic to agents of the Board"].
[50] (9th Cir. 2000) 217 F.3d 692.

subsequently charged with crossing state lines for the purpose of engaging in sex with a minor.

But the Ninth Circuit ruled that the agent's conduct constituted entrapment. Among other things, the court noted that Poehlman "continued to long for an adult relationship with Sharon," he "offered marriage," talked about "quitting his job and moving to California," and "even offered his military health insurance benefits." Meanwhile, Sharon was making it clear that none of these things would happen unless Poehlman agreed to her terms; e.g., "If this is ok to you [sic], please tell me so. If not, I wish you well and I'll continue my search." Said the court, "Through its aggressive intervention, the government materially affected the normal balance between risk and rewards from the commission of the crime, and thereby induced Poehlman to commit the offense."

Appeals to sympathy or friendship

Entrapment will also result if the officers motivated the defendant to commit the crime by means of a strong emotional appeal such as close friendship or sympathy.[51] For example, in *Bradley* v. *Duncan*[52] an undercover narcotics officer contacted an addict on the street and told him that he was looking to buy some cocaine. The addict, Flores, was going through withdrawal and was in bad shape. According to the officer, he was "pale and shaking," his head "kept moving back and forth," and he said he desperately needed cocaine.

Although Flores said he didn't have any cocaine to sell, he agreed to take the officer to a seller up the street. The seller, Bradley, testified that when Flores arrived he "smelled like vomit; he was 'tweaking and twitching'; and he was 'shaking like a junky.'" According to Bradley, Flores told him "I need a fix, I'm hurting," adding, "Please, please, big man, would you help me out?" Bradley testified that he told Flores that he did not sell drugs, but that he knew some people nearby who did. So he rode his bicycle "up the street where the drug dealers congregated" and returned with cocaine, which he delivered to Flores.

In ruling that Bradley was entitled to an entrapment instruction, the Ninth Circuit noted, among other things, "Flores appeal, 'Please, please, big man, would you help me out?'—despite Bradley's statements that he neither had drugs nor sold them—could certainly be found by a jury to constitute badgering or cajoling."

Similarly, in *Sherman* v. *United States*[53] the defendant and an informant were addicts who happened to meet at the office of the doctor who was treating them. The informant told the defendant that he was "not responding to treatment" and asked if he "knew a good source of narcotics." The defendant said no and, for some time thereafter, he "tried to avoid the issue." But the informant persisted, making "a number of repetitions of the request" and claiming he needed the drugs because he was "suffering." Eventually, the defendant sold drugs to the informant and, as a result the defendant was convicted. But the United States Supreme Court overturned the conviction, ruling that entrapment results when "the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted."

In the absence of a close frienndship, however, entrapment is not apt to result merely because the defendant and the undercover officer were acquainted. For example, in *People* v. *Lee*[54] the defendant argued that she was entrapped because her decision to sell drugs to a police agent was motivated by feelings of friendship. But the court pointed out that, while the defendant and agent were friends, they were hardly close friends. Said the court, people have "best friends, dear friends, close' friends, [and] fair-weather friends." But here, said the court, "there was substantial evidence that Lee sold drugs to earn money, not out of friendship." POV

[51] See *People* v. *Barraza* (1979) 23 Cal.3d 675, 690 [appeal to "friendship or sympathy" would result in entrapment]; *People* v. *Thoi* (1989) 213 Cal.App.3d 689, 694 ["It would be repugnant for government agents to spawn Medi-Cal fraud by playing upon the sympathies of Vietnamese doctors for persons suffering in their mother country."]; *U.S.* v. *Poehlman* (9th Cir. 2000) 217 F.3d 692, 698 ["[T]he government induces a crime when it creates a special incentive for the defendant to commit the crime."].

[52] (9th Cir. 2002) 315 F.3d 1091.

[53] (1958) 356 U.S. 369.

[54] (1990) 219 Cal.App.3d 829. ALSO SEE *U.S.* v. *Vincent* (10th Cir. 2010) __ F.3d __ [2010 WL 2902748] [not entrapment when CI merely asked defendant to sell him drugs so that he could resell them and make some money to prevent being evicted];

Recent Cases

People v. Hartsch

(2010) 49 Cal.4th 232

Issue

Did officers violate a murder suspect's Sixth Amendment rights when they put him in a cell with his accomplice and secretly recorded their conversation about the crime?

Facts

After a night of partying and drug use, Cisco Hartsch and Frank Castaneda decided to go target shooting in an orange grove in Riverside County. When they arrived, they noticed a truck parked in the grove. The truck appeared to be unoccupied, and Hartsch told Castaneda he was going to steal it. But as he approached he saw a man and a woman asleep in the vehicle. Just then, the man awoke and Hartsch pulled out a .22-caliber pistol and fired several shots at him. As the woman screamed, Hartsch returned to the car and notified Castaneda that the two people in the truck were "not dead yet." So he reloaded his gun, walked back to the truck, and continued firing. All told, he shot the man seven times, and the woman 13 times. Both were killed. While driving back home, Hartsch told Castaneda that he shouldn't worry about the killings because "it's not like they were important. Nobody cared about them."

The bodies were discovered later that morning. At the scene, investigators found shoe prints around the truck; they were size 9½ with a "chevron pattern" that was consistent with Nike's.

The next day, Castaneda saw Hartsch driving a car with Angelica Delgado, the 14-year old sister of Castaneda's girlfriend. When Hartsch stopped to talk, he told Castaneda that he and Angelica were going to the orange groves to have sex. Four days later, Angelica's body was discovered in an orchard in Riverside. She had been shot five times in the head; embedded bullet fragments were "in the .22-caliber range." At the scene, investigators found shoe prints leading to and from the body. The shoes were size 9½, and the shoe prints indicated they were probably Nike's with a chevron pattern.

In the course of the investigation, the following occurred:

- Castaneda fled to Texas but was arrested by a state trooper during a traffic stop when he couldn't produce the vehicle registration.
- Investigators learned that Angelica had received a phone call from Hartsch shortly before she disappeared. When they went to Hartsch's house to talk with him, they noticed several shoe prints in the yard; they were similar to those found near Angelica's body.
- Hartsch told the investigators that he had two pairs of Nike's: one black, one white.
- Hartsch's employer told investigators that, when Hartsch arrived for work on the morning of the orange grove murders, he was wearing white tennis shoes.
- While executing a search warrant at Hartsch's home, investigators found a pair of black Nike tennis shoes, size 9½; the shoe prints did not match those found at the two murder scenes.
- Castaneda's girlfriend notified investigators that Castaneda told her that Hartsch had killed the couple in the orange grove.
- Investigators flew to Texas and interviewed Castaneda in jail. He confirmed that Hartsch had committed the orange grove murders.
- A firearms expert determined that all three murder victims were shot with the same .22-caliber handgun.
- Semen was found in Angelica's vagina. A comparison with Hartsch's DNA revealed there was only a one in one billion chance that the semen came from anyone other than Hartsch.
- Hartsch admitted to investigators that he had driven to the orange grove with Castaneda on the night of the murders, but claimed he had been drunk and was unable to remember what had happened. He eventually admitted that "it was possible" he had "shot up a car in the groves without realizing anyone was in it."
- Hartsch was charged with three counts of murder and was housed in the Riverside County Jail.

After waiving extradition, Castaneda was taken back to Riverside County where he, too, was housed in the county jail. An investigator testified that he had initially instructed jail officials to keep Castaneda and Hartsch separated, but he later decided to put them together in a cell that had been wired for sound. He testified that his plan "was to see if [Hartsch] would make any incriminating statements," and to see if Castaneda would make any inconsistent statements.

In the course of a recorded conversation, Hartsch told Castaneda that the investigators "got the wrong shoes" and that his mother had thrown out the white Nike's he had been wearing on the night of the orange grove murders. Hartsch also asked Castaneda to call a mutual friend and "tell him to get the fuckin' rid of that shit," which Castaneda interpreted to mean his .22-caliber handgun. Hartsch said he wasn't worried about the murder charges because "there was no evidence." When Castaneda disagreed, Hartsch "spoke about getting rid of the gun," saying it was "the only thing they can use."

At trial, a recording of the conversation was played to the jury. Hartsch was convicted of all three murders and was sentenced to death.

Discussion

On appeal to the California Supreme Court, Hartsch contended that his conversation with Castaneda should have been suppressed because it was obtained in violation of the Sixth Amendment. The court disagreed.

In 1964, the United States Supreme Court ruled in the landmark case of *Massiah* v. *United States*[1] that a Sixth Amendment violation results if an undercover officer or police agent "deliberately elicits" information from a suspect about a crime with which he had been charged. Over the years, the courts have broadly interpreted the term "deliberately elicit" to include merely engaging the suspect in a conversation about a charged crime. Moreover, in 2008 the Supreme Court ruled that, in the context of the Sixth Amendment, a suspect becomes "charged" when he is arraigned on criminal charges in court.[2] Consequently, the conversation between Hartsch and Castaneda would have violated *Massiah* if, at the time it occurred, Castaneda had been a police agent.

Although Castaneda had not agreed to work as a police agent, it is settled that the agency requirement will be satisfied if officers gave the person an incentive to elicit incriminating statements from the suspect, especially if the officers then arranged for them to be alone together.[3] Citing this principle, Hartsch argued that the investigators had, in fact, given Castaneda a motive to elicit incriminating information because, according to Castaneda's testimony, one of the investigators told him that, because he might be charged as an accessory in the orange grove murders, "it would be in his interest to cooperate with the police," and the officer added, "my door is always open."

The court ruled, however, that this was insufficient evidence of an implied agreement, saying "[t]he mere fact that Castaneda decided to cooperate with the police did not transform him into a police agent."[4] Moreover, as the court pointed out, "Castaneda was unaware of the taping arrangement. There is no evidence the police ever prompted him to obtain statements from defendant. He was given no instructions regarding the meeting in the cell or even advance notice that it would take place."

For these reasons, the court ruled that Hartsch's statement was obtained lawfully. It then affirmed his murder convictions and death sentence.

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[1] (1964) 377 U.S. 201.

[2] *Rothgery* v. *Gillespie County* (2008) 554 U.S. 191, __ ["[A] criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel."].

[3] See *United States* v. *Henry* (1980) 447 U.S. 264, 274 [the agents had created "a situation likely to induce Henry to make incriminating statements"]; *People* v. *Whitt* (1984) 36 Cal.3d 724, 742 ["[T]he critical inquiry is whether the state has created a situation likely to provide it with incriminating statements from an accused."]; *In re Neely* (1993) 6 Cal.4th 901, 917-18 [a deputy told the informant that he "was seeking specific information from [the defendant] as to the whereabouts of the murder weapon," and the deputy "encouraged and instructed [the informant] as to the means by which [he] could procure this information from [the defendant]"].

[4] See *People* v. *Whitt* (1984) 36 Cal.3d 724, 744 ["The detectives' offer to speak to the prosecutor on [the informant's] behalf raises a serious concern as to whether the state gave [the informant] an incentive to extract further statements from Whitt."]; *People* v. *Memro* (1995) 11 Cal.4th 786, 828 [informant was promised safe housing "after he obtained defendant's statements"].

People v. Williams

(2010) 49 Cal.4th 405

Issue

In the course of an interrogation, did a murder suspect invoke his *Miranda* right to counsel?

Facts

At about 8 P.M., Joanne Lacey was driving home from work at a Post Office in downtown Los Angeles when she was involved in a traffic accident with David Williams. It was a minor collision, but when Ms. Lacey said she wanted to call the police, Williams forced her into her car at gunpoint and abducted her. Over the next few hours, he directed Ms. Lacey to withdraw money from an ATM machine and to arrange for a friend of Ms. Lacey to meet her at a location in Altadena and give her $500 in cash. The friend later told officers that, when she handed the money to her, Ms. Lacey was accompanied by a man with shoulder-length black hair.

Williams then drove Ms. Lacey to Pasadena where he picked up a friend, Loretta Kelly. A little later, he forced Ms. Lacey into the trunk of the car and, using gasoline purchased by another friend—Margaret Williams—set the car ablaze. When firefighters extinguished the fire, they found Ms. Lacey's charred body in the trunk. They also found a .22-caliber revolver in the street near the car.

Four days later in Pasadena, homicide Det. John Knebel, received a phone call from a man named John Wright. According to Wright, his daughter was told by Margaret Williams that she "had been paid to purchase gasoline and to serve as a lookout while someone burned up an automobile." The next day, Det. Knebel arrested Margaret on a warrant for an unrelated assault charge. He then questioned her about the Lacey murder and learned that David Williams had visited her shortly after the murder, that his hand was burned and, when she asked what had happened, he said, "I burnt the bitch up." Det. Knebel arrested Williams later that day. He noticed that Williams had shoulder-length black hair.

About two hours later, Det. Knebel and Det. Lionel Salgado interviewed Williams at the police station. After Knebel advised Williams of his *Miranda* rights and after Williams confirmed that he understood his rights, the following exchange ensued:

Knebel: Do you wish to give up your right to remain silent?
Williams: Yeah.
Knebel: Do you wish to give up the right to speak with an attorney and have him present during questioning?
Williams: You talking about now?
Knebel: Do you want an attorney here while you talk to us?
Williams: Yeah.
Knebel: Yes you do?
Williams: Uh huh.
Knebel: Are you sure?
Williams: Yes.
Salgado: You don't want to talk to us right now?
Williams: Yeah, I'll talk to you right now.
Knebel: Without an attorney?
Williams: Yeah.
Knebel: OK, let's be real clear. If you want an attorney here while we're talking to you we'll wait till Monday [the interview occurred on a Saturday] and they'll send a public defender over, unless you can afford a private attorney.
Williams: No, I don't want to wait till Monday.

Williams then waived his right to counsel and, in the course of the subsequent interview, he denied any involvement in the crimes. He was returned to the jail.

Three days later, Det. Knebel arranged for a physician to examine some burn marks on Williams' hand and ankle. After the examination, Williams said he wanted to talk with Knebel who began by reminding him of the *Miranda* rights he had waived on Saturday. Williams then admitted he had "participated" in setting fire to Ms. Lacey's car, but denied knowing that she was in the trunk.

A few hours later, Knebel obtained another waiver and asked him about the handgun that was found at the murder scene. Williams admitted that it was his gun and, as the interview progressed, he confessed that he had robbed Ms. Lacey, kidnapped her, and doused her car with gasoline. But he claimed that Loretta Kelly had ignited the fire.

Williams' statements were used against him at trial, and he was convicted of capital murder, kidnapping for robbery, and arson causing great bodily injury. He was sentenced to death.

Discussion

Williams contended that his statements should have been suppressed because he had previously invoked his *Miranda* right to counsel as the result of the following exchange:

Knebel: Do you want an attorney here while you talk to us?
Williams: Yeah.
Knebel: Yes you do?
Williams: Uh huh.

In the abstract, these words would plainly have constituted an invocation. But in determining whether a suspect invoked, his words must be considered in context; i.e., in light of what he said beforehand.[5] And here, said the court, Williams had said two things that indicated he did not intend to invoke.

First, just seconds earlier he showed no hesitation in waiving his right to remain silent. Second, as discussed earlier, when he was asked if he wanted to waive his right to counsel, he said, "You talking about now?" This response, said the court, could be reasonably interpreted to mean that he wanted to have an attorney present if one could be provided immediately; but when he learned that an attorney would not be available until Monday, he made it clear that he was willing to talk without one. As the court explained the situation:

> [Defendant] had indicated to the officers that he understood his rights and would relinquish his right to remain silent. When asked whether he also would relinquish the right to an attorney and to have an attorney present during questioning, defendant responded with a question concerning timing. In light of defendant's evident intent to answer questions, and the confusion observed by Knebel concerning when an attorney would be available, a reasonable listener might be uncertain whether defendant's affirmative remarks concerning counsel were intended to invoke his right to counsel.

Accordingly, the court ruled that because Williams' words did not constitute an invocation when considered in context, and because his words suggested some ambiguity—at least "sufficient ambiguity that a reasonable officer would be uncertain of defendant's actual intent"—it was appropriate for Det. Knebel to try to resolve the confusion by asking the two follow-up questions; i.e., "Are you sure?" and "You don't want to talk to us right now?" The court then ruled that, because these questions resolved the ambiguity, and because Williams thereafter waived his rights, his statements were obtained in compliance violation of *Miranda*.

Williams raised several secondary issues pertaining to the admissibility of his statement, but the court rejected them. It then affirmed his conviction and death sentence.

Comment

After *Mirandizing* a suspect, officers will ordinarily ask something like, "Do you understand the rights I have just read to you?" If he says yes, they will ask the waiver question; e.g., "Having these rights in mind, do you want to talk with us now?" In the past few years, however, officers have sometimes split the procedure into two parts. For example, they might advise the suspect of his right to remain silent, then ask if he understands that right and, if so, whether he wants to waive it. If he says yes, they will advise him of his right to counsel and repeat the process.

There is, however, no legal or logical reason to complicate the waiver process by seeking two separate statements of understanding or two separate waivers. On the contrary, it requires that the suspect make two critical decisions instead of one. And this may induce an invocation or, as here, produce a problematic situation in which officers must attempt to clarify a potential invocation. Experience has shown that the most effective way to comply with *Miranda* is to keep it simple.

Mickey v. Ayers

(9th Cir. 2010) 606 F.3d 1223

Issue

Did a conversation between an officer and an arrestee on an extradition flight from Japan constitute "interrogation" under *Miranda*?

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[5] See *Connecticut* v. *Barrett* (1987) 479 U.S. 523, 528 ["Nothing in our decisions or in the rationale of *Miranda*, requires authorities to ignore the tenor or sense of a defendant's response to these warnings."].

Facts[6]

After committing a drug-related double murder in Placer County, Douglas Mickey fled to Japan where he was arrested on an extradition warrant. Placer County Sheriff Donald Nunes flew to Japan and attempted to interview him, but he invoked his *Miranda* right to counsel. He was later transported back to Placer County by Nunes and Det. Curtis Landry.

At the start of the flight, Mickey and Sheriff Nunes sat together and engaged in some "small talk." Nunes testified that Mickey "spoke of his family and hobbies and was generally pleasant and talkative." When Nunes and Landry switched seats, Mickey talked to Landry about "philosophy, politics, food, football, family, and California." Landry told Mickey that he had watched him play high school football, that he knew about his brother's suicide, and he had participated in the investigation into the death of his mother.

About two hours later, Mickey asked if the two murder victims had been buried together. When Landry said they had been cremated and that their ashes had been "scattered in the High Sierra," Mickey "suffered an emotional lapse." Landry testified that Mickey "was openly crying" and "found it difficult to speak." After he calmed down, he said that "nothing would have happened" if the man had not become angry about a dispute they had had over drugs. Landry did not respond to Mickey's statement; he just listened. As they left the plane for an overnight stopover in Hawaii, Mickey told Landry, "Curt, I would like to continue our conversation at a later time." Mickey was then transported to the Honolulu County Jail. Meanwhile, Nunes phoned a deputy DA in Placer County and related what Mickey had said. The DA advised him to visit Mickey in the jail and ask "if he wanted to speak and, if Mickey said yes, to *Mirandize* and then to interrogate him."

The interview was conducted by Det. Landry. After confirming that Mickey still wanted to talk to him, Landry obtained a *Miranda* waiver and began questioning him about the murders. During the interview, which lasted over four hours, Mickey gave a detailed account of how he carried out the killings. His confession was used against him at trial; he was found guilty, and sentenced to death.

After the California Supreme Court affirmed the convictions and death sentence, Mikey filed a petition for a writ of habeas corpus with the Ninth Circuit.

Discussion

In his writ, Mickey contended that, because he had invoked his *Miranda* right to counsel in Japan, his in-flight admission and subsequent confession should have been suppressed. The Government responded that the in-flight conversations did not violate *Miranda* because it is undisputed that officers are free to communicate with suspects who have invoked so long as their communication does not constitute "interrogation." The question, then, was whether the conversations on the plane should have been considered interrogation.

In the context of *Miranda*, "interrogation" occurs if officers asked questions that were reasonably likely to elicit an incriminating response.[7] But, as the court pointed out, the officers asked no questions during the flight and "only responded to Mickey's desire for small talk." It also noted that casual conversation of this sort "is generally not the type of behavior that police should know is reasonably likely to elicit an incriminating response." Accordingly, it ruled that the in-flight conversations did not constitute prohibited post-invocation interrogation.

Second, Mickey argued that the statements he made in the Honolulu jail were made in response to interrogation because, unlike the situation on the plane, Landry's jailhouse conversation included questions about the crime with which Mickey was charged. But the court ruled the interview was permitted nevertheless because Mickey effectively initiated it when, as he disembarked in Honolulu, he told Landry that he "would like to continue our conversation at a later time."

Third, Mickey contended that Landry had engaged in prohibited "softening up" during the flight by "participating in a discussion of the connections between their two families, including Landry's knowledge of Mickey's brother's suicide." In 1977, the California Supreme Court outlawed a *Miranda* tactic called "softening up," which is loosely defined as a ploy in which officers, who have reason to believe that a suspect will not waive his rights, engage him in

[6] **NOTE**: Some facts were taken from the California Supreme Court's decision, *People* v. *Mickey* (1991) 54 Cal.3d 612.
[7] See *Rhode Island* v. *Innis* (1980) 446 U.S. 291.

a lengthy pre-waiver conversation for the purpose of causing him to believe it would be advantageous to talk; e.g., the officers disparaged the victim to make it appear they were on the suspect's "side."[8] Although the courts have not been receptive to such claims, defendants frequently raise the issue, usually as a last-ditch effort to obtain a suppression order.

In any event, the court in *Mickey* ruled that no softening up had occurred here, pointing out that Det. Landry "did not intend and had no reason to know that his statements about his various family members and how they interacted with Mickey's family were likely to elicit an incriminating response in the context of a conversation ranging from California, philosophy, and politics to family, food, and football."

For these reasons, the court ruled that Mickey's statements were properly admitted into evidence, and it affirmed his conviction and death sentence.

People v. Bloom

(2010) 185 Cal.App.4th 1496

Issue

Did a police dispatcher make a lawful citizen's arrest of a man for making annoying or harassing 9-1-1 calls?

Facts

Craig Bloom liked to make annoying phone calls to the 9-1-1 operators in Palm Springs. He would phone repeatedly, scream into the phone and call the operators obscene names. It got so bad that they wouldn't answer the phone when his home phone number appeared on their monitors. So he started using pay phones.

Although Bloom was violating the law, officers could not arrest him because his crime (Pen. Code § 653x) was a misdemeanor and, under California law, officers cannot ordinarily arrest a person for a misdemeanor unless it was committed in their presence.

One night, after Bloom had called over 40 times, one of the operators decided to take matters into her own hands. So she dispatched officers to the location of Bloom's most recent call and told them to arrest him because she was hereby making a citizen's arrest. When the officers arrived, Bloom resisted arrest and was charged with, among other things, battery on a peace officer in the performance of his duties. In the trial court, Bloom argued that, for reasons discussed below, the officers were not acting in the performance of their duties. But the court disagreed, and Bloom eventually pled guilty.[9]

Discussion

Bloom appealed the court's ruling, arguing that his arrest was unlawful because, (1) his calls to 9-1-1 did not occur in the presence of the arresting officers, and (2) the 9-1-1 operator did not comply with the legal requirements for making citizens' arrests.

"In the presence": As noted, officers may not ordinarily arrest a person for a misdemeanor without a warrant unless they have probable cause to believe that the arrestee committed the crime "in their presence."[10] This requirement also applies to citizens' arrests for misdemeanors,[11] which meant that Bloom's arrest would have been unlawful unless the officers had probable cause to believe that his crimes had been committed in the operator's presence.

Because Bloom committed his crimes while speaking on phones that were probably miles away from the police station, he argued that his crimes were not committed in the operator's presence. But the court disagreed, ruling that the term "presence" does not require *physical* proximity. Instead, it simply means the crime must have been "apparent to the senses" of the citizen. And because hearing is a "sense," Bloom's 9-1-1 calls were committed in the operator's presence. Said the court, "Here, the misdemeanor offense of making annoying and harassing calls to 9-1-1 was made in the dispatcher's presence because she was personally engaged in the telephone calls."

Citizen's arrest requirements: Bloom also argued that a citizen's arrest is unlawful if the suspect was taken into custody by someone other than the citizen; i.e., police officers. It is settled, however, that

[9] **NOTE**: Bloom pled guilty after the judge reduced the crimes to misdemeanors per Pen. Code § 17(b). The Court of Appeal said the "more appropriate procedure" would have been to reduce the felonies to misdemeanors *after* the defendant pled guilty.
[10] See Pen. Code § 836(a)(1). **NOTE**: There are several exceptions to this requirement, such as arrests for juveniles, certain DUI offenses, and domestic violence. See Welf. & Inst. Code § 625; Veh. Code § 40300.5; and Pen. Code §§ 243.5, 12031(a)(3), 836.
[11] Pen. Code § 837.1.

a citizen who has probable cause to arrest a person may delegate to officers his or her right to take physical custody.[12] Furthermore, such a delegation need not be formal ("I hereby delegate . . .") but will be implied if the citizen promptly notified officers that the crime had just been committed, and if the citizen stated that he or she wanted to make a citizen's arrest.

An intent to delegate will also be implied if the citizen took steps to keep the suspect on the scene, follow him, identify him, or learn his whereabouts—as any of these actions reasonably indicates that the citizen wanted the officers to take him into custody.[13] As the 9th Circuit explained, "A private person making a citizen's arrest need not physically take the suspect into custody, but may delegate that responsibility to an officer, and the act of arrest may be implied from the citizen's act of summoning an officer, reporting the offense, and pointing out the suspect."[14]

Consequently, the court ruled that the arrest of Bloom was lawful because, (1) the 9-1-1 operator had probable cause to arrest him, (2) the crimes were committed in her presence, and (3) she immediately notified officers of her decision to arrest him.

"STALE" MISDEMEANOR? Finally, Bloom argued that his arrest was unlawful because the crime was a "stale" misdemeanor. The courts seem to be in agreement that an arrest for a "stale" misdemeanor is unlawful, and that a misdemeanor becomes "stale" if the officer or citizen delayed making the arrest for an unreasonable period of time after developing probable cause.[15] As the court in *Bloom* explained, this essentially means that "the arrestor must proceed as soon as possible to make the arrest, and if instead of doing so he goes about other matters unconnected with the arrest, the right to make the arrest ceases." This was not, however, an issue in *Bloom* because the operator's request to arrest Bloom was made immediately after his last call.

City of Ontario v. Quon

(2010) __ U.S. __ [2010 WL 2400087]

Issues

(1) Did a police officer have a reasonable expectation of privacy in the contents of text messages that he sent and received over a police-issued pager? (2) If so, did his supervisors violate his Fourth Amendment rights when they obtained and read transcripts of his messages?

Facts

To alert its SWAT officers of call-outs, the Ontario Police Department provided them with pagers that were capable of sending and receiving text messages. The department also announced a policy that it "reserves the right to monitor and log all network activity" including text messaging; and that officers "should have no expectation of privacy or confidentiality when using these resources."

One of the officers who received a pager was Jeff Quon. Because he had repeatedly exceeded the allocated number of text messaging characters per month, his supervisor obtained transcripts of his text messages from the wireless service provider and determined that, during one month, Quon had sent or received 456 messages during work hours, but that no more than 57 of them were work related. After Quon was disciplined for misusing his pager, he sued the department on grounds that his messages were private, and therefore his supervisor had violated the Fourth Amendment when he reviewed them.

Following a jury trial, a federal district court judge ruled that the department did not violate Quon's Fourth Amendment rights. Quon then appealed to the Ninth Circuit which reversed the judgment, ruling that, (1) he had a reasonable expectation of privacy in the text messages, and (2) the search was unreasonable in its scope because there were less

[12] See *Padilla* v. *Meese* (1986) 184 Cal.App.3d 1022, 1030 ["[The citizen] may delegate the act of taking the suspect into physical custody."]; *People* v. *Sjosten* (1968) 262 Cal.App.2d 539, 544 ["[T]he authority of Officer Smith to make the arrest at the request of Mrs. Morales is well established."].

[13] See *Padilla* v. *Meese* (1986) 184 Cal.App.3d 1022, 1030 ["[T]he delegation of the physical act of arrest need not be express, but may be implied from the citizen's act of summoning an officer, reporting the offense, and pointing out the suspect."].

[14] *Meyers* v. *Redwood City* (9th Cir. 2005) 400 F.3d 765, 772.

[15] See *People* v. *Craig* (1907) 152 Cal. 42, 47 ["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."]; *Green* v. *DMV* (1977) 68 CA3 536, 541 ["the arrest must be effected . . . within a reasonable time after the offense is committed"]; *P* v. *Hampton* (1985) 164 CA3 27, 30 [the arrest "must be made at the time of the offense or within a reasonable time thereafter."].

intrusive means of determining whether Quon was misusing his pager. The department appealed to the United States Supreme Court.

Discussion

Under established law, a police department or other government agency may lawfully review communications over government-issued devices if, (1) the employee could not reasonably expect that the communications were private, or (2) the employer had a legal right to review them. Here, the Court decided not to decide whether Quon could reasonably expect privacy in his text messages because, even if he did, the Court ruled the city had a legal right to obtain and inspect copies.

The Court's ruling was based on the settled principle that a federal, state, or local agency may search places and things in the workplace that are owned by the government but used by employees if the search was, (1) reasonably necessary to obtain evidence of "work-related misconduct," and (2) not unduly intrusive in light of the nature of the misconduct.[16]

The Court then applied these requirements to the facts of the case and made the following determinations. First, it was apparent that Quon's excessive text messaging provided the department with sufficient proof of work-related misconduct.

Second, the Ninth Circuit had either neglected to address the intrusiveness issue or had misunderstood it. Specifically, it thought that any intrusion is unlawful if it was not the least intrusive means available under the circumstances. But, as the Supreme Court pointed out in *Quon*, "This Court has repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment."[17] Instead, it has ruled that a search may be invalidated only if officers were negligent in failing to recognize and implement the less-intrusive alternative. Thus, in 1985 the Court observed, "The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it."[18] The Court then ruled that, because there was no reason to believe the search of Quon's text messages was excessive in its scope, the Ninth Circuit erred when it ruled the search was unlawful.

Comment

Two things. In the recent case of *U.S.* v. *Struckman* (see the Summer 2010 *Point of View* for a report), another Ninth Circuit panel employed the "least intrusive means" test to suppress evidence; this time, it was a gun that officers had obtained from a suspected burglar. It appears there are some judges on the Ninth Circuit who either don't read the opinions of the United States Supreme Court or choose to ignore them.

Second, although the Supreme Court's decision in *Quon* was well-reasoned, it was disappointing because it was widely expected to be *the* case in which the Court would rule on whether, or to what extent, people can expect privacy in text and email messages (and maybe stored cell phone messages) when, as is usually the case, a copy of the message was kept by an internet or cellular provider.

Strangely, the Court said that it decided not to rule on this issue because the "judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." But if the "emerging" character of a government activity were to stand as a barrier to "elaborating" constitutional standards for its use, there would never be a ruling on privacy in digital communications because the technology will be emerging for decades, probably centuries.

Taking note of the timorous tone of the Court's opinion, the Eleventh Circuit aptly pointed out that it "shows a marked lack of clarity in what privacy expectations as to content of electronic communications are reasonable."[19] POV

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[16] See *O'Connor* v. *Ortega* (1987) 480 U.S. 709, 726; *Schowengerdt* v. *General Dynamics* (9th Cir. 1987) 823 F.2d 1328, 1335-36 ["Ordinarily, a search of an employee's office by a supervisor will be justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct"].

[17] ALSO SEE *United States* v. *Sharpe* (1985) 470 U.S. 675, 687; *Atwater* v. *City of Lago Vista* (2001) 532 U.S. 318, 350 [the "least-restrictive-alternative limitation" is "generally thought inappropriate in working out Fourth Amendment protection"]; *United States* v. *Sokolow* (1989) 490 U.S. 1, 11 ["The reasonableness of the officer's decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques."].

[18] *United States* v. *Sharpe* (1985) 470 U.S. 675, 686.

[19] *Rehlberg* v. *Paulk* (11th Cir. 2010) __ F.3d __ [2010 WL 2788199].

The Changing Times

Alameda County District Attorney's Office

We mourned the loss of our colleague **Art Garrett** who died on July 14, 2010 from complications that developed following surgery. Art was 59 years old. During his 36-year career with the DA's Office, Art and **Vicki Long** established the DA's Forensic Video Unit which, among other things, produces outstanding educational videos that are utilized by prosecutors in several California counties, and a legal update for POST. Art is survived by his wife **Dottie Garrett**, who retired from the DA's Office last year.

Assistant DA **Ann Diem** retired after 25 years of service. Support staff supervisor **Waver Green** retired after 16 years of service. **Paul Balzouman**, who retired from Oakland PD, was hired as an Inspector II. Retired support staff supervisor **Joy Borba** died on August 5, 2010.

Alameda County Narcotics Task Force

Roger Lee was reassigned to Oakland PD due to the current shortage of Oakland officers.

Alameda Police Department

The following officers retired: Lt. **Art Fuentes** (30 years), Sgt. **Steve Rodekohr** (32 years), **Russ Thurman** (20 years), and **Pete Murray** (27 years). The following officers were promoted to sergeant: **Wayland Gee**, **Jennifer Basham**, and **Eileen Tannahill**. **Lorenzo Graham** was promoted to acting sergeant. New officers: **Edward Wisgerhof**, **Adam DiGiusto**, **Adam McCallon**, **David Lloyd**, and **Rob Stofle**. Transfers: **Rick Bradley** from SRO to Patrol, **Pete Yakas** from Patrol to SRO, **Edward Dowd** from Patrol to Property Crimes, and **Jeff Emmit** from Patrol to Personnel and Training.

Berkeley Police Department

Lt. **Erik Upson** was promoted to captain. Sgt. **Kevin Schofield** was promoted to lieutenant. **Emily Murphy** was promoted to sergeant. The following officers retired: Lt. **Craig Juster** (25 years), **Tony Lau** (24 years), **Alan Pagle** (20 years), **Thomas Jeremiason** (17 years), and **Lori Cutler** (15 years). **Lloyd Grove** resigned to pursue a law degree at Georgetown University.

California Highway Patrol

Dublin Area: The following officers were selected for specialized units: **Nicholas Doko** (Headquarters MAIT Unit) and **George Granada** (Office of Judicial Protection). Transferring in: **Mitchell Buck** (Contra Costa Area), **Shawna Pacheco** (Contra Costa Area), **Bruce Calero** (Redwood City Area), **Sean Harrington** (Altadena Area), and **Richard Murrieta** (San Gregorio Pass Area).

East Bay Regional Parks Police Dept.

After 33 years of service with San Francisco PD, **Tom Walsh** was hired as a lateral police officer. **Stephannie Guerrero** was hired as a dispatcher. After completing a three year compliance process, the department was awarded full CALEA accreditation.

Emeryville Police Department

Lateral appointment: **Jared Malec** (Rohnert Park PD). Congratulations go out to Chief **Ken James** who went "Over the Edge" for the Special Olympics, and to Police Services Technician **Sherry Hughes** who talked him into it. EPD raised $1,000 so the chief could rappel 37 stories down the San Francisco Grand Hyatt. The event, which was sponsored by KTVU, was conducted over two days to promote awareness and have fun. All proceeds went to benefit the Special Olympics. Finally, the department now has a Facebook page that is used for community networking and awareness. Chief James believes that this new media is a positive step to reach out to our citizens to bring police and community closer together.

Fremont Police Department

Officer **Todd Young** was shot and critically injured on August 27, 2010 while attempting to serve an arrest warrant in Oakland on a Fremont gang member. The perpetrator was arrested the next day by San Diego police. Lt. **Greg Gerhard** retired after 30 years of service. Det. **William Carattini** retired after 23 years of service. Lateral appointments: **Darryl Manrique** (Newark PD) and **Gailan Chahouati** (Ripon PD). New officers: **Bryan Hollifield**, **Joshua Harvey**, and **Lindsey Snyder**. New communications dispatcher: **Kristen Parks**.

Newark Police Department

David Ramirez took a disabilitiy retirement after nearly 15 years at Newark PD. **Darryl Manrique** left the department to join Fremont PD. Transfers: Sgt. **Mike Carroll** from Patrol to the Detective Division, and Sgt. **Renny Lawson** from Personnel and Training to Patrol. **David Higbee** was recognized as 2009 Officer of the Year.

Oakland Housing Authority Police Dept.

Acting sergeant **Kenneth Nielsen** was promoted to sergeant. **Luther DuPree** was promoted to acting sergeant. Clerical Services Supervisor **Jackie Mesterhazy** was promoted to Communications Records Supervisor. Later appointments from Oakland PD: **Arzo Homayun**, **Melissa Baddie**, **Qiana Johnson**, **Michael Quijano**, and **Derek Souza**. New officers: **Jason Zimiga** and **Nathan Mumbower**. New Police Service Aids: **Rianne Moland** and **Nequiche Johnson**.

The department was awarded Explorer Post #3200 by the Boy Scouts of America. New police explorers: **Ahmed Abdelrahman**, **Chandri Kim**, **Anthony Pen**, **James Posey**, and **Dajoun Sephers**. Each explorer passed Class #1 of the Mission Peak Law Enforcement Explorer Academy.

Oakland Police Department

The department underwent an acute reduction in force due to the city's budgetary plight. To date, 79 officers were laid off, and eight sergeants were reduced in rank to officer.

Lt. **Anthony Banks** was promoted to captain. The following officers have retired: Lt. **Lawrence Green** (24 years), Sgt. **Mitchell Powell** (21 years), Sgt. **Paul Balzouman** (21 years), Sgt. **Jeffrey Ferguson** (28 years), and **Andrew Barton** (26 years). The following officers have taken disability retirements: **Allen Hall**, **Shaun Lyevers**, **Michael McArthur**, **Steven Chavez**, **Jacob Floyd**, **Enrico Taupal**, and **Christopher Yanke**.

Pleasanton Police Department

Sgt. **Scott Rohovit** was promoted to lieutenant. **James Boland** and **Kurt Schlehuber** were promoted to sergeant. All three were assigned to the Operations Division. Sgt. **Barry Mickleburgh** retired after 26 years of service. **Kelly O'Neal** retired after 25 years of service, preceded by nine years as a reserve. Office Manager **Paula Janusek** retired with over 25 years of service to the city. Lateral appointment: **Eric Gora** (Citrus Heights PD). **Mardene Lashley** and **Matt Lengel** transferred from Patrol to Investigations.

San Leandro Police Department

Chief of Police **Ian Willis** retired after 26 years of service, the last three as Chief. Officer **Tai Nguyen** retired after 22 years of service. Transfers: Lt. **Jeff Tudor** and Sgt. **Brian Anthony** to the Criminal Investigations Division, Sgt. **Ron Clark** to the Tactical Unit, **Jeff Bouillerce** to the Commercial Enforcement Unit, **Christopher Albert** to the Traffic Division, Administrative Specialist **Gerald Pickett** and Dispatcher **Teresa Loconte** to Support Services. New dispatchers: **Shaina Blalock** and **Marisol Hernandez**.

The department is sad to report that two of its retirees recently passed away. **Larry Albright** started his career with the department in 1962 and retired at the rank of lieutenant in 1992. **John Ritter** began his career with SLPD in 1957, and retired in 1984.

Union City Police Department

Corp. **Steve Mendez** was promoted to sergeant and assigned to Patrol. Det. **Stan Rodrigues** was promoted to corporal and assigned to Patrol. Moving on to other departments: **Mike Yeager** (Brentwood PD) and **Alex Lentz** (San Francisco PD). Transfers: Sgt. **Javier Diaz** from Personnel and Training to Patrol, Sgt. **Raul Galindo** from Patrol to Personnel and Training, Sgt. **Mark Quindoy** from Investigations to Patrol, Sgt. **Jared Rinetti** from Patrol to Investigations, and **Trent Collins** from Patrol to Investigations. Dispatcher **Joyce Huber** retired after 25 years of service.

University of California, Berkeley Police Department

Sergeants **Alex Yao**, **Eric Tejada**, and **Andrew Tucker** were promoted to lieutenant. Retirements: Sgt. **David Roby** (20 years), and **Joseph Miceli** (28 years). New officers: **Reza Pourfarhani**, **Ricardo Florendo**, and **William Kasiske**.

Retired lieutenant **Rick Dillard** passed away on July 25, 2010. Rick joined the department in 1978 and retired in 2009. POV

War Stories

A urine test

Over at the Alameda County Probation Department in Oakland, a probationer was standing at a urinal, taking an unusually long time to provide a sample for his P.O. "Hurry up," said the P.O. Just then, the probationer dropped a plastic bottle cap on the floor. "What's that?" asked the P.O. "It's just the cap off my bottle of Visine," he replied. As the P.O. examined the Visine bottle, he noticed the liquid inside was yellow, kinda like urine. "If this is Visine," he said, "let's see you put some in your eyes." The probationer decided to call his bluff. But just as he put a few drops in one eye, he recoiled, his eye turned bright red, and tears started streaming down his face. With remarkable resolve, the man said, "Damn, that's strong Visine!"

More bad acting

While Philadelphia police were looking for a woman who had just escaped from the downtown jail, the owner of a nearby funeral home noticed that one of his display coffins was moving slightly. Because this is considered an unusual occurrence in coffins, he opened the lid and encountered the escapee who was doing an impression of a dead body. But it was a bad impression, as her eyelids were fluttering and she was breathing hard. So the mortician quietly closed the lid and called 911. Officers arrived a few minutes later and resurrected the escapee.

Speaking of morticians . . .

It's unlikely that many of our readers will remember those wonderful Burma Shave mini-billboards that were fixtures along America's roadways in the '40's and '50's. Each billboard contained just one line of a short story or thought for the day, and the last billboard in the line always just said "Burma Shave." Here's a classic:

Don't pass cars
On curve or hill
If the cops don't get you
The mortician will
Burma Shave

Finally, shoes for people with two left feet!

During the disturbance in downtown Oakland following the verdict in the Mehserle case, several people looted the Foot Locker store, stealing mostly tennis shoes on display in the front window. A few hours later, an Alameda police officer spotted a man hawking tennis shoes on Webster Street. As he examined the shoes, he noticed there were Foot Locker tags attached to each one and, even more peculiar, all the shoes were for *left feet*. Sensing that something was amiss (a report of the looting had not yet been broadcast), the officer arrested the man on the theory that, even in the unlikely event that the shoes weren't stolen, he was obviously committing consumer fraud by selling pairs of left-footed shoes to people with left and right feet.

Finally, an honest shoplifter!

Hayward police officers were dispatched to a McDonald's to investigate a report of a man with a gun. Outside the store, they detained the man and noticed that he was carrying a DVD player. When they explained that someone had reported he was carrying a gun, he assured them that he was unarmed. And just to prove that he never lies to officers, he volunteered that the DVD player he was carrying was stolen—in fact, he had just shoplifted it from the nearby Target store! When a Target employee arrived and confirmed his story, the officers arrested him.

Guilty with a likely excuse

While executing a warrant to search for drugs in a house, an Alameda County sheriff's deputy entered a room that was full of assorted computer equipment. When he asked the suspect where he bought all the stuff, he replied, "I got it at the Flea Market in Oakland—$50 for everything!" The deputy asked, "Did it occur to you that it might be stolen?" With refreshing honesty, the suspect replied, "*Obviously* they're stolen! But, hey, if I didn't buy 'em, somebody else would."

Appellate follies

In federal court in San Francisco, two men who were on trial for mail fraud decided to represent themselves and base their defense on, in the words of the 9th Circuit, "an absurd legal theory wrapped up in Uniform Commercial Code gibberish." They were convicted and, of course, they appealed. On what grounds? They asserted that their courtroom antics proved beyond a doubt that they were incompetent to act as their own attorneys. The court agreed that the record "clearly shows that the defendants are fools," but it noted that foolishness "is not the same thing as being incompetent." Conviction affirmed.

Popping off in court

In a courtroom in Melbourne, Australia, a judge was arraigning an out-of-custody defendant who was chewing gum and blowing bubbles. The judge didn't mind too much at first. But when the man blew an immense bubble that exploded in a loud "pop," the judge found him guilty of "scandalizing the court" and sent him to jail for 30 days.

Sometimes it doesn't pay to advertise

A man on trial for murder in Riverside County shaved the top of his head into a Mohawk-style strip with the letters "187" on top. The prosecutor argued to the jury that the in-your-face display constituted circumstantial evidence that the defendant was guilty of murder. His true-believing attorney disagreed, arguing that his innocent client was merely telling the world that he was *charged* with murder. The jury believed the DA.

Will you be paying with cash or check?

In Tehema County, a woman pled guilty to burglary and was sentenced to state prison. Her court-appointed attorney filed an appeal, arguing that the trial judge had miscalculated his client's statutory fine. According to the attorney, the woman was fined $34 when she should have been fined only $24.

At the beginning of its discussion, the Court of Appeal hinted at its low opinion of the matter when it said, "In this case, the services of an appointed counsel and a deputy attorney general, together with three justices and staff of this court, are applied to the resolution of a single issue: whether the court's order imposing a $34 fine was proper." The court then explained that it did the math and concluded (with obvious pleasure) that the trial judge had, in fact, made a mistake. The fine should have been $66.

Heading back to the academy

A rookie Oakland police officer was dispatched to a "459-Cat," which is police code for cat burglary. A few minutes after he arrived on the scene, the officer radioed in: "I was unable to locate any cats here. What color was he?"

Burnt bagel blues

One day at the Courthouse in Oakland, a court reporter decided to have a toasted bagel during the morning recess. So she popped one in the toaster in her office and went out to the courtroom to talk with the clerk. Meanwhile in the courtroom next door, a defenses attorney was questioning a psychologist who was testifying that the defendant wasn't responsible for the double murder he had committed because he suffers from some sort of mental condition that makes him extremely jittery. Just then, the bagel caught fire, setting off a smoke detector and triggering the Courthouse's fire alarm system.

As the ear-shattering alarm sounded, the psychologist and everyone else in the courtroom jumped out of their seats—except the defendant, who remained quite calm and extremely non-jittery. The alert jurors later said they took note of the phenomenon, as they found the defendant guilty.

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