POINT of VIEW

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Nancy E. O'Malley, District Attorney

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Executive Editor
Nancy E. O'Malley
District Attorney

Writer and Editor
Mark Hutchins

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This edition of Point of View
is dedicated to the memory of
Officer Tara O'Sullivan
of the Sacramento Police Department
who was killed in the line of duty
on June 19, 2019

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Search Warrant Basics

There's a simple way for the police to avoid many complex search and seizure problems: Get a warrant.[1]

Knowing when and how to seek a search warrant is has become more important than ever. That's because the number of situations in which a warrant is required has grown over the past few years. For example, the Supreme Court ruled in 2016 that officers must now ordinarily obtain a warrant before drawing blood from DUI arrestees, thereby overturning the general rule that warrants were unnecessary because the dissipation of alcohol from the bloodstream constituted an exigent circumstance.[2] In 2012, the Court expanded the definition of "search" so that officers may sometimes need a warrant to walk onto a suspect's property to look for evidence.[3] It also eliminated the rule that a warrant was not required to search a vehicle if an occupant had been arrested.[4]

But the most significant change resulted from the enactment of California's Electronic Communications Privacy Act of 2016 (CalECPA) which mandates warrants to obtain a type of evidence that is now crucial in many investigations: electronic communications and data. Specifically, CalECPA ordinarily requires a warrant to gain access to cellphones, tablets, and similar devices which are frequently storehouses of useful information.[5] CalECPA also ordinarily requires a warrant to obtain electronic communications and metadata from providers.

In this article, we will review the basics of obtaining search warrants so as to help reduce situations in which warrants are invalidated due to violations of fundamental rules. To this end, we begin by defining terms.

AFFIDAVIT: An affidavit is a declaration that is signed under penalty of perjury.[6]

AFFIANT: An affiant is the person who writes and signs an affidavit.

MAGISTRATE: In the context of search warrants, the term "magistrate" means "judge."[7]

SEARCH WARRANT: A search warrant is a court order that commands officers to search a certain person, place, or thing for specified property.[8]

SEARCH WARRANT AFFIDAVIT: A search warrant affidavit is a document in which the affiant sets forth the facts upon which probable cause for the warrant was based.[9]

"BARE BONES" AFFIDAVIT: A "bare bones" affidavit is an affidavit "that is so lacking in indicia of probable cause that no reasonable officer would rely on the warrant."[10].

"OVERBROAD" WARRANTS: A warrant is "overbroad" if its statement of probable cause failed to demonstrate probable cause to search for one or more items of listed evidence.[11] Such evidence will ordinarily be suppressed.

UNPARTICULAR WARRANTS: A warrant is "unparticular" if it failed to clearly describe (1) the places and things that officers may search, and (2) the property they are permitted to search for and seize.[12] The terms "overbroad" and "unparticular" are often conflated.[13]

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[1] *U.S. v. Harper* (9th Cir. 1991) 928 F.2d 894, 895. Edited.
[2] *Birchfield v. North Dakota* (2016) __ U.S. __ [136 S.Ct. 2160].
[3] See *United States v. Jones* (2012) 565 U.S. 400, 406, fn. 3; *Collins v. Virginia* (2018) __ U.S. __ [138 S.Ct. 1663, 1670].
[4] See *Arizona v. Gant* (2009) 556 U.S. 332.
[5] Pen. Code § 1546 et seq.
[6] See Code Civ. Proc. § 2003. Also see *People v. MacAvoy* (1984) 162 Cal.App.3d 746, 755.
[7] See *Shadwick v. City of Tampa* (1972) 407 U.S. 345, 348; Pen. Code §§ 807, 808.
[8] See Pen. Code § 1523.
[9] See Code Civ. Proc. § 2003 ["An affidavit is a written declaration under oath, made without notice to the adverse party."].
[10] *U.S. v. White* (6th Cir. 2017) 874 F.3d 490, 496.
[11] See *People v. Hepner* (1994) 21 Cal.App.4th 761, 773-74.
[12] See *U.S. v. SDI Future Health, Inc.* (9th Cir. 2009) 568 F.3d 684, 702; *Davis v. Gracey* (10th Cir. 1997) 111 F.3d 1472, 1478.
[13] See *Millender v. County of Los Angeles* (9th Cir. 2010) 620 F.3d 1016, 1024.

"GENERAL" WARRANTS: A warrant is deemed "general" if it contained no meaningful restriction on where officers may search; e.g., a warrant to search for "all evidence," "all stolen property."[14] This is usually a fatal defect.

The Affidavit

The first step in obtaining a warrant is to write the affidavit, which is a document that contains (1) the facts upon which probable cause was based,[15] (2) descriptions of the place or thing to be searched and the evidence that officers are authorized to seize, and (3) certain technical information. In addition, if officers are seeking authority to implement certain special procedures (e.g., night service, no-knock entry), they must explain why these procedures are reasonably necessary.

WHO SHOULD BE THE AFFIANT? The affiant should ordinarily be the officer who is "most directly involved in the investigation and most familiar with the facts stated in the affidavit."[16] Although most affiants are peace officers, anyone can be an affiant, even informants.[17]

AFFIANT'S TRAINING AND EXPERIENCE: The affidavit must contain a summary of the affiant's training and experience if (1) the existence of probable cause will be based, even partly, on the affiant's opinion concerning the meaning or significance of information in the affidavit;[18] or (2) the description of the place to be searched or the evidence to be seized will be based in part on an inference drawn by the affiant. Statements of training and experience should not be included as a matter of routine and should ordinarily be brief.

USING ATTACHMENTS: One of the most efficient ways of inserting information into affidavits and warrants is to incorporate documents that already contain this information. Common attachments include witness statements, affidavits previously submitted in the matter under investigation, police reports, fingerprint reports, maps (such as Google maps and Street View), photographs, and DNA reports.

An attachment will not, however, be deemed "incorporated" into an affidavit or warrant merely because it was submitted to the judge at the same time. Instead, there are two additional requirements that are designed to eliminate any confusion as to the status of any supplementary documents. First, the affiant must clearly identify the document that is being incorporated into the warrant or affidavit.[19] This is typically accomplished by assigning it an exhibit number or letter, then writing the exhibit number or letter in a conspicuous location at the top of the attachment; e.g., "Exhibit A."

Second, the warrant or affidavit must contain "appropriate words of incorporation"[20] which demonstrate that the attachment is an element of the affidavit or warrant. As the Court of Appeal explained, "Incorporation by reference occurs when one complete document expressly refers to and embodies another document."[21] Example: "The autopsy report, identified as Exhibit A, is attached hereto and incorporated by reference."

Note that judges must read incorporated attachments in their entirety and, therefore, affiants should avoid lengthy attachments whenever possible. This is especially true if the attachment contains only a small amount of relevant information, in which case the relevant information should be extracted from the attachment and inserted directly into the affidavit.

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[14] See *U.S. v. Kimbrough* (5th Cir. 1995) 69 F.3d 723, 727; *U.S. v. Clark* (2nd Cir. 2011) 638 F.3d 89, 94.
[15] See Pen. Code § 1527.
[16] *Bennett v. City of Grand Rapids* (5th Cir. 1989) 883 F.2d 400, 407.
[17] See *People v. Bell* (1996) 45 Cal.App.4th 1030, 1055.
[18] See *Illinois v. Gates* (1983) 462 U.S. 213, 232; *United States v. Arvizu* (2002) 534 U.S. 266, 273.
[19] See *Groh v. Ramirez* (2004) 540 U.S. 551, 557-58; *People v. Egan* (1983) 141 Cal.App.3d 798, 803.
[20] *Groh v. Ramirez* (2004) 540 U.S. 551, 557-58. ALso see *U.S. v. SDI Future Health, Inc.* (9th Cir. 2009) 568 F.3d 684, 699 "suitable words of reference"]; *People v. Stipo* (2011) 195 Cal.App.4th 664, 670.
[21] *People v. Egan* (1983) 141 Cal.App.3d 798, 803.

THE OATH: The affiant must sign the affidavit under oath; e.g., "I declare under penalty of perjury that the information contained herein is true."[22] By doing so, he is swearing that (1) the information within the affiant's personal knowledge is true; (2) information obtained from another person or source was, in fact, received by the affiant; and (3) the affiant had no reason to doubt its accuracy.

WHEN AND HOW TO SIGN: The affiant must not sign the affidavit until he is directed to do so by the judge. This is because the judge must indicate on the warrant that the affiant swore to the judge that the information in the affidavit was true; e.g., the information "was sworn to and subscribed before me." Exception: Affiants who seek warrants via email or computer server may digitally sign the affidavit beforehand, but the judge must confirm on the warrant that the affiant informed the judge that the signature was genuine.[23]

SHOULD A PROSECUTOR REVIEW IT? Although this may depend on departmental policies, a knowledgeable prosecutor should ordinarily review the affidavit and warrant if (1) there were legal issues with which the affiant was unfamiliar or uncertain; or (2) the existence of probable cause was close, as a prosecutor's approval is a circumstance that the courts may consider in determining whether to uphold a faulty warrant per the good faith rule.[24]

The Warrant: Technicalities

Because search warrants are court orders, they must contain certain information that is necessary to constitute an enforceable judicial command, plus some information that is required by statute.

THE HEADING: Like any court order, the heading must identify the issuing court:

Superior Court of California
County of _____

IDENTIFY THE OFFICERS: The warrant must identify the officers who are ordered to conduct the search: "The People of the State of California to any peace officer in the County of _____."[25] Note that the warrant must be directed to officers in the county in which the issuing judge sits.[26] This is true even if the warrant authorized a search in another county. For example, if a judge in Alameda County issued a warrant to search for evidence located in San Francisco, the warrant must be directed to "any peace officer in the County of Alameda," although SFPD officers would ordinarily assist.

THE JURAT AND IDENTIFICATION OF THE AFFIANT: The warrant must identify the affiant, and the judge must confirm, by means of the jurat, that he or she swore the affiant who then signed the affidavit in the judge's presence; e.g., "An affidavit by [name of affiant], sworn and subscribed before me on this date . . ."[27]

EVIDENCE CLASSIFICATION: Several California statutes expressly authorize judges to issue warrants for certain purposes, such as seeking evidence that tends to prove that a felony was committed, or that a particular person committed a felony, or that the evidence constituted contraband (such as drugs). Although the Penal Code does not require that the warrant or affidavit specify the statutory authority for the issuance of warrants, it is common practice, usually by checking one or more preprinted boxes. See Classification of Evidence on page 16.

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[22] See Pen. Code § 1526(c); *People v. Egan* (1983) 141 Cal.App.3d 798, 804; *People v. Hale* (2005) 133 Cal.App.4th 942, 947; *People v. Leonard* (1996) 50 Cal.App.4th 878, 884 ["The failure of the affiant to swear to the truth of the information given to the magistrate cannot be construed as a 'technical' defect. It is a defect of substance, not form."].

[23] See Pen. Code § 1526(c).

[24] See *Massachusetts v. Sheppard* (1984) 468 U.S. 981, 989 ["The officers in this case took every step that could reasonably be expected of them. Detective O'Malley prepared an affidavit which was reviewed and approved by the District Attorney."]; *People v. Camarella* (1991) 54 Cal.3d 592, 605, fn.5 ["It is, of course, proper to consider ... whether the affidavit was previously reviewed by a deputy district attorney."]; *Dixon v. Wallowa County* (9th Cir. 2003) 336 F.3d 1013, 1019 ["Though not conclusive, reliance on [the District Attorney's] advice is some evidence of good faith."].

[25] See Pen. Code § 1529.

[26] See Pen. Code § 1528(a); *People v. Fleming* (1981) 29 Cal.3d 698, 703; *People v. Galvan* (1992) 5 Cal.App.4th 866, 870.

[27] See Pen. Code §§ 1526(a), 1529.

Two common drafting issues

When writing affidavits and warrants, here are some drafting issues that have tended to cause problems or confusion.

Boilerplate

In the context of search warrants, the term "boilerplate" refers to a list—usually lengthy—of descriptions of evidence that affiants have copied verbatim from other warrants or affidavits. Also known "stereotyped," "formulaic writing," and "stock language," boilerplate can cause problems. Specifically, unless it has been carefully edited, the descriptions may have little or no resemblance to the evidence for which there is probable cause. As the California Supreme Court observed, "[B]oilerplate lists [are] routinely incorporated into the warrant without regard to the evidence."[1] So, the thing to remember is that, for each type of evidence listed in the warrant, the affidavit must contain facts that establish probable cause to search for it.

"Including, but not limited to . . ."

Affiants will sometimes provide a particular description of evidence followed by some language that authorizes a search for similar things. Such indefinite language—known as a "wild card," or "general tail"—may render a description insufficiently particular if, when considered in context, it authorizes an unrestricted search. For example, in *Aday v. Superior Court*[2] the California Supreme Court invalidated a warrant to search for "all other records and paraphernalia" connected with the defendant's business because this description was "so sweeping as to include virtually all personal business property on the premises and placed no meaningful restriction on the things to be seized."

This does not mean that wildcards are prohibited. For example, they have been used without serious objection when the affidavit established probable cause to search for a category of evidence (e.g., indicia, drug paraphernalia, credit cards) but the affiant could not be expected to know precisely what each item would look like. In such cases, the courts may interpret the language as merely providing examples of seizable evidence. As the Second Circuit observed, "In upholding broadly worded categories of items available for seizure, we have noted that the language of a warrant is to be construed in light of an illustrative list of seizable items.[3]

For example, in *People v. Rogers*[4] a warrant to search the suspect's home authorized a search for indicia "including, but not limited to, utility company receipts, rent receipts, [and] cancelled mail." On appeal, the court ruled that the language "but not limited to" did not invalidate the warrant because the investigating officers clearly had probable cause to search for evidence of dominion and control, but they "could not be expected to divine in advance of their entry the precise nature of such evidence—whether mail, bills, checks, invoices, other documents, or keys."

Similarly, in *People v. Schilling*[5] the body of a woman was discovered in the Angeles National Forest. Having developed probable cause to believe that Schilling had shot and killed her in his home, a Los Angeles County sheriff's homicide detective obtained a warrant to search Schilling's house for "scientific evidence, including but not limited to fingerprints, powder burns, blood, blood spatters, photographs, measurements, bullet holes, hair fibers." On appeal, Schilling argued that the "but not limited to" language rendered the warrant insufficiently particular but the court disagreed, pointing out that the warrant "simply authorized seizure of additional scientific evidence" pertaining to the murder that the affiant was "unable to detail."

In contrast, in *U.S. v. Castro*,[6] two warrants authorized a search of a computer for, among other things, "any other files, deleted or not, involved in this or any other unlawful activities." In ruling that this sentence was overbroad, the court described it as a "catch-all phrase tacked onto the operative sentence in each warrant."

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[1] (1985) 38 Cal.3d 711, 722.
[2] *People v. Frank* (1961) 55 Cal.2d 789.
[3] *U.S. v. Riley* (2nd Cir. 1990) 906 F.2d 841, 844.
[4] (1986) 187 Cal.App.3d 1001, 1009. Also see *People v. Balint* (2006) 138 Cal.App.4th 200, 206-207.
[5] (1987) 188 Cal.App.3d 1021.
[6] (6th Cir. 2019) 881 F.3d 961.

DISPOSITION OF SEIZED EVIDENCE: Finally, the warrant must contain instructions on what officers must do with the seized evidence. Although the judge may order them to bring the evidence directly to the court,[28] warrants almost always order the officers to retain possession of the evidence pending further court order.[29] Because the officers hold the evidence on behalf of the court, they may not give it to officers from another agency unless they are authorized to do so by the judge.

Describing the Places and Things to Be Searched

The first substantive requirement is that the warrant describe the people, places, and things that officers are permitted to search.[30] A description will be deemed satisfactory if the quality and quantity of the descriptive information is such that the searching officers can "ascertain and identify the place intended" with "reasonable effort."[31] While this "reasonable effort" test is necessarily ambiguous, there is general agreement on what descriptive information will suffice, as follows.

SINGLE-FAMILY RESIDENCES: In most cases, the city, street, and street number are sufficient.[32] If street signs or unit numbers are lacking or obscured, the warrant must include a physical description of the premises or some other information that will direct the officers to the right place; e.g., a photo, diagram, assessor's map, map image from Google Earth or Google Street View.[33] While affiants sometimes describe the premises by inserting the name of the owner, this is not a requirement.[34] Moreover, inserting the owner's name would ordinarily be of dubious value because ownership is often a complicated legal issue that officers cannot determine without a title search.

DETACHED STRUCTURES: If there are structures on the property that are detached from the home (such as a garage or guest house), and if officers want to search them, the warrant should specifically authorize it. Although a court might rule that authorization to search ordinary detached structures may be implied, it is better to avoid this issue by requesting specific authorization. This is commonly done by describing each detached structure to be searched; e.g., "The house at 415 Hoodlum Drive and the silver and black recreational vehicle parked approximately 25 feet directly behind the house."[35] Another method is to insert the word "premises" in the description of the place to be searched; e.g., "the *premises* at 415 Hoodlum Drive." Inclusion of the term "premises" has been deemed to authorize a search of structures that are ancillary to the main house.[36]

MULTI-OCCUPANT RESIDENCES: A multi-occupant residence is essentially a building that has been divided into separate and integrated living units, such as apartment buildings and motels. Because officers will seldom have probable cause to search more than one unit, they must describe or otherwise designate the particular living unit that may be searched; e.g., "Apartment 211," "Room number one of the Bates Motel."[37]

Note that a single-family residence does not become a multiple-occupant residence merely because the occupants had separate bedrooms; e.g., roommates. For example, in *People v. Gorg*[38] officers in Berkeley developed probable cause to believe that a man named Fontaine was selling marijuana out of a three-bedroom flat that he shared with Gorg and another man. So they obtained a warrant to search the flat and, in the course of the search, found marijuana in Gorg's bedroom. Gorg argued

[28] See Pen. Code §§ 1523, 1529.
[29] Pen. Code § 1528(a).
[30] See Pen. Code § 1525.
[31] *Andresen v. Maryland* (1976) 427 U.S. 463, 480. Also see *People v. Amador* (2000) 24 Cal.4th 387, 392.
[32] See *People v. McNabb* (1991) 228 Cal.App.3d 462, 469; *People v. Superior Court (Fish)* (1980) 101 Cal.App.3d 218, 225.
[33] See *U.S. v. Perez-Rey* (9th Cir. 2012) 680 F.3d 1179, 1182, fn.2; *U.S. v. Shaw* (6th Cir. 2013) 707 F.3d 666, 667.
[34] See *Hanger v. U.S.* (8th Cir. 1968) 398 F.2d 91, 99.
[35] See *People v. McNabb* (1991) 228 Cal.App.3d 462, 469; *U.S. v. Villegas* (2nd Cir. 1990) 899 F.2d 1324, 1335.
[36] See *People v. Dumas* (1973) 9 Cal.3d 871, 881, fn.5; *People v. Weagley* (1990) 218 Cal.App.3d 569, 573.
[37] *People v. Estrada* (1965) 234 Cal.App.2d 136, 148.
[38] (1958) 157 Cal.App.2d 515, 523.

that the flat was a multiple-occupant residence and, therefore, the search of his bedroom was unlawful since the warrant did not expressly authorize it. The court disagreed, explaining:

> [The warrant] was issued for a search of the lower flat in question, and Fontaine was named as the one occupying the named premises. Actually three people lived in this flat, sharing the living room, kitchen, bath and halls. The three bedrooms opened on these rooms and were not locked. All of the rooms constituted one living unit.

BUSINESSES: If a single business occupies an entire building, and if there is probable cause to search the entire business, the warrant may simply identify the building by its street address. The better practice, however, is to seek express authorization to search the entire structure. That is because such a search would be unusually intrusitve. If, however, probable cause is limited to a certain area, room, or place in the structure, the warrant must specify which areas may be searched.[39] What about searching detached structures on commercial property? Because the relationship between central commercial structures and detached structures is oftentimes ambiguous, affiants should describe each detached structure to be searched.

PEOPLE: A warrant to search a person must identify the person by name, physical description, or both.[40] A photograph may be attached to the warrant; e.g., DMV or booking photo.[41] A warrant may authorize a search of "all residents" of the premises, or everyone present when officers arrive, but only if the affidavit establishes probable cause to believe that at least some of the listed evidence will be found on *every* resident or occupant.[42]

VEHICLES: It is sufficient to identify vehicles by their license number and a brief description. As the California Supreme Court explained, "While it is not necessary that a search warrant state the name of the owner or a correct license number of the automobile to be searched, a warrant supporting the search of a motor vehicle must, at the very least, include some explicit description of a particular vehicle or of a place where a vehicle is later found."[43] If the license number is unknown or if the plates were missing, it may be identified by its VIN number, a detailed description (e.g., customizing, damage, bumper sticker), and/or its location. Note that a warrant may authorize a search of all vehicles on the premises only if there was probable cause to believe that at least some of the listed evidence would be found in every vehicle.[44]

COMPUTERS AND OTHER COMMUNICATIONS DEVICES: Pursuant to California's Electronic Communications Privacy Act of 2016 (CalECPA), officers who seek authorization to search for communications or related data in computers, cellphones, and other digital communication devices must ordinarily specify the files they want to search. Specifically, CalECPA says the warrant "shall describe with particularity the information to be seized by specifying, as appropriate and reasonable, the time periods covered, the target individuals or accounts, the application or services covered, and the types of information sought."[45]

The words "appropriate and reasonable" were added to the Penal Code later when it became apparent that it is often impossible to specify the dates of the relevant files; e.g., officers cannot know when the suspect began using the computer for criminal purposes or which files contained the listed information.[46] Still, officers must describe the files in as much detail as they possess or that they can obtain with reasonable effort.[47]

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[39] See, for example, *Dalia v. United States* (1979) 441 U.S. 238, 242, fn.4.
[40] See Pen. Code § 1525; *People v. Tenney* (1972) 25 Cal.App.3d 16, 22.
[41] See *People v. Superior Court (Fish)* (1980) 101 Cal.App.3d 218, 220 [CDL attached to warrant].
[42] See *Ybarra v. Illinois* (1979) 444 U.S. 85, 90; *Marks v. Clarke* (9th Cir. 1996) 102 F.3d 1012, 1029.
[43] *People v. Dumas* (1973) 9 Cal.3d 871, 881. Edited. Also see *People v. McNabb* (1991) 228 Cal.App.3d 462, 469.
[44] See *People v. Camel* (2017) 8 Cal.App.5th 989, 999; *People v. Sanchez* (1981) 116 Cal.App.3d 720, 727-28.
[45] Pen. Code § 1546.1(d)(1).
[46] See *U.S. v. Banks* (9th Cir. 2009) 556 F.3d 967, 973]; *U.S. v. Hay* (9th Cir. 2000) 231 F.3d 630, 637.
[47] Pen. Code § 1546.1(d)(1).

Note that officers who have probable cause to search cellphones and other digital storage devices may be unable to describe those devices because they have not seen them. If so, they should insert a detailed description of the information to be seized, then add some language that authorizes officers to search for it in places or things that are capable of storing such things; e.g., hard drives, flash drives, notebooks.

Describing the Evidence

Next to establishing the existence of probable cause, the most difficult part of the application process is writing a description of the evidence to be seized. This is because officers will not know exactly what the evidence looks like unless they had seen it. And yet, a description is crucial because, otherwise, the officers who execute the warrant would have no way of determining what they may search for and seize.[48] As the Ninth Circuit explained, search warrants will be deemed invalid "when they are so bountiful and expansive in their language that they constitute a virtual, all-encompassing dragnet of personal papers and property to be seized."[49] For example, warrants have been invalidated when the affiant listed the evidence merely as "stolen property,"[50] "certain personal property used as a means of committing attempted grand larceny,"[51] "all other property owned by [the victim of a burglary],"[52] any and all records and paraphernalia connected with [the suspect's business],[53] "any illegal contraband,"[54] and "other evidence."[55]

General principles

A description will suffice if it imposes a "meaningful restriction" on the scope of the search,[56] or if it otherwise "sets out objective standards" by which officers can determine what they may, and may not, search for and seize.[57] As the Tenth Circuit observed, "[We ask] did the warrant tell the officers how to separate the items subject to seizure from irrelevant items."[58] Although this issue "has been much litigated with seemingly disparate results,"[59] the following principles may be helpful.

DESCRIPTIVE—BUT NOT ELABORATE—LANGUAGE: While some courts in the past would elevate form over substance by requiring technical precision and elaborate specificity,[60] that has changed. Today, as the Supreme Court observed, "Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area."[61] As the First Circuit aptly explained:

> Specificity does not lie in writing words that deny all unintended logical possibilities. Rather, it lies in a combination of language and context, which together permit the communication of clear, simple direction. Any effort to negate all unintended logical possibilities through the written word alone would produce linguistic complication and confusion to the point where a warrant, in practice, would fail to give clear direction that is its very point.[62]

REASONABLY AVAILABLE INFORMATION: A borderline description is apt to be upheld if it contained all of the descriptive information that officers could have obtained with reasonable effort. As the Supreme Court explained, "The validity of the war-

[48] See *People v. Balint* (2006) 138 Cal.App.4th 200, 206.
[49] *U.S. v. Bridges* (9th Cir. 2003) 344 F.3d 1010, 1016. Edited.
[50] See *Lockridge v. Superior Court* (1969) 275 Cal.App.2d 612, 625; *Thompson v. Superior Court* (1977) 70 Cal.App.3d 101.
[51] *People v. Mayen* (1922) 188 Cal. 237, 242. Also see *Burrows v. Superior Court* (1974) 13 Cal.3d 238, 249.
[52] *People v. Smith* (1986) 180 Cal.App.3d 72, 89.
[53] *Aday v. Superior Court* (1961) 55 Cal.2d 789, 795-96.
[54] *Cassady v. Goering* (10th Cir. 2009) 567 F.3d 628, 635.
[55] *Stern v. Superior Court* (1946) 76 Cal.App.2d 772, 784.
[56] *Burrows v. Superior Court* (1974) 13 Cal.3d 239, 249.
[57] *U.S. v. Lacy* (9th Cir. 1997) 119 F.3d 742, 746, fn.7. Also see *People v. Tockgo* (1983) 145 Cal.App.3d 635, 640.
[58] *Davis v. Gacey* (10th Cir. 1997) 111 F.3d 1472, 1478.
[59] *U.S. v. Upham* (1st Cir. 1999) 168 F.3d 632, 535.
[60] See, for example, *People v. Frank* (1985) 38 Cal.3d 711, 726.
[61] *Illinois v. Gates* (1983) 462 U.S. 213, 235.
[62] *U.S. v. Gendron* (1st Cir. 1994) 18 F.3d 955, 966.

rant must be assessed on the basis of the information that the officers disclosed, or had a duty to discover and to disclose."[63] In other words:

> There are circumstances in which the law enforcement officer applying for a warrant cannot give an exact description of the materials to be seized even though he has probable cause to believe that such materials exist and that they are being used in the commission of a crime. In these situations we have upheld warrants when the description is as specific as the circumstances and the nature of the activity under investigation permit.[64]

For example, in *People v. Tockgo*[65] officers developed probable cause to believe that boxes containing stolen cigarettes were located in a certain liquor store. They also learned from the victim that certain invoice numbers were printed on each box, that each box contained a tax stamp, and that the cigarette cartons were sealed with a unique colored glue. Although this information was contained in the affidavit, it was omitted from the warrant which simply described the evidence to be seized as "cigarettes, cellophane wrappers, cigarette cartons." In ruling that this description was inadequate, the court pointed out that "[t]he vice of this uncertainty is particularly objectionable because the procuring officer's affidavit provided a ready means for effective description and identification of the particular cigarette packages to be seized."

In *Millender v. County of Los Angeles*,[66] a woman notified sheriff's deputies that her boyfriend, Jerry Bowen, had tried to shoot her during an argument. Although the woman described the firearm as a "black sawed-off shotgun with a pistol grip," and even though she provided deputies with a photograph of the weapon, they obtained a warrant to search Bowen's house for "all handguns, rifles, or shotguns of any caliber, or any firearms capable of firing ammunition." In ruling that this language was insufficiently particular, the Ninth Circuit said:

> [W]here the police do have information more specifically describing the evidence or contraband, a warrant authorizing search and seizure of a broader class of items may be invalid. Thus, when upon the information available to it, the government knew exactly what it needed and wanted, it was unconstitutional for a warrant to authorize a massive reexamination of all records.

Finally, in *Center Art Galleries v. U.S.*[67] officers developed probable cause to search several art galleries for stolen paintings by Salvador Dali. In the course of their investigation, they obtained warrants to search the defendant's galleries for, among other things, "sales records and customer/client information, lithographic and etching plates." But the Ninth Circuit ruled that this description was insufficiently particular because it "failed to limit the warrants to items pertaining to the sale of Dali artwork." This failure, said the court, was especially egregious because the government had the means to identify accounts which may have involved Dali artwork."

INCLUDING ATTACHMENTS: As noted earlier, one of the most efficient ways of inserting descriptive information into affidavits and warrants is to incorporate documents that already contain this information. Common attachments include witness statements, affidavits previously submitted in the case, police reports, rap sheets, business records, maps (such as Google maps and Street View), photographs, autopsy and DNA reports.

Also as noted earlier, if the description of the evidence is lengthy or complex, but if the affiant has a document in which the description is adequately set forth, the affiant may attach a copy of that document in the warrant itself, as well as the affidavit. The affiant must then incorporate the document into the affidavit and warrant; e.g., "Attached hereto and incorporated by reference is the police report (Exhibit A) which contains a list of the evidence that was stolen in the burglary."

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[63] See *Maryland v. Garrison* (1987) 480 U.S. 79, 85 [edited]; *People v. Hepner* (1994) 21 Cal.App.4th 761, 778.
[64] *U.S. v. Santarelli* (11th Cir. 1985) 778 F.2d 609, 614-16.
[65] (1983) 145 Cal.App.3d 635.
[66] (9th Cir. 2010) 620 F.3d 1016, 1026-27.
[67] (9th Cir. 2010) 620 F.3d 747.

SEARCH PROTOCOLS: If it is impractical or impossible to particularly describe the evidence to be seized, but if there was a procedure that would enable officers at the scene to identify it, the evidence may be deemed sufficiently described if the warrant provided the officers with instructions (a "protocol") on how to locate the seizable evidence. Thus, the Ninth Circuit noted that "we look favorably upon the inclusion of a search protocol."[68] For example, a protocol for digital evidence might require "an analysis of the file structure, next looking for suspicious file folders, then looking for files and types of files most likely to contain the objects of the search by doing keyword searches,"[69] or it might require that the officers begin the search by "cursorily reading the first few" pages to make sure that it contains relevant information."[70]

"WILDCARDS" ("... including but not limited to"): Affiants frequently write warrants that contain detailed descriptions of the evidence to be seized, accompanied by some language indicating that officers may seize other things that were not specifically listed; e.g., "including but not limited to," "among other things." Such open-ended language—known as a "wildcard" or "general tail"[71]—is ordinarily permitted, but it will be narrowly interpreted to mean that officers may seize unlisted evidence that falls within the same category as the listed evidence.[72] As the Second Circuit explained, "In upholding broadly worded categories of items available for seizure, we have noted that the language of a warrant is to be construed in light of an illustrative list of seizable items."[73]

For example, in *People v. Balint*[74] the court ruled that the wildcard "including" that appeared before a list of particularly described evidence was sufficiently particular because "the itemized list following the word 'including' may reasonably be interpreted as nonexclusive and merely descriptive of examples of items likely to show who occupied the residence." Similarly, in *Roman Catholic Archbishop of Los Angeles v. Superior Court*[75] the court ruled that a subpoena for documents "including but not limited to" was sufficiently particular because it was linked to language indicating "what criminal activity was being investigated." Also see "Two Common Drafting Issues" on page 4.

Descriptions based on inference

If no one saw the evidence, or if no one was able to provide a useful description of it, officers may describe it by making reasonable inferences based on their training and experience as to the appearance of evidence that is commonly used in similar cases. Here are some examples.

MURDER: At the scenes of fatal shootings and stabbings, officers will often have probable cause to believe that certain trace evidence will be found. But because they will seldom know exactly what they will find or what it will look like, the courts permit them to describe evidence that is commonly found at the scenes of such crimes. For example, in *People v. Schilling*[76] an LASD homicide detective developed probable cause to believe that Schilling had shot and killed an out-call masseuse whose body had been dumped in a remote area. Because the woman had had an appointment to meet with Schilling at his home shortly before the approximate time of death, the detective sought a warrant to search his house for evidence that, based on his

[68] *U.S. v. Hill* (9th Cir. 2006) 459 F.3d 966, 978.
[69] *U.S. v. Burgess* (10th Cir. 2009) 576 F.3d 1078, 1094.
[70] *U.S. v. Ulbricht* (2nd Cir. 2017) 858 F.3d 71, 101-102.
[71] See *In re Search Warrant Dated July 4, 1977* (D.C.Cir. 1977) 572 F.2d 321, 329.
[72] See *Andresen v. Maryland* (1976) 427 U.S. 463, 479-80; *Toubus v. Superior Court* (1981) 114 Cal.App.3d 378, 385; *U.S. v. Anderton* (5th Cir. 2018) 901 F.3d 278, 287; *U.S. v. Kuc* (1st Cir. 2013) 737 F.3d 129, 133.
[73] *U.S. v. Riley* (2nd Cir. 1990) 906 F.2d 841, 844.
[74] (2006) 138 Cal.App.4th 200, 207.
[75] (2005) 131 Cal.App.4th 417, 460.
[76] (1987) 188 Cal.App.3d 1021.

training and experience, would likely be found at the scene of a shooting in a residence; namely, "scientific evidence, including but not limited to fingerprints, powder burns, blood, blood spatters, bullet holes, hairs, fibers." The search turned up incriminating evidence which Schilling sought to suppress on grounds the description was too general. But the court refused, saying it "was clearly a particularized specification of the scientific evidence that could reasonably be obtained in defendant's residence in light of the facts set forth in [the] affidavit."

DRUG PARAPHERNALIA: If the affidavit established probable cause to believe that the suspect was selling drugs from a certain location, the affiant will ordinarily also request authority to search for and seize items that are commonly used to sell drugs.[77] Thus, in *U.S. v. Burgess*[78] the court ruled that such a description was sufficient because it "was limited to the kind of drug and drug trafficking information likely to be found on a computer, to wit (as the warrant says): 'pay-owe sheets, address books, rolodexes' and 'personal property which would tend to show conspiracy to sell drugs.'"

CHILD MOLESTING: If the affidavit established probable cause to believe that an occupant of the premises has molested a child, the following description of evidence has been deemed sufficient: "Sexually explicit material or paraphernalia used to lower the inhibition of children, sex toys, photography equipment, child pornography, address ledgers, journals, computer equipment, digital and magnetic storage devices."[79]

IDENTITY THEFT: Officers who have probable cause to believe that the suspect is committing identity theft may seek authorization to search for the types of evidence that is commonly found in such operations. For example, in *U.S. v. Holzman*[80] officers in Scottsdale, Arizona developed probable cause to believe that Holzman and Walsh were co-conspirators in such a scheme. In the course of their investigation, they obtained a warrant to search their hotel rooms for, among other things, "All credit cards under miscellaneous issuance names and account numbers" and "credit card drafts under miscellaneous issuance and names." In ruling that these descriptions were sufficiently particular, the court said, "In the absence of complete and detailed knowledge on the part of the police, the magistrate was justified in authorizing the search for these generic classes of items."

FRAUD AND CONSPIRACY: In cases involving fraud and conspiracy, a more general description of the evidence may suffice because of the difficulty in determining beforehand exactly how the crimes are carried out. As the California Supreme Court observed, "In a complex case resting upon the piecing together of many bits of evidence, the warrant properly may be more generalized than would be the case in a more simplified case resting upon more direct evidence."[81] Or, as the Eighth Circuit put it, "[A] search warrant involving a scheme to defraud is sufficiently particular in its description of the items to be seized if it is as specific as the circumstances and nature of activity under investigation permit."[82]

For example, in a real estate fraud case, *Andresen v. Maryland*, the Supreme Court ruled that a warrant to search a lawyer's office for an array of documents was sufficiently particular because, said the Court, "Like a jigsaw puzzle, the whole picture of petitioner's false-pretense scheme could be shown only by placing in the proper place the many pieces of evidence that, taken singly, would show com-

[77] See *People v. Superior Court (Marcil)* (1972) 27 Cal.App.3d 404, 415; *U.S. v. Storage Spaces* (9th Cir. 1985) 777 F.2d 1363. Also see *U.S. v. Johnson* (8th Cir. 1976) 541 F.2d 1311, 1315 ["In recent years 'paraphernalia' has become a standard vocabulary word in the vernacular of the drug community."].

[78] (10th Cir. 2009) 576 F.3d 1078, 1091.

[79] See *U.S. v. Meek* (9th Cir. 2004) 366 F.3d 705. Also see *U.S. v. Gleich* (8th Cir. 2005) 397 F.3d 608 ["photographs, pictures, visual representations, or videos in any form that include sexual conduct by a minor"].

[80] (9th Cir. 1989) 871 F.2d 1496, 1509.

[81] *People v. Farley* (2009) 46 Cal.4th 1053, 1102.

[82] *U.S. v. Sigillito* (8th Cir. 2014) 759 F.3d 913.

paratively little."[83] Similarly, in *U.S. v. Phillips* the court noted that in cases "involving complex crime schemes with interwoven frauds" the courts "have routinely upheld the seizure of items described under a warrant's broad and inclusive language."[84]

Searches for documentary evidence

The courts usually require a more detailed description of documents, including digital files, for four reasons. First, document searches are especially intrusive because officers must usually examine every room, container, and computer file in which the documents may be found. Second, every document and computer file on the premises must ordinarily be read (or at least skimmed) to determine whether it was seizable under the warrant.

Third, the reading of some types of documents constitutes a serious intrusion into personal privacy. Fourth, officers will usually have some information that would make it possible to distinguish between relevant and irrelevant documents.[85] Accordingly, the Tenth Circuit explained that officers "must be clear as to what it is they are seeking on the computer and conduct the search in a way that avoids searching files of types not identified in the warrant."[86] For example, in ruling that descriptions of documents were overbroad, the courts have noted that the description "permitted the seizure of all of petitioner's financial records without regard to the persons with whom the transactions had occurred or the date of transactions,"[87] the IRS "knew exactly what it needed and wanted and where the records were located. There was no necessity for a massive re-examination of all records bearing on income and expenses."[88]

Even so, the courts require only reasonable particularity. As the court explained in *U.S. v. Phillips*, "A warrant need not—and in most cases, cannot—scrupulously list and delineate each and every item to be seized. Frequently, it is simply impossible for law enforcement officers to know in advance exactly what business records the defendant maintains."[89] Thus, the Second Circuit observed, "Search warrants covering digital data may contain some ambiguity so long as law enforcement agents have done the best that could reasonably be expected under the circumstances, have acquired all the descriptive facts which a reasonable investigation could be expected to cover."[90]

DESCRIPTION LIMITED BY DATE: In many cases it is possible to restrict the description by means of a date or time frame. Thus, warrants have been invalidated because they "permitted the seizure of all of petitioner's financial records without regard to the persons with whom the transactions had occurred or the date of transactions,"[91] or because the affiant "did not limit the scope of the seizure to a time frame within which the suspected criminal activity took place, even though [the affidavit] indicates that the alleged criminal activity began relatively late in HK Video's existence."[92]

DESCRIPTION BASED ON SUBJECT MATTER: It is almost always possible to describe documents based on their subject matter, such as documents pertaining to a particular person or even. The following are examples of descriptions that sufficed:

- Personnel records for "any and all documents and correspondence relating to" an employee who had killed and wounded several people at his workplace.[93]

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[83] (1976) 427 U.S. 463, 482, fn.10. Edited.
[84] (4th Cir. 2009) 588 F.3d 218, 225.
[85] See *Andresen v. Maryland* (1976) 427 U.S. 463, 482; *U.S. v. Leary* (10th Cir. 1988) 846 F.2d 592, 603, fn.18.
[86] *U.S. v. Walser* (10th Cir. 2001) 275 F.3d 981, 986.
[87] *Burrows v. Superior Court* (1974) 13 Cal.3d 238, 249-50.
[88] *U.S. v. Cardwell* (9th Cir. 1982) 680 F.2d 75, 78.
[89] (4th Cir. 2009) 588 F.3d 218, 225.
[90] *U.S. v. Ulbricht* (2nd Cir. 2017) 858 F.3d 71, 100.
[91] *Burrows v. Superior Court* (1974) 13 Cal.3d 238, 249-50. Also see *U.S. v. Abrams* (1st Cir. 1980) 615 F.2d 541, 543, 545.
[92] *U.S. v. Kow* (9th Cir. 1995) 58 F.3d 423, 427.
[93] *People v. Farley* (2009) 46 Cal.4th 1053, 1101.

- Cell phone records of communications, indicia of use, ownership, and possession pertaining to wire fraud, including "electronic calendars, address books, e-mails, and chat logs" related to wire fraud, credit fraud, and identity theft.[94]
- Documents "pertaining to the Windward International Bank."[95]

"ALL DOCUMENTS": The courts understand that some businesses are so corrupt—so "permeated with fraud"—that there is a fair probability that all or substantially all of the documents on the premises constitute evidence. In these cases, judges will ordinarily accept a general description of the types of documents that are commonly used in such schemes. As the Ninth Circuit explained, "[A] warrant authorizing the seizure of essentially all business records may be justified when there is probable cause to believe that fraud permeated the entire business operation."[96]

Thus, in upholding such searches, the courts have noted the following:

- "The crimes were committed largely through computers [including] the laptop at issue, and the warrant application gave ample basis for the judge to conclude that evidence related to [the fraud] likely permeated the computer."[97]
- "NPI's central purpose was to serve as a front for defrauding prime bank note investors."[98]
- "[T]he magistrate's authorization to seize all of Spectrum's patient files was supported by evidence of pervasive fraud."[99]
- "This is the rare case in which even a warrant stating 'Take every piece of paper related to the business' would have been sufficient. Universal was fraudulent through and through."[100]

SEARCHES FOR INDICIA: When a warrant authorizes a search for evidence which, if found, would help prove the identities of the people who own or control the home or business in which it was found, affiants will almost always seek permission to search for and seize documents and other things on the premises that tend to identify these people. Such documents and things are commonly known as "indicia" or "evidence of dominion and control," and most warrants to search for illegal drugs, weapons, and other contraband should contain authorization to search for it. As the Court of Appeal explained, "[E]stablishing dominion and control of a place where incriminating evidence is found is reasonable and appropriate."[101]

In virtually all such cases, however, officers will have no direct proof that indicia is located in the home or business they want to search. And even if they did, they would not know where it was located or the types of indicia they would probably find unless they searched for it. And this requires a warrant. For these reasons, officers can usually obtain authorization to search for indicia by listing some examples. Said the Court of Appeal, "We cannot believe the Fourth Amendment prohibits officers with ample probable cause to believe those in a residence have committed a felony from searching the residence to discover ordinary indicia of the identities of the perpetrators."[102] For example, in *People v. Alcala* the court ruled that the following description of indicia was sufficient: "[A]ny articles of personal property tending to establish the identity of persons in control of the premises including but not limited to rent receipts, cancelled mail envelopes, and keys."[103] POV

[94] *U.S. v. Bass* (6th Cir. 2015) 785 F.3d 1043, 1050.
[95] *U.S. v. Federbush* (9th Cir. 1980) 625 F.2d 246, 251.
[96] *U.S. v. Smith* (9th Cir. 2005) 424 F.3d 992, 1006. Also see *In re Grand Jury Investigation* (9th Cir. 1997) 130 F.3d 853, 856.
[97] *U.S. v. Ulbricht* (2nd Cir. 2017) 858 F.3d 71, 103. Edited.
[98] *U.S. v. Rude* (9th Cir. 1996) 88 F.3d 1538, 1551.
[99] *U.S. v. Sanjar* (5th Cir. 2017) 853 F.3d 190, 201.
[100] *U.S. v. Bentley* (7th Cir. 1987) 825 F.2d 1104, 1110.
[101] *People v. Varghese* (2008) 162 Cal.App.4th 1084, 1102.
[102] *People v. Rogers* (1986) 187 Cal.App.3d 1001, 1009.
[103] *People v. Alcala* (1992) 4 Cal.4th 742, 799. Edited.

When Detainees Refuse to Identify

As I recall, several times I would ask him his name, and he would say "Puddin' Tame, ask me again I'll tell you the same."[1]

Penal Code section 148 makes it a misdemeanor for a person to delay or obstruct officers in the performance of their duties. One such duty is to identify the people they detain. Thus, if a detainee refuses to furnish officers with ID documents in his possession or even state his name and birthdate, the officers will be delayed in the performance of their duties. Granted, such a refusal is not a "serious" crime, and prosecutors might not charge all of them. But the fact remains that such conduct violates section 148.

And yet, this subject has generated some confusion. From what we can tell, the fault lies with three cases decided by the Ninth Circuit, none of which actually address the issue. And even if they had, decisions by federal circuit courts—including the Ninth Circuit—are not binding on California courts.[2] So, let's see if we can put this issue to rest.

The Ninth Circuit's Cases

Lawson v. Kolender: In *Lawson,*[3] the court ruled that California's old vagrancy statute—Penal Code section 647(e)—was unconstitutional because it permitted officers to detain anyone who "loiters" or "wanders" in a public place "without apparent reason or business." And such people could be arrested if they refused to identify themselves and "account for their presence." The court's decision was later affirmed by the Supreme Court[4]—not because the statute required people to identify themselves, but because it provided no standards for determining what kinds of ID are satisfactory.

Martinelli v. City of Beaumont: In the second case, *Martinelli v. City of Beaumont,*[5] a panel of the Ninth Circuit ruled that officers violate the Fourth Amendment if they arrest detainees for refusing to identify themselves. In *Martinelli*, officers in Riverside County approached a woman inside a laundromat and questioned her about a hit-and-run collision that had occurred outside. She admitted that she was the owner of the hit-and-run vehicle but then "refused to supply identification and refused to give her name." Consequently, the officers arrested her for violating section 148.

How did the panel reach the conclusion that this arrest was unconstitutional? No one knows. And that is because its entire analysis of the issue was set forth in a single sentence: *"The present case falls squarely within our holding in Lawson."* Oh, really? Well, then, perhaps you would like to explain why a 1981 case in which you invalidated a blatantly unconstitutional detention—one that required people in public places to "account for their presence" or face arrest—necessarily prohibits law enforcement officers from demanding identification from people who have been detained *lawfully,* and who are refusing to provide officers with information they possess and which the officers had a right to obtain? Forget *Martinelli.* A ruling without reasoning is less than worthless.

Carey v. Nevada Gaming Control Board: In *Carey,*[6] officers in a casino detained Carey for card cheating. It appeared that the detention was based on reasonable suspicion, although the court did not say. In any event, Carey refused to identify himself and was arrested pursuant to a Nevada statute that was similar to section 148. He later sued the officers and others for violating his civil rights, but the trial court granted summary judgment against him. So he appealed to the Ninth Circuit which—relying solely on *Lawson* and *Martinelli* and, again, providing no analysis of the issue—ruled that the "police cannot, consistent with the Fourth Amendment, compel identification during an investigatory stop."

These three cases—and nothing more—constitute the entire legal basis for the idea that a person who has been lawfully detained, and who refuses to even state his name, cannot be arrested for delaying an officer in the performance of his duties. Now, we will look at some published cases in which this precise issue was presented, and in which the courts took the time to analyze the issue.

U.S. v. Christian: In *Christian*,[7] officers in Seattle lawfully detained Christian for waving a gun at a 15-year old girl. Christian identified himself as Rick James but said he "had no ID on him." When informed that a computer check disclosed no listing for a Rick James in Washington, Christian said his ID was from Florida. But it turned out there was no Rick James in Florida either.

Undeterred, Christian said his ID was actually inside the glove box of his car. There was no ID there either. He then said his ID was inside a leather bag in the back seat. There were two IDs in the bag, but one was an obvious forgery, and the other was in the name of "Kent Merlin Younger." Christian then said that his driver's license was in the pocket of the driver's side door. There was, in fact, a driver's license there, and it displayed a photo of Christian. But the license was issued to someone named "Albert Ernest Hort."

Having run out of patience, the officers arrested Christian for "false reporting," plus possession of document-making equipment in violation of federal law and two counts of identification fraud. When his motion to suppress the evidence was denied, he pled guilty.

On appeal, Christian argued that, pursuant to *Lawson*, *Martinelli*, and *Carey* "it is never reasonable for officers to demand identification during a [detention]." But this panel had done its homework and determined that "these cases do not support Christian's claim" and "do not preclude police from demanding a suspect's identification during a [detention]." The court went further and said that "nothing in our case law prohibits officers from asking for, or even demanding, a suspect's identification. Instead, our cases, as well as those of the Supreme Court, suggest that determining a suspect's identity is an important aspect of police authority [to detain]." The court added:

> To preclude police from ascertaining the identity of their suspects would often prevent officers from fully investigating possible criminal behavior and would result in situations in which officers would have to simply shrug [their] shoulders and allow a crime to occur or a criminal to escape.

Hiibel v. Nevada Judicial Court: In the most recent federal case on point, *Hiibel v. Nevada,*[8] the Supreme Court ruled that Nevada's obstruction statute which, like section 148, permits officers to arrest detainees who refuse to identify themselves, was constitutional because a "request for identity has an immediate relation to the purpose, rationale, and practical demands of a [detention]." The Court added that "[t]he threat of criminal sanction helps ensure that the request for identity does not become a legal nullity," and that "[o]btaining a suspect's name in the course of a [lawful detention] serves important government issues," such as determining whether the detainee was wanted on a warrant, or had a history of violence.

Florida v. Hayes: In *Florida v. Hayes*,[9] the Supreme Court ruled that if officers have grounds to detain a suspect, "that person may be stopped in order to identify him." More to the point, the Court said that the need to identify detainees is so plainly necessary that it might even be reasonable for officers to fingerprint them on the scene or transport them to a police station for fingerprinting.

People v. Loudermilk: In *Loudermilk,*[11] Sonoma County sheriff's deputies detained a man because he matched the description of a person who had just shot a homeless man near a campground. The man, Loudermilk, claimed he did not possess any identification documents, but one of the deputies noticed there was a wallet in his back pocket. So he searched it and found ID. Just then, Loudermilk began crying and said, "I shot him. Something went wrong in my head. I thought he was going to shoot me, so I shot him."

Loudermilk was charged with ADW and filed a motion to suppress his statement on grounds that the deputies could not legally search his wallet for ID and, therefore, his statement should be suppressed as the fruit of an unlawful search. In rejecting the argument, the Court of Appeal noted that "[i]nquiries of the suspect's identity, address and his reason for being in the area are usually the first questions to be asked and may immediately dispel the officer's suspicions. The court then ruled, "Without question, an officer conducting a lawful

[detention] must have the right to [ask the suspect to identify himself], otherwise the officer's right to conduct an investigative detention would be a mere fiction."

People v. Rios: In *Rios*,[11] San Jose police responded to a report that a man was apparently selling drugs out of a car that was parked at a certain location. When officers arrived, they detained the man and identified him as David Rios. Although they did not arrest him, they included his name and the license number of the vehicle in a field investigation report. About a month later, that same vehicle was used in the armed robbery of a gas station. In the course of their investigation, detectives ran the license number and learned that the car was registered to Rios, and that he matched the description of the perpetrator. Based on this information, they arrested Rios who later claimed the arrest was unlawful because it was based on information about his identity that had been obtained unlawfully. Not so, said the court, because "where there is such a right to so detain, there is a companion right to request, and obtain, the detainee's identification."

People v. Long: We will conclude with the most succinct and compelling reason for writing off *Martinelli* and *Carey* as thoughtless blunders. The case is *People v. Long*:

> To accept the contention that the officer can stop the suspect and request identification, but that the suspect can turn right around and refuse to provide it, would reduce the authority of the officer to identify a person lawfully stopped by him to a mere fiction. Unless the officer is given some recourse in the event his request for identification is refused, he will be forced to rely either upon the good will of the person he suspects or upon his own ability to simply bluff that person into thinking that he actually does have some recourse.[12]

Other Issues

There are, however, limitations on arresting detainees for refusing to identify themselves. In *People v. Quiroga*[13] and *In re Chase C.*[14] the courts ruled that a detainee's refusal to identify himself did not violate Penal Code section 148 if the refusal occurred after the suspect had been *arrested.* Second, while the Fifth Amendment prohibits officers from demanding that detainees answer their questions pertaining to their investigation,[15] this does not prevent them from asking routine questions pertaining to identity because the answers to such questions are not "testimonial" in nature.[16]

Third, a detainee does not violate Penal Code section 148 if, instead of refusing to identify himself, he merely says he does not have any ID in his possession. That is because people in the United States are not required to carry ID. Fourth, a detainee does not violate section 148 if he merely asks officers to explain why he had been detained. As the Supreme Court observed, "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."[17]

As noted, the purpose of this article was to dispel the idea that officers are prohibited from arresting detainees for violating section 148 when they refuse to identify themselves. On the contrary, the cases indicate just the opposite. This does not mean that officers should routinely make such arrests, or that prosecutors will charge these cases. But officers should at least be aware of their legal options when they encounter defiant detainees. POV

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[1] *People v. Quiroga* (1993) 16 Cal.App.4th 961, 965.
[2] See *People v. Bradford* (1997) 15 Cal.4th 1229, 1305 ["Such decisions, as we often have observed, provide persuasive rather than binding authority."].
[3] (9th Cir. 1981) 658 F.2d 1362.
[4] See *Kolender v. Lawson* (1983) 461 U.S. 352, 360.
[5] (9th Cir. 1987) 820 F.2d 1491.
[6] (9th Cir. 2002) 279 F.3d 873.
[7] (9th Cir. 2004) 356 F.3d 1103.
[8] (2004) 542 U.S. 177.
[9] (1985) 470 U.S. 811.
[10] (1987) 195 Cal.App.3d 996, 1002.
[11] (1983) 140 Cal.App.3d 616.
[12] (1987) 189 Cal.App.3d 77, 87.
[13] (1993) 16 Cal.App.4th 961.
[14] (2016) 243 Cal.App.4th 107.
[15] *See Ganwich v. Knapp* (9th Cir. 2003) 319 F.3d 1115, 1120.
[16] See *Ohio v. Clark* (2015) __ US __ [135 S.Ct. 2173].
[17] *Houston v. Hill* (1987) 482 U.S. 451, 462-63.

Classification of Evidence

Various statutes, mainly Penal Code section 1524(a), expressly authorize judges to issue warrants for certain types of evidence. Although the Penal Code does not require that the warrant or affidavit specify statutory authority for the issuance of warrants, it is common practice to do so, usually by checking one or more preprinted boxes. The categories are as follows:

Proves felony was committed: The evidence tends to show that a felony was committed.

Identifies perpetrator of felony: The evidence tends to identify the perpetrator of a felony.

Third party concealing evidence: The evidence is in the possession of a person to whom it was delivered for the purpose of concealing it. Felony or misdemeanor.

Instrumentality of a crime: The evidence is in the possession of a person who intends to use it as a means of committing a felony or misdemeanor.

Drugs: The evidence consists of a controlled substance or paraphernalia for its use or administration. Felony or misdemeanor.

Stolen property: The evidence consists of stolen or embezzled property. Felony or misdemeanor.

Vehicle tracking: The warrant authorizes the installation and monitoring of a tracking device on a vehicle and there is probable cause to believe that the tracking information will tend to show that a felony had been committed, that a particular person committed a felony.

DUI blood draw: The evidence consists of blood in the bloodstream of a person who has been arrested for DUI, and the person has refused to voluntarily submit to a blood test or has failed to complete one. Felony or misdemeanor.

Electronic communications: California's Electronic Communications Privacy Act specifically authorizes the issuance of warrants to search for electronic communications and metadata.

Child pornography: The evidence tends to show that a person possesses, develops, or duplicates child pornography in violation of Penal Code § 311.11. Felony or misdemeanor.

Sexual exploitation of child: The evidence tends to show that sexual exploitation of a child occurred in violation of Penal Code § 311.3. Felony or misdemeanor.

Peeping: The evidence tends to show that someone visually accessed a bathroom, dressing room or other such place with intent to violate an occupant's reasonable privacy expectations.

Execute arrest warrant: The warrant authorizes a search for a wanted suspect.

Weapons

Deadly weapon: 5150: The warrant authorizes a search for a deadly weapon and there is probable cause to believe the premises are owned, rented, or under the control of a person who is in custody on a hold under Welfare & Institutions Code § 5150.

Deadly weapon: **Domestic violence**: The warrant authorizes a search for a deadly weapon at the scene of, or at the premises occupied, or under the control of a person arrested in connection with, a domestic violence incident involving a threat to human life or a physical assault, and the person has been lawfully served with that order but failed to relinquish the firearm.

Felon in possession: The warrant authorizes a search for a firearm in the possession of a felon.

Firearms: "No firearms" order: The premises are owned or occupied by a person who is prohibited from possessing firearms pursuant to Family Code § 6389.

Gun violence restraining order: The warrant authorizes officers to search for firearms or ammunition in the possession, custody, or control of a person who is subject to a gun violence restraining order, and the person was lawfully served with that order but failed to relinquish the firearm.

Questioning Accomplices

Once partners in crime recognize that the "jig is up," they tend to lose any identity of interest and immediately become antagonists.[1]

When officers have arrested accomplices to a crime, the odds of obtaining an incriminating statement from at least one of them are pretty good. That's mainly because a suspect who knows that his accomplice has been arrested will not know whether his associate is talking to investigators and, if so, what he is saying. As the Supreme Court observed, "[T]he probability of confession increases with the number of participants, since each has a reduced assurance that he will be protected by his own silence."[2] While this is undoubtedly a good thing, it can result in problems for prosecutors if, as is usually the case, they want to try the accomplices together.

This problem stems from two landmark cases, *People v. Aranda*[3] and *Bruton v. United States*.[4] In these cases, the California Supreme Court, and later the U.S. Supreme Court, ruled that if part of one defendant's statement incriminates a codefendant, prosecutors will not be permitted to use that part against either of them in a joint trial unless one of the exceptions to this rule apply.

There are three reasons for restricting the use of such statements. First, a statement by one accomplice (the "declarant") that incriminates another are inherently unreliable because accomplices almost always try to make themselves appear less culpable by shifting as much blame as possible to their associates.[5] Second, despite their dubious reliability, incriminating statements by accomplices tend to carry a lot of weight with jurors. Third, when these statements are used in joint trials, the attorney for a defendant who is incriminated by a codefendant's statement will be unable to cross-examine the codefendant if, as is often the case, he does not testify.[6]

There is, of course, an easy solution to the problem: try all accomplices separately. But while this solves one problem, it creates several others. Of particular importance, it will almost always make it more difficult to obtain convictions since prosecutors will usually be unable to present to the jurors a complete picture of what really happened.

In addition, separate trials are expensive, they waste valuable court resources and, as the Supreme Court observed, they "impair both the efficiency and the fairness of the criminal justice system" by requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand."[7] In contrast, the Supreme Court explained that joint trials "generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability."[8]

Although these issues affect prosecutors much more than officers, as we discuss in this article, there are several things that officers can do to increase the chances that all accomplices are tried jointly.

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[1] *Lee v. Illinois* (1986) 476 U.S. 530, 544-45. Edited.
[2] *Richardson v. Marsh* (1987) 481 U.S. 200, 209-10.
[3] (1965) 63 Cal.2d 518.
[4] (1968) 391 U.S. 123.
[5] See *Lee v. Illinois* (1986) 476 U.S. 530, 541 [such statements are "presumptively unreliable"].
[6] *Bruton v. United States* (1968) 391 US 123, 136 ["The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination."].
[7] *Richardson v. Marsh* (1987) 481 U.S. 200, 210.
[8] *Richardson v. Marsh* (1987) 481 U.S. 200, 210.

Aranda Statements

The best, but the most difficult, way of navigating *Aranda-Bruton* issues is to obtain a so-called "*Aranda* statement." This is a statement in which officers ask each accomplice to explain only his role in planning and carrying out the crime. In fact, a successful *Aranda* statement is one that does not even suggest that the crime was committed by two or more people. Such statements are admissible at joint trials for the simple reason that the only person who is incriminated by the statement is the accomplice who made it.

For example, if a robbery suspect, we'll call him Curley, was giving a statement in which he said "Moe and I went into Larry's Liquor Store and robbed it, the statement would not constitute an *Aranda* statement—and therefore it could not be used by prosecutors if Curley and Moe were tried together—because (1) Curley's statement also incriminated Moe, and (2) if Curley does not testify, Moe's lawyer will be unable to cross-examine Curley to explore the truth of the statement. On the other hand, if Curley said "I went to Larry's Liquor Store and robbed it" the statement would be admissible because it contained nothing that would incriminate Moe or suggest the Curley had an accomplice.

As a practical matter, however, it can be difficult for officers to obtain *Aranda* statements because it is difficult for most suspects to explain how two or more people committed a crime without using the terms "we," "he," and "us"—each of which would indicate that they did, in fact, have an accomplice. To complicate matters, suspects who are asked to give such a statement will ordinarily not understand why they are being asked to explain what happened in such a peculiar manner.

But, as we will now discuss, even if the attempt fizzles, prosecutors may be able to convert an unsuccessful *Aranda* statement into a usable *Arandized* statement.

Arandized Statements

A so-called *Arandized* statement is a statement that originally contained information that incriminated the declarant's accomplice, but which was edited or "sanitized" (usually by prosecutors) so as to eliminate all "references to the participation of anyone else, whether directly or indirectly identified or not."[9]

It should be noted that, in the past, *Arandized* statements were admitted if the name of the accomplice was covered-up or replaced by the a word such as "redacted" or a blank space. But it was soon discovered that this didn't work because, as the Supreme Court observed, jurors would quickly figure out that the purpose of these deletions was to hide the identity of the defendant's accomplice—and the most likely candidate for the job was the declarant's co-defendant.[10] The Court offered this example:

> Assume that officers obtained the following confession from Bob Smith: "I, along with Sam Jones, robbed the bank." If prosecutors redacted the confession to read "I and blank robbed the bank" a juror who heard the confession and wondered to whom "blank" referred, "need only lift his eyes to Jones, sitting at counsel table, to find what will seem the obvious answer."

Another failed solution was to remove all words that might conceivably indicate the existence of an accomplice. This was almost as bad because it resulted in strange and awkward sentences that left jurors scratching their heads. For example, in a case in which two burglary suspects were tried together, a statement made by one of them was rewritten and presented to the jury as follows: "Well, first broke open, opened up the lock with bolt cutters ... and then opened the back of the car and got the body out and left the body near some rocks." In ruling that this statement did not qualify as an *Arandized* Statement, the court explained

[9] *People v. Manson et al.* (1976) 61 Cal.App.3d 102, 151. Also see *Richardson v. Marsh* (1987) 481 U.S. 200, 211.
[10] *Gray v. Maryland* (1998) 523 U.S. 185, 193.

that, "[w]hile appellant's name is not mentioned in the statement, the existence of another participant is obvious from the statement itself."[11]

Because of problems such as this, the Supreme Court ruled that an edited or redacted *Arandized* statement will be admissible only if there was no "obvious indication of deletion."[12] As the Ninth Circuit explained in *U.S. v. Parks*,[13] "The combination of an obviously redacted statement with the language implying the existence of a third party reasonably could lead the jury to conclude that the unnamed third party must be the codefendant before them."

Significantly, even if an *Arandized* statement incriminated the accomplice, the admission of the statement would not violate *Aranda-Bruton* if it became incriminating only as the result of evidence that was presented *after* the statement was admitted. For example, in the 1970-71 murder trial of Charles Manson[14] and three women who were members of his "family," the three women each gave statements that were edited so that each woman explained only her role in carrying out the grisly Tate-LaBianca murders in Los Angeles. Consequently, the statements were admitted into evidence and the jury was given a standard instruction that each statement must not be considered as evidence of the guilt of anyone other than the defendant who made the statement.

Nevertheless, each of them contended on appeal that the statements of the others incriminated them because of testimony that was presented after the jury was told about the statement. Specifically, prosecutors later presented evidence that all members of the Manson Family "ate together, slept together, had sex together, and functioned as a unit." Consequently, they argued that, in light of this testimony, the murderous actions of one member of the "unit" would naturally be viewed by the jurors as actions that were committed, encouraged, or at least approved by the others. Employing the reasoning that the Supreme Court would adopt eleven years later in *Richardson v. Marsh*,[15] the Court of Appeal ruled that an *Aranda* violation does not result when, as occurred here, "each admission was edited to delete any explicit reference to anyone other than the declarant," and that the admissions only became incriminating to the others "by reason of circumstantial implications that might be drawn by the jury."

Finally, it should be noted that, even if prosecutors were able to produce an *Arandized* statement, it will not be admissible at a joint trial if it was *more* incriminating to the declarant than the unedited version,[16] or if it "impliedly overstated" the declarant's role,[17] or if it undermined the declarant's credibility because it was inconsistent with other evidence that was admitted.[18]

Adoptive Admissions

The third major exception to the *Aranda-Bruton* restrictions is that a declarant's statement will be admissible if, before it was admitted into evidence, the accomplice had acknowledged it was true. Such an acknowledgment renders the statement an "adoptive admission" which prosecutors may use in court because, as the California Supreme Court explained, "once the defendant has expressly or impliedly adopted the statements of another, the statements become his own admissions."[19]

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[11] *People v. Archer* (2000) 82 Cal.App.4th 1380, 1390
[12] *Gray v. Maryland* (1998) 523 U.S. 185, 189, 197.
[13] (9th Cir. 2002) 285 F.3d 1133, 1339.
[14] *People v. Charles Manson et al.* (1976) 61 Cal.App.3d 102.
[15] (1987) 481 U.S. 200.
[16] See *People v. Douglas* (1991) 234 Cal.App.3d 273, 285; *People v. Tealer* (1975) 48 Cal.App.3d 598.
[17] See *People v. Lewis* (2008) 43 Cal.4th 415, 457.
[18] See *People v. Stallworth* (2008) 164 Cal.App.4th 1079, 1096.
[19] See *People v. Cruz* (2008) 44 Cal.4th 636, 672.

For example, in *People v. Castille*[20] three men—Castille, Shields, and Brown—decided to rob Sharif's Market in Oakland. While Brown waited outside in the getaway car that was registered to him, Castille and Shields walked inside wearing ski masks and armed with sawed-off shotguns. At first, everything went as planned: Shields stood guard at the door as Castille confronted the clerk. But as Castille did so, the clerk grabbed his shotgun and the two men began struggling. When Shields saw this, he raised his shotgun and pointed it in the direction of the clerk. This caught the attention of Castille who ducked, thinking that Shields would hit him, too. As Castille ducked, Shields fired twice, killing the clerk. Castille and Shields then ran to the car but, as they sped off, the owner of the store (who had been upstairs) fired several shots at the car.

For the next few weeks the investigation stalled. But then an informant told investigators that Castille and Brown had given him the two shotguns to sell. Shortly after that, officers located Brown's car parked on a street; the rear fender was peppered with bullet holes. About a week later, officers arrested the three men for murder and brought them to the OPD's Homicide Section for questioning. All three were placed in separate interrogation rooms, and two homicide investigators interviewed each of them at the same time. All three essentially confessed, but their confessions would not have been admissible at a joint trial because of the *Aranda-Bruton* problem.

So, the investigators put all three in one room together with the six investigators, hoping to obtain statements from everyone that would be admissible under *Aranda-Bruton* if they were tried together. This procedure was described by the court at follows: "The officers frequently began their questions on a particular topic by addressing one defendant and then continuing the account with the other. As one defendant gave information, the officers asked the others to confirm or deny. Here's an example:

Castille: The clerk dude had the gun and everything. Remon [Shields] was like come on, so I let the gun go. I look at Remon and I see [his] gun pointing right at me so I'm like dang, if he pull the trigger it's going to hit me in my head. So I ducked and ran out of the store. As soon as I ducked, the shot went off.

Investigator #1: Okay Remon, you just heard what he said.

Shields: Yes.

Investigator #2: Is what he said true? Remon, I know it's hard but you need to answer me, son. Is what [Castille] just said true?

Shields: If he say it's true, it's true.

Investigator #2: That's your answer?

Shields: You know, I don't know for a fact though I probably did, but I know when I went to turn and walk out of the store the gun went off. I know that. I know that. I can remember that. I won't ever forget that.

Before the investigators concluded the joint interview, the court noted that "each defendant was asked directly whether he agreed with statements made by the others [they all did except for some minor points] and each had the further opportunity to clarify any statements to which he took exception." Citing these minor points, the defendants contended that their joint statement did not constitute an adoptive admission, but the court disagreed, ruling that an adoptive admission will not be suppressed merely because there were conflicts over matter that, in light of the entire statement, were immaterial. Consequently, all three men were tried together and convicted.

One last thing: Officers should ordinarily not put all of the accomplices together until they have obtained a fairly complete statement from each. This is because, if officers are unable to obtain a adoptive admission and if, as the result, prosecutors are required to try the accomplices separately, having a complete statement from each may be imperative. POV

[20] (2005) 129 Cal.App.4th 863.

Recent Cases

Mitchell v. Wisconsin

(2019) __ U.S. __ [139 S.Ct. 2525]

Issue

If a DUI arrestee is unconscious, must officers obtain a search warrant before requesting that hospital staff draw blood for alcohol testing?

Facts

An officer in Wisconsin arrested Gerald Mitchell for DUI based mainly on Mitchell's "stumbling" and "slurring" of words, plus a preliminary breath test result of 0.24%. Because Mitchell "could hardly stand without the support of two officers," and because he was "too lethargic" for a breath test, he was transported to a hospital for a blood test. En route, however, he lost consciousness so, upon arrival, an officer requested that medical staff draw a blood sample.

The sample tested at 0.222%. When Mitchell's motion to suppress the blood test result was denied, the case went to trial and he was convicted. He appealed to the Supreme Court.

Discussion

The Court ruled that when a DUI arrestee is unconscious, and is therefore unable to provide a breath sample, it is usually reasonable for officers to order a warrantless blood test. Said the Court, "When police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment."

Comment

Much has been written about DUI blood testing in the past few years, and this has resulted in some confusion. It started in 2013 when the Supreme Court ruled that the natural dissipation of alcohol from the bloodstream no longer constitutes an exigent circumstance.[1] Two years later, the Court ruled that, for various technical reasons, warrantless blood draws are not permitted under the Implied Consent Laws.[2] So it was not surprising to see a case in which a defendant could seriously argue that the Fourth Amendment prohibits officers from ordering blood draws from DUI arrestees who were unconscious and therefore incapable of providing a breath sample.

What was surprising was that the court's analysis of this straightforward issue took eight dense pages (including an extended explanation that drunk driving is "dangerous"), followed by a lengthy dissenting opinion signed by three justices who disagreed with the majority's ruling.

As noted, the Supreme Court ruled that warrantless blood draws from unconscious DUI arrestees would "almost always" be reasonable. Why *almost* always? The reason, said the Court, is that "in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." Translation: When officers arrive at a hospital with an unconscious DUI arrestee, it is almost always reasonable to obtain a blood sample without a warrant. Years ago, there was a recurring theme in most of the Supreme Court's Fourth Amendment cases that "[a] single, familiar standard is essential to guide police offic-

[1] *Missouri v. McNeely* (2013) 569 U.S. 141.
[2] *Birchfield v. North Dakota* (2016) __ U.S. __ [136 S.Ct. 2160].

ers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."[3] It might be helpful if the Justices perused these cases.

People v. Caro

(2019) 7 Cal.5th 463

Issues

(1) Did an officer violate the Fourth Amendment when he seized a murder suspect's clothing that had been removed by emergency room staff? (2) Was a warrant required to seize evidence obtained from the defendant's person while she underwent surgery? (3) Did the presence of investigators in the operating room, and their taking of photos, constitute an illegal search? (4) Was the defendant "in custody" for *Miranda* purpose when she was later questioned by investigators?

Facts

In 1999, Socorro Caro shot and killed three of her four young boys in their home near Northridge in Ventura County. She then shot herself in the head but survived. The carnage was discovered shortly thereafter by her husband when he returned home. Caro was airlifted to a local hospital where staff cut off her clothing and left it on a backboard in the emergency room. A short time later, a sheriff's deputy arrived at the ER, saw the bloody clothing and gave it to an evidence tech for processing. While Caro was in surgery, staff removed scrapings from under her fingernails and bullet fragments from her head. They later gave these items to investigators who were in scrubs and present in the operating room. The investigators also took photos of the procedure.

The next day, a Ventura County sheriff's detective interviewed Caro in the ICU. The detective did not *Mirandize* her. During the interview, which occurred on-and-off for almost three hours, the detective asked Caro about a bruise on her foot. She replied that it resulted from "wrestling with a boy." The detective then *Mirandized* her, and Caro invoked her right to counsel.

A forensic analysis of Caro's clothing "provided a wealth of incriminating evidence." This included "high velocity spatter" blood from two of her children, thus indicating that Caro had shot them, not her husband as she later claimed.

Caro's trial attorney did not file a motion to suppress the physical evidence. Counsel did, however, file a motion to suppress the statements Caro made in the ICU on grounds that they were obtained before she had been *Mirandized*. The trial judge ruled the statements was obtained lawfully. Caro was found guilty and sentenced to death.

Discussion

On appeal to the California Supreme Court, Caro argued that the physical evidence should have been suppressed because her trial attorney was negligent by failing to file a suppression motion. She also argued that her motion to suppress her statements should have been granted. The court rejected both arguments.

THE CLOTHING: Caro claimed that the seizure of her bloody clothing found on the backboard in the emergency room was unlawful because the deputy did not have a warrant. Prosecutors argued that the seizure was lawful under the "plain view" rule that permits officers to seize evidence without a warrant if (1) they had a legal right to be at the location from which they saw the evidence, (2) they had a legal right to enter the location, and (3), before the officers seized the evidence, they had probable cause to believe it was, in fact, evidence of a crime.[4]

It was apparent that all three requirements were satisfied since the deputy was lawfully present in

[3] *Dunaway v. New York* (1979) 442 U.S. 200.

[4] See *Minnesota v. Dickerson* (1993) 508 U.S. 366, 375 ["The rationale of the plain-view doctrine is that if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no 'search'"]; *Washington v. Chrisman* (1982) 455 U.S. 1, 5-6 ["The 'plain view' exception to the Fourth Amendment warrant requirement permits a law enforcement officer to seize what clearly is incriminating evidence or contraband when it is discovered in a place where the officer has a right to be."].

the emergency room, the clothing was not located in a place in which Caro had a reasonable expectation of privacy and, given the nature of the crime under investigation, the deputy had probable cause to believe that the bloody clothing constituted evidence. The court did not, however, rule on these issues because, as noted, Caro's attorney did not file a motion to suppress the evidence, and Caro failed to demonstrate that such a motion would have been granted. (It seems apparent that the seizure was lawful.)

EVIDENCE OBTAINED DURING SURGERY: As noted, while Caro was in surgery, staff took scrapings from under her fingernails and bullet fragments from her head. And a nurse later gave this evidence to investigators. The scrapings were later determined to contain blood from the children, and this was used by prosecutors as additional evidence that Caro was the shooter.

There is not much case law on whether, or to what extent, a suspect who was injured during the commission of a crime has a reasonable expectation of privacy as to clothing removed from her body by hospital staff. Although the court noted that "concerns about incursions on the privacy we maintain in our bodies are heightened during medical procedures," it did not rule on whether the scrapings and photos should have been suppressed. This was because it concluded that the photos would not have affected the jury's verdict since there was other substantial evidence that Caro was near her children when she shot them. (Because the scrapings were taken for the sole purpose of obtaining evidence pertaining to the murders—not as a routine hospital procedure—the legality of this warrantless intrusion is questionable.[5])

As for the bullet fragments that were removed from Caro's head by physicians during surgery, the court ruled that the officers did not obtain them unlawfully because, said the court, "the removal of a bullet by medical personnel acting independently of law enforcement directives" does not violate the Fourth Amendment.[6]

INVESTIGATORS' PRESENCE DURING SURGERY: Caro also argued that the officers presence in the operating room (they wore scrubs) and their taking of photos of her while she was unconscious, constituted an illegal search. This was an issue that, to our knowledge, has not been raised before. But it seems clear that the courts would view it as so highly intrusive that only a very strong need would suffice. Although no such need was apparent here, the court did not address the issue because it concluded that, even if it were illegal, it would not have affected the jury's verdict given the minimal evidentiary value of the photos.

CARO'S STATEMENTS TO THE DETECTIVE: Finally, Caro argued that the statements she gave to the detective in the Intensive Care Unit should have been suppressed because she was "in custody" for *Miranda* purposes. The court began by pointing out that, while "[w]e have not explicitly discussed the custody analysis in a medical setting," the detective "tread on perilous ground" when she questioned Caro in ICU without having obtained a *Miranda* waiver. But the court ruled that, assuming that the detective violated *Miranda*, the statements Caro made were harmless because, even without the statement, the evidence of her guilt was overwhelming.

Consequently, the court affirmed Caro's conviction and the death sentence.

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[5] **NOTE**: One possible, but untested, option would be to seize the scrapings without a warrant due to exigent circumstances, then seek a warrant to analyze them.

[6] See *United States v. Jacobsen* (1984) 466 U.S. 109, 113 ["[The Fourth Amendment] is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official."]; *People v. Wachter* (1976) 58 Cal.App.3d 911, 920 [the exclusionary rule "does not extend to cases where evidence has been seized or obtained by a private citizen unless that citizen was then acting as an agent for the government"].

People v. Molano

(2019) __ Cal.5th __ [2019 WL 2621826]

Issues

(1) Did investigators violate *Miranda* by lying to a murder suspect about their reasons for wanting to interview him? (2) Did the suspect reinitiate questioning after he invoked his *Miranda* rights?

Facts

On June 15, 1995, an habitual sex offender named Carl Molano murdered Suzanne McKenna who lived in a cottage near his apartment in unincorporated Alameda County. The next day, he returned to the cottage to wipe his fingerprints. While there, some of McKenna's friends happened to arrive because she wasn't answering her phone. One of them happened to look through a window and saw a man, later identified as Molano, standing in McKenna's kitchen. The woman yelled and Molano ran out a back door. When McKenna's friends entered the cottage, they found that it had been ransacked, and they notified the Alameda County Sheriff's Office. When deputies arrived, they found McKenna's body. She had been strangled. While searching McKenna's cottage, deputies preserved some biological samples which were not analyzed because the crime lab was not yet able to conduct DNA testing.

When Molano left the cottage, he returned to his apartment and told his wife, Brenda, that he had been "partying with a couple in one of the cottages" and that the other man had choked McKenna to death. Molano asked Brenda not to notify sheriff's deputies because the man had threatened to kill his family if he did. That afternoon a deputy knocked on the door, told Brenda about the murder. Brenda said she didn't know anything about it. There were no leads, and the investigation stalled.

Six years later, Benda took her 13-year old son, Robert, to the sheriff's substation and admitted that she had lied to the deputy who had questioned her, and she reported what Molano said and did when he arrived home. Detectives also questioned Robert who said that, on the day after the murder, he had seen Molano jogging away from the cottages and later encountered him—sweating and shoeless—in a nearby storage shed. Molano told him that he would kill him if he reported it.

As the result of this information, the investigation was reopened and three things happened in quick succession: First, one of McKenna's friends positively identified Molano as the man she had seen in the cottage. Second, investigators learned that Molano was an habitual sex offender. Third, because DNA testing was now possible, technicians were able to process the biological samples from the scene, and found Molano's DNA on a ligature that had been wrapped around McKenna's neck.

It wasn't difficult for investigators to locate Molano, as he was currently incarcerated at San Quentin. Before interviewing him, however, they devised a ruse whereby they would tell him that they were assigned to a unit that kept track of habitual sex offenders, and they merely wanted to talk to him about the registration matters. After obtaining a *Miranda* waiver, they asked Molano about his job prospects, family background, and substance abuse issues. Then they asked if he remembered the murder of his neighbor in 1995.

Molano admitted that he and McKenna had had sexual intercourse one or two days before the murder, and that he did not come forward because of his status as an habitual sex offender. Because the topic of conversation had changed dramatically, it apparently dawned on Molano that he had been duped. So he told the investigators "I understand where this is leading to, and I would rather not say anything else until I have a public defender of mine." The investigators terminated the interview but told Molano that if he wanted to resume their conversation he would have to initiate contact. Molano responded that he wanted to tell them "about his involvement with McKenna's murder," but that he first "wanted to have a counseling session with his psychologist." The investigators gave him their cards and left.

One week later, Molano was charged with the murder, and the investigators returned to San Quentin and transported him back to Alameda County to stand trial. When they informed him that

he was under arrest for murdering McKenna, he said "he had been meaning" to call them, had "intended to," and that he had already talked to a counselor. Because Molano had previously invoked his right to remain silent and right to counsel, the investigators told him they could not discuss the murder until they arrived at their substation. During the drive, Molano asked "What's it look like I'm facing?" An investigator responded, "[I]f you'd like to give an explanation then we're gonna give you another opportunity once we get to our station." What followed was a lengthy conversation in which the investigators made it clear that they wanted to talk with him, but they put no pressure on him. When they arrived, Molano said he "wanted to get this over with, [that] he knows that the public defender would tell him not to talk to the police," but that he "just wants to tell the story, and get it over with."

When the interview began, and after Molano waived his *Miranda* rights, the investigators confirmed with him that he wanted to talk with them about the murder, and that he had initiated the interview. He then claimed that he and another man were having rough sex with McKenna, and that the other man inadvertently strangled her. Shortly thereafter, a deputy district attorney interviewed Molano and, after obtaining a *Miranda* waiver, asked, "Would it be a fair statement to say that you reinitiated the discussion about the case? Molano replied that it "would be fair because I asked like if I will be straight up with you both like I was with them." He then repeated his story.

Before trial, Molano filed a motion to suppress his statements on grounds that he had previously invoked. The motion was denied and the case went to trial. He was found guilty and sentenced to death.

Discussion

On appeal, Molano argued that his confession should have been suppressed on the following grounds: (1) his initial *Miranda* waiver at San Quentin was ineffective because the investigators lied to him about the real purpose of their visit, and (2) he did not freely reinitiate the interview that took place at the sheriff's station.

The ruse

As noted, the investigators lied to Molano when they met with him at San Quentin when they said they wanted to talk about the sex registration matters. Although Molano did not then make any incriminating statements, he argued that the incriminating statement he made later at the sheriff's station should have been suppressed because "he would not have waived his *Miranda* rights if he had actually been told who the officers were and what they were investigating."

It is settled, however, that officers who are seeking a *Miranda* waiver are not required to provide suspects with any information other than the *Miranda* rights themselves. As the Supreme Court observed, "[W]e have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights."[7]

More to the point, the Court has ruled that officers may ordinarily lie to the suspect about other matters so long as they do not misrepresent the *Miranda* rights. For example, waivers have been deemed "knowing and intelligent" even though officers told the suspect that his victim was "hurt" when, in fact, she was dead;[8] and when FBI agents told the suspect that they wanted to question him about "terrorism" when, in fact, he was under investigation for having sex with children.[9]

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[7] *Moran v. Burbine* (1986) 475 U.S. 412, 422. Also see *People v. Tate* (2010) 49 Cal.4th 635, 683, 683 [the "mere failure by law enforcement officers to advise a custodial suspect of all possible topics of interrogation is not trickery sufficient to vitiate the uncoerced waiver of one who had and understood the warnings required by *Miranda*"].

[8] *People v. Tate* (2010) 49 Cal.4th 635, 683.

[9] *Illinois v. Perkins* (1990) 496 U.S. 292, 297.

Applying these principles, the court ruled that "the fact that the officers did not tell defendant they were going to ask him about McKenna's killing does not invalidate the waiver. Defendant's lack of awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether he voluntarily, knowingly, and intelligently waived [his rights]."

Reinitiating questioning

Molano also argued that his incriminating statements should have been suppressed because he had invoked his right to counsel when the investigators sought to interview him at San Quentin. Although Molano clearly invoked, the Supreme Court has ruled that officers may question a suspect who had previously invoked the right to remain silent or the right to counsel if the suspect (1) freely initiated the questioning; and (2) demonstrated a willingness to open up a general discussion about the crime, as opposed to merely discussing incidental or unrelated matters, or "routine incidents of the custodial relationship."[10] As the Court observed, "There are some inquiries, such as a request for a drink of water or a request to use a telephone, that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion."

In most cases, a suspect's intent to engage in a general discussion may be implied if he did not restrict the interview to incidental or unrelated matters. Because Molano did not impose such a restriction, the court ruled that he had voluntarily reinitiated the interview and that his subsequent statements were properly admitted.

For these reasons, the court ruled that Molano's statement to the investigators was obtained lawfully, and it affirmed Molano's conviction and death sentence.

People v. Young

(2019) __ Cal.5th __ [2019 WL 3331305]

Issues

A homicide detective requested that an arrested murder suspect listen to a recorded phone call in which the suspect essentially confessed. Did the detective violate *Miranda* by not obtaining a waiver beforehand?

Facts

Early one morning, four skinheads robbed the employees of a parking lot near San Diego International Airport. The robbery did not go well. While one of the men waited in the getaway car, one of the others went to the toll booth, ordered the toll taker to lie on the ground, and emptied the cash drawer. When the suspect did not leave quickly (as most robbers would), the toll taker looked up and asked him why he still there. The man replied, "I can't leave. I'm waiting for my ride." Meanwhile, two of his accomplices—one of whom was Jeffrey Young—walked into a nearby office, ordered the two employees there to lie on the ground and, again for no apparent reason, shot and killed both of them. All three men then ran to the getaway car but, when the driver tried to start the engine, the key broke. So they abandoned their getaway car and ran to a parking lot across the street, where they carjacked a vehicle. Despite all the screw-ups, they got away and the case "went cold."

Three years later, a San Diego police homicide investigator interviewed a woman who, at the time of the crimes, had been the girlfriend of one of the perpetrators. She identified three of them and said that, after they fled, they had driven to Arizona and stayed with a man named Jason Getscher. When the detective learned that Getscher was currently serving time for forgery in an Arizona state prison,

[10] See *Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1045; *Minnick v. Mississippi* (1990) 498 US 146, 156 [the suspect must have "initiated the conversation or discussions with the authorities"]; *P v. Davis* (2009) 46 C4 539, 596 [officers may resume an interview if the suspect "initiated further discussions with the police"]; *P v. Frank C* (1982) 138 CA3 708, 713 ["Notwithstanding an initial assertion of the right to remain silent, a statement subsequently made by a suspect in custody is admissible if it was volunteered upon his own initiative and was not made in response to interrogation by police."]; *US v. Michaud* (9C 2001) 268 F3 728, 737-38 [court ruled that Michaud initiated questioning when (1) she and a fellow inmate approached a jailer, (2) the fellow inmate said that Michaud wanted to talk about a murder; and (3), Michaud confirmed this was true].

they interviewed him and Getscher explained exactly how the crimes were committed and that Young had admitted to him that he was one of the shooters.

Getscher then agreed to participate in a sting, whereby he would make a recorded phone call to Young and get him to discuss the crimes. It worked and Young admitted that the robbery was "poorly planned" and that it became necessary to kill the victims when he realized he had forgotten to bring duct tape.

After Young was arrested, the detective met with him and told him that his phone conversation with Getscher had been recorded. He then allowed Young to listen to the recording, after which he *Mirandized* him and asked if he wanted to tell his side of the story. Young replied, "You heard it all." The interview ended.

Before trial, Young filed a motion to suppress the statement. The judge denied the motion, and the statement was used in trial. Young was found guilty and sentenced to death.

Discussion

On appeal to the California Supreme Court, Young argued that everything he said before he waived his *Miranda* rights was obtained in violation of *Miranda* and should have been suppressed. The court agreed, but pointed out that, because none of his pre-warning statements were used by prosecutors at trial, there was nothing to suppress.

The more substantial issue was whether the trial court should have suppressed Young's admission ("You heard it all") since he had essentially admitted that all of the incriminating statements he made during the phone conversation was true. Specifically, he argued that his statement should have been suppressed because the detective obtained it by employing an illegal "two step" interrogation procedure. The two-step was a tactic in which officers would interrogate a suspect in custody without obtaining a *Miranda* waiver. That was "Step 1." Then, if he confessed or made a damaging admission, the officers would move to "Step 2" in which they would *Mirandize* him and try to get him to repeat the statement in full compliance with *Miranda*. The two-step works on the theory that suspects will usually waive their rights and repeat their incriminating statements because they thought (erroneously) that their earlier statement could be used against them and therefore, they had nothing to lose by repeating it.

In 2004, however, the Supreme Court ruled in *United States v. Seibert* ruled that the two-step was illegal if it was used as a deliberate attempt to circumvent *Miranda*.[11] Although it was arguable that the detective employed this tactic, it was unnecessary for the court to address this issue (or determine whether *Seibert* should be enforced retroactively) because, again, it ruled that, even if the admission was obtained in violation of *Seibert*, the error was harmless in light of the other overwhelming evidence of Young's guilt. Consequently, the court affirmed his conviction.

Comment

In 1999, when the detective interviewed Young, some officers in California were being encouraged to ignore the *Miranda* requirements. Specifically, they were taught by some that, because voluntary statements obtained in violation of *Miranda* could be used to impeach the defendant if he testified at trial, it was smart to "go outside *Miranda*" by conducting unwarned interrogations and even ignoring *Miranda* invocations. The situation became even more complicated when some courts, when faced with intentional *Miranda* violations of this sort, would dodge the issue.[12] Judging from the precipitous decline in the number of cases in which this issue has arisen, it appears that officers and their agencies have concluded that it is better if the officers avoided such tactics.

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[11] See *Missouri v. Seibert* (2004) 542 U.S. 600.

[12] See, for example, *People v. Case* (2018) 5 Cal.5th 1, 25; *People v. Depriest* (2007) 42 Cal.4th 1, 35; *People v. Coffman* (2004) 34 Cal.4th 1, 58; *People v. Demetrulias* (2006) 39 Cal.4th 1, 30.

People v. Sanchez

(2019) 7 Cal.5th 14

Issue

In ID cases, under what circumstances may officers show a witness a single photo of the suspect, as opposed to conducting a photo or live lineup?

Facts

In the early morning hours of August 4, 1997, Juan Sanchez snuck into the home of Ermanda Reyes in Porterville and entered the bedroom of Ermanda's daughter, 17-year old Lorena Martinez. He sexually assaulted Lorena, then shot and killed her. He then shot and killed Ermanda. Also in the house were Ermanda's sons, 13-year old Victor and 5-year old Oscar who were not physically harmed.

Police learned of the murders later that morning when Oscar walked to the home of a neighbor, Rosa Chandi, and told her that his mother and sister were "cut," "bleeding," and "sleeping," and he couldn't wake them up. Chandi went to Ermanda's house where she found the bodies and called 911.

Oscar told investigators that he had been sleeping in his mother's bed and was "awakened by firecrackers" and a "man's loud voice." He did not identify the man by name, but said the man had given him some ice cream about a week earlier. He also said that the man had a "wisp" on his chin (apparently referring to a goatee). Chandi told detectives that the killer "might" have been Ermanda's boyfriend; and although she did not know his name, she said he drove a yellow truck. Oscar's brother Victor said that Oscar had told him that the man who had given him ice cream was "Juan," and he directed them to Juan's home where officers arrested him.

At around noon, an investigator showed Oscar an old booking photo of Sanchez. In the photo, Sanchez had a mustache but no goatee. Oscar identified him as the man he had seen earlier that morning in his mother's bedroom. He also said that Sanchez had been holding a knife and a gun, and that he had driven away in a yellow truck. Meanwhile, other investigators who were searching Sanchez's home pursuant to a warrant found a knife "with a black handle" that was similar to, but somewhat larger, than the knife that was found under Lorena's body. Sanchez's wife told them that she had purchased the knife and a smaller one from a "99-Cent Store." A forensic metallurgist would later testify that both knives shared certain "design characteristics" which "suggest a common manufacturer."

Later that day, a detective showed Oscar a photographic lineup containing six photos. This time, the detective did not use the booking photo of Sanchez but, instead, used a photo that had been taken earlier that day after the arrest for the purpose of including it in the photo lineup. Oscar again identified Sanchez as the man he had seen in his mother's bedroom.

Two days later, investigators interviewed Sanchez who waived his *Miranda* rights and admitted that he had given ice cream to Oscar a week earlier. When he was shown a photo of the knife that officers had found in his home, he said "I've never seen a knife that looks like this." But when he was informed that the knife was found in his house, he said that "my wife bought that at the 99-cent store." A detective then showed Sanchez a photo of the knife that was found under Lorena's body. Sanchez admitted the knife was his but claimed he had inadvertently left it in the back yard when he and his wife had been cutting watermelon about a week earlier.

The next day, during an interview with another investigator, Sanchez confessed. At trial, the judge ruled that the results of both the single-photo showup ID and the six-person photo lineup ID were admissible. Sanchez was subsequently convicted and sentenced to death.

Discussion

Sanchez argued that prosecutors should have been prohibited from introducing testimony that Oscar, when shown the booking photo of Sanchez, had identified him as the man he had seen in his mother's bedroom. The argument was based on the fact that any single-person display of a suspect in an

ID case is inherently suggestive. As the Supreme Court put it, the danger of misidentification "will be increased if the police display to the witness only the picture of a single individual."[13] Similarly, the Court of Appeal observed, that "Numerous cases have condemned the use of a single photo identification procedure."[14]

The courts understand, however, that it may be reasonable for officers to seek an ID based on a single photo if they have identified a suspect and they need to quickly determine whether he was, in fact, the perpetrator. Thus, the courts have ruled that the results of single-person showups may be admissible if there was an overriding reason for not conducting a photo or live lineup.

Prosecutors argued that the single-person photo lineup procedure was necessary because, as the court explained, "At the time Oscar viewed the single photograph, defendant was a suspect but was still at large. To take the time to prepare a photographic spread may have increased the risk that he might flee." Still, the court noted that the need to conduct a single-photo showup was reduced since both Oscar and Victor had already identified Sanchez as the perpetrator, and therefore the officers could have immediately arrested him and then conduct a photo or live lineup.

The court did not, however, need to decide whether the single-photo showup was reasonably necessary since it is also settled that an identification made during showup or lineup that was unnecessarily suggestive may be admissible if prosecutors can prove that the identification was otherwise reliable. Consequently, the court in *Sanchez* took note of several circumstances that were relevant in making this determination:

- Although Oscar had "only a fleeting opportunity to observe the man in the dimly lit bedroom" he had "ample opportunity to observe and get to know defendant the weekend before the Monday morning murders."
- Oscar's memory of the killer's appearance was fresh in his mind since the identification had occurred "mere hours after the murders."
- Although Oscar said the killer had a mustache and goatee, he only had a mustache in the booking photo. Thus, it was apparent that Oscar's identification of Sanchez was based on more than just the goatee.

On the other hand, there was no overriding need to conduct a single-photo showup since the officers already had probable cause to arrest Sanchez and knew where he lived, so they could have conducted a photo or live lineup instead. But the court concluded that, "although the suggestive nature of the identification does raise concerns," the totality of circumstances demonstrated that Oscar's identification of Sanchez when shown the single photograph was sufficiently reliable that it was appropriate for the jury to be informed of the identification.

U.S. v. Landeros

(9th Cir. 2019) 913 F.3d 862

Issue

While conducting a traffic stop, may officers demand that passengers identify themselves?

Facts

In the early morning hours, an officer in Arizona stopped a car for speeding. In addition to the driver, there were two young women in the back seat and another man in the front passenger seat. The man was Alfredo Landeros. According to the officer, the women "looked younger" than 18 years old. This circumstance was undisputed by the defendant.[15] While speaking with the driver, the officer detected the odor of alcohol from somewhere the passenger compartment. He then asked Landeros to identify himself because, as he later testified, it was "standard" procedure to identify the passengers in a vehicle that had been stopped for a traffic violation.

[13] *Simmons v. United States* (1968) 390 U.S. 377, 383.
[14] *People v. Contreras* (1993) 17 Cal.App.4th 813, 820. Citations omitted.
[15] **NOTE**: The officer later learned that one of the women was 19-years old and the other was 21. Their actual age was, however, irrelevant because the legality of an officer's actions depends on whether it were reasonable—not true.

Landeros refused to identify himself, saying that he "was not required to do so." The officer called for backup and, when other officers arrived, he "commanded Landeros to exit the car because he was not being 'compliant.'" Landeros eventually exited, at which point the officer saw "pocketknives, a machete, and two open beer bottles on the floorboard in front of Landeros. The officer then arrested Landeros pursuant to an Arizona statute that, like California's Vehicle Code,[16] prohibits open containers of alcohol in vehicles. During a consent search of Landeros's pockets, the officer found six bullets. As the result, Landeros was charged in federal court with possession of ammunition by a convicted felon. When his motion to suppress the ammunition was denied, he pled guilty.

Discussion

Officers who are conducting traffic stops may do only those things that are reasonably necessary to carry out their duties.[17] Citing this rule, Landeros argued that it is not reasonably necessary for officers to identify the passengers in cars they have stopped for traffic violations. The court agreed, saying, "A demand for a passenger's identification is not part of the mission of the traffic stop" because it "will ordinarily have no relation to a driver's safe operation of a vehicle."

The court acknowledged, however, that passengers may be required to identify themselves if officers can articulate a reason to believe the intrusion was necessary for officer safety. But, according to the court, neither of these circumstances existed. Consequently, it ruled that, by asking Landeros to identify himself, the officer had unduly prolonged the stop and, therefore, the ammunition found in Landeros's pocket was the fruit of an illegal detention and should have been suppressed.[18]

Comment

While we do not question the court's conclusion that officers cannot *routinely* demand ID from the passengers in vehicles stopped for traffic violations, the officer in this case had good reason to believe that the women were underage and that Landeros was furnishing alcohol to them.[19] After all, they were riding around in a vehicle smelling of alcohol in the early morning hours with two adult men. To put it another way, any parent of an underage girl who learned that an officer had not bothered to investigate her safety under such circumstances would be outraged. And so would the officer's chief, the news media, and the general public. It might even become the national outrage of the week. The failure of the court to recognize this danger is inexcusable.

Fortunately, a reasoned analysis of this issue can be found in another recent case, *U.S. v. Clark*.[20] In *Clark*, the First Circuit ruled that an officer's request that a passenger identify himself was lawful because the inquiry extended the traffic stop for only about a minute, and that such a "negligibly burdensome precaution" was "justified by the unique safety threat posed by traffic stops." As we discussed in the Fall 2018 edition, the lower courts are having difficulty trying to resolve this issue because the Supreme Court has announced three inconsistent rules that arguably apply.

Two other things: It is arguable that officers may seek identification from passengers if the officer was unable to confirm the detainee's identity and needed to question the companions for this purpose. Also, there would be no Fourth Amendment issue if a second officer questioned the passenger, as this would have no affect on the length of the detention.

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[16] See Veh. Code § § 23222(a), 23223.

[17] See *Rodriguez v. United States* (2015) __ U.S. __ [135 S.Ct. 1609, 1616]; *U.S. v. Gorman* (9th Cir. 2017) 859 F3 706, 715; *Gallegos v. Los Angeles* (9th Cir. 2002) 308 F3 987, 991.

[18] But also see *U.S. v. Clark* (1st Cir. 2018) 879 F.3d 1, 4 ["Although the Supreme Court has not explicitly held that an inquiry into a passenger's identity is permissible, its precedent inevitably leads to that conclusion." Citations omitted.].

[19] **NOTE**: The court attempted to sidestep this issue by saying at the end of its opinion that, "[a]s explained above," the officer had "no reasonable suspicion that Landeros had committed an offense." The opinion contained no such explanation.

[20] (1st Cir. 2019) 879 F.3d 1.

Gonzalez v. Moreno

(1st Cir. 2019) 919 F.3d 582

Issue

Was a suspect's consent to search his computer invalid because officers lied to him about their reasons for wanting to search it.

Facts

While investigating a report that Gonzalez was downloading child pornography, FBI agents in Puerto Rico went to his home in hopes of obtaining consent to search his laptop. When Gonzalez answered the door, the agents told him they needed to search his computer because they had reason to believe that his modem was "sending a signal and/or viruses to computers in Washington," and that he "could no longer touch or access the laptop because it contained evidence of a crime."

Gonzalez consented and the agents took his computer which was examined by FBI technicians who found that it contained child pornography. Gonzalez was arrested and filed a motion to suppress the images on grounds that the agents' misrepresentations invalidated his consent. Instead of responding to the allegation, the U.S. Attorney dismissed the case. Gonzalez then sued the agents for violating his civil rights. When the district court rejected the agents' argument that they were entitled to qualified immunity, the government appealed to the First Circuit.

Discussion

Obtaining consent to search by means of a ruse or other misrepresentation is legal—most of the time. That is because consent, unlike a waiver of constitutional rights, need not be "knowing and intelligent."[21] This is why undercover officers do not violate the Fourth Amendment when they obtain a suspect's consent to enter his home or business to buy drugs.[22]

But consent is ineffective if officers—whether undercover or not—claim that they needed to enter for a *lawful* purpose. For example, the courts have invalidated consent when an undercover officer claimed that he was a building inspector, property manager, or a friend of the Sears repairman who was currently working inside the suspect's home.[23]

Although there is no simple test for determining when a misrepresentation of the officers' purpose will invalidate consent, it is always unlawful if the officers falsely represented that they had some official or otherwise legitimate reason for entering or searching. Accordingly, the court had "little difficulty" in ruling that the FBI agents crossed the line when they said they needed to enter to defuse a national emergency. Said the court, "[T]he agents here relied on the predictable acquiescence of citizens to assist law enforcement where it reasonably could be inferred that national interests were at stake." Accordingly, the court ruled that the agents were not entitled to qualified immunity and, therefore, the case could proceed to trial.

People v. Rubio

(2019) __ Cal.App.5th __ [2019 WL 3230857]

Issue

Did a warrantless entry into a garage fall within the "community caretaking" exception to the warrant requirement?

Facts

At about 10:40 P.M., East Palo Alto police received a "ShotSpotter" alert that gunshots had just been fired near 2400 Gonzaga St. Several officers responded, and one of them was notified by witnesses that the shots were fired from behind a boat that was parked in the driveway. As officers approached, the found spent shell casings on the ground, and two others near the gate leading from

[21] See *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 243.
[22] See *Lewis v. United States* (1966) 385 U.S. 206, 211; *U.S. v. Bullock* (5th Cir. 1979) 590 F.2d 117 [undercover ATF agent obtained consent from Bullock, a Ku Klux Klan member, to enter Bullock's house to discuss joining the Klan].
[23] *People v. Mesaris* (1970) 14 Cal.App.3d 71. Also see *Mann v. Superior Court* (1970) 3 Cal.3d 1, 9.

the driveway to the back yard. A sergeant at the scene concluded that the shots were fired from near the gate but he could not tell from which side. Just then, a man later identified as Joshua Bazan walked through the gate from the back yard to the driveway, yelling obscenities and assuming a combative position." Officers arrested him.

The sergeant then pounded on the door to the garage. Although no one responded, he heard a sound in the garage as if someone was trying to barricade the door. He testified that, at this point, he was "investigating whether or not we had a victim or a shooter who was hiding out." Other officers spoke with the owner who consented to a search of the house. He also said that his son, Alan Rubio, was inside the garage, but he "did not know" whether anyone had been shot." At this point, Rubio walked into the house from the garage and started yelling at the officers, demanding that they shoot him. He then threw a key ring into the kitchen sink, and officers used the key to try to open the garage but it didn't work. So they broke in and saw "an explosive device" and a .45 caliber semiautomatic pistol on a shelf.

After clearing the house of all occupants, the officers obtained a warrant to search the premises and found a .357 Smith & Wesson handgun, twenty .40-caliber bullets, 87 live .357-caliber bullets, a body armor vest, spent .357-caliber shell casings, and surveillance equipment that recorded the view from the driveway. When officers played the video, they saw Rubio and two other men walking down the driveway and firing six shots into the air.

Rubio was charged with discharging a firearm with gross negligence, unlawful possession of a firearm and ammunition, and possession of an explosive device. When his motion to suppress the evidence was denied, he pled no contest to some counts and others were dropped.

Discussion

On appeal, Rubio argued that the evidence should have been suppressed because the officers did not have a warrant to search the garage. Prosecutors contended the search was lawful pursuant to the "community caretaking" exception to the warrant requirement.

"Community caretaking" is a type of exigent circumstance in which officers reasonably believed that an immediate warrantless entry or search was necessary because of a threat to a person's health, safety, or property, but that the threat—while pressing—did not rise to the level of a traditional exigent circumstance.[24] Like exigent circumstances, an entry based on community caretaking is permitted if the officers responded in a reasonable manner. The question, then, was whether the facts known to the officers reasonably indicated that there might be someone in the garage who needed immediate assistance.

The court ruled the answer was yes, and in explaining why, it essentially adopted the trial judge's reasoning, as follows: "[W]hat the defense is asking is for this court to second guess the actions of an officer in the field who knows that shots have been fired, sees physical evidence of the location where the firearm was discharged, hears movement within the home that he seeks entry to that is consistent with a reasonable fear that a victim of a shooting may be secreted within the residence based on his prior experience." The court also noted that "there's physical activity suggesting an attempt to barricade the door" and the sudden aggressive appearance of Bazan who, the officers were aware, did not live in the house.

Consequently, the court ruled that the entry and search of the garage was lawful pursuant to the community caretaking exception to the warrant requirement. POV

[24] See *Cady v. Dombrowski* (1973) 413 US 433, 441 [officers must "engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."]; *Indianapolis v. Edmond* (2000) 531 US 32, 37 ["[W]e have upheld certain regimes of suspicionless searches where the program was designed to serve 'special needs,' beyond the normal need for law enforcement."]; *Illinois v. McArthur* (2001) 531 US 326, 330 ["When faced with special law enforcement needs ... the Court has found that certain general, or individual circumstances may render warrantless search or seizure reasonable."].

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