POINT of VIEW

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Point of View

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Our 50th Anniversary Edition

We would like to take a moment to commemorate the 50th anniversary edition of the *Point of View*. It was in the summer of 1970 when the first *POV* was published. And now, fifty years later, we are still here. The person who conceived the idea, and who wrote *POV* for eleven years before he became district attorney, was Jack Meehan. Jack is retired now, but he keeps in touch. So, Jack, this one's for you.

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Grounds to Detain: Suspicious Reactions

His face started to turn pale, his hands began to shake, and he did not take his eyes off of the officer.[1]

Criminals tend to get jumpy when they see an officer or patrol car. So, when officers encounter someone whose reaction seems suspicious, they tend to view it as an indication that something is amiss. And so do the courts. As the Court of Appeal observed, "An inference that an individual is engaging or has just engaged in criminal conduct may be drawn where that individual, knowing that police are approaching, flees or engages in other activity indicative of an effort to avoid apprehension or police contact."[2]

Although a suspect's pre-detention or pre-arrest conduct may establish or help establish grounds to detain or arrest, it will only happen if both of the following circumstances existed: (1) the officers reasonably believed that the reaction was, in fact, a response to seeing them; and (2) the suspect's conduct was such that a reasonable officer under the circumstances would have stopped him.[3] In this article, we will explain how officers can satisfy these requirements.

Proving Recognition

The first requirement is that the officers be able to articulate their reasons for believing that the suspect's reaction was, in fact, a response to seeing them. As the Court of Appeal explained, "Absent a showing the citizen should reasonably know that those who are approaching are law enforcement officers, no reasonable inference of criminal conduct may be drawn."[3]

In most cases, such an inference will almost always be based on circumstantial evidence, and the most common circumstances are that (1) the suspect reacted *immediately* after he looked in the officers' direction, and (2) the officers were in a marked patrol car or were wearing a standard uniform. If, however, the officers were in an unmarked car or were wearing non-standard attire, the suspect may claim that he didn't recognize them, and therefore his reaction cannot be taken into account. This occurred in *People v. Huntsman* where the court ruled that the suspects' flight from officers was not suspicious because they "were in plain clothes and were driving an unmarked car at night." Said the court, "the unmarked car served its intended purpose of disguising the law enforcement identities of its occupants."[4]

For many criminals, however, spotting unmarked cars is second nature. As the Sixth Circuit observed, "unmarked does not mean unrecognizable.[5] In fact, one court noted that some of these cars are "about as inconspicuous as three bull elephants in a backyard swimming pool."[6] For example, some makes of ve-

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[1] *People v. Brown* (1985) 169 Cal.App.3d 159, 162. Edited.

[2] *People v. Mims* (1992) 9 Cal.App.4th 1244, 1249.

[3] *People v. Huntsman* (1984) 152 Cal.App.3d 1073, 1091. Also see *Wong Sun v. United States* (1963) 371 U.S. 471, 482 ["[W]hen an officer insufficiently or unclearly identifies his office or his mission, the occupant's flight must be regarded as ambiguous conduct." Edited.]; *People v. Conley* (1971) 21 Cal.App.3d 894, 899 ["[T]he rationale of the furtive gesture doctrine applies only where the gesture is made in response to seeing an approaching police officer"]; *U.S. v. Briggs* (10th Cir. 2013) 720 F.3d 1281, 1287 ["Mr. Briggs's movements and change of pace might not have been suspicious if the officers had not been readily identifiable as police."]; *U.S. v. Edmonds* (D.C. Cir. 2001) 240 F.3d 55, 51 ["furtive gestures are significant only if they were undertaken in response to police presence"].

[4] (1984) 152 Cal.App.3d 1073, 1091. Compare *U.S. v. Dykes* (D.C. Cir. 2005) 406 F.3d 717, 718 ["[Officers wore] multiple items of identification—either MPD raid jackets and medallions, or badges and orange MPD emblems."].

[5] *U.S. v. Price* (6th Cir. 2016) 841 F.3d 703, 706.

[6] *Flores v. Superior Court* (1971) 17 Cal.App.3d 219, 224.

hicles are closely associated with law enforcement, such as the Ford Police Interceptor Utility, Ford Crown Victoria, and Dodge Charger. Also relevant are the colors of the vehicles (i.e., bland), "exempt" license plates, and the presence of common police equipment such as a push bar, spotlight, red LED dash light, antennas, exposed shotgun, exposed computer monitor, or back seat cage. Thus, in *U.S. v. Nash* the court ruled that an officer's semi-marked car "clearly was identifiable as a police car" because it was a dark blue Dodge equipped with several antennae and police lights on the rear shelf."[7]

Suspicious Reactions

Having proved to the court that the suspect recognized them, officers must then explain why the suspect's reaction demonstrated circumstantial evidence of guilt. The following reactions are commonly cited:

Flight

To run from officers is one of the strongest nonverbal admissions of guilt that a suspect can make. "Flight from the police," said the California Supreme Court, "can be a key factor in determining whether the police have sufficient cause to detain."[8]

The court also explained, however, that flight *alone* will not justify a detention. Instead, something more is required—some additional suspicious circumstance. Said the court, "[A]n inference of guilt from flight" may be found "only in those instances in which there is other indication of criminality, such as evidence that the defendant fled from a crime scene or after being accused of a crime. To put it succinctly, there must be 'flight plus.'" The following are circumstances that have been deemed to have satisfied the "plus" requirement:

- Two men who had just arrived at Miami International Airport from Washington D.C. ran when they saw a DEA agent and a Metro Police officer in plain clothes heading in their direction. **PLUS**: One of the men appeared nervous and the other was walking 20-25 feet behind him while "furtively keeping [the other man] under constant observation."[9]
- As officers in an unmarked car entered a parking lot, the suspect ran "at a fast pace." **PLUS**: The lot was in an area "known for heavy narcotics trafficking," and the men did not run until the officers got out of their car.[10]
- The suspect ran from an officer who was investigating a report of a prowler in the residential neighborhood. **PLUS**: The incident occurred at 4 A.M. and the man had emerged from a dark area between a home and a plastics company.[11]
- The suspect walked up to a parked Porsche as if to open the door. But when he saw an officer approach, he "turned and ran." **PLUS**: The officer knew that the Porsche was stolen.[12]
- After making a hand-to-hand transaction in a Jeep, the suspects saw the officers approaching, at which point they looked "shocked." **PLUS**: they tossed something into the backseat," then "quickly walked away."[13]
- When officers arrived in an area known for "heavy narcotics trafficking," a man looked in their direction and immediately ran. **PLUS**: The man was holding an opaque bag.[14]

Two other things. First, if officers had grounds to detain the suspect, his flight would ordinarily convert reasonable suspicion to probable cause, and may also provide them with probable cause to arrest for violating Penal Code section 148.[15]

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[7] (7th Cir. 1989) 876 F.2d 1359, 1360.
[8] *People v. Souza* (1994) 9 Cal.4th 224, 235-36. Edited. Also see *People v. Britton* (2001) 91 Cal.App.4th 1112, 1118.
[9] *U.S. v. Haye* (4th Cir. 1987) 825 F.2d 32.
[10] *U.S. v. Dykes* (D.C. Cir. 2005) 406 F.3d 717.
[11] *People v. Superior Court (Johnson)* (1971) 15 Cal.App.3d 146. Also see *Sibron v. New York* (1968) 392 U.S. 40, 67.
[12] *People v. Superior Court (Quinn)* (1978) 83 Cal.App.3d 609, 615.
[13] *U.S. v. Davis* (3rd Cir. 2013) 726 F.3d 434, 440.
[14] *Illinois v. Wardlow* (2000) 528 U.S. 119.
[15] See *People v. Mendoza* (1986) 176 Cal.App.3d 1127, 1131; *People v. Messervy* (1985) 175 Cal.App.3d 243, 247.

Second, in many cases, the "plus" factor is that the contact occurred late at night or early in the morning,[16] or that it was accompanied by a shout or warning, such as "Rollers!" "Jesus Christ, the cops," "Police!"[16]

Furtive gestures

A "furtive gesture" is a movement by a suspect, usually of the hands or arms, that (1) reasonably appeared to have been made in response to seeing an officer or patrol car; and (2) was secretive in nature, meaning that it appeared the suspect was trying to hide, discard, or retrieve an object.[16] As the court observed in *People v. Holloway:*

> The appearance of a police officer, even when unexpected, would not lead an innocent citizen to attempt to hurl his personal property into the night.[17]

Note that a furtive gesture may become even more significant if the suspect denied making it.[18]

In the past, some courts downplayed the importance of furtive gestures because of the possibility there might have been an innocent explanation for them.[19] That changed in 2000 when the Supreme Court ruled that "[o]ur cases have recognized that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion."[20]

Similarly, the California Supreme Court noted that the possibility of an innocent explanation "does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct."[21] What is required, said the court, "is not the *absence* of innocent explanation, but the *existence* of "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[22]

One of the most common (and highly suspicious) furtive gestures are made by the driver or passenger in a car after it had been lit up, or as officers were approaching. Some examples:

- The suspect "was fidgeting and constantly moving."[23]
- The suspect "reached under the driver's seat" and did something that sounded like "metal on metal."[24]
- The suspect "lifted himself up from the seat with both arms in his rear portion of his body behind his back, both arms went up and down rapidly."[25]
- The driver pushed a small box under the front seat.[26]
- The suspect kept his left hand hidden from the officer who detained him.[27]
- The suspect raised himself up from the car seat and "began reaching towards the floor."[28]

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[16] See *U.S. v. Bullock* (D.C. Cir. 2007) 510 F.3d 342, 348 [the suspect "made furtive gestures with his hands by repeatedly moving his hands toward his lap area"]; *U.S. v. Taylor* (1st Cir. 2007) 511 F.3d 87, 92 [the suspect "appeared to be actively attempting to conceal something from the officers' view"]; *U.S. v. Flatter* (9th Cir. 2006) 456 F.3d 1154, 1158.

[17] (1985) 176 Cal.App.3d 150, 156. Edited.

[18] See, for example, *U.S. v. Washington* (D.C. Cir. 2009) 559 F.3d 573 [during a traffic stop, the suspect "moved his hand and body as if to reach under the seat"; he later claimed he was merely reaching for his cell phone, but officers had previously seen the phone on the passenger seat.]; *U.S. v. Burkett* (9th Cir. 2010) 612 F.3d 1103, 1107.

[19] See, for example, *People v. Superior Court (Kiefer)* (1970) 3 Cal.3d 807, 823; *People v. Bower* (1979) 24 Cal.3d 638, 647.

[20] *Illinois v. Wardlow* (2000) 528 U.S. 119, 124.

[21] *People v. Brown* (2015) 61 Cal.4th 968, 985. Also see *District of Columbia v. Wesby* (2018) __ U.S. __ [138 S.Ct. 577, 588 [probable cause does not require officers to rule out a suspect's innocent explanation for suspicious facts"]; *United States v. Arvizu* (2002) 534 U.S. 266, 277 ["A determination that reasonable suspicion exists need not rule out the possibility of innocent conduct."].

[22] *People v. Glaser* (1995) 11 Cal.4th 354, 373.

[23] *People v. Fews* (2018) 27 Cal.App.5th 553, 560.

[24] *People v. King* (1989) 216 Cal.App.3d 1237, 1240.

[25] *People v. Clayton* (1970) 13 Cal.App.3d 335, 337.

[26] *People v. Superior Court (Vega)* (1969) 272 Cal.App.2d 383, 387.

[27] *U.S. v. Burnette* (9th Cir. 1983) 698 F.2d 1038, 1048.

[28] *U.S. v. Nash* (7th Cir. 1989) 876 F.2d 1359.

Trying to prevent officers from seeing something is another type of furtive gesture. Examples:

- The suspect "angled his body away from [the officers] so that they were unable to view [his] right side."[29]
- Officers saw a group of men looking at a TV set located in the trunk of a car. When the men saw the officers, one of them slammed the trunk shut, then they started walking away.[30]
- As the suspect was looking in her purse for ID, she "attempted to obstruct [the officer's] view"[31]
- Upon seeing the officers, a young man standing between two parked cars in an alley "stepped behind a large dumpster and then continued to move around it in such a fashion that he blocked himself from the officers' view."[32]

Finally, when officers are testifying at suppression hearings, it is never adequate to simply say that the suspect made a "furtive gesture." Instead, they must provide details; e.g., "I saw [the suspect] lean all of the way forward, almost ducking out of my sight. I could see his head above the dashboard, and then I saw him lean back, seated upright in the vehicle.'"[33]

Sudden movements

In contrast to furtive gestures, a sudden—almost instinctive—movement of the hands or arms as if to hide, discard, or retrieve something is relevant in establishing probable cause to believe that the suspect possessed a weapon or incriminating evidence. As the court observed, in *People v. Holloway*, "The appearance of a police officer, even when unexpected, would not lead an innocent citizen to attempt to hurl his personal property into the night."[34] Examples

- An officer saw the suspect "reach underneath his jacket and shirt and adjust a weighty object concealed at the center of his waistline."[35]
- Upon seeing officers, the suspect "threw a small plastic bag onto the ground."[36]
- Two men involved in a hand-to-hand exchange suddenly put their hands in their pocket.[37]
- When officers ordered a detainee to put his hands outside the car window he "reached back inside the car toward his waistband."[38]

Warning to accomplice

When two or more people are committing a crime, and one of them spots an officer, it is ordinarily a good idea to panic. For that reason, panicky reactions such as the following are relevant: "Jesus Christ, the cops,"[39] "Let's get out of here!"[40] "Oh shit. Don't say anything,"[41] "Rollers!"[42] "Bobby, run, it's the narcs."[43]

Such a warning will become even more suspicious when they are immediately followed by some physical response; e.g., group disperses,[44] two men involved in a hand-to-hand exchange suddenly put their hands in their pockets.[45]

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[29] *U.S. v. Oglesby* (7th Cir. 2010) 597 F.3d 891, 894.
[30] *People v. Gravatt* (1971) 22 Cal.App.3d 133, 137.
[31] *People v. Bigham* (1975) 49 Cal.App.3d 73, 78.
[32] *In re Michael S.* (1983) 141 Cal.App.3d 814, 816.
[33] *U.S. v. Edmonds* (D.C. Cir. 2001) 240 F.3d 55, 61.
[34] (1985) 176 Cal.App.3d 150, 156.
[35] *U.S. v. Padilla* (2nd Cir. 2008) 548 F.3d 179, 189.
[36] *U.S. v. Stigler* (8th Cir. 2009) 574 F.3d 1008, 1009.
[37] *People v. Mims* (1992) 9 Cal.App.4th 1244, 1246.
[38] *U.S. v. Price* (D.C. Cir. 2005) 409 F.3d 436, 442.
[39] *U.S. v. Burnette* (9th Cir. 1983) 698 F.2d 1038, 1048.
[28] *U.S. v. Nash* (7th Cir. 1989) 876 F.2d 1359.
[40] *Florida v. Rodriguez* (1984) 469 U.S. 1, 3.
[41] *People v. Vasquez* (1983) 138 Cal.App.3d 995, 999.
[42] *People v. Lee* (1987) 194 Cal.App.3d 975, 980.
[43] *Pierson v. Superior Court* (1970) 8 Cal.App.3d 510, 516.
[44] *People v. Brown* (1990) 216 Cal.App.3d 1442, 1450.
[45] *People v. Mims* (1992) 9 Cal.App.4th 1244, 1250.

Extreme attention to officers

Merely looking at an officer or patrol car hardly qualifies as a suspicious circumstance. Thus, the Fifth Circuit pointed out that "in the ordinary case, whether a driver looks at an officer or fails to look at an officer, taken alone or in combination with other factors, should be accorded little weight."[46]

But extreme or unusual attention to officers may be a factor. Some examples:

- The defendant was "constantly checking the mirrors and talking on his mobile phone as he looked back at the unmarked car behind them."[47]
- "The defendant upon seeing the [police] car did not give it the passing glance of the law-abiding citizen. His eyes were glued on that car."[48]
- "[The officer] noticed that [the suspect] appeared to be startled by him, had a 'look of fear in his eyes' and then quickly looked away."[49]
- Six suspects in a moving vehicle all turned to look at the officer as they drove past him.[50]
- "[The officer saw] both men continually scanning the area, and monitoring [the officer's] movements once they were aware of his presence."[51]

Note, however, that merely watching police activity is unimportant because people have a "clearly established right to watch police-citizen interactions at a distance and without interfering."[52]

Attempt to hide from officers

Like flight, a person's attempt to hide from officers is highly suspicious; e.g., "slouching, crouching, or any other arguably evasive movement."[53]

- At 4:40 A.M., a man in an open gas station was "glancing around the corner" and pulled "his head back as if he were trying to hide."[54]
- Upon seeing the officers, a young man standing between two parked cars in an alley "stepped behind a large dumpster and then continued to move around it in such a fashion that he blocked himself from the officers' view."[55]
- "[T]he officers observed Thompson concealing himself behind the fence and peering out toward the street."[56]
- Four men in a parked car were "ducking up and down."[57]
- On a logical escape route from a robbery that had just occurred, officers saw a car containing four men. As the car passed the patrol car, two of the men ducked down, then "popped their heads up two or three times and then ducked down out of sight."[58]
- When officers spotlighted a car full of teenagers at 3:30 A.M., one of them "ducked down in the front seat and put his arm up over his head bringing his jacket with it trying to shield himself from the view of the officers."[59]
- At 3 A.M., an officer on patrol in a "high crime" area saw a man standing near a car, talking to the occupants. The car was parked in an area of "almost complete darkness." When the officer shined his spotlight at the car, the two occupants "bent down toward the floorboard" and the man "took off running."[60]

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[46] *U.S. v. Moreno-Chaparro* (5th Cir. 1999) 180 F.3d 629,632.
[47] *U.S. v. Sloan* (7th Cir. 2011) 636 F.3d 845, 850.
[48] *Flores v. Superior Court* (1971) 17 Cal.App.3d 219, 224. Edited. Also see *People v. Joines* (1970) 11 Cal.App.3d 259.
[49] *People v. Fields* (1984) 159 Cal.App.3d 555, 564. Also see *People v. Harris* (1980) 105 Cal.App.3d 204, 212.
[50] *People v. Soun* (1995) 34 Cal.App.4th 1499, 1513. Also see *People v. Hunter* (2005) 133 Cal.App.4th 371, 379, fn.5.
[51] *U.S. v. Holzman* (9th Cir. 1989) 871 F.2d 1496, 1502.
[52] *Chestnut v. Wallace* (8C 2020) __ F3 __ [2020 WL 360458]
[53] *U.S. v. Woodrum* (1st Cir. 2000) 202 F.3d 1, 7.
[54] *U.S. v. Glover* (4th Cir. 2011) 662 F.3d 694, 695.
[55] *In re Michael S.* (1983) 141 Cal.App.3d 814, 816.
[56] *U.S. v. Thompson* (D.C. Cir. 2000) 234 F.3d 725, 729.
[57] *People v. Nonnette* (1990) 221 Cal.App.3d 659, 668.
[58] *People v. Overten* (1994) 28 Cal.App.4th 1497, 1504.
[59] *In re Jonathan M.* (1981) 117 Cal.App.3d 530, 535.
[60] *People v. Souza* (1994) 9 Cal.4th 224, 240.

Attempt to avoid officers

Although not as suspicious as an obvious attempt to hide from officers, it is relevant that a suspect attempted to avoid them by, for example, suddenly walking away or changing direction or ducking into a store or other building. As the Third Circuit pointed out, "Walking away from the police hardly amounts to the headlong flight and of course would not give rise to reasonable suspicion by itself, even in a high-crime area, but it is a factor that can be considered in the totality of the circumstances."[61] Here are some examples:

- The suspects "suddenly changed course" and "increased their pace" as "the officers' vehicle came into view."[62]
- Two suspected drug dealers "looked at the black and white sheriff's unit the deputies were driving and started walking away in different directions.[63]
- A man standing alone at 4 A.M. next to a business in which a silent alarm had just been triggered began walking away as officers arrived.[64]
- When an officer approached three suspects, one of them "dropped back" as if to disassociate himself from the group, the others changed direction.[65]
- Suspect tried to hide himself from surveillance camera in post office.[66]
- Suspected gang members "split into two segments and apparently attempted to leave the area in two different directions."[67]

Nervousness

Criminals tend to become nervous when they spot officers, even if they are not doing anything illegal at the moment. Consequently, nervousness is a circumstance that the courts will take into account. But because many people get nervous when an officer approaches, its significance depends on whether it was extreme or unusual,[68] such as the following:

- "[V]isibly elevated heart rate, shallow breathing, and repetitive gesticulations, such as wiping his face and scratching his head."[69]
- "Shaking hands, labored breathing, a visible pulse in his neck [and] red blotches on his face."[70]
- "[H]is hands were shaking, his voice was cracking, he could not sit still, and his heart was beating so fast that [the officer] was able to see his chest jerk."[71]
- Suspect was "perspiring, swallowing and breathing heavily, and constantly moving his feet or fingers."[72]
- "[H]is face started to turn pale, his hands began to shake, and he did not take his eyes off of [the officer]"[73]

Although less significant, the following indications of nervousness have been noted: the suspect looked "shocked," the suspect "appeared nervous and anxious to leave the area."[74] Much less significant—but not irrelevant—is a suspect's failure to make eye contact with officers.[75] POV

[61] *U.S. v. Valentine* (3rd Cir. 2000) 232 F.3d 350, 357. Edited. Also see *U.S. v. Mays* (7th Cir. 2016) 819 F.3d 951.
[62] *U.S. v. Briggs* (10th Cir. 2013) 720 F.3d 1281, 1286.
[63] *People v. Boissard* (1992) 5 Cal.App.4th 972, 975. Also see *Florida v. Rodriguez* (1984) 469 U.S. 1, 6.
[64] *People v. Lloyd* (1992) 4 Cal.App.4th 724, 734. Also see *People v. Smith* (1981) 120 Cal.App.3d 282, 286.
[65] *People v. Profit* (1986) 183 Cal.App.3d 849, 882.
[66] *U.S. v. Gill* (9th Cir. 2002) 280 F.3d 923.
[67] *In re Stephen L.* (1984) 162 Cal.App.3d 257, 260.
[68] See *U.S. v. Chavez-Valenzuela* (9th Cir. 2001) 268 F.3d 719, 726; *U.S. v. Brown* (7C 1999) 188 F.3d 860, 865.
[69] *U.S. v. Riley* (8th Cir. 2012) 684 F.3d 758, 763.
[70] *U.S. v. Mayo* (8th Cir. 2010) 627 F.3d 709, 713-14.
[71] *U.S. v. Williams* (10th Cir. 2005) 403 F.3d 1203, 1205. Also see *U.S. v. Simpson* (10th Cir. 2010) 609 F.3d 1140, 1148.
[72] *U.S. v. Bloomfield* (8th Cir. 1994) 40 F.3d 910, 913.
[73] *People v. Brown* (1985) 169 Cal.App.3d 159, 162.
[74] *People v. Guajardo* (1994) 23 Cal.App.4th 1738, 1743.
[75] *People v. Valenzuela* (1994) 28 Cal.App.4th 817, 828.

Miranda Waivers

Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture. —Dickerson v. United States[1]

Miranda is practically a household word. —Anderson v. Terhune[2]

Now that the *Miranda* has become a cultural icon—like Batman and COVID-19—it seems appropriate to ask: Why must officers still inform suspects of their *Miranda* rights? The question is especially apt in light of the Supreme Court's observation that anyone who knows he can refuse to answer an officer's questions (i.e., just about everybody) "is in a curious posture to later complain that his answers were compelled."[3]

Despite the possibility that the *Miranda* warning and waiver procedure has outlived its usefulness, the Supreme Court is not expected to scrap it anytime soon. Over the years, however, the Court has made *Miranda* compliance much less burdensome. "If anything," said the Court, "our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement."[4]

Still, there are four legal requirements that must still be met before a waiver can occur. Specifically, a waiver must be "knowing," "intelligent," voluntary, and timely. In this article, we will discuss what officers must do to comply with these requirements. We will also discuss the related subject of communications with suspects before they have waived their rights, and California's new law that restricts interviews with some minors.

"Knowing" Waivers

The requirement that a *Miranda* waiver must be "knowing" simply means that officers must have correctly informed the suspect of his rights and the consequences of waiving them.[5] It is true, of course, that most people know their *Miranda* rights, having heard them recited countless times on television and in the movies. It is also true that many arrestees have received multiple *Miranda* warnings over the years and can recite them faster and more accurately than some officers. Nevertheless, officers must still read them their *Miranda* rights because prosecutors cannot prove that a suspect knew his rights providing the court with a copy of his rap sheet. In the words of the Supreme Court, "No amount of circumstantial evidence that the person may have been aware of this right will suffice."[6]

The Miranda warning

Although officers are not required to recite the *Miranda* warnings exactly as they were enumerated in the *Miranda* decision or as they appear in departmental *Miranda* cards, they must "reasonably convey"[7] the following information:

(1) **Right to remain silent**: The suspect must be informed of his Fifth Amendment right not to answer any questions; e.g., *You have the right to remain silent*.[8]

(2) **Consequences of waiving**: The suspect must be notified of the downside of waiving his rights; i.e., *Anything you say may be used against you in court*.

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[1] (2000) 530 U.S. 428, 443.
[2] (9th Cir. 2008) 516 F.3d 781, 783.
[3] *United States v. Washington* (1977) 431 U.S. 181, 188.
[4] *Dickerson v. United States* (2000) 530 U.S. 428, 443.
[5] See *Moran v. Burbine* (1986) 475 U.S. 412, 421-22.
[6] *Miranda v. Arizona* (1966) 384 U.S. 436, 471-72. Also see *People v. Bennett* (1976) 58 Cal.App.3d 230, 239 ["The prosecution was required to prove that appellant was *in fact* aware of his rights"].
[7] See *People v. Wash* (1993) 6 Cal.4th 215, 236-37 ["The essential inquiry is simply whether the warnings reasonably convey to a suspect his rights as required by *Miranda*."]; *People v. Samayoa* (1997) 15 Cal.4th 795, 830.
[8] See *Miranda v. Arizona* (1966) 384 U.S. 436, 467-68.

(3) **Right to counsel**: The suspect must be told that he has a right (a) to consult with an attorney before questioning, (b) to have an attorney present during questioning, and (c) to have an attorney appointed if he cannot afford one; e.g., *You have the right to talk to a lawyer and to have him present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish one.*

Although not a requirement,[9] officers may supplement the *Miranda* warning by informing suspects that, if they waive their rights initially, they can invoke them at any time during the interview; i.e., the decision to waive is revocable.[10]

"Can and will be used": In the past, officers were instructed to warn suspects that anything they say "will be used" against them. There is, however, no requirement that officers deliver such an ominous and disconcerting warning. Instead, they only need to notify them that anything they say "may," "might," or "could" be used against them.[11] The Court of Appeal explained the source of this confusion as follows:

> In the latter part of the *Miranda* opinion the Court employed the overstatement "can and will be used." But at an earlier point the Court described the warning as being that what is said "may be used," and this alternative has been consistently approved by the lower courts.[12]

Furthermore, telling a suspect that anything he said "will" or "can" be used" is patently false because most of the things that suspects say during interviews will not and cannot be used against them; e.g., "This coffee sucks."

NO ADDITIONAL INFORMATION: Officers are not required to furnish suspects with any additional information, even if the information might have affected their decision to waive.[13] 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."[14] For example, the courts have rejected arguments that officers must disclose the topics that would be discussed during the interview,[15] the nature of the crime under investigation,[16] the possible punishment upon conviction, or that the suspect's attorney is present and wants to talk with him.[17]

Note that, because minors have the same *Miranda* rights as adults, officers are not required to provide them with any additional information.[18] As we will discuss later, however, a California statute requires that minors who are 15-years old or younger consult with an attorney before they may waive their rights.

Using Miranda cards: It is usually best to read the admonition from a standard *Miranda* card, especially if the warning-waiver dialogue was not recorded. As the court observed in *People v. Prysock*, "If officers begin to vary from the standard language, their burden of establishing that defendants have been adequately advised before waiving their rights will increase substantially."[19] Reading from a card will also enable officers to prove that the warning was accurate by testifying that they recited it from a *Miranda* card, then reading to the court the warning from that card or a duplicate.[20]

UTILIZING DECEPTION: Although officers must correctly explain the *Miranda* rights to the suspect, a waiver will not be invalidated on grounds that they

[9] See *People v. Castille* (2005) 129 Cal.App.4th 863, 886.
[10] See *Florida v. Powell* (2010) 559 U.S. 50, 54; *People v. Kelly* (1990) 51 Cal.3d 931, 949.
[11] See, for example, *Berghuis v. Thompkins* (2010) 560 U.S. 370, 380; *People v. Johnson* (2010) 183 Cal.App.4th 253, 292.
[12] *People v. Valdivia* (1986) 180 Cal.App.3d 657, 664.
[13] *Colorado v. Spring* (1987) 479 U.S. 564, 577; *Collins v. Gaetz* (7th Cir. 2010) 612 F.3d 574, 590.
[14] *Moran v. Burbine* (1986) 475 U.S. 412, 422.
[15] See *Colorado v. Spring* (1987) 479 U.S. 564, 577; *U.S. v. Brenton-Farley* (11th Cir. 2010) 607 F.3d 1294.
[16] See *People v. Tate* (2010) 49 Cal.4th 635, 684; *People v. Boyette* (2002) 29 Cal.4th 381, 411.
[17] See *People v. Roundtree* (2013) 56 Cal.4th 823, 848; *People v. Clark* (1993) 5 Cal.4th 950, 987, fn.11.
[18] See *Fare v. Michael C.* (1979) 442 U.S. 707, 725; *In re Charles P.* (1982) 134 Cal.App.3d 768, 771-72.
[19] (1982) 127 Cal.App.3d 972, 985. Also see *Oregon v. Elstad* (1985) 470 U.S. 298, 314-15.
[20] See *Oregon v. Elstad* (1985) 470 U.S. 298, 314-15.

had lied about other matters. In the words of the Supreme Court, "Ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda's* concerns."[21] For example, waivers have been deemed knowing even though officers told the suspect that his victim was "hurt" when he was actually dead,[22] or when FBI agents told a suspect that they wanted to talk to him about "terrorism" when they really wanted to question him about molesting a child.[23]

RECORDING WAIVERS: There is no requirement that officers record the warning and waiver procedure.[24] Still, it is highly recommended because it provides judges with proof of exactly what the officers and suspect said. For example, in *People v. Gray* the defendant disputed the officer's testimony as to what the officer told him. But the court quickly disposed of the matter, saying, "Thanks to the professionalism of [the officers] in their taping of the statement, there was little room to argue at trial that the waiver was not complete and unequivocal."[25] Furthermore, recordings may be helpful because the suspect's tone of voice, emphasis on certain words, pauses, and even laughter may "add meaning to the bare words."[26] Note that the recording may be done covertly, as well as overtly.[27]

Timely Waivers: Reminders

Even though a suspect was correctly informed of his rights, it may be necessary to remind him of his rights if there was a substantial delay between the *Miranda* warning and the start or resumption of the interview. In other words, a *Miranda* warning and the subsequent interview must be "reasonably contemporaneous."[28] This issue commonly arises if the suspect was *Mirandized* in the field during a detention or after he was arrested, but was not questioned until he had been transported to a police station. In such cases, the suspect may argue that his waiver was not "knowing" because he had forgotten his rights or thought that they no longer applied. (This is one reason for not *Mirandizing suspects* until the interview is imminent.)

Note that there is no set time after which a fresh warning or reminder will be required. For example, delays ranging from 30 minutes to 36 hours have been deemed insignificant.[29] Furthermore, in determining whether a reminder was necessary, the courts may consider "any change in the identity of the interrogator or the location of the interview . . . the suspect's sophistication or past experience with law enforcement, and any indicia that he subjectively understands and waives his rights."[30]

"Intelligent" Waivers

Suspects must not only know their rights in the abstract, they must have understood them.[31] This is what the courts mean when they say that waivers must be "intelligent."[32] As the court explained in *People v. Simpson,* "While we usually indicate waivers must be 'intelligent,' that term can be confusing; it conjures up the idea that the decision to waive *Miranda* rights must be wise. That, of course, is not the idea. Essentially, 'intelligent' connotes knowing and aware."[33]

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[21] *Illinois v. Perkins* (1990) 496 U.S. 292, 297.
[22] *People v. Tate* (2010) 49 Cal.4th 635, 683.
[23] *U.S. v. Farley* (11th Cir. 2010) 607 F.3d 1294.
[24] *See People v. Pearson* (2012) 53 Cal.4th 306, 318; *People v. Thomas* (2012) 54 Cal.4th 908, 929.
[25] (1982) 135 Cal.App.3d 859, 864.
[26] *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 526.
[27] See *People v. Jackson* (1971) 19 Cal.App.3d 95, 101; *Lopez v. United States* (1963) 373 U.S. 427, 439.
[28] See *Wyrick v. Fields* (1982) 459 U.S. 42; *People v. San Nicolas* (2004) 34 Cal.4th 614, 640.
[29] See, for example, *Berghuis* v. *Thompkins* (2010) 560 U.S. 370, 386 [3 hours]; *People v. Spencer* (2018) 5 Cal.5th 642, 668]["Only five hours"]; *People* v. *Pearson* (2012) 53 Cal.4th 306, 317 [27 hours].
[30] *People v. Mickle* (1991) 54 Cal.3d 140, 170.
[31] *Moran v. Burbine* (1986) 475 U.S. 412, 421; *Brady v. United States* (1970) 397 U.S. 749, 748.
[32] See *Brady v. United States* (1970) 397 U.S. 742, 748.
[33] (1998) 65 Cal.App.4th 854, 859, fn.1.

CIRCUMSTANTIAL EVIDENCE OF UNDERSTANDING? As a practical matter, the only way to prove that a suspect understood his rights is to ask. This is why *Miranda* cards typically include the question, *Do you understand each of the rights I have explained to you?* If necessary, however, a court may also consider circumstantial evidence of understanding such as whether the suspect previously had invoked or waived his rights; and his age, experience, background, and intelligence.[34]

CLARIFYING THE MIRANDA RIGHTS: If the suspect says or indicates that he did not understand his rights, officers must attempt to clarify them.[35] Furthermore, they must not begin the interview until the suspect confirms that he now understands the admonition.

IMPAIRED SUSPECTS: A suspect who told officers that he understood his rights may later claim that he didn't because his mental state was impaired due to alcohol, drugs, physical injuries, a learning disability, or mental disorder. In most cases, however, the courts reject these arguments if the suspect's answers to the officers' questions were responsive and coherent. As the California Supreme Court observed in *People v. Clark*, "[T]his court has repeatedly rejected claims of incapacity or incompetence to waive *Miranda* rights premised upon voluntary intoxication of ingestion of drugs, where, as in this case, there is nothing in the record to indicate that the defendant did not understand his rights and the questions posed to him."[36] For example, in rejecting arguments that impaired suspects were unable to understand their rights, the courts have noted the following:

- The suspect "answered the officers' questions coherently and intelligibly."[37]
- The suspect was under the influence of PCP but his answers were "rational and appropriate to those questions."[38]
- The suspect was schizophrenic but he "participated in his conversations with detectives, and indeed was keen enough to change his story when [a detective] revealed that the fire originated from inside the car."[39]
- The suspect's IQ was 47 but he testified that he "knew what an attorney was, that he could get one, that he did not have to speak to police unless he wanted to, and that they could not force him to talk."[40]
- Although the suspect "possessed relatively low intelligence," he was "sufficiently intelligent to pass a driver's test, and to attempt to deceive officers by [lying to them]."[41]
- The suspect had an IQ of between 79 and 85 but he had "completed the eighth grade," could read and write, and "was able to work and function in society."[42]

In contrast, in *Rodriguez v. McDonald* the court invalidated a waiver because the suspect "was not only young (14-years old); he also had Attention Deficit Hyperactivity Disorder and a 'borderline' I.Q. of seventy-seven."[43]

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[34] See, for example, *Oregon v. Elstad* (1985) 470 U.S. 298, 315, fn.4; *People v. Memro* (1995) 11 Cal.4th 786, 834; *People v. Riva* (2003) 112 Cal.App.4th 981, 989.

[35] See *People v. Cruz* (2008) 44 Cal.4th 636, 668; *People v. Farnam* (2002) 28 Cal.4th 107, 181; *People v. Turnage* (1975) 45 Cal.App.3d 201, 211 [the law "permits clarifying questions with regard to the individual's comprehension of his constitutional rights or the waiver of them"].

[36] (1993) 5 Cal.4th 950, 988. Also see *People v. Frye* (1998) 18 Cal.4th 894, 988 ["To have prevailed, defendant would have had to establish his consumption of alcohol so impaired his reasoning that he was incapable of freely and rationally choosing to waive his rights and speak with the officers."].

[37] *U.S. v. Daniels* (8th Cir. 2014) 775 F.3d 1001, 1005.

[38] *People v. Loftis* (1984) 157 Cal.App.3d 229, 232.

[39] *People v. Lewis* (2001) 26 Cal.4th 334, 384.

[40] *In re Norman H.* (1976) 64 Cal.App.3d 997, 1002.

[41] *People v. Whitson* (1998) 17 Cal.4th 229, 249.

[42] *Poyner v. Murray* (4th Cir. 1992) 964 F.2d 1404, 1413.

[43] (9th Cir. 2017) 872 F.3d 908, 923

WAIVERS BY MINORS: While it is undisputed that minors are generally more likely than adults to feel intimidated when they are questioned by officers, it is also undisputed (at least by most) that many minors today are as hardened and unintimidated by authority as the average resident of San Quentin. As the Court of Appeal observed in 1982, "A presumption that all minors are incapable of a knowing, intelligent waiver of constitutional rights is a form of stereotyping that does not comport with the realities of every day living in our urban society."[44]

Consequently, in determining whether a minor understood his rights, the courts apply the same standards and principles that apply when the defendant was an adult.[45] But because the age, maturity, education, and intelligence of minors may have a greater effect on understanding than they do on adults, these circumstances will usually have greater importance, especially if the minor was younger than 16.[46] For example, in ruling that minors understood their rights, the courts have noted the following:

- "He was a 16-year-old juvenile with considerable experience with the police. He had a record of several arrests. He had served time in a youth camp, and he had been on probation for several years. There is no indication that he was of insufficient intelligence to understand the rights he was waiving, or what the consequences of that waiver would be."[47]
- "Appellant was a worldly 12-year-old. He was on probation and had been advised of his *Miranda* rights on a prior occasion. Considering the fact that [he] had a prior experience with the juvenile court, it would be reasonable to assume that he knew what the role of an attorney was in the juvenile law process."[48]
- "The evidence reveals a very unintelligent 15-year-old boy. His intelligence quotient was that of about a 7- or 8-year old (I.Q. 47). By his own testimony in open court, minor disclosed that he knew what an attorney was, that he could get one, that he did not have to speak to police unless he wanted to, and that they could not force him to talk."[49]
- "Although she was a 16-year-old juvenile, she was streetwise, having run away from home at the ages of 13 and 15, and having traveled and lived on her own in San Francisco and the Southwest." She also lied to the police about her name, age, and family background."[50]

Despite this, California's legislature passed a law that essentially says that all minors who are 15-years old or younger are incapable of understanding their rights and, therefore, officers may not even seek waivers from them until they have consulted with an attorney. And because attorneys will almost always advise minors not to cooperate with the police, the legislature has apparently sought to prevent officers from interviewing them, regardless of the minor's intelligence and experience, and regardless of the seriousness of the crime under investigation.

But because the legislature failed to obtain a two-thirds vote on the bill, a statement by a minor may not be suppressed on grounds that it was obtained in violation of the statute. Moreover, the bill itself specifies that the only remedy for a violation is that the consequence for a violation is that the trial

[44] *In re Charles P.* (1982) 134 Cal.App.3d 768, 771-72.
[45] See *Fare v. Michael C.* (1979) 442 U.S. 707, 725 ["We discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so."]; *In re Bonnie H.* (1997) 56 Cal.App.4th 563, 577 ["special caution" not required in determining whether a juvenile waived his *Miranda* rights]; *U.S. v. Doe* (9th Cir. 1998) 155 F3 1070, 1074 ["The test for reviewing a juvenile's waiver of rights is identical to that of an adult's and is based on the totality of the circumstances."].
[46] See *J.D.B. v. North Carolina* (2011) 564 U.S. 261, 272; *People v. Nelson* (2012) 53 Cal.4th 367, 378; *People v. Lessie* (2010) 47 Cal.4th 1152, 1169; *People v. Jones* (2017) 7 Cal.App.5th 787, 809.
[47] *Fare v. Michael C.* (1979) 442 U.S. 707, 726. Edited.
[48] *In re Charles P.* (1982) 134 Cal.App.3d 768, 772.
[49] *In re Norman H.* (1976) 64 Cal.App.3d 997, 1002.
[50] *In re Bonnie H.* (1997) 56 Cal.App.4th 563, 578.

courts must consider this fact, along with other relevant circumstances, in determining the admissibility of the minor's statement. But this is something the courts would have done anyway because, under federal and California law, a minor's age is a relevant circumstance in determining whether he understood his rights.[51] Thus, the Court of Appeal has observed that the statute "does not authorize a court to exercise its discretion to exclude statements if those statements if those statements are admissible under federal law."[52] Instead, said the court, "the proper inquiry remains not whether officers complied with the state statute, but whether federal law compels exclusion of the minor's statements."

Voluntary Waivers

In addition to being "knowing" and "intelligent," *Miranda* waivers must be "voluntary," meaning that officers must not have obtained it by means of threats or other form of coercion. As the Supreme Court explained, "[T]he relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception."[53] For example, in rejecting arguments that *Miranda* waivers were involuntary, the courts have noted the following:

- "[T]he record is devoid of any suggestion that police resorted to physical or psychological pressure to elicit the statements."[54]
- "The officers made no threats or promises of any kind, and there is no indication that the questioning was oppressive in any way."[55]
- "The officers were courteous, polite and low-key. The record is devoid of evidence that there was pressure or coercion brought to bear."[56]

In contrast, the courts have invalidated *Miranda* waivers because the officers told the suspect that, unless he waived his rights, they "had to assume the worst, e.g., the death penalty,"[57] or when officers told the suspect that she would stop receiving state financial aid for her child if she did not waive.[58]

Three other things should be noted about voluntariness. First, the rule prohibiting involuntary *Miranda* waivers is similar to the rule that prohibits involuntary confessions and admissions.[59] The difference is that a waiver is involuntary if officers coerced a suspect into waiving his rights; while a statement is involuntary if officers, after obtaining a voluntary waiver, coerced him into making an incriminating statement. Second, in the past, some courts indicated that a waiver was involuntary if it resulted from the "slightest pressure." This incoherent standard was abrogated by the Supreme Court.[60] Third, because the issue is whether officers pressured the suspect into waiving, the suspect's mental state—whether caused by intoxication, low IQ, young age, or such—is relevant to the issue of voluntariness only if the officers exploited it to obtain the waiver.[61]

Express and Implied Waivers

Miranda waivers may be express or implied. An express waiver results if the suspect, after being advised of the *Miranda* rights, responded in the affirmative when officers asked if he was wiling to speak with them; e.g., "Having these rights in mind, do you want to talk to us?" Note that an affirmative response constitutes an express waiver even if the suspect did not appear enthusiastic about it. For example, in *People v. Avalos* the California Supreme

[51] See *J.D.B. v. North Carolina* (2011) 564 U.S. 261, 272; *People v. Lessie* (2010) 47 Cal.4th 1152, 1169.
[52] *In re Anthony L.* (2019) __ Cal.App.5th __ [2019 WL 6837968]
[53] *Moran v. Burbine* (1986) 475 U.S. 412, 421. Also see *Colorado v. Spring* (1987) 479 U.S. 564, 572.
[54] *Moran v. Burbine* (1986) 475 U.S. 412, 421. Also see *People v. Parker* (2017) 2 Cal.5th 1184, 1216.
[55] *U.S. v. Doe* (9th Cir. 1998) 155 F.3d 1070, 1075.
[56] *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 526.
[57] *People v. Hinds* (1984) 154 Cal.App.3d 222, 234.
[58] *Lynumn v. Illinois* (1963) 372 U.S. 528
[59] *People v. Guerra* (2006) 37 Cal.4th 1067, 1093.
[60] See *Arizona v. Fulminante* (1991) 499 U.S. 279, 285-86; *People v. Clark* (1993) 5 Cal.4th 950, 986, fn.10.
[61] See *Colorado v. Connelly* (1986) 479 U.S. 157, 169-70; *Collins v. Gaetz* (7th Cir. 2010 612 F.3d 574, 584.

Court rejected the argument that the defendant did not demonstrate a sufficient willingness to waive when he responded "Yeah, whatever; I don't know. I guess so."[62] It is also immaterial that the suspect refused to sign a waiver form or provide a written statement.[63]

In contrast, an implied waiver will result if the suspect, after being advised of his rights and acknowledging that he understood them, freely answered the officers' questions. As the Supreme Court explained, "As a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford."[64] Or, in the words of the California Supreme Court, "It is well settled that law enforcement officers are not required to obtain an express waiver of a suspect's *Miranda* rights prior to a custodial interview and that a valid waiver of such rights may be implied from the defendant's words and actions."[65]

Pre-Waiver Communications

Before seeking a waiver, officers will almost always have some conversation with the suspect. In many cases, the purpose is simply to reduce tension. As the Ninth Circuit observed, "There is nothing inherently wrong with efforts to create a favorable climate for confession."[66] For example, in *People v. Gurule*[67] the California Supreme Court rejected the argument that officers violated *Miranda* when, before seeking a waiver from a murder suspect, they engaged him in "some small talk, to put him at ease." There are, however, some communications that may invalidate a subsequent waiver.

"INTERROGATION": A *Miranda* violation will result if officers asked a question or made a statement that was "reasonably likely to elicit an incriminating response," even if it did not blatantly call for one.[68] Although such a violation will not necessarily invalidate a subsequent waiver, it complicates things. This subject was covered in the article "*Miranda* 'Interrogation,'" in the Winter 2020 edition.

PUTTING YOUR CARDS ON THE TABLE: Before seeking a waiver, officers will sometimes provide suspects with information about the status of their investigation. This will not invalidate a subsequent waiver so long as it was done in a brief, factual, and dispassionate manner, as opposed to goading, provocative, or accusatory.[69] For example, the courts have ruled that officers did not violate *Miranda* when they told the suspect that a witness had identified him as the perpetrator,[70] or that his accomplice had confessed,[71] or that "agents had seized approximately 600 pounds of cocaine and that [he] was in serious trouble,"[72] or that officers played a tape recording of a wiretapped conversation that incriminated the suspect,[73] or that an agent showed him a surveillance photo showing him robbing the bank.[74]

In contrast, a waiver may be invalidated if officers presented the evidence in a manner that was goading or accusatorial. Some examples:

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[62] (1984) 37 Cal.3d 216, 230.
[63] See *Berghuis v. Thompkins* (2010) 560 US 370, 375; *Connecticut v. Barrett* (1987) 479 US 523, 530, fn.4.
[64] *Berghuis v. Thompkins* (2010) 560 U.S. 370, 385. Also see *People v. Nelson* (2012) 53 Cal.4th 367, 375.
[65] *People v. Parker* (2017) 2 Cal.5th 1184, 1216.
[66] *Clark v. Murphy* (9th Cir. 2003) 331 F.3d 1062, 1073. Also see *People v. Gurule* (2002) 28 Cal.4th 557, 559.
[67] (2002) 28 Cal.4th 557, 602.
[68] *Rhode Island v. Innis* (1980) 446 U.S. 291, 301
[69] See *Arizona v. Roberson* (1988) 486 U.S. 675, 687; *People v. Gray* (1982) 135 Cal.App.3d 859, 865.
[70] *People v. Dominick* (1986) 182 Cal.App.3d 1174, 1192; *Shedelbower v. Estelle* (9th Cir. 1989) 885 F.2d 570, 573.
[71] See *People v. Patterson* (1979) 88 Cal.App.3d 742, 752; *Nelson v. Fulcomer* (3rd Cir. 1990) 911 F.2d 928, 934.
[72] *U.S. v. Moreno-Flores* (9th Cir. 1994) 33 F.3d 1164, 1169.
[73] *U.S. v. Vallar* (7th Cir. 2011) 635 F.3d 271, 285 ["Merely apprising Vallar of the evidence against him by playing tapes implicating him in the conspiracy did not constitute interrogation."].
[74] *U.S. v. Davis* (9th Cir. 1976) 527 F.2d 1110. Also see *People v. Thomas* (1990) 219 Cal.App.3d 134, 143.

- The officer "launched into a monologue on the status of the investigation including that a newly contacted witness *disputed defendant's claim* as to the last time defendant had visited the victims' residence."[75]
- An officer questioning a murder suspect described the crime scene, "including the condition of the victim, bound, gagged, and submerged in the bathtub, and said to defendant that the victim 'did not have to die in this manner and could have been left there tied and gagged in the manner in which he was found."[76]
- An officer implied that the suspect's fingerprint had been found on the murder weapons; i.e., "Think about that little fingerprint" that officers had found on the murder weapon."[77]

TRIVIALIZING MIRANDA: A court might invalidate a waiver if officers belittled the importance of the *Miranda* rights or the significance of waiving them. As the California Supreme Court noted in *People v. Musselwhite*, "[E]vidence of police efforts to trivialize the rights accorded suspects by the *Miranda* decision—by 'playing down,' for example, or minimizing their legal significance—may under some circumstances suggest a species of prohibited trickery and weighs against a finding that the suspect's waiver was knowing, informed, and intelligent."[78]

"TWO-STEP" INTERVIEWS: A "two step" interview is one in which officers begin by interrogating the suspect without obtaining a *Miranda* waiver. Then, if he confesses or makes a damaging admission, they will seek a waiver and, if he waives, try to get him to repeat the statement.[79] As the Ninth Circuit explained, "A two-step interrogation involves eliciting an unwarned confession, administering the *Miranda* warnings and obtaining a waiver of *Miranda* rights, and then eliciting a repeated confession."[80]

The two-step works on the theory that the suspect will usually waive his rights and repeat his incriminating statement because he will think (erroneously) that his first statement could be used against him and, thus, he had nothing to lose by repeating it. Currently, the courts seem to have taken the position that a statement obtained during a two-step interview will be suppressed only when a court find that officers employed the two-step as a tactic to undermine *Miranda*."[81]

"SOFTENING-UP": Defendants sometimes argue that, although they were not actually coerced into making a statement, their waiver was nevertheless involuntary because officers had "softened them up." The term "softening up" comes from the 1977 case of *People v. Honeycutt* in which the California Supreme Court ruled that an interview with a suspect was involuntary because of three circumstances: (1) the officers had reason to believe that the suspect would not waive his rights, (2) they had a lengthy talk with him before seeking a waiver, (3) the apparent objective of the talk was to convince him that it would be advantageous to waive their rights. In *Honeycutt*, for example, the officers disparaged the suspect's victim to make it appear that they were on Honeycutt's "side."

Over the years, however, the courts have not been receptive to softening-up claims. For example, in *People v. Musselwhite* the court disposed of the issue by pointing out that "[t]he whole of [the officer's] one-sentence statement is nowhere close to the half-hour of 'softening up' of the suspect we disapproved in [Honeycutt]."[82] And in *People v. Patterson* the court said "it is clear that *Honeycutt* involves a unique factual situation and hence its holding must be read in the particular factual context in which it arose."[83] POV

[75] *People v. Boyer* (1989) 48 Cal.3d 247, 274].
[76] *People v. Sims* (1993) 5 Cal.4th 405, 444.
[77] *People v. Davis* (2005) 36 Cal.4th 510, 555.
[78] (1998) 17 Cal.4th 1216, 1237. Also see *Doody v. Ryan* (9th Cir. 2011) 649 F.3d 986, 1002-1003.
[79] See *Missouri v. Seibert* (2004) 542 U.S. 600.
[80] *U.S. v. Narvaez-Gomez* (9th Cir. 2007) 489 F.3d 970, 973.
[81] See *People v. Krebs* (2019) 8 Cal.5th 265, __ ; *U.S. v. Williams* (2nd Cir. 2012) 681 F.3d 35, 41.
[82] (1998) 17 Cal.4th 1216, 1236. Also see *People v. Gurule* (2002) 28 Cal.4th 557, 603.
[83] (1979) 88 Cal.App.3d 742, 751.

"Knock and Talks"

The "knock and talk" procedure used by the police is a legitimate investigative technique.[1]

Criminal investigations sometimes lead to the front door of the suspect's home where officers hope he will answer some questions or consent to a search. Known as "knock and talks," these visits are especially productive when an investigation has stalled and officers have determined that the danger of alerting the suspect to their investigation is outweighed by the lack of practical alternatives.

On the surface, knock and talks appear quite unintrusive because, as the California Supreme Court noted, "it is not unreasonable for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes."[2] It is, however, unreasonable for officers to conduct themselves as if they had a legal right to compel answers or consent. And this has happened. In fact, knock and talks have sometimes taken on the character of the "dreaded knock on the door" that is prevalent in totalitarian and police states. Addressing this concern, the Sixth Circuit observed that the "right of officers to thrust themselves into a home is a grave concern, not only to the individual but to society which chooses to dwell in reasonable security and freedom from surveillance."[3]

For this reason, there are restrictions on what officers may say and do when they conduct knock and talks. As we will explain, these restrictions cover everything from the time and manner of arrival, the officers' conduct as they walked to the front door, the manner in which they knocked and greeted the person who answered, the number of officers who were present, and the manner in which they questioned the suspect or sought consent to search.

The consequences of failing to comply with these restrictions are severe. For example, if a court concludes that the suspect reasonably believed that he was not free to terminate the encounter, it will likely be deemed an illegal de facto detention. As the result, anything the suspect said might be suppressed, along with any evidence discovered during a consensual search. And if a court concludes that the officers' initial entry onto the suspect's property constituted a "search," any evidence they happened see while walking to the front door might also be suppressed.

Relevant Circumstances

Although the courts will consider the totality of circumstances surrounding the visit in determining the legality of a knock and talk, the following are most frequently cited.

Time of arrival

The time that officers arrived at the suspect's home and knocked on the door is significant because "visitors" do not ordinarily show up in the middle of the night or when the residents are apparently sleeping. For example, in *U.S. v. Jerez* the court invalidated a knock and talk because the officers had arrived at about 11 P.M. and it appeared that the residents had gone to bed; e.g., "no sounds were heard."[4]

Number of officers

While there is no rule that only two officers may conduct knock and talks, it is a good rule of thumb. That is because seeing three or more officers at the door is more apt to be perceived as a show of force, which is something that visitors rarely do. For example, the courts have invalidated knock and talks,

[1] *U.S. v. Lucas* (6th Cir. 2011) 640 F.3d 168, 174.
[2] *People v. Michael* (1955) 45 Cal.2d 751, 754.
[3] *U.S. v. Morgan* (6th Cir. 1984) 743 F.2d 1158, 1161.
[4] (7th Cir. 1997) 108 F.3d 684, 690. Also see *Bailey v. Newland* (9th Cir. 2001) 263 F.3d 1022, 1026.

at least in part, because the suspect "was confronted by six officers,"[5] or he "was faced with the threatening presence of several officers,"[6] or "four police officers were positioned at or near the door,"[7] or when a suspect who was staying at a hotel was greeted by "three officers and two security guards" plus the hotel manager.[8]

Trespassing

Millions of times each day, people walk up to the front doors of homes for the purpose of speaking with the occupants. Although many of these visits are annoying, they are essentially unregulated. That was also true of knock and talks until 2013. That was when the Supreme Court ruled in *Florida v. Jardines* that a "search" results if the officers' purpose was to obtain evidence or incriminating information—which is usually the objective of knock and talks.[9] The Court also ruled, however, that these types of searches are lawful if the officers restricted their movements to the paths that visitors would normally use to reach the front door.

Officers might also walk on access routes leading to doors in the side or maybe even the back of the residence if, based on the layout of the property and the nature of the walkway, they reasonably believed that the residents greeted visitors at these doors.[10]

What if there was a "No Trespassing" sign posted outside? Does this constitute a revocation of the residents' implied consent to walk to the door? The answer is no because, as the Supreme Court observed, "[E]fforts to restrict access to an area do not generate a reasonable expectation of privacy where none would otherwise exist."[11] Thus, in *U.S. v. Coleman* the Sixth Circuit said that, "[t]hough the condominium complex had a 'Private Property' sign at its entrance, anyone could drive into the complex without express permission."[12]

For these reasons, it appears that the existence of a fence surrounding the front yard would not be viewed as a serious attempt to prevent entry so long as the gate was not locked or constructed in a manner that reasonably appeared to be an absolute barrier to entry.

Behavior en route to the door

Although officers may walk on normal access routes to the front door, they do not have implied consent to engage in activities that go beyond what would be expected of visitors. As the Supreme Court explained, "The scope of a license [to enter] is limited not only to a particular area but also to a specific purpose."[13] Thus, officers may ordinarily do nothing more than "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave."[14]

For example, the courts have invalidated knock and talks when the officers took "tactical positions around the exterior,"[15] or peered into the house "through binoculars,"[16] or explored the area with a drug-sniffing K9 or a metal detector. As the Court in *Jardines* observed, "To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police."

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[5] *U.S. v. Washington* (9th Cir. 2004) 387 F.3d 1060, 1068.
[6] *Orhorhaghe v. I.N.S.* (9th Cir. 1994) 38 F.3d 488, 494.
[7] *U.S. v. Conner* (8th Cir. 1997) 127 F.3d 663, 666, fn.2.
[8] *U.S. v. Quintero* (8th Cir. 2011) 648 F.3d 660, 670.
[9] *Florida v. Jardines* (2013) 569 U.S. 1
[10] See *U.S. v. Perea-Rey* (9th Cir. 2012) 680 F.3d 1179, 1188; *U.S. v. Robbins* (8th Cir. 2012) 682 F.3d 1111, 1116.
[11] *New York v. Class* (1986) 475 U.S. 106, 114.
[12] (6th Cir. 2019) 923 F.3d 450, 455.
[13] *Florida v. Jardines* (2013) 569 U.S. 1, 9. Edited.
[14] *Florida v. Jardines* (2013) 569 U.S. 1, 8.
[15] *U.S. v. Maxi* (11th Cir. 2018) 886 F.3d 1318, 1327.
[16] *Florida v. Jardines* (2013) 569 U.S. 1, 9, fn.3.

Polite vs. persistent knocking

When officers knock on the door or ring the doorbell they must do so in a manner consistent with that of an ordinary visitor. As the California Supreme Court observed, "The right to seek interviews with suspects at their homes does not include the right to demand that a suspect open his door."[17] Or, as the Fifth Circuit put it, "When officers demand entry into a home without a warrant, they have gone beyond the reasonable 'knock and talk' strategy of investigation."[18]

Consequently, any loud, continuous, or repeated knocking may be deemed a command to open the door, and will render the resulting encounter a seizure. Some examples:

- The officer knocked "for one and a half to two minutes, while identifying himself as a police officer [and said] it was his intention to stay at the door until someone answered it."[19]
- The officer "knocked on the door longer and more vigorously than would an ordinary member of the public. The knocking was loud enough to awaken a guest in a nearby room and to cause another to open her door."[20]
- For at least twenty minutes, "three officers pounded on [the suspect's] door and window while yelling loudly identifying themselves as police officers."[21]

The Supreme Court has also ruled, however, that neither loud knocking nor a loud announcement will *automatically* convert the encounter into a seizure. This is because, said the Court, a "forceful knock may be necessary to alert the occupants that someone is at the door," and unless they made a loud announcement, the occupants "may not know who is at their doorstep."[22]

Command to open the door

An illegal search or seizure will automatically result if the officers ordered the residents to open the door.[23] As the Fourth Circuit observed in *U.S. v. Mowatt*, "It is well established that a search occurs for Fourth Amendment purposes when officers gain visual or physical access to a room after an occupant opens the door not voluntarily, but in response to a demand under color of authority."[24] Or, in the words of the California Supreme Court, "The right to seek interviews with suspects at their homes does not include the right to demand that a suspect open his door."[25]

Officers' attitude

The officers' attitude and demeanor throughout the visit are crucial because an officer's overbearing or officious attitude might reasonably be interpreted to mean the suspect does not have a legal right to refuse the officers' requests or shut the door.[26] As the Court of Appeal explained:

> It is not the nature of the question or request made by the authorities, but rather the manner or mode in which it is put to the citizen that guides us in deciding whether compliance was voluntary or not.[27]

For example, in invalidating a knock and talk in *People v. Boyer*, the California Supreme Court observed that "[t]he manner in which the police arrived at defendant's home, accosted him, and secured his 'consent' suggested that they did not intend to take 'no' for an answer."[28] Similarly, in

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[17] *People v. Shelton* (1964) 60 Cal.2d 740, 746.
[18] *U.S. v. Gomez-Moreno* (5th Cir. 2007) 479 F.3d 350, 355-56.
[19] *Bailey v. Newland* (9th Cir. 2001) 263 F.3d 1022, 1030.
[20] *U.S. v. Conner* (8th Cir. 1997) 127 F.3d 663, 666, fn.2.
[21] *U.S. v. Reeves* (10th Cir. 2008) 524 F.3d 1161, 1168-69.
[22] *Kentucky v. King* (2011) 563 U.S. 452, 468.
[23] See *U.S. v. Winsor* (9th Cir. 1988) 846 F.2d 1569, 1573.
[24] (4th Cir. 2008) 513 F.3d 395, 400.
[25] *People v. Shelton* (1964) 60 Cal.2d 740, 746.
[26] See *Orhorhaghe v. I.N.S.* (9th Cir. 1994) 38 F.3d 488, 495-96 [officers were "officious and authoritative"].
[27] *People v. Franklin* (1987) 192 Cal.App.3d 935, 941.
[28] 48 Cal.3d 247, 268. Edited.

Orhorhagne v. I.N.S., the Ninth Circuit ruled that a knock and talk became a illegal detention because the officer "acted in an officious and authoritative manner that indicated that [the suspect] was not free to decline his requests."[29] On the other hand, when officers conduct themselves as polite guests, the courts almost always take notice; e.g., the officer "spoke in a polite, conversational tone,"[30] the officer's tone "was calm and casual,"[31] the officers' "tone of voice was inquisitive rather than coercive."[32]

Seizing Evidence in Plain View

While speaking with the suspect at the front door, officers will sometimes see drugs or other evidence in plain view. Can they enter and seize it without a warrant? Not always. As Justice Grodin observed in *People v. Superior Court (Spielman)*:

> Seeing something in plain view does not, of course, dispose, ipso facto, of the problem of crossing constitutionally protected thresholds. Those who thoughtlessly overapply the plain view doctrine to every situation where there is a visual open view have not yet learned the simple lesson long since mastered by old hands at the burlesque houses, "You can't touch everything you can see."[33]

Thus, a warrantless entry based on exigent circumstances will be upheld only if (1) the suspect voluntarily opened the door; e.g., he was not commanded to do so; (2) the officers had probable cause to believe the item was evidence of a crime; and (3) they reasonably believed that the suspect would have destroyed or hidden the evidence if they did not secure it promptly; e.g., the suspect saw the officers looking at an obvious drug supply in plain view.[34]

For example, in *U.S. v. Scroger*[35] police in Kansas City decided to conduct a knock and talk after they received reports of drug activity at a certain house. As they were walking to the front door they heard someone say "go out the back," followed by the sounds of someone running. Two officers went to the rear of the house while the other two went to the front door and knocked. Scroger answered the door, and the officers detected a "strong odor" that they associated with methamphetamine production.

Just then, Scroger tried to slam the door shut, but the officers forced their way in and took him into custody. After entering and securing the house, they obtained a warrant and seized the evidence. In ruling that the entry was justified by exigent circumstances, the court said, "It is highly likely that the evidence would have been destroyed or moved if the officers had waited to apprehend Scroger until they had obtained a warrant."

Similarly, in *People v. Ortiz*[36] an officer happened to be walking by the open door of a hotel room when he saw a woman inside "counting out tinfoil bindles and placing them on a table." Having probable cause to believe the bindles contained heroin, the officer went inside and seized them. In ruling that the officer's entry was justified by exigent circumstances, the court pointed out that, because the officer was initially only three to six feet away from the woman, he reasonably believed that she had seen him, and it is "common knowledge that those who possess drugs often attempt to destroy the evidence when they are observed by law enforcement officers."

Note, however, that a threat to the existence of integrity of evidence—even if indisputably real—will not constitute an exigent circumstance if the officers created if by saying or doing something that would have caused the person at the door to reasonably believe that they were about to enter or search the premises illegally.[37] POV

[29] (9th Cir. 1994) 38 F.3d 488, 495-96.
[30] *People v. Bennett* (1998) 68 Cal.App.4th 396, 402.
[31] *U.S. v. Jones* (10th Cir. 2012) 701 F.3d 1300, 1314.
[32] *U.S. v. Dockter* (8th Cir. 1995) 58 F.3d 1284, 1287.
[33] (1980) 102 Cal.App.3d 342, 348, fn.1 (conc. on. Grodin, J.)
[34] See *Kentucky v. King* (2011) 563 U.S. 452, 460; *U.S. v. Maxi* (11th Cir. 2018) 886 F.3d 1318, 1329.
[35] (10th Cir. 1997) 98 F.3d 1256.
[36] (1995) 32 Cal.App.4th 286.
[37] See *Kentucky v. King* (2011) 563 U.S. 452, 469.

Recent Cases

Kansas v. Glover

(2020) __ U.S. __ [2020 WL 1668283]

Issue

If an officer runs the license plate on a moving vehicle and learns that the registered owner's license was suspended or revoked, may the officer stop the vehicle to confirm that the driver was the registered owner and was therefore citable?

Facts

A sheriff's deputy in Kansas ran the plate on a pickup truck and was informed that the license of the registered owner had been revoked. Although the deputy saw nothing to indicate the driver was impaired or that he had committed a traffic infraction, he stopped the truck to confirm his suspicion that the driver—Glover—was the registered owner. After he received confirmation, he cited Glover for driving on a revoked license.

In the course of the appeals process, the Kansas Supreme Court ruled that the deputy lacked grounds to stop the truck because many people who drive vehicles are not the registered owner, and it was therefore unreasonable for the deputy to assume that the driver of Glover's truck was Glover. Prosecutors appealed to the U.S. Supreme Court.

Discussion

It is settled that neither probable cause nor reasonable suspicion can exist in the absence of specific facts. This demand for specificity is so important that the Supreme Court described it as "the central teaching of this Court's Fourth Amendment jurisprudence."[1] It is also settled that, in determining whether probable cause or reasonable suspicion exist, officers may (and should) utilize their common sense and make reasonable inferences as to the meaning and significance of the facts. As the Supreme Court observed in *Illinois v. Wardlow*, "[T]he determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior."[2]

Moreover, the inferences that an officer makes may be based, at least in part, on their training and experience. Thus, in *Illinois v. Gates*, the Supreme Court explained that "[t]he evidence must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."[3] Or, as the California Court of Appeal put it, "[T]he officer's training and experience can be critical in translating observations into a reasonable conclusion."[4]

In light of these principles and rulings, it was rather obvious that the deputy who stopped Glover reasonably believed that Glover was the driver and that his license had been revoked. But the Supreme Court of Kansas thought otherwise, saying the stop was based on "only a hunch" that Glover was the registered owner, and that it was unreasonable for the deputy to conclude that "the registered owner was likely the primary driver of the vehicle."

The United States Supreme Court disagreed. While the Court acknowledged that many vehicles are driven by someone other than the registered owner, it pointed out that, when an officer's inference provides him with probable cause or reasonable suspicion, it is immaterial that there existed a possibility that the officer was mistaken. As the California Court of Appeal explained in *People v. Brown*, "The possibility of an innocent explanation does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct. Indeed, the principal function of his investigation is to revolve that very ambiguity."[5]

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[1] *Terry v. Ohio* (1968) 392 U.S. 1, 21, fn.18.
[2] (2000) 528 U.S. 119, 125.
[3] (1983) 462 U.S. 213, 232.
[4] *People v. Ledesma* (2003) 106 Cal.App.4th 857, 866.
[5] (1990) 216 Cal.App.3d 1442, 1449. Also see *Illinois v. Wardlow* (2000) 528 U.S. 119, 126.

The U.S. Supreme Court disagreed, ruling that the it was reasonable for who stopped Glover reasonably infer that Glover was, in fact, the registered owner of the truck and that he was driving on a revoked license. Accordingly, the Court ruled the car stop was lawful, and it reversed the ruling of the Kansas Supreme Court.

Comment

Readers might be wondering how it is possible that the highest court in the state of Kansas was unaware of these fundamental principles of constitutional law? We will put that aside because there is something even more troubling: One of the nine justices of the U.S. Supreme Court *agreed* with the Kansas court. Specifically, Justice Sonia Sotomayor filed a dissenting opinion in which she wrote that, while officers may take into account their "experiences in law enforcement" in determining whether they have probable cause or reasonable suspicion, they may not apply common sense. That idea seems nonsensical—common or otherwise.

But there's more. Justice Sotomayor claimed that the Court's ruling "pave[s] the road to finding reasonable suspicion based on nothing more than a demographic profile." That is preposterous. In reality, the Court did nothing more than reaffirm two fundamental principles of constitutional law: (1) probable cause and reasonable suspicion require facts; and (2) in determining the significance and meaning of those facts, officers may use their brains.[6]

People v. Rubio

(2020) 43 Cal.App.5th 342

Issue

Under what circumstances will a "ShotSpotter" alert that a gun was fired outside a certain house provide officers with grounds to enter the house and search for possible victims?

Facts

At about 11 P.M., the East Palo Alto police received two "ShotSpotter" alerts, about one minute apart. The first indicated that five rounds had been fired from in front of the residence at 2400 Gonzaga Street near "the edge of the garage driveway." The second alert reported that six rounds had been fired from the same area but closer to the sidewalk.

When officers arrived, they spoke with witnesses who said they had heard gunfire and had seen "flashes" near a boat that was parked in the driveway of the house. The officers checked the area and found one spent .45 caliber shell casing on the ground at the top of the driveway and two more behind an open gate that led to the back yard.

A sergeant at the scene testified that his immediate objective was to determine "whether or not we had a victim or a shooter who was hiding out" in the garage. But when officers "pounded loudly" on a door leading to the garage, no one answered. So they knocked on the front door which was opened by the father of the defendant, Adon Rubio. Mr. Rubio said he didn't think anyone in the house had been shot. He also said that Adon was currently inside a part of the garage that he had converted into an apartment. Just then, Adon "emerged from the garage" but immediately closed the door as he exited.

After Rubio was detained, officers determined that the door to the garage had locked automatically when Adon shut it, so they kicked it open and entered. Inside, in plain view, they saw "an explosive device" and a .45 automatic handgun. The officers then secured the house, obtained a warrant to search it and found twenty .40 caliber bullets, 87 live .357 caliber bullets, a body armor vest, six spent .357 shell casings, and some methamphetamine. They also found a surveillance camera that showed Rubio firing six shots into the air.

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[5] (1990) 216 Cal.App.3d 1442, 1449. Also see *Illinois v. Wardlow* (2000) 528 U.S. 119, 126 [the Constitution "accepts the risk that officers may stop innocent people."]; *New Jersey v. T.L.O.* (1985) 469 U.S. 325, 346.

[6] **NOTE**: The Court noted that "[e]mpirical studies demonstrate what common experience readily reveals: Drivers with revoked licenses frequently continue to drive and therefore to pose safety risks to other motorists and pedestrians," and that "75% of drivers with suspended or revoked licenses continue to drive." Citations omitted.

Rubio was arrested and charged with discharging a firearm with gross negligence, possession of a controlled substance while armed with a firearm, and possession of a weapon by a felon. When his motion to suppress the evidence was denied, he pled no contest and was sentenced to nine months in jail and three years of supervised probation.

Discussion

On appeal, Rubio argued that the officers' entry into the garage was unlawful because there were no exigent circumstances. Prosecutors responded that, when the officers kicked in the door, they had probable cause to believe that the shooter or a victim of the shooting would be found inside. The court disagreed.

One of the most important rules pertaining to the exigent circumstances exception to the warrant requirement is that officers must be able to articulate specific facts that established probable cause to believe that an emergency entry was necessary.[7] Although this belief may be based on direct or circumstantial evidence, the court in *Rubio* ruled that the facts known to the officers did not constitute probable cause. "Missing in this case," said the court, "are specific and articulable facts that would lead a reasonable person to conclude shots fired *outside* defendant's garage apartment required breaking down the door to rescue someone *inside* his home." Among other things, the court noted there were "no bullet holes in windows or siding to suggest that any of the shots fired outside the home had penetrated into the garage." Nor were there "drops of blood on the ground to suggest anybody in range of the gunshots had been hit."

Accordingly, the court ruled that the evidence discovered in the garage should have been suppressed. As the court explained, "With nothing more than an unparticularized suspicion that emergency aid might be necessary, the police may not breach the firm line the Fourth Amendment draws at the entrance to defendant's home."[8]

Comment

Three things should be noted. First, before the officers entered the garage, they had heard what sounded like someone trying to barricade the door. This was a significant fact, but the court dismissed it by saying that "any American has the right to retreat into his own home and there be free from unreasonable governmental intrusion." We think this explanation was inapposite. Second, although the evidence from the garage was ultimately seized pursuant to a warrant, the evidence was suppressed because the warrant was based mainly on facts that the officers obtained while inside the residence unlawfully. Third, Rubio might still be charged with possession of a firearm by a felon because the officers had obtained a surveillance video in the neighborhood that showed him shooting a firearm.

In re Anthony L.

(2019) __ Cal.App.5th __ [2019 WL 6837968]

Issue

What are the consequences if officers interrogate a 15-year old suspect who has not yet conferred with an attorney?

Facts

Anthony and four other young men assaulted a man in San Francisco and fled. The crime was captured on a surveillance camera and, for reasons not disclosed, an officer showed the recording to a teacher in Anthony's school. The teacher identified Anthony as one of the perpetrators. The officer then went to Anthony's home and interviewed him in the presence of his mother. The officer *Mirandized* Anthony who acknowledged that he understood his rights and freely answered the officer's questions. In the course of the interview, he confessed.

After Anthony was charged in juvenile court with assault, he filed a motion to suppress his confession on grounds that it was obtained in violation of a California statute that prohibits officers from seek-

[7] See *People v. Ovieda* (2019) 7 Cal.5th 1034, 1043 ["specific and articulable facts" are required].

[8] **NOTE**: Much of the court's opinion consisted of a discussion about how the old "emergency aid" exception to the warrant had been incorporated into the doctrine of exigent circumstances. For a discussion of this issue, see the article "Exigent Circumstances" in the Winter 2018 edition of *Point of View*.

ing *Miranda* waivers from minors who are 16-years old or younger unless they consulted with an attorney beforehand. The juvenile court judge rejected the argument, affirmed the wardship petition, and placed Anthony on probation. He appealed the denial of his motion to suppress.

Discussion

Welfare and Institutions Code section 625.6 prohibits officers from conducting custodial interrogations of minors who are 15-years old or younger unless they had conferred with an attorney beforehand. The officer who interrogated Anthony was aware of the law but did not attempt to comply because he did not think that Anthony was "in custody" for *Miranda* purposes. Although the officer was probably correct (e.g., a short interview at home, with mother present, no coercion), the court assumed for the sake of argument that it was custodial. The question, then, was what are the consequences if an officer interrogates a 15-year old in custody who had not previously consulted with an attorney? Anthony argued that anything the minor says must be suppressed. The court disagreed.

Section 625.6 does not permit courts to suppress statements if officers fail to comply. Instead, it merely requires that judges consider the violation in determining whether the statement was admissible under federal law. As the court explained, "[T]he proper inquiry remains not whether officers complied with the state statute, but whether federal law compels exclusion of the minor's statements."

It was apparent that suppression was not required under federal law because Anthony was correctly informed of his rights, he said he understood them, and he freely answered the officer's questions. Furthermore, there was no reason to believe that Anthony's age, experience, education, or intelligence would have prevented him from understanding his *Miranda* rights.[9] Said the court, "Nothing in the record persuades us [that Anthony] did not understand his rights to silence and counsel and the consequences of waiving those rights."

Nevertheless, Anthony argued that suppression was required because section 625.6 says that the courts must consider a violation in determining whether a minor understood his *Miranda* rights, and the judge did not do so. But it didn't matter, said the court, because there was no reason to believe that Anthony was coerced into waiving his rights or answering the officer's questions. Consequently, the court upheld the juvenile court's ruling that Anthony's confession was admissible.

People v. Lopez

(2020) __Cal.App.5th __ [2020 WL 1163518]

Issue

If officers arrest a person for driving under the influence of drugs, does he effectively consent to a blood draw if he does not object when informed that he is required by law to provide a blood sample?

Facts

An officer in Rocklin stopped Sharon Lopez based on indications she was driving while impaired. When field sobriety tests confirmed the officer's belief, and a PAS test showed no alcohol whatsoever, the officer concluded that she was under the influence of drugs and arrested her. The officer explained that when they arrived at the police station he told Lopez that "since she was under arrest for a DUI, and since I believed it was a controlled substance DUI, she's required, by law, to submit to a blood test." The officer also told her that if she did not consent, he would seek a warrant.

Lopez did not refuse to provide a blood sample and fully complied with the instructions she was given by the phlebotomist. Although the court did not know the result of the blood test, it presumably demonstrated that Lopez had been under the influence of drugs, inasmuch as she later filed a motion to suppress it. After her the motion was denied, Lopez appealed the court's ruling to the appellate department of the Placer County Superior Court which ruled it was correct. Lopez appealed these rulings to Appeal.

[9] See *People v. Lessie* (2010) 47 Cal.4th 1152, 1167.

Discussion

The issue in *Lopez* was when, or under what circumstances, officers can obtain a blood sample from a DUI arrestee. Although consent is one such circumstance, and although Lopez cooperated with the phlebotomist in obtaining a sample of her blood, she argued that her motion to suppress should have been granted because a person cannot be deemed to have consented to a search if he merely failed to object.

In a typical search case, Lopez would have been correct. But things are more complicated when the objective of the search was to obtain a blood sample from a DUI arrestee. This is because of the overlap between the requirements for consent under the Fourth Amendment and "consent" under California's implied consent law. Although the Court of Appeal did not employ our nomenclature, it ruled there are essentially three ways in which officers can obtain a blood sample without a warrant based on the suspect's consent.

TRADITIONAL IMPLIED CONSENT: Pursuant to California's implied consent law, a driver who is lawfully arrested for DUI impliedly consents to providing officers with a breath or blood sample for testing.[10] Consequently, if he chooses a blood test, the problem is solved, provided that the officers informed him that (1) he may choose between a blood or breath test, and (2) if he refuses to choose a test or fails to complete the chosen test (a) he will be subject to fine and mandatory imprisonment if convicted, and (b) his license will be suspended for one to three years depending on his priors.[11] In discussing this type of consent, the court in *Lopez* explained that "California courts have found a blood test may be administered without a warrant as a search incident to arrest where the suspect chooses a blood test after being given a choice between a blood test and a breath or urine test. (A urine test is required only if a "blood test was unavailable."[12])

DRUG-RELATED IMPLIED CONSENT: Although it is an oxymoron to say that a driver "must" consent to a blood draw, that's the way the law has evolved.[13] Specifically, a DUI arrestee may be compelled to submit to blood testing if the following circumstances existed:

(1) Drug-related impairment: Officers must have had probable cause to believe that the driver was under the influence of drugs or the combined influence of alcohol and drugs.[14]

(2) Instructions: Officers must have informed the driver of the following:

a. He is required by law to submit to a blood test.[15]

b. There will be criminal and civil penalties if he refuses. (See the consequences for obtaining traditional implied consent, above.)

c. He does *not* have the right to have an attorney present before or during the procedure.

d. If he still refuses, his refusal may be used against him in court to prove consciousness of guilt.[16]

ACTUAL CONSENT: "Actual consent" in DUI cases means the same as actual consent to conduct any other type of search; i.e. the driver's consent must have been given freely and was not the result of a threat or other form of coercion. Because actual consent is based on the Fourth Amendment (not a California statute), the driver need not—and must not—be informed of any consequences if he refuses, or that he has a right to have an attorney present. As the Sixth Circuit observed, "[T]here is no 'magic'

[10] See Veh. Code § 23612(a)(1)(A).
[11] See Veh. Code §§ 23612(a)(1)(D), 23612(a)(2)(D).
[12] See Veh. Code § 23612(a)(1)(A).
[13] Note: Veh. Code § 23612(a)(2)(C) says that officers may "request" the driver to submit to a blood test, but that the driver is "required to submit" to a blood test.
[14] See Veh. Code §§ 23612(a)(1)(B). 23612(a)(2)(C). Note: The court in *Lopez* explained that the officer "was authorized to request that she take a blood test because he had reasonable cause to believe she was under the influence of drugs."
[15] See Veh. Code § 23612(a)(2)(C) [officers " shall advise the person that he or she is required to submit to [a blood] test."].
[16] See Veh. Code § 23612(a)(4).

formula or equation that a court must apply in all cases to determine whether consent was validly and voluntarily given."[17]

In *Lopez*, the court ruled that the requirements for traditional implied consent and hybrid implied consent were not satisfied because the officer did not provide her with the information required pursuant to Penal Code section 23612. This left actual consent. Lopez argued that she did not actually consent because she was coerced into submitting to a blood test for three reasons. First, the officer did not notify her that she could refuse to consent. The court rejected this argument because the officer's act of seeking consent demonstrated that she knew she could refuse.

Second, Lopez argued that she did not freely consent because the officer told her that she was required to submit to blood testing, and also because he told her that if she did not consent, he would seek a warrant authorizing a blood draw. Although he said these things, the court explained that in determining whether a person freely consented to a search, the courts must, pursuant to the Fourth Amendment, consider the totality of circumstances.[18] Consequently, the court examined the various circumstances and determined that there were three that sufficiently diminished any coerciveness that might have resulted:

(1) She did not object to taking a blood test.
(2) She cooperated with the phlebotomist in obtaining a blood sample, and
(3) The officer said nothing that would have constituted coercion.

As the court explained, the officer's "omission of the admonitions was one factor for the trial court to consider when it reviewed the totality of the circumstances," but the omission "did not deny defendant her right to withdraw her implied consent and compel her to consent" since she "did not object or refuse to undergo the [blood] test. She did not resist by of the officers' direction or actions. She voluntarily placed her arm on the table to allow the phlebotomist to draw her blood."

Consequently, the court ruled that the trial court correctly determined that the blood test results would be admissible if the case went to trial.

Comment

When seeking actual consent, officers must be careful if they inform the driver that they will seek a search warrant if he refuses to consent. So long as officers have probable cause to believe that the driver is under the influence of drugs or a combination of drugs and alcohol, his subsequent consent will not be deemed involuntary if officers merely told him that they would "seek" or "apply for" a warrant if he did not cooperate.[19]

It is also permissible to inform the driver that officers would "get" a warrant, As the Ninth Circuit explained, "[C]onsent is not likely to be held invalid where an officer tells a defendant that he could obtain a search warrant if the officer had probable cause upon which a warrant could issue."[20] However, such consent may be deemed involuntary if a court rules that officers did not have probable cause for a warrant.

Finally, consent will be deemed involuntary if officers said or implied that they did not need a warrant or that they had one. As the Supreme Court observed in *Bumper v. North Carolina*, "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion."[21] POV

[17] *U.S. v. Worley* (6th Cir. 1999) 193 F.3d 380, 387.
[18] Also see *People v. Harris* (2015) 234 Cal.App.4th 671, 692 ["failure to strictly follow the implied consent law does not violate a defendant's constitutional rights"].
[19] See *People v. Goldberg* (1984) 161 Cal.App.3d 170, 188; *U.S. v. Whitworth* (9th Cir. 1988) 856 F.2d 1268, 1279.
[20] *U.S. v. Kaplan* (9th Cir. 1990) 895 F.2d 618, 622. Also see *People v. Rodriguez* (2014) 231 Cal.App.4th 288, 303; *U.S. v. Lucas* (6C 2011) 640 F.3d 168, 174 [having probable cause, the officer's "warning that a search warrant would be sought if Lucas did not grant consent to search was a proper statement that did not taint the subsequent search"].
[21] *Bumper v. North Carolina* (1968) 391 U.S. 543, 550. Edited.

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—Albert Einstein

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